UNITED STATES POSTAL SERVICE®

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1. Publication Title	2. Publication Number	3. Filing Date
Advance Sheets of the Kansas Supreme Court and Court of Appeals	0 0 7 _ 4 8 0	Sept. 2024
4. Issue Frequency	**5. Number of Issues Published Annually**	**6. Annual Subscription Price** *(if any)*
8x/yearly	8	$120-130

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*
301 S.W. Tenth Ave, Topeka, KS 66612-1507

Contact Person
Sara Stratton

Telephone *(Include area code)*
(785) 554-7866

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*
SAME

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*

Publisher *(Name and complete mailing address)*
Sara Stratton, Reporter of Appellate Decisions, 301 S.W. Tenth Ave, Topeka, KS 66612-1507

Editor *(Name and complete mailing address)*
N/A

Managing Editor *(Name and complete mailing address)*
N/A

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Advance Sheets of the Kansas Supreme Court and Court of Appeals	September 2024

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OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 319, No. 1
Opinions filed in July – August 2024

"Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals" (USPS 007-480) are published every month except February, June, August, and October by the State of Kansas, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598. Periodical postage paid at Topeka, Kansas. POSTMASTER: Send address changes to "Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals," State Law Librarian, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598.

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PUBLISHED 2024 BY

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IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-078

RE: Rules Relating to Judicial Conduct

The court amends the attached Supreme Court Rule 640, effective the date of this order.

Dated this 4th day of September 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 640

JUDGES ASSISTANCE COMMITTEE

(a) **The Committee.** A Judges Assistance Committee is created to provide assistance to any Kansas judge who is experiencing mental health issues such as depression, stress, grief, and anxiety; addiction issues such as alcohol abuse, drug abuse, and gambling; age-related issues; or any other issue that may affect the judge's quality of life or ability to perform the judge's judicial duties.

(b) **Definition of "Judge."** For purposes of this rule, "judge" means any Supreme Court justice, Court of Appeals judge, district judge, district magistrate judge, Municipal Court judge, or any retired judge or justice accepting judicial assignments.

(c) **Membership.** The Committee will consist of seven judges appointed by the Supreme Court and must always include at least two active district judges and two active district magistrate judges. The other three members may be active or retired judges. The court will consider population and geographical representation in the appointment process.

(d) **Terms.** Each Committee member is appointed for a term of four years.

(1) The court will appoint a new member to fill a vacancy on the Committee occurring during a term. A vacancy occurs when a member no longer meets the qualifications for the appointment. A new member appointed to fill a vacancy serves the unexpired term of the previous member.

(2) No member may serve more than three consecutive four-year terms, except that a member initially appointed to serve an unexpired term may serve three more consecutive four-year terms. A member may serve additional terms after a break in service on the Committee. ~~A vacancy occurs when the qualifications for the appointment of any member are no longer met.~~

(e) **Chair and Meetings.** The Supreme Court will designate one member as chair of the Committee. The Committee will meet when the need arises and when called by the chair.

(f) **Objectives.** The Committee~~'s~~ has the following objectives ~~are to~~:

(1) identify a judge whose ability to perform the judge's duties is affected by mental health issues such as depression, stress, grief, and anxiety; addiction

issues such as alcohol abuse, drug abuse, and gambling; age-related issues; or any other issue that may affect the judge's quality of life or ability to perform the judge's judicial duties;

(2) arrange intervention in a manner that a judge involved will recognize issues that may affect the judge's quality of life or ability to perform the judge's judicial duties, accept help from the Committee and medical professionals, and be treated and monitored for a period of time so that the judge may return to performing judicial duties when able;

(3) recommend avenues of treatment and provide a program of peer support; and

(4) act as an advocate of a judge and assist the judge in recognizing issues that may affect the judge's quality of life or ability to perform the judge's judicial duties, in obtaining effective treatment when possible, and in returning to the responsible performance of the judge's profession.

(g) **Office of Judicial Administration.** The Office of Judicial Administration will assist the Committee in achieving its purpose and objectives ~~by~~ through the following actions:

(1) helping judges and other persons contact the Committee;

(2) educating the public and the legal community about the nature of issues that may affect the judge's quality of life or ability to perform the judge's judicial duties and developing a program that will generate confidence to warrant early referrals and self-referrals to the Committee so that such issues may be avoided, limited, or reversed;

(3) compiling and creating reports required by the Supreme Court; and

(4) providing any other assistance requested by the Supreme Court or the Committee.

(h) **Contact.** Rather than asking the Office of Judicial Administration for assistance in contacting the Committee, a judge or anyone on the judge's behalf may contact the Committee or one of its members directly.

(i) **Designees.** The Committee may designate persons to assist the Committee in its work.

(j) **Immunity.** The Committee members, Office of Judicial Administration staff assisting the Committee, designees, and all other participants are entitled to the immunities of Rule 612 and are relieved from the provisions of Rule 8.3 of the Kansas Rules of Professional Conduct, Rule 2.15(A) and (C) of the Kansas Code of Judicial Conduct, and Rule 210 as to work done for and information obtained in carrying out the Committee's work.

(k) **Confidentiality.** All proceedings, information, meetings, reports, and records of the Committee or the Office of Judicial Administration pertaining to individual judges are privileged and must not be divulged except as follows:

(1) when a judge fails or refuses to address the issues of concern, the Committee, upon a vote of the majority, may refer the matter to the Commission on Judicial Conduct;

(2) when a judge has been referred to the Committee by the Commission on Judicial Conduct, the Committee will provide progress reports and recommendations to the Commission;

(3) when the Committee, upon a vote of the majority, seeks the assistance of the Kansas Lawyers Assistance Program;

(4) when the judge consents to the release of information; or

(5) by order of the Supreme Court.

(l) **Annual Report.** The Committee must file an annual statistical report of its activities with the Supreme Court and the Commission on Judicial Conduct. The court may order additional reports.

(m) **Internal Procedural Rules.** The Committee may adopt rules of procedure consistent with this rule.

(n) **Expenses.** Members and designees of the Committee will be reimbursed their actual and necessary expenses, including the use of professional intervention assistance, incurred in the discharge of their official duties. Any psychological, medical, or rehabilitative programs undertaken will not be the financial responsibility of the Committee.

(o) **Cooperation.** A judge's interaction with the Committee is voluntary. However, a judge's cooperation, or failure to cooperate, with the Committee may be considered by the Commission on Judicial Conduct and the Supreme Court in any disciplinary proceeding.

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PETITIONS FOR REVIEW OF DECISIONS OF THE COURT OF APPEALS 319 Kan. No. 1

TITLE	DOCKET NUMBER	DISPOSITION	DATE	REPORTED BELOW
Abbey v. Kansas Board of Examiners in Optometry	126,120	Denied	07/09/2024	Unpublished
Ashley Clinic v. Coates	125,528	Denied	07/09/2024	64 Kan. App. 2d 53
Austin Properties v. City of Shawnee, Kansas	125,734	Granted	08/22/2024	64 Kan. App. 2d 166
Breitenbach v. State	125,751	Denied	08/30/2024	Unpublished
Brown v. State	123,905	Denied	08/23/2024	Unpublished
Davis v. Kansas Dept. of Revenue	126,391	Denied	08/30/2024	64 Kan. App. 2d 107
Dixon v. State	125,428	Denied	08/23/2024	Unpublished
Gregg v. Kansas University Medical Center	126,053	Denied	07/09/2024	Unpublished
Grey v. City of Topeka	125,338	Denied	07/09/2024	Unpublished
Hollenbeck v. State	125,532	Denied	08/23/2024	Unpublished
In re A.G.	126,668	Denied	07/09/2024	Unpublished
In re Care and Treatment of Rich	126,123	Denied	08/23/2024	Unpublished
In re Care and Treatment of Thayer	125,848	Denied	08/23/2024	Unpublished
In re H.W.	126,727	Denied	08/30/2024	Unpublished
In re M.C.	126,974	Denied	08/30/2024	Unpublished
In re Y.B.	126,233	Denied	07/09/2024	Unpublished
James v. State	125,692	Denied	08/23/2024	Unpublished
Johnson v. Bass Pro Outdoor World	126,314	Granted	08/22/2024	64 Kan. App. 2d 217
Kane v. State	124,857	Denied	08/23/2024	Unpublished
Robl v. Carson	125,927	Denied	08/30/2024	Unpublished
State v. Adams	126,130	Granted	08/22/2024	64 Kan. App. 2d 132
State v. Albright	125,866	Denied	08/30/2024	Unpublished
State v. Baker	126,228	Denied	08/23/2024	Unpublished
State v. Beasley	125,831	Denied	08/30/2024	64 Kan. App. 2d 203
State v. Beck	126,350	Granted	08/22/2024	Unpublished
State v. Blackman	125,701	Denied	08/30/2024	Unpublished
State v. Brockett	125,767	Denied	07/09/2024	Unpublished
State v. Bustillos	126,226	Denied	08/30/2024	Unpublished
State v. Decaire	125,285	Denied	07/09/2024	Unpublished
State v. Decaire	125,486	Denied	08/30/2024	Unpublished
State v. Dixon	125,992	Denied	08/30/2024	64 Kan. App. 2d 82
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State v. Drake	125,184	Denied	07/09/2024	Unpublished
State v. Gachelin	125,859	Denied	08/30/2024	Unpublished
State v. Goldstein	125,985	Denied	08/30/2024	Unpublished
State v. Harris	126,208	Denied	08/23/2024	Unpublished
State v. Holmes	124,794	Denied	07/09/2024	Unpublished
State v. Howard	126,015	Denied	08/30/2024	Unpublished

Title	Docket Number	Disposition	Date	Reported Below
State v. Jackson	124,834	Denied	07/09/2024	Unpublished
State v. Kramer	125,700	Denied	08/23/2024	Unpublished
State v. Lawson	126,008	Denied	08/30/2024	Unpublished
State v. Munoz	121,770	Denied	08/30/2024	Unpublished
State v. Ogwangi	124,328	Denied	08/30/2024	Unpublished
State v. Osaghae	125,623	Denied	08/30/2024	Unpublished
State v. Para-Delarosa	126,245	Denied	08/30/2024	Unpublished
State v. Robinson	126,058	Denied	08/23/2024	Unpublished
State v. Ross	126,074			
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State v. Schultz	125,094			
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State v. Smith	125,463	Denied	08/30/2024	Unpublished
State v. Speakman	124,884	Denied	08/30/2024	Unpublished
State v. Sullivan	125,488	Denied	08/30/2024	Unpublished
State v. Thornton	126,134	Denied	07/09/2024	Unpublished
State v. Walker	125,196			
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State v. Ward	125,186	Denied	08/23/2024	Unpublished
State v. Whitaker	124,704			
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State v. Wilson	126,364	Denied	08/23/2024	Unpublished
Swindler v. State	125,340	Denied	08/23/2024	Unpublished
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Williams v.. State	126,338	Denied	08/23/2024	Unpublished

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State v. Reynolds

No. 121,504

STATE OF KANSAS, *Appellee*, v. RYAN DAVID REYNOLDS, *Appellant.*

(552 P.3d 1)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Alternative Means Crime—Jury Instructions Incorporate Multiple Means for Single Statutory Element*. The State may charge a defendant with a single offense that can be committed in more than one way. This is called an alternative means crime. A district court presents an alternative means crime to a jury when its instructions incorporate a statute's multiple means for a charged crime's single statutory element.

2 SAME—*Crime of Aggravated Burglary—Statute Describes Alternative Means.* K.S.A. 2017 Supp. 21-5807(b) describes alternative means for committing aggravated burglary that depend, in part, on where the crime occurs—a dwelling, a nondwelling building, or a means of conveyance.

3. SAME—*Crime of Aggravated Burglary—Statute*'s *Language* "*With Intent to Commit a Felony*" *Not Limited to Particular Felony.* K.S.A. 2017 Supp. 21-5807(b) criminalizes entering into or remaining within a dwelling, a nondwelling building, or a means of conveyance, in which a human being is present, "with intent to commit a felony." The quoted element is not limited to any particular felony.

4. TRIAL—*Jury Instructions—Claim of Alternative Means Error—Appellate Review.* If a defendant claims a jury instruction contained an alternative means error, the reviewing court must consider whether the instruction was both legally and factually appropriate. The court will use unlimited review to determine whether the instruction was legally appropriate and will view the evidence in the light most favorable to the requesting party when deciding whether the instruction was factually appropriate. Upon finding error, the court will then determine whether that error was harmless, using the test and degree of certainty set forth in *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012), and *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011). Contrary language in *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010), *disapproved of on other grounds by State v. Brooks*, 298 Kan. 672, 317 P.3d 54 (2014), and its progeny is disapproved.

5. SAME—*Jury Instructions—Unpreserved Instructional Issues Not Clearly Erroneous—No Cumulative Error Analysis.* Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis under K.S.A. 22-3414(3).

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 17, 2022. Appeal from Shawnee District Court; NANCY E. PARRISH,

judge. Oral argument held March 31, 2023. Supplemental briefing completed December 26, 2023. Opinion filed July 12, 2024. Judgment of the Court of Appeals affirming the district court is affirmed on the issues subject to review. Judgment of the district court is affirmed on the issues subject to review.

Kai Tate Mann, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with her on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: Armed with a handgun, Ryan Reynolds broke into his estranged wife's house through a downstairs door used for her salon business. He went upstairs to the living area, where he confined his wife, their young daughter, and his wife's sister-in-law. He threatened to kill everyone inside. The two women eventually escaped with the child, and police apprehended Reynolds as he was leaving. A jury convicted him of multiple crimes arising from this incident. A Court of Appeals panel affirmed his convictions for aggravated burglary and aggravated endangering a child. *State v. Reynolds*, No. 121,504, 2022 WL 2188164, at *1 (Kan. App. 2022) (unpublished opinion). Both Reynolds and the State challenge that decision. We affirm on the issues subject to review, although our analysis differs from the panel's.

In particular, we agree with Reynolds that the district court presented the aggravated burglary charge to the jury as an alternative means crime in the instructions by referring to both a building and a dwelling as locations for committing the offense. And we agree with Reynolds that the State's evidence did not support the building alternative, so we must confront our caselaw requiring his conviction's automatic reversal. See *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010), *disapproved of on other grounds by State v. Brooks*, 298 Kan. 672, 317 P.3d 54 (2014). To that end, we ordered additional briefing and now reject *Wright*'s inflexible rule that requires substantial evidence supporting each means of a criminal element included in an instruction to uphold a conviction. *Wright*, 290 Kan. 194, Syl. ¶ 2.

In *Wright*'s place, we employ our familiar instructional error analysis. And on that basis, we hold the aggravated burglary instruction in Reynolds' case was factually inappropriate but of no consequence. We have no hesitation concluding the jury understood all occupants were in the upstairs living area during the intrusion and found Reynolds guilty of aggravated burglary of a dwelling. None of the evidence confuses that reality, and the jury can be relied on to do what the district court instructed it to do—apply the law to the only evidence available in arriving at its verdict. See *Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) (holding due process does not require setting aside general guilty verdict in a multiple-object conspiracy when evidence supported only one object); *State v. De La Torre*, 300 Kan. 591, Syl. ¶ 3, 331 P.3d 815 (2014) (holding the clearly erroneous harmless error standard applied in a multiple acts case when unanimity instruction not requested or its absence not objected to).

FACTUAL AND PROCEDURAL BACKGROUND

Reynolds' wife, Kayla, filed for divorce in July 2017. A court awarded her temporary possession of their home with a lower-level salon, where she worked as a cosmetologist. She lived upstairs with the couple's daughter.

About 6:15 a.m., on November 4, 2017, Kayla heard loud banging on an exterior door to the house. She gathered in a bedroom with her daughter and sister-in-law, Lynzie, who had stayed overnight. Lynzie said Reynolds was outside. He pounded on the windows and told Kayla not to call the police, but she did anyway. While on the phone with a dispatcher, Kayla heard crashing noises downstairs in the salon and sounds of Reynolds coming up the stairs before he kicked in the bedroom door. She testified he was "out of control" and yelling things about "money and saving the world." He kept trying to grab their daughter.

Reynolds pulled out a handgun, screaming that he loved his daughter. He said he would hurt "whoever was there" and was "going to kill everyone." Lynzie testified he kept asking where the other people in the house were. At some point, he told the dispatcher he would kill everybody there.

Kayla and Lynzie said Reynolds positioned himself in front of the room's only exit and stopped them from leaving. Lynzie persuaded him to search the house to prove no one else was there. As he stepped out, they ran away and went to a neighbor's home. Reynolds followed, yelling for Kayla to come back. Police officers stopped him as he pulled his car out of the driveway. They took him into custody after a two-hour standoff.

A jury convicted Reynolds of aggravated burglary, two counts of aggravated assault, criminal threat, aggravated endangering a child, interference with law enforcement, stalking, and two counts of criminal damage to property. The district court sentenced him to a controlling term of 180 months in prison and 36 months of postrelease supervision.

Reynolds appealed the aggravated burglary, aggravated child endangerment, and criminal threat convictions. A Court of Appeals panel reversed the criminal threat conviction but upheld the others. *Reynolds*, 2022 WL 2188164, at *1. Reynolds asked for our review of the aggravated burglary and aggravated child endangerment convictions. He also renews a cumulative error claim. The State conditionally cross-petitioned seeking review of the panel's aggravated burglary conviction analysis. The State did not challenge the criminal threat conviction's reversal, so that much is settled in Reynolds' favor. See *State v. Moler*, 316 Kan. 565, 569, 519 P.3d 794 (2022); Supreme Court Rule 8.03(i)(1) (2024 Kan. S. Ct. R. at 59).

We granted both requests for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

AGGRAVATED BURGLARY: ALTERNATIVE MEANS (BUILDING OR DWELLING)

The State may charge a defendant with a crime that can be committed in more than one way. This is called an alternative means crime. See *State v. Rucker*, 309 Kan. 1090, 1094, 441 P.3d 1053 (2019). A district court presents an alternative means crime to a jury when its instructions on a charged offense incorporate

multiple means for a single statutory element. *State v. Sasser*, 305 Kan. 1231, 1239, 391 P.3d 698 (2017). Reynolds argues the district court presented the aggravated burglary offense to the jury as an alternative means crime by separately identifying both a building and a dwelling as locations for committing the offense. We agree with him.

Additional facts

A grand jury indicted Reynolds with one count of aggravated burglary, charged as a level four, person felony—the severity level specified only for aggravated burglary of a dwelling. K.S.A. 2017 Supp. 21-5807(b) provides:

"(b) Aggravated burglary is, without authority, entering into or remaining within any:

(1) Dwelling in which there is a human being, with intent to commit a felony, theft or sexually motivated crime therein;

(2) building, manufactured home, mobile home, tent or other structure which is not a dwelling in which there is a human being, with intent to commit a felony, theft or sexually motivated crime therein; or

(3) vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property in which there is a human being, with intent to commit a felony, theft or sexually motivated crime therein."

The district court drew from this statutory language to craft its aggravated burglary instruction for the jury's deliberation:

"The defendant is charged in Count 4 with aggravated burglary. The defendant pleads not guilty.

"To establish this charge, each of the following claims must be proved:

"1. The defendant entered into or remained in a *building or dwelling*.

"2. The defendant did so without authority.

"3. The defendant did so with the intent to commit kidnapping, aggravated assault or criminal threat therein.

"4. At the time there was a human being in the building or dwelling.

"5. This act occurred on or about the 4th day of November, 2017, in Shawnee County, Kansas." (Emphasis added.)

Reynolds highlights the terms, "building or dwelling," as dual means for the crime's location element. The jury's general verdict form simply recited: "We, the jury, find the defendant guilty of the crime of Aggravated Burglary as charged in Count 4." It did not differentiate between the two terms.

The district court's instructions set out alternative means.

Reynolds argues the instructions set out alternative means for the crime's location element. He is correct. K.S.A. 2017 Supp. 21-5807(b) identifies building and dwelling in different subsections and each describes materially distinct situations. See *State v. Williams*, 303 Kan. 750, 757, 368 P.3d 1065 (2016) ("The legislature typically signals its intent to create an alternative means by 'separating alternatives into distinct subsections of the same statute.'"); *State v. Davis*, 312 Kan. 259, 266, 474 P.3d 722 (2020) (looking to whether "there is a material difference between the" alleged alternative means). We hold K.S.A. 2017 Supp. 21-5807(b) describes alternative means for committing aggravated burglary that depends, in part, on where the crime occurs—a dwelling, a nondwelling building, or a means of conveyance.

We also easily agree Reynolds' case presents what we would consider an alternative means error. The uncontroverted evidence shows he entered the unoccupied lower-level salon, went upstairs, and broke into the occupied living quarters. And on that basis, he notes the obvious—no one was in the salon, so no evidence supports convicting him of aggravated burglary of a nondwelling building, one of the two instructed means.

Under our current precedent, when a defendant raises an alternative means issue, a reviewing court applies what we refer to as *Wright*'s super-sufficiency test. 290 Kan. at 206. But the State asks us to reconsider that caselaw, so we do that next.

Deciding on the correct law to apply

Under super-sufficiency, if a jury instruction presents an alternative means crime, the court decides whether sufficient evidence supports each means. If not, the court reverses the conviction, because only automatic reversal "ensure[s] a criminal defendant's statutory entitlement to jury unanimity." *Wright*, 290 Kan. at 206. And if we continue following *Wright*, we must reverse Reynolds' aggravated burglary conviction because all the victims were in the upstairs dwelling during the incident.

But automatic reversal assumes jury unanimity—the foundation on which *Wright* rests—is a genuine concern here, despite everyone agreeing all occupants were upstairs. Said differently,

why can't we employ harmless error to conclude the jury unanimously convicted Reynolds on the only means for which there was evidence of human presence—the dwelling? See *State v. Brown*, 295 Kan. 181, 218, 284 P.3d 977 (2012) (Moritz, J., concurring) ("[W]hen we instruct a jury on a legal means for committing a crime for which there is *no* evidence and an alternative means of committing the same crime for which there *is sufficient* evidence and the jury convicts the defendant of that crime, we can reliably conclude it did so unanimously upon the *only* means for which there was evidence.").

To illustrate, consider a hypothetical prosecution for aggravated criminal sodomy with a child victim much like the scenario in *State v. Dern*, 303 Kan. 384, 362 P.3d 566 (2015). There, the district court mistakenly instructed the jury that

> "'[s]odomy means: (1) oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; (2) *oral or anal sexual relations between a person and an animal*; (3) *sexual intercourse with an animal*; or (4) anal penetration, however slight, of a male or female by any body part or object.'" (Emphases added.) 303 Kan. at 396.

Now assume the evidence supports convicting on the first and fourth means involving human beings, but no evidence exists as to the second and third means involving animals. How does it make any sense to require the conviction's reversal and a new trial over a worry that jurors somehow mixed up the alleged sex with a child for sex with an animal? Yet reversal is what our caselaw currently demands for our hypothetical because *Wright* uniquely equates this juror unanimity concern with structural error. Some course correction seems appropriate. After all, "jurors *are* well equipped to analyze the evidence." *Griffin*, 502 U.S. at 59.

This concern is not new. Our court has struggled for decades over the consequences for a defendant's conviction when the jury instructions presented one or more alternative means not factually supported by the evidence. And no viewpoint has left this back-and-forth unscathed. See Mott, *Alternative Means Jurisprudence in Kansas: Why* Wright *Is Wrong*, 62 U. Kan. L. Rev. 53, 53 (2013) ("Untied from any mooring, alternative means jurisprudence in Kansas has drifted into a strange and confusing world

where 'secondary matters' infest every corner of the criminal code.").

No doubt this conundrum accounts for the string of past cases taking different views at different times. For instance, in *State v. Wilson*, 220 Kan. 341, 344, 552 P.2d 931 (1976), *disapproved of on other grounds by State v. Quick*, 226 Kan. 308, 317, 597 P.2d 1108 (1979), the court sustained a first-degree murder conviction based on "duplicate theories" of premeditated murder and felony murder because the evidence supported both theories, avoiding any need to discuss a remedy. Sixteen years later, the court rejected jury unanimity concerns and upheld three first-degree murder convictions, even though sufficient evidence supported only one alleged alternative theory for each conviction. *State v. Grissom*, 251 Kan. 851, 893, 840 P.2d 1142 (1992). The *Grissom* court did not explicitly employ a harmless error model, but its reasoning resembled it.

Nearly two years later, the court again avoided remedy by noting sufficient evidence existed for each alternative means alleged in *State v. Timley*, 255 Kan. 286, Syl. ¶ 1, 875 P.2d 242 (1994), *disapproved of on other grounds by Brooks*, 298 Kan. 672. But it returned to harmless error when the evidence did not support each alternative means in *State v. Dixon*, 279 Kan. 563, 606, 112 P.3d 883 (2005) (relying on *Grissom*). Three years later, the court detoured to an instructional error paradigm for a remedy in an aggravated burglary case in *State v. Cook*, 286 Kan. 1098, 1108, 191 P.3d 294 (2008) (conducting clear error analysis). And two years after that, the *Wright* court imposed its super-sufficiency test, requiring sufficient proof for all alternative means to avoid reversal. *Wright*, 290 Kan. at 205-06.

But over the next 14 years, detractors to *Wright*'s do-or-die test persisted in questioning whether it supplies an appropriate remedy. See, e.g., *Brown*, 295 Kan. at 226-27 (Moritz, J., concurring) (proposing modified harmless error analysis to affirm a conviction when sufficient evidence supports one means and no evidence supports another but reverse when there is sufficient evidence of one means and insufficient evidence of the other); *Dern*, 303 Kan. at 415 (Biles, J., concurring in part) (characterizing a conviction's reversal under *Wright*'s super-sufficiency rule as

"nonsensical" under the case facts; suggesting adoption of a harmless error test); *Dern*, 303 Kan. at 417 (Johnson, J., concurring in part) (rejecting modified approach but expressing amenability to harmless error); *State v. Johnson*, 310 Kan. 835, 845, 450 P.3d 790 (2019) (Stegall, J., dissenting) (arguing for modified harmless error); Mott, 62 U. Kan. L. Rev. at 91-92 ("When a trial court makes an alternative means error in Kansas by allowing a jury the option of convicting a defendant on a factually inadequate statutory theory, the harmless error statute should apply no matter how . . . [the] judicially-enhanced definition of alternative means might classify the elements in question.").

No doubt sensing this continued angst with *Wright*'s reasoning, the State argues we should overrule it if we accept Reynolds' claim that alternative means error occurred. Reynolds did not respond to the State's suggestion initially. But we discussed it at oral argument and ordered additional briefing on the matter, including asking for any other appropriate approach to determine a remedy short of structural error. Predictably, Reynolds embraces *Wright* and demands a new trial on the dwelling alternative, while the State again urges us to overrule *Wright* and replace it with a typical harmless error analysis, citing *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011), and *State v. Plummer*, 295 Kan. 156, 283 P.3d 202 (2012).

Disapproving precedent is not taken lightly. In *State v. Sherman*, 305 Kan. 88, Syl. ¶¶ 2-3, 378 P.3d 1060 (2016), the court restated the cautions embedded within our stare decisis doctrine:

> "2. Once a point of law has been established by a court, it will generally be followed by the same court and all courts of lower rank in subsequent cases when the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by a court. The application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. . . .
>
> "3. Stare decisis is not a rigid inevitability but a prudent governor on the pace of legal change. A court of last resort will follow that rule of law unless clearly convinced it was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."

Still, the *Sherman* court overruled *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004) (requiring a particularized harmlessness inquiry for prosecutorial misconduct cases), reasoning its circumstance did not compel stare decisis and the new rule would bolster justice. Cf. *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, Syl. ¶ 6, 89 P.3d 573 (2004) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.").

Reynolds asserts overruling *Wright* will do more harm than good. He maintains "*Wright* incentivizes prosecutors to provide clear articulate theories for a jury to consider," while harmless error would weaken an accused's jury unanimity right, creating an endless series of appeals to determine whether an error is harmless. The State insists on a departure, arguing *Wright* was originally flawed. We agree with the State.

Wright says it finds its source of law from Kansas statute, so we start with that statute to see how well *Wright* holds up. See 290 Kan. at 201 ("Jury unanimity on guilt in a criminal case is statutorily required in Kansas. See K.S.A. 22-3421."); *State v. Young*, 313 Kan. 724, 728, 490 P.3d 1183 (2021) ("Statutory interpretation begins with the words of the statute because the words chosen by the Legislature are the best expression of legislative intent."). K.S.A. 22-3421 provides:

> "The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, and the inquiry made whether it is the jury's verdict. If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If the verdict is defective in form only, it may be corrected by the court, with the assent of the jury, before it is discharged."

This plain and unambiguous language requires that a jury render its verdict without any disagreement, meaning the verdict must be unanimous, i.e., a general verdict. The Kansas Code of Criminal Procedure, K.S.A. 22-2101 et seq., does not define "verdict," but in a criminal prosecution, "'the only proper verdicts to be submitted . . . are "guilty" or "not guilty" of the charges.'" *State v. Obregon*, 309 Kan. 1267, 1278, 444 P.3d 331 (2019) (quoting

State v. Osburn, 211 Kan. 248, 256, 505 P.2d 742 [1973]); *Osburn*, 211 Kan. at 255 (noting Kansas criminal procedure does not provide for submitting special questions to a jury).

On its face, K.S.A. 22-3421 simply demands a jury's unanimous "guilty" decision and nothing more. But the *Wright* court added something not found in the statute:

> "2. In an alternative means case, there must be jury unanimity as to the crime charged, *but not as to the particular means by which the crime was committed, so long as substantial evidence supports each means*." (Emphasis added.) *Wright*, 290 Kan. 194, Syl. ¶ 2.

As readily seen, the italicized language has no obvious statutory origin.

More importantly, *Wright* rushed to formulate a remedy even though none was required under its facts. See 290 Kan. at 206 ("The evidence in this case was sufficient to find Wright guilty beyond a reasonable doubt of committing rape by force or fear."). For unexplained reasons, *Wright* prescribed a solution—structural error—for a problem not presented by the case. It did this by imposing what it termed a "'super-sufficiency'" rule it found in another case. See 290 Kan. at 203 (discussing *Timley*, 255 Kan. 286; declaring, "If evidence had been lacking on either means alleged, Timley's rape conviction would have been reversed.").

But *Timley* said nothing about reversal or remedy because there was no alternative means error in that case either. See *Timley*, 255 Kan. at 290 ("Timley's counsel readily points out that there was evidence from which the jury could determine that each sexual act was the result either of force, based on Timley's choking the victims, or of fear, based on the threats Timley made to the victims."). So how did *Wright* deduce that Timley's conviction would have been reversed in a factual situation not presented? We have no clue. And why would it matter anyway when *Wright*'s facts did not require a remedy because evidence supported both alternative means? *Wright*'s logic was imagined.

Wright references a law review article, Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 Washburn L.J. 275 (2005), which advocated for automatic reversal when super sufficiency is absent based on a general citation to a death penalty case with an erroneous reasonable-doubt

jury instruction. See Beier, 44 Washburn L.J. at 299 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 [1993]). But the exceptional remedy necessary to address the pervasive harm to a trial's fairness created by a faulty reasonable-doubt instruction is hardly comparable to any concerns emanating from K.S.A. 22-3421's general verdict provisions. See *Johnson*, 310 Kan. at 913 (defining structural error as rare and so pervasive it defies harmless error analysis). So neither *Timley* nor the referenced law review article justifies the unnecessary remedy *Wright* seemed compelled to conjure.

To be sure, K.S.A. 22-3421 does not demand super sufficiency; it simply says, "If any juror disagrees, the jury must be sent out again." But other statutes do give direction for addressing trial errors and they consistently specify harmless error review. For example, K.S.A. 2023 Supp. 60-261 straightforwardly provides:

> "Unless justice requires otherwise, no error in admitting or excluding evidence, or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

Similarly, K.S.A. 60-2105 states:

> "The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it, the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court."

Taken together, these statutes direct appellate courts to address trial error by reversing convictions only when it prejudices a defendant's substantial rights and the party benefiting from the error fails to show there is no reasonable probability the error affected the trial's outcome in light of the entire record. See *Brown*, 316 Kan. at 162; Black's Law Dictionary 1584 (11th ed. 2019) (defining "substantial right" as "[a]n essential right that potentially

affects the outcome of a lawsuit and is capable of legal enforcement and protection, as distinguished from a mere technical or procedural right"). This is a classic harmless error approach used every day by our appellate courts. Yet alternative means error stands as an outlier, even though *Wright* characterizes it as a statutorily based issue. *Wright*, 290 Kan. at 201.

An even more specific option emerges in K.S.A. 22-3414(3), because any argument there was insufficient evidence to support each alternative means presented actually challenges the instruction's factual appropriateness. See *State v. Wimbley*, 313 Kan. 1029, 1033, 493 P.3d 951 (2021) ("Factual appropriateness depends on whether sufficient evidence . . . supports the instruction."). And that statute's analytical rubric straightforwardly directs:

> "No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous."

But *Wright* shuns harmless error paradigms under the pretext of statutory juror unanimity and substitutes a court-created remedy mandating reversal unless sufficient evidence supports every instructed means. This is evident when *Wright* explained:

> "'[A] reversal mandated by *Timley* is a reversal for insufficient evidence. An insufficiency error cannot be harmless because it means the State failed to meet its burden of proving the defendant guilty beyond a reasonable doubt. *This is a most basic guarantee of due process in criminal cases.*
>
> "'The *Timley* super-sufficiency condition evolved for a good reason. It evolved because we recognized that we were allowing uncertainty as to how the State persuaded each juror. We were comfortable with this uncertainty—at that particular level of generality in the jury's factfinding—only because we insisted on assurance that each juror's vote was supported by a means for which there was sufficient evidence. . . .'
>
> "*We are now persuaded that the* Timley *alternative means rule is the only choice to ensure a criminal defendant's statutory entitlement to jury unanimity*." (Emphases added.) *Wright*, 290 Kan. at 205-06.

Setting aside its mischaracterization of *Timley*, *Wright* seems to blend K.S.A. 22-3421's discrete concern for general verdict unanimity with the Fourteenth Amendment's Due Process

Clause's need for sufficient evidence. But due process does not support automatic reversal either. In *State v. Sieg*, 315 Kan. 526, 530, 509 P.3d 535 (2022), the court said:

> "The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires proof beyond a reasonable doubt of every element of the crime charged. It also requires fact-finders to rationally apply the proof-beyond-a-reasonable-doubt standard to the facts in evidence. So when a criminal defendant challenges the evidence's sufficiency, a reviewing court must examine the evidence in the light most favorable to the prosecution and decide whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' '*All that a defendant is entitled to on a sufficiency challenge is for the court to make a "legal" determination whether the evidence was strong enough to reach a jury at all*.' [Citations omitted.]" (Emphasis added.)

See also *Griffin*, 502 U.S. at 60 (holding the Fifth Amendment's Due Process Clause does not require a general guilty verdict in multiple object conspiracy be set aside in a federal prosecution if evidence is inadequate on one object).

This court applies harmless error in other situations that present jury unanimity concerns as well. For example, as the State points out, this court applies harmless error analysis in multiple acts cases. See *De La Torre*, 300 Kan. 591, Syl. ¶ 3 ("In a multiple acts case . . . the appellate court must [] determine whether the error warrants reversal or was harmless. The test for harmlessness when a unanimity instruction was not requested or its absence not objected to is the clearly erroneous standard provided in K.S.A. 2013 Supp. 22-3414[3]."). We even apply a form of harmless error to an arguably more serious situation—the omission of a crime's element from the jury instructions. See *State v. Reyna*, 290 Kan. 666, Syl. ¶ 10, 234 P.3d 761 (2010) ("When a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless."), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

Given all this, there simply is no excuse for treating alternative means issues as something exceptional—even under due process. See Mott, 62 U. Kan. L. Rev. at 76 ("[A]t its core, the problem *Wright* wants to solve is more a due process issue than a juror

unanimity issue because the issue persists unaltered, even if unanimity were not required by our law. But remember, as a primary justification for the super sufficiency rule, due process is problematic."). Once again, a course correction seems advisable to square how we treat jury instruction problems across their spectrum.

Moving past *Wright*, we asked the parties to consider whether alternative means error implicates the federal Sixth Amendment right to a unanimous verdict. See *Ramos v. Louisiana*, 590 U.S. 83, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020). Reynolds, of course, seized the opportunity to assert the Sixth Amendment mandates unanimity in jury verdicts in cases such as his. The State, just as predictably, contends *Ramos* simply clarified the jury unanimity requirement for a general verdict and did not extend it to a crime's means. We agree with the State.

In *Ramos*, a 10-to-2 jury verdict convicted the defendant of second-degree murder as permitted by state law at the time, resulting in a life sentence without parole. The defendant argued this violated his Sixth Amendment right because two jurors voted not guilty. The United States Supreme Court agreed. It held the Sixth Amendment requires a unanimous verdict to convict a defendant of a serious offense. *Ramos*, 590 U.S. at 87-93.

In holding as it does to require a general unanimous jury verdict to convict a defendant of a serious offense, *Ramos*' spirit aligns with K.S.A. 22-3421's plain text discussed above but *Ramos*' limitations are notable. See *Edwards v. Vannoy*, 593 U.S. 255, 265 n.1, 141 S. Ct. 1547, 209 L. Ed. 2d 651 (2021) ("*Ramos* does not apply to defendants charged with petty offenses, which typically are offenses that carry a maximum prison term of six months or less."). We hold *Ramos* does not support a structural error remedy for an alternative means error in a jury instruction.

We also asked the parties to discuss whether alternative means error violates due process or any other rights under the Kansas Constitution. Reynolds argued Kansas Constitution Bill of Rights sections 5 (trial by jury) and 10 (rights of the accused in prosecution) "guarantee unanimity, which necessarily includes super sufficiency in alternative means cases to be effective." But *State v. Voyles*, 284 Kan. 239, 250, 160 P.3d 794 (2007), rejected that proposition, citing sections 5 and 10, and held: "the right to a

unanimous jury verdict in a Kansas court is not a federal constitutional right or a state constitutional right, but rather a state statutory one." And Reynolds concedes Kansas' due process is co-extensive with its federal counterparts, so we need not explore new legal frontiers on that front either. See *State v. Boysaw*, 309 Kan. 526, 537, 439 P.3d 909 (2019); *Griffin*, 502 U.S. at 59 (providing federal due process does not require setting aside a unanimous verdict on multiple-object conspiracy even when insufficient evidence supports one of the objects). The *Boysaw* court advised: "Any future challenge . . . based on state constitutional provisions will need to explain why this court should depart from its long history of coextensive analysis of rights under the two constitutions." 309 Kan. at 538. Reynolds offers no such explanation.

Finally, Reynolds asserts we should continue following *Wright* because it "incentivizes prosecutors to provide clear articulate theories for a jury to consider." That may have a grain of truth, but it ignores the statutorily imposed scheme prompting defendants to object to proposed jury instructions "before the jury retires." K.S.A. 22-3414(3). This "incentivizes" defendants as a matter of law to timely object, so the district court has a chance to correct an error before it occurs, by setting a harder standard of review if they do not. But that statutory encouragement evaporates under *Wright*, because it perversely rewards a defendant's silence with automatic reversal when a proposed jury instruction contains an alternative means problem. We see no reason to skirt the statute.

As for the dissent, it underscores the points made above by not engaging with any depth or precision on the merits. To illustrate, it continues to superficially label *Wilson*, *Timley*, and *Wright* as "precedent" without explaining why that is appropriate when those cases did not involve alternative means error because sufficient evidence supported all proffered means. At best, those cases offer only dicta about an unnecessary remedy, while the cases not discussed by the dissent required a remedy but did not resort to automatic reversal. See *State v. Grissom*, 251 Kan. 851, 893, 840 P.2d 1142 (1992), *State v. Dixon*, 279 Kan. 563, 606, 112 P.3d 883 (2005), and *State v. Cook*, 286 Kan. 1098, 1108, 191 P.3d 294 (2008). Nor does the dissent attempt to reconcile its view with our

multiple acts caselaw, which does not require automatic reversal. See *De La Torre*, 300 Kan. 591. These are not minor analytical omissions.

After careful consideration, we overrule *Wright* and its progeny. There is no justification for requiring automatic reversal and a new trial under circumstances like those presented in Reynolds' case. We are convinced *Wright* was originally erroneous and that more good than harm will come by departing from its singular approach to this type of instructional error. See *Sherman*, 305 Kan. at 108. In its place, we adopt the analysis contemplated by K.S.A. 22-3414(3) when a defendant asserts an alternative means problem with a jury instruction.

Standard of review

For clarity, we restate the applicable test in context: If a defendant claims a jury instruction contained an alternative means error, the reviewing court must consider whether the instruction was both legally and factually appropriate. The court will use unlimited review to determine whether the instruction was legally appropriate and will view the evidence in the light most favorable to the requesting party when deciding whether the instruction was factually appropriate. Upon finding error, the court will then determine whether that error was harmless, using the test and degree of certainty set forth in *Plummer*, 295 Kan. 156, and *Ward*, 292 Kan. 541.

Discussion

The district court instructed Reynolds' jury that an aggravated burglary conviction would require the State prove as one of the elements: "The defendant entered into or remained in a building or dwelling."

To decide whether this instruction was legally appropriate, we look to K.S.A. 2017 Supp. 21-5807(b) under which the State charged Reynolds, which sets out three locations where an aggravated burglary may occur—a "[d]welling in which there is a human being," a "building . . . which is not a dwelling in which there is a human being," or a "means of conveyance . . . in which there

is a human being." K.S.A. 2017 Supp. 21-5807(b). And the instruction listed "building or dwelling" for the location element. This fairly and accurately reflected the applicable statute. We also note the State may charge a defendant with a crime that can be committed in more than one way. See *Rucker*, 309 Kan. at 1094. We hold the instruction was legally appropriate.

Moving to factual appropriateness, the uncontroverted evidence shows Reynolds entered the unoccupied lower-level salon, went upstairs, and broke into the occupied living quarters. The State half-heartedly suggests sufficient evidence established the nondwelling building alternative because Reynolds entered and remained in the lower level with intent to commit a felony. But that ignores a critical component—the statute expressly criminalizes entering into or remaining within "a building . . . *in which there is a human being*." (Emphasis added.) K.S.A. 2017 Supp. 21-5807(b)(2); see also *State v. Daws*, 303 Kan. 303, 794, 368 P.3d 1074 (2016) (holding insufficient evidence supported aggravated burglary conviction when defendant entered an empty dwelling, even though someone arrived later while the defendant remained in the home).

We agree with Reynolds that nothing in the record can sustain an aggravated burglary conviction for entry into a nondwelling building, even viewing the evidence in the light most favorable to the State. No evidence supports that instructed means. We hold listing this alternative means for the location element was factually inappropriate.

Turning to our final step of harmless error, we note Reynolds did not object to the aggravated burglary instruction before the jury retired, so we must look for clear error. See K.S.A. 22-3414(3). And that requires us to be firmly convinced the jury would have reached a different verdict had this error not occurred. See *State v. Williams*, 295 Kan. 506, 516, 286 P.3d 195 (2012).

Reynolds contends if we are to apply any harmless error test, we should apply constitutional harmless error under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). But as we have explained, no constitutional right has been violated; and even if it had, clear error still applies—just as it does for any other unpreserved jury instruction issue under K.S.A. 22-

3414(3). See, e.g., *State v. Jarmon*, 308 Kan. 241, 244, 419 P.3d 591 (2018) (applying clear error to an unobjected-to instruction that, had the defendant objected, would be governed by constitutional harmless error).

Returning to our test, we have no reluctance concluding Reynolds' jury understood all occupants were upstairs in the living area and found him guilty of aggravated burglary of a dwelling. No evidence detracts from that single scenario, and we can rely on the jury to apply the law to the only available evidence in reaching its verdict. See *State v. Gray*, 311 Kan. 164, Syl. ¶ 2, 459 P.3d 165 (2020) ("Kansas courts presume jury members follow instructions . . . ."). We are not firmly convinced the outcome would have been different without listing building as a possible location element. The aggravated burglary instruction was not clearly erroneous.

AGGRAVATED BURGLARY: ALTERNATIVE MEANS (THREE ITEMIZED FELONIES)

The district court instructed the jury that the State had to prove Reynolds entered into or remained in a building or dwelling "with the intent to commit *kidnapping, aggravated assault or criminal threat therein*." (Emphasis added.) In the Court of Appeals, Reynolds argued the individually listed felonies described in the aggravated burglary instruction created alternative means for intent—one for each felony. The panel bypassed that argument by just assuming they were alternative means and held sufficient evidence supported each. The State challenges this assumption, arguing the three felonies were options within a means as defined by our caselaw. We consider next how our post-*Wright* approach with alternative means instructions impacts the related matter of options within a means.

The consequences for options within a means

Two years after *Wright*, the court in *Brown* distinguished "alternative means" from "options within a means" for the first time. *Brown*, 295 Kan. at 188-200. There, the defendant claimed jury instructions separating the charged offenses' elements with "or" stated alternative means of committing the charged crimes. But

the State argued this statutory language should be treated as an "atypical alternative means case," no doubt hoping to avoid *Wright*'s rigid outcome. 295 Kan. at 189.

Rejecting the invitation to change course by overturning *Wright*, the *Brown* court embraced a "no error" concept of "options within a means" borrowed from the Washington Supreme Court. 295 Kan. at 196 (citing *In re Jeffries*, 110 Wash. 2d 326, 339-40, 752 P.2d 1338 [1988]). The *Brown* court held:

"The listing of alternative material elements, when the list is incorporated into an elements instruction, creates an alternative means issue demanding super-sufficiency of the evidence. *But merely describing a material element or a factual circumstance that would prove the crime does not create alternative means, even if the description is included in a jury instruction*." (Emphasis added.) 295 Kan. at 181, Syl. ¶ 7.

For "options within a means," the *Brown* court held *Wright*'s super sufficiency was not required. It noted a court must discern legislative intent to determine "if an 'or' separates an option" that is or is not an alternative means. 295 Kan. at 193; see also 295 Kan. at 194 ("In examining legislative intent, a court must determine for each statute what the legislature's use of a disjunctive 'or' is intended to accomplish. Is it to list alternative distinct, material elements of a crime . . . ? Or is it to merely describe a material element or a factual circumstance that would prove the crime?").

Under *Brown*, the key difference between alternative means and options within a means is in their proof requirements. With alternative means, super sufficiency demands the evidence establish each means presented to the jury to avoid reversal. With options within a means, one option's lack of evidence does not automatically compel reversal. See *Brown*, 295 Kan. at 198 ("Jury unanimity on options within a means—secondary matters—is generally unnecessary; therefore, on appeal, a super-sufficiency issue will not arise regarding whether there is sufficient evidence to support all options within a means.").

At the outset, one might ponder the obvious question: How is it that our courts would treat the conjunction "or" differently in terms of evidentiary proof in one circumstance and not the other? See, e.g., *Daws*, 303 Kan. at 789 (aggravated burglary case; "entering into or remaining within" is viewed as alternative means);

State v. Castleberry, 301 Kan. 170, 185, 339 P.3d 795 (2014) (fleeing a police officer under K.S.A. 2009 Supp. 8-1568[b][1][C], [E]; "engaging in reckless driving or committing five or more moving violations are 'options within means'"). This seems to invite the same sort of speculation that *Wright* abhors. See *State v. Jordan*, 317 Kan. 628, 636, 537 P.3d 443 (2023) (suggesting a court speculates when addressing alternative means or options within a means cases by stating: "a reviewing court looks to the relevant statute's language and structure to *decide whether the Legislature meant* to list distinct alternatives for an element of the crime" [emphasis added]); see also *Moler*, 316 Kan. at 571 ("[W]hen a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it."). The irony, of course, is that the Legislature did not explicitly create options within a means as an analytical steppingstone—it is a judicially crafted concept that simply limits *Wright*'s fallout.

That question aside, since we have decided alternative means no longer requires super sufficiency to avoid reversal, we hold there is no corresponding need to continue distinguishing options within a means in a search for instructional error. In either instance, the same test applies.

Discussion

To address Reynolds' claim, we must first decide whether the instruction was legally appropriate. K.S.A. 2017 Supp. 21-5807(b) criminalizes entering into or remaining within an enclosed space "with intent to commit a felony . . . therein." It does not identify particular felonies triggering the crime, even though the district court listed three in its instruction: kidnapping, aggravated assault, or criminal threat. Even so, all three listed crimes are felonies, and the record shows the kidnapping instructions fairly and accurately reflected the criminal elements of each. See K.S.A. 2017 Supp. 21-5408(a)(3) (kidnapping is a severity level three, person felony); K.S.A. 2017 Supp. 21-5412(b)(a) (aggravated assault is a severity level seven, person felony); K.S.A. 2017 Supp. 21-5415(a)(1) (criminal threat is a severity level nine, person felony). We hold the aggravated burglary instruction was legally appropriate.

Moving to factual appropriateness, Reynolds argues insufficient evidence supported the kidnapping and criminal threat felonies. He did not seek review of the panel's holding that "ample evidence" supported his intent to commit an aggravated assault, so we need not consider that one. See *Reynolds*, 2022 WL 2188164, at *8.

As to kidnapping, Reynolds points out the jury found him not guilty of the separate kidnapping charge, along with its lesser included offenses, so he concludes no evidence existed to justify including the kidnapping means with the aggravated burglary instruction. In rejecting that assertion, the panel observed, "This court is merely charged with determining if sufficient evidence exists such that a rational fact-finder *could have* found Reynolds guilty of intent to kidnap . . . [,] not whether he was in fact found guilty beyond a reasonable doubt." *Reynolds*, 2022 WL 2188164, at *8. We agree with the panel and note an appellate court examines factual appropriateness by viewing the evidence in the light most favorable to the requesting party.

For the criminal threat listing, Reynolds claims error because the panel reversed his criminal threat conviction and argues the jury may have convicted him of aggravated burglary based on the unconstitutional reckless disregard mens rea. See *Reynolds*, 2022 WL 2188164, at *1 (reversing the criminal threat conviction under *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 [2019] [holding the reckless disregard portion of the criminal threat statute unconstitutionally overbroad]). The panel did not directly address his concern. Instead, it looked to whether sufficient evidence proved Reynolds intended to commit criminal threat and held the record did so. *Reynolds*, 2022 WL 2188164, at *7-8.

Reynolds does not challenge that holding, he simply repeats his argument that the aggravated burglary conviction must be reversed because the jury may have relied on reckless criminal threat to find him guilty. He cites *Leary v. United States*, 395 U.S. 6, 31-32, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), as support, noting the Supreme Court wrote that "[i]t [h]as long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the convic-

tion be set aside." But Reynolds' argument fails because the instructions did not give the jury the option to rely on reckless criminal threat as the underlying felony.

The instructions explained the State had to show Reynolds intended to commit one of three underlying felonies. The jury could not have concluded Reynolds intended to commit criminal threat recklessly because "a person cannot act both intentionally and recklessly with respect to the same act. Rather, an act is either intended or not intended; it cannot simultaneously be both. [Citation omitted.]" *State v. O'Rear*, 293 Kan. 892, 903, 270 P.3d 1127 (2012); see *Griffin*, 502 U.S. at 59 ("[J]urors *are* well equipped to analyze the evidence.").

The panel appears to have acknowledged this. It stated: "[W]hile this court reverses Reynolds' criminal threat conviction for the reasons explained above, there is nevertheless sufficient evidence to support that Reynolds likewise *had the intent to commit intentional criminal threat when he entered into and remained within the house*." (Emphasis added.) *Reynolds*, 2022 WL 2188164, at *8. Reynolds does not discuss this in his petition for review, and "[w]hen a party presents . . . no argument to support its request for relief, an issue may be deemed abandoned." See *State v. Evans*, 313 Kan. 972, 993, 492 P.3d 418 (2021). Even so, the jury instruction required the State prove Reynolds "threatened to commit violence and communicated the threat with the intent to place another in fear," and the record shows he told the victims he was "going to kill everyone." This strongly supports aggravated burglary's "intent to commit criminal threat" element.

We hold the aggravated burglary instruction, listing three felonies for the alternative means to commit aggravated burglary, was legally and factually appropriate. There was no error in giving that instruction.

THE AGGRAVATED BURGLARY CHARGING DOCUMENT

Generally, when a jury instruction describing the crime's elements adds statutory elements not in the charging document, that instruction is overly broad and erroneous. *State v. Phillips*, 312 Kan. 643, 668, 479 P.3d 176 (2021); see also *State v. Hart*, 297 Kan. 494, 508, 301 P.3d 1279 (2013). This is because a charging

document specifically sets out an alleged offense, so a defendant knows the nature of the accusation. This principle serves two purposes: enabling the defendant to develop a defense and limiting convictions to facts advanced in the accusation. *Phillips*, 312 Kan. at 668. For these reasons, the State is bound by its charging document.

Reynolds claims the aggravated burglary instruction was too broad because it included the dwelling element, which the original grand jury indictment did not expressly identify. It charged him with entering into or remaining within "a building, motor vehicle, or other means of conveyance," while the jury instruction listed "a building or dwelling" for the location element. The panel avoided the merits and simply decided any error was harmless using a clear error standard. It explained:

> "Assuming, without deciding, that the aggravated burglary instruction was in fact overbroad such as to constitute an error—Reynolds cannot show that the error was clearly erroneous. This court is not firmly convinced that the jury would have reached a different verdict had the jury instruction only included the word building and not the word dwelling. There is no evidence that Reynolds suffered a "'trial by ambush'" based on the inclusion of a description for the burgled structure in the jury instruction. Accordingly, this court finds that even if the instruction were overbroad, it would not require reversal under the clear error standard. [Citations omitted.]" *Reynolds*, 2022 WL 2188164, at *11.

Additional facts

The grand jury issued an indictment alleging aggravated burglary:

> "COUNT 4
> "AGGRAVATED BURGLARY
> "K.S.A. 21-5807(b)
> "Level 4, Person Felony
> "On or about the 4th day of November, 2017 in the State of Kansas and County of Shawnee, RYAN DAVID REYNOLDS, did, then and there, unlawfully, feloniously, and without authority, enter into or remain within *a building, motor vehicle, or other means of conveyance*, to-wit: 2225 NE 39th St., in which there is a human being, to-wit: Kayla Reynolds and/or Lynzie Reynolds and/or E.R.R. xx/xx/15, with the intent to commit a felony therein, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State of Kansas." (Emphasis added.)

As readily seen, despite K.S.A. 2017 Supp. 21-5807(b) identifying a dwelling as an enclosed space, the indictment did not explicitly mention it. But the aggravated burglary instruction did, stating in pertinent part: "The defendant entered into or remained in a building or dwelling." This same language appeared in Reynolds' own proposed instruction, which he submitted well before trial.

Discussion

On review, the State reframes the issue as a charging document question because the indictment's introductory language plainly alleging a level four, person felony can only apply to a dwelling under K.S.A. 2017 Supp. 21-5807(b). The State's point is well taken. The indictment specifying a level four, person felony, certainly weakens Reynolds' prejudice claim—especially when he proposed a similar instruction and had ample time to discover the mismatched elements. See *State v. Dunn*, 304 Kan. 773, 821, 375 P.3d 332 (2016) (holding the charging document error did not affect the defendant's substantial rights because the defendant and his trial counsel understood exactly what the State sought to prove on the charged crime).

This may explain why Reynolds makes little effort to show prejudice or even explain why the jury would have reached a different conclusion with an instruction more like the charging document. Instead, he just repeats his assertion the evidence does not support he entered a "building in which there was a human," which we already discussed.

In *Brown*, the court explained:

"For attempted aggravated robbery, the State charged Brown with committing 'any overt act, to-wit: demanded drugs and cash, toward the perpetration of a crime, to-wit: Aggravated Robbery.' The district court omitted 'to wit: demanded drugs and cash' from the related jury instruction. Brown argues this instruction erroneously broadened the crime charged to include any overt act.

"Generally, '[a] jury instruction on the elements of a crime that is broader than the complaint charging the crime is erroneous.' Such error is excusable when the defendant's substantial rights are not prejudiced. However, Brown does not explain how—and the record does not suggest that—the discrepancy between the information and the instruction deprived him of due process or impacted his substantial rights. For example, Brown does not argue he was unfairly surprised at trial when the State presented the theory that he served as wheelman instead

of demanding drugs and cash. Furthermore, the instruction accurately stated the law as applied to the facts in this case. Therefore, we are not persuaded that this discrepancy—if error—amounts to reversible error. [Citations omitted.]" *Brown*, 306 Kan. at 1165.

Because the instruction did not define a "building"—and Reynolds does not argue the instruction was faulty for neglecting to provide that definition—he fails to firmly convince us the jury would have reached a different result. And as the panel pointed out, Reynolds could not have been surprised or "ambushed" by an instruction he proposed. See *State v. Hart*, 297 Kan. at 510.

AGGRAVATED ENDANGERING A CHILD: JURY INSTRUCTION

The State charged Reynolds with aggravated endangering a child under K.S.A. 2017 Supp. 21-5601(b)(1), which criminalizes "[r]ecklessly causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health is endangered." Reynolds argues "causing or permitting" creates two alternative means of committing the crime and insufficient evidence supports that he permitted the child to be in danger. The panel concluded these were not alternative means and even if they were, sufficient evidence supported both. *Reynolds*, 2022 WL 2188164, at *9-10. We agree there was no error.

Additional facts

At the instructions conference, Reynolds argued no evidence showed he *permitted* the child to be placed in danger, so the instruction should have been limited to whether he *caused* the child to be placed in danger. The district court agreed, but when it orally instructed the jury on the charge, it said the State needed to prove "[t]he defendant recklessly *caused or permitted* [the child] to be placed in a situation in which [the child]'s life, body, or health was endangered." (Emphasis added.) Reynolds did not object. Later, during the State's closing arguments, the court noted its mistake and told the prosecutor: "[W]hen you get to [the aggravated child endangerment] instruction . . . , there was an error in that one. I have a copy with the error in question."

When the prosecutor read the instruction for aggravated child endangerment, she omitted the "permitted" language: "Instruction

Number 20 is Count 9, Aggravated Endangering a Child. And these elements that the State has to prove is that the defendant recklessly caused [the child] to be placed in a situation in which [the child]'s life, body, or health was in danger." The written instruction provided to the jury included only the "causing" language, telling it that the State had to prove "[t]he defendant recklessly caused [the child] to be placed in a situation in which [the child]'s life, body or health was endangered."

Discussion

Considering the district court acknowledged its misstatement, the prosecutor read the instruction without "permitted," and the written instruction omitted "permitted," it seems clear the jury had only one alleged means before it. Indeed, Reynolds' attempt to exploit what amounts to a slip of the tongue as an alternative means structural error underscores the potential harm in preserving *Wright*. Even so, our caselaw suggests we should continue the analysis. See *Miller v. State*, 298 Kan. 921, 933, 318 P.3d 155 (2014) ("[A] correct written instruction does not overcome defects in a trial court's oral instructions because orally instructing the jury on applicable law is one of a trial court's fundamental duties."). The issue is whether the district court's oral instruction was legally and factually appropriate.

We hold the instruction was legally appropriate because the challenged phrase "caused or permitted" fairly and accurately reflected the applicable statutory language, "causing or permitting." See K.S.A. 2017 Supp. 21-5601(b)(1). And we hold it was factually appropriate because, viewed in the light most favorable to the State, Reynolds both caused and permitted his daughter to be placed in danger when he entered the dwelling without authority, confined his daughter in the room, waved his gun around, and declared he would kill everyone. See Black's Law Dictionary 275, 1376 (11th ed. 2019) (defining "cause" as "[t]o bring about or effect" and "permit" as "to allow [something] to happen").

Reynolds argues he did not "permit" the child to be placed in danger. He relies on *State v. Wilson*, 267 Kan. 550, 987 P.2d 1060 (1999), in which the court defined "permit" in this context as having "authority or control over either the child or the abuser and

permit[ting] a child under the age of 18 years to be placed in such a situation where the child's life, body, or health may be injured or endangered." 267 Kan. at 568. But the *Wilson* court defined "cause," as not requiring authority or control if the defendant participated in "actively creating the injurious circumstances." 267 Kan. at 562.

To be sure, there is room to question *Wilson*'s interpretation, but even its view supports a conclusion that Reynolds permitted the incident. He created this dangerous situation for his daughter and could have stopped himself. He controlled his own conduct, causing the circumstances, and allowed them to continue.

We hold the district court's oral instruction was legally and factually appropriate. No error occurred.

CUMULATIVE ERROR

We have determined the factually inappropriate jury instruction setting out the aggravated burglary charge's location element as both a building and dwelling was not clearly erroneous. We also concluded the overly broad, aggravated burglary instruction was not clearly erroneous. In *State v. Waldschmidt*, 318 Kan. 633, 662, 546 P.3d 716 (2024), we held an unpreserved instructional issue that is not clearly erroneous may not be aggregated in a cumulative error analysis under K.S.A. 22-3414(3). There is no error to accumulate here.

Judgment of the Court of Appeals affirming the district court is affirmed on the issues subject to review. Judgment of the district court is affirmed on the issues subject to review.

* * *

ROSEN, J., concurring in part and dissenting in part: I join most of the majority's opinion. But I dissent from its decision to depart from our precedent in *State v. Wilson*, 220 Kan. 341, 552 P.2d 931 (1976), *State v. Timley*, 255 Kan. 286, 875 P.2d 242 (1994), and *State v. Wright*, 290 Kan. 194, 224 P.3d 1159 (2010). I would continue to reverse an alternative means conviction when at least one of the means submitted to the jury lacked sufficient supporting evidence and the jury did not indicate it unanimously relied on a sufficiently supported theory of guilt.

Some crimes may be committed in more than one way. We call these "alternative means" crimes. *State v. Rucker*, 309 Kan. 1090, 1094, 441 P.3d 1053 (2019). Courts may permit juries to consider every means of a charged crime that was included in the charging document when the jury considers a defendant's guilt. In 1976, we held that individual jurors do not need to unanimously agree on which of those alternative means the State proved in finding a defendant guilty. But we also held that, in the absence of such unanimity, sufficient evidence must support every means. *Wilson*, 220 Kan. at 345. Although we strayed from this "super-sufficiency" requirement in a few cases, we confirmed it in 1994 and again in 2010. See *Timley*, 255 Kan. 289; *Wright*, 290 Kan. at 205.

In *Wright*, we expanded on the reasoning behind the super-sufficiency requirement. We explained that it exists to ensure that "each juror's vote was supported by a means for which there was sufficient evidence," or, in other words, that a jury unanimously rested its verdict on a legally cognizable theory of guilt—even if it was not unanimous on which theory. 290 Kan. at 205 (quoting Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 Washburn L.J. 275, 299 [2005]). This is because, when the State inexplicably charges a means for which there is insufficient or no supporting evidence and then successfully advocates for an instruction on that means, some jurors may arrive at a guilty verdict by finding the State proved that insufficiently supported means. Cf. *State v. Daniels*, 278 Kan. 53, 72, 91 P.3d 1147 (2004) (duplicitous charging—including two separate offenses in single count—"confuses the defendant as to how he or she must prepare a defense, and it confuses the jury"). Those jury votes cannot stand. What remains is, at best, a non-unanimous finding of guilt or, at worst, no finding of guilt. See *State v. Green*, 94 Wash. 2d 216, 232, 616 P.2d 628 (1980) (when there is sufficient evidence to support only one of two alternative means, only the sufficiently supported means is "left" to support the conviction and it is impossible "to know whether the jury deemed that [means] established in the absence of some indication of jury unanimity"). Because of this possibility, the difficulty guessing what a jury might have done, and the defendant's right to a unanimous

general verdict, we've held the State accountable for its slipshod approach to prosecution and reversed a conviction when there was insufficient evidence to support at least one means offered to the jury and there was no indication from the jury that it unanimously relied on a sufficiently supported means.

Today, the majority rejects this line of precedent without addressing its underlying reasoning. It observes that K.S.A. 22-3421 and the Sixth Amendment require only a general unanimous guilty verdict and thus do not require that sufficient evidence support every means submitted to a jury. The majority concludes an alternative means error should therefore be reviewed under our instructional error paradigm, a shift that essentially paves the way for the State to charge and instruct on crimes for which there is no evidence.

I agree, as does our precedent, that neither K.S.A. 22-3421 nor the Sixth Amendment *require* super-sufficiency. The majority contends the Constitution requires only a unanimous general verdict as to guilt. But what the majority ignores is the possibility of a non-unanimous general verdict as to guilt when the jurors do not indicate they were unanimous as to means and at least one of the means was not supported by sufficient evidence. As I discussed, in that situation, some jurors' guilty votes may have rested on a means for which there was insufficient evidence, and those votes *cannot stand*. We are then left with less than a unanimous jury rendering a guilty verdict. This surely violates any "general verdict" requirement. 319 Kan. at 11.

I find nothing in the State's briefing or the majority's opinion that convinces me we do not face a jury unanimity concern under these circumstances. In the early portions of the majority's opinion, it seems to acknowledge the concern is there. But it quickly swats it away by rhetorically asking "why can't we employ harmless error to conclude the jury unanimously convicted [the defendant] on the only means for which there was [sufficient evidence]?" 319 Kan. at 6-7.

To this, I answer that the State has failed to meet its burden to show that we should depart from our precedent treating the potential deprivation of general jury unanimity as a structural error. Neither the State nor the majority offers any discussion of the nature of structural error or why this is not one. Cf. *State v. Ramos*, 367

Or. 292, 299-319, 478 P.3d 515 (2020) (providing lengthy analysis of whether jury unanimity error under Sixth Amendment is structural error or amenable to harmless error review). At the very least, because this error implicates Sixth Amendment rights, the majority should review for no less than constitutional harmless error. See *United States v. Litwin*, 972 F.3d 1155, 1178 (9th Cir. 2020) (holding that if jury unanimity error under the Sixth Amendment is subject to harmlessness review, constitutional harmless error standard applies); *Ramos*, 367 Or. at 319-20 (holding that instruction errors implicating Sixth Amendment right to jury unanimity are subject to constitutional harmless error standard).

The United States Supreme Court has offered no ruling on whether the Sixth Amendment requires jury members to unanimously rest their guilty verdicts on a legally cognizable theory of guilt and whether errors casting doubt on that unanimity are subject to automatic reversal. In the absence of such a ruling, the State holds the burden to convince this court our decisions imposing such a requirement were error. Because I believe the State has failed to carry that burden, I would reverse Reynolds' conviction for aggravated burglary.

LUCKERT, C.J., joins the foregoing concurring and dissenting opinion.

No. 125,318

STATE OF KANSAS, *Appellee*, v. ZSHAVON MALIK DOTSON, *Appellant*.

(551 P.3d 1272)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Proof of Existence of Premeditation—Requirements*. Premeditation exists when the intent to kill arises before the act takes place and is accompanied by reflection, some form of cognitive review, deliberation, or conscious pondering. Premeditation requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions.

2. SAME—*Challenge to Sufficiency of Circumstantial Evidence Supporting Finding of Premeditation by Jury—Appellate Review*. When the sufficiency of the circumstantial evidence supporting a jury's finding of premeditation is challenged on appeal, courts often reference five factors that are said to support an inference of premeditation: (1) the nature of the weapon used; (2) the lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless. While these factors sometimes help appellate courts frame the sufficiency inquiry, they need not always apply them, nor are they limited to those factors. Whether premeditation exists is a question of fact. Thus, when an appellate court reviews the sufficiency of the evidence of premeditation, the determinative question is not whether one or more of these factors are present. Instead, the court must decide whether a rational juror could have found beyond a reasonable doubt that the case-specific circumstances, viewed in a light most favorable to the State, established the temporal and cognitive components of premeditation.

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Oral argument held April 23, 2024. Opinion filed July 19, 2024. Affirmed.

Peter Maharry, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant, and *Zshavon Dotson*, appellant, was on a supplemental brief pro se.

Kayla L. Roehler, deputy district attorney, argued the cause, and *Claire Kebodeaux*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: A few days after Thanksgiving in 2018, Zshavon Malik Dotson shot and killed his friend Ronald "R.J." Marks Jr. at the Kansas City home that R.J. shared with his mother. Dotson and R.J. had grappled for control of R.J.'s rifle, and Dotson shot and killed R.J. in the kitchen after overpowering him. Dotson insisted at trial that he had acted in self-defense. R.J.'s mother cast Dotson as the aggressor. A jury weighed the conflicting evidence, assessed the credibility of Dotson and the mother, and found Dotson guilty of first-degree premeditated murder and aggravated battery. We now consider Dotson's appeal.

Dotson and his appellate attorney both filed briefs in this appeal, and there are many issues before us. They argue the State presented insufficient evidence of premeditation, the prosecutors repeatedly misstated the applicable law during closing arguments, the district court made several errors when instructing the jury, Dotson's trial counsel provided constitutionally ineffective assistance, and our court's caselaw has made first-degree premeditated murder and second-degree intentional murder into identical offenses. We have carefully considered these challenges, but we disagree with Dotson that there was any error that warrants a reversal. We therefore affirm his convictions.

FACTS AND PROCEDURAL BACKGROUND

A few facts are undisputed. Dotson and R.J. wrestled over R.J.'s rifle. Dotson overpowered R.J. Dotson shot R.J. And R.J.'s mother, Carolyn Marks, witnessed most of the confrontation. But what precipitated the fight, who the aggressor was, how it ended, and what happened after—those facts were sharply contested at trial. As the State told it, Dotson had argued with R.J. because Dotson had no place to live, and Carolyn would not let him stay at her house. Dotson escalated that argument by diving for R.J.'s rifle, and once he wrenched control of the weapon, he shot and killed R.J. in cold blood. As the defense told it, R.J. and Carolyn were behind on their bills and demanded money from Dotson at gunpoint. Dotson grabbed the gun to defend himself, and he shot R.J. with the rifle only after R.J. pulled a handgun on him. The State's account relied almost entirely on Carolyn's testimony; the defense's account relied almost entirely on Dotson's testimony.

According to Carolyn, she came out of her bedroom when she heard people talking in the living room and found her son and Dotson sitting on opposite sides of a sectional. Dotson had stayed the previous night because his girlfriend had kicked him out, but Carolyn said he could not live there and needed to have someone pick him up. Dotson told her he had no place to go. Carolyn went back to bed to lie down. She came out of her bedroom for a second time when she heard arguing. Dotson and R.J. were still sitting on the couch. Carolyn told them to cut it out and went back to her bedroom.

When Carolyn heard arguing again, she came out of her bedroom for a third time. She could hear the argument—Dotson was saying that R.J. was never there for him and that he had nobody; her son was saying that Dotson was never there for him either but that his mom and he were always helping Dotson. When Carolyn came into the living room, Dotson and R.J. were standing with eyes locked about 6 feet apart. When R.J. turned to look at her, Dotson dove straight for the rifle that had been on the floor next to her son. R.J. dove on Dotson and grabbed the gun. The fight was on.

While Dotson and R.J. were grappling, Carolyn headed back to her bedroom and grabbed a revolver from under her bed. She came back into the living room, yelled for the boys to stop, and then shot her revolver in the air as a warning. But the boys did not stop. The shot startled R.J., and Dotson slammed him against the wall. Then with her son still gripping the gun, Dotson swung it back and hit Carolyn in the face with the stock. Carolyn fell unconscious.

When she awoke on the ground, the boys were in the kitchen, still wrestling over the gun. Dotson backed R.J. up against the dryer, hit him with the stock, and knocked him to the ground. As R.J. was falling, he reached his hands out and started to say "no." Dotson shot him twice in "one quick motion." After those shots, her son was "laying with his hands up, eyes looking straight up at the ceiling, not blinking or nothing." Dotson stood over R.J., gun pointed at him, ignoring Carolyn's pleas. Then after a minute or two, Dotson shot her son several more times. Unlike the "first shots" that had been in the "upper chest area," the second round of

shots were "below [the] waist" in the groin. After that, Dotson "took off running and ransacking [the] house" and then fled. Carolyn called the police.

Dotson offered a very different account. According to him, R.J. was agitated because he had been on the phone arguing with somebody about money for the electric bill. R.J. was upset with Dotson because Dotson had not been there to bond him out of jail or to pay the electric bill. Dotson responded that he had bonded R.J. out once and it was not Dotson's responsibility to keep paying for his mistakes or to pay for their electric bill when he had asked to stay only a few nights. Carolyn told Dotson that if he could not help to pay the bill, he had to leave, and Dotson agreed to do so. R.J. then grabbed his rifle, pointed it at Dotson, and demanded money. Then Carolyn grabbed her gun and pointed it at Dotson too.

Dotson grabbed the barrel of the rifle, pushed R.J. against the wall, and began wrestling over the gun. After 15-30 seconds, Dotson was able to overpower R.J., secure the gun, and send him flying to the ground. Before Dotson could diffuse the situation, R.J. pulled a handgun from his hip to shoot Dotson. Dotson was forced to fire, and he shot consecutive times without pause. After that, he picked up the rifle and the handgun, ran to the bedroom to get his bag, and ran out the front door.

After the State and the defense had presented their evidence, the district court instructed the jury on the charges. A district court must instruct the jury on lesser-included offenses when there is some evidence, viewed in a light most favorable to the defendant, that would reasonably justify the defendant's conviction for a lesser crime. See *State v. Berkstresser*, 316 Kan. 597, 601, 520 P.3d 718 (2022). So here, the court instructed the jury that it could find Dotson not guilty or find him guilty of either first-degree murder, second-degree murder, voluntary manslaughter, or involuntary manslaughter, and it described the elements of each offense. The court also explained that it was up to the jury to assess the significance and the credibility of each witness' testimony. Evidently, the jury determined that Carolyn's testimony was credible, for it found Dotson guilty of first-degree murder. The jury also

convicted Dotson of aggravated battery for striking Carolyn during the fight, but Dotson's appeal primarily focuses on his murder conviction.

The district court imposed a life sentence with no chance of parole for 25 years—a so-called "hard 25" sentence. Dotson appealed directly to our court, and we have jurisdiction because the district court imposed a life sentence and because Dotson was convicted of an "off-grid" crime, meaning his sentence was not imposed under the grids that set out the presumptive sentences for most felonies. See K.S.A. 22-3601(b)(3)-(4). We heard arguments during a special session at Lansing Middle School on April 23, 2024.

ANALYSIS

Dotson's principal challenges to his murder conviction focus on the concepts of premeditation and self-defense. He argues the State presented insufficient evidence to establish premeditation. And he contends the prosecutors mischaracterized the law on self-defense and premeditation during closing arguments, which lowered the State's burden to secure a conviction and denied him a fair trial. We address these challenges first, concluding that there was legally sufficient evidence of premeditation under the deferential standard that appellate courts use and that the prosecutors' minor misstatement about premeditation was harmless beyond a reasonable doubt given the trial evidence.

Then we address Dotson's other challenges. Dotson argues his trial counsel provided constitutionally ineffective assistance, but he either fails to show error or cannot show that there is a reasonable probability the verdicts would have been different without the deficient performance he alleges. Dotson also argues the district court erred in four ways when instructing the jury, but these challenges are either foreclosed by our recent caselaw or so lacking in detail that we cannot meaningfully review them. Next, Dotson argues that our court's caselaw has made first-degree premeditated murder and second-degree intentional murder into identical offenses, thus he can be guilty of only the lesser offense under the so-called "identical offense doctrine." But we have recently considered

and rejected this argument, too. Finally, we reject Dotson's argument that cumulative error deprived him of a fair trial because only one trial error occurred, so the doctrine does not apply.

I. *The State Presented Sufficient Evidence of Premeditation*

Dotson was convicted under K.S.A. 2018 Supp. 21-5402(a) of first-degree murder for killing R.J. "intentionally" and with "premeditation." But he argues the State presented insufficient evidence of premeditation. In his view, the State's evidence showed only that he killed R.J. "intentionally," so he should be resentenced for the lesser-included crime of second-degree murder. See K.S.A. 2018 Supp. 21-5403(a) (defining second-degree murder as a "killing . . . committed . . . intentionally"); *State v. Kingsley*, 252 Kan. 761, 782, 851 P.2d 370 (1993) ("[When] a defendant has been convicted of the greater offense but evidence supports only a lesser included offense, the case must be remanded to resentence the defendant for conviction of the lesser included offense.").

Our approach to sufficiency challenges is well settled. When the State charges a defendant with a crime and the defendant exercises his or her right to a jury trial, it is the jury, not an appellate court, that is tasked with weighing the evidence, judging the credibility of witnesses, and determining questions of fact. See *State v. Hillard*, 315 Kan. 732, 784, 511 P.3d 883 (2022). So when the jury convicts the defendant after hearing the State's evidence, and the defendant challenges the sufficiency of that evidence on appeal, an appellate court must defer to the jury's factual findings. Appellate courts do that by reviewing the evidence in a light most favorable to the State. 315 Kan. at 784. Using this standard, the appellate court must affirm the conviction if a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. 315 Kan. at 784. The question for us, then, is whether a rational fact-finder could have concluded that Dotson acted with premeditation.

Our court thoroughly examined premeditation in *State v. Stanley*, 312 Kan. 557, 478 P.3d 324 (2020). Premeditation "exists when the [intent to kill] arises before the act takes place and is accompanied by reflection, some form of cognitive review (i.e., 'thinking over'), deliberation, conscious pondering." 312 Kan. at

572. In other words, "[p]remeditation requires more than mere impulse, aim, purpose, or objective"—"[i]t requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." 312 Kan. at 574. Thus, premeditation consists of two components: a temporal component (the intent must arise before the act) and a cognitive component (deliberation). See *State v. Coleman*, 318 Kan. 296, Syl. ¶ 1, 543 P.3d 61 (2024).

Occasionally, the State may offer direct evidence of premeditation—for example, a coconspirator might testify to planning the victim's death with the defendant. But more often, the State tries to prove premeditation with circumstantial evidence. See *State v. Scaife*, 286 Kan. 614, 620, 186 P.3d 755 (2008). In those cases, the jury may infer premeditation from the case-specific circumstances, provided the inference is reasonable. *Hillard*, 315 Kan. at 787.

When the sufficiency of that circumstantial evidence is challenged on appeal, our court often references five factors that are said to support an inference of premeditation. See, e.g., *State v. Hilyard*, 316 Kan. 326, 331, 515 P.3d 267 (2022) (reciting five premeditation factors). Those factors include (1) the nature of the weapon used, (2) the lack of provocation, (3) the defendant's conduct before and after the killing, (4) threats and declarations of the defendant before and during the occurrence, and (5) the dealing of lethal blows after the deceased was felled and rendered helpless. 316 Kan. at 331.

While these factors sometimes help our court frame the sufficiency inquiry, we need not always apply them, nor are we limited to those factors. See *State v. Holmes*, 272 Kan. 491, 499, 33 P.3d 856 (2001) ("[I]n a prosecution for premeditated murder, the law does not presume the existence of premeditation or deliberation from any state of circumstances."). In other words, appellate courts should not apply the five factors in an overly formalistic manner. Whether premeditation exists is a question of fact. *Stanley*, 312 Kan. 557, Syl. ¶ 5. Thus, when reviewing the sufficiency of the evidence of premeditation, the determinative question is not

whether one or more of these factors are present. Instead, we decide whether a rational juror could have found beyond a reasonable doubt that the case-specific circumstances, viewed in a light most favorable to the State, established the temporal and cognitive components of premeditation.

Like most other premeditated first-degree murder cases, there was no direct evidence of premeditation here. But when the circumstantial evidence is viewed with the required deference to the State, which requires us to adopt Carolyn's version of the incident over Dotson's when their accounts differ, we conclude it was sufficient to establish premeditation. The evidence shows that Dotson found himself in a desperate situation: he had been kicked out of his girlfriend's home and had no place to live. His only remaining option was Carolyn and R.J.'s house. When Carolyn foreclosed that option, Dotson's demeanor noticeably changed, and he accused R.J. of never supporting him. When Carolyn emerged from her bedroom for the third time and told Dotson and R.J. to stop arguing, Dotson seized on the momentary distraction to lunge for the lethal rifle. Then during the protracted struggle, Dotson was undeterred by Carolyn's pleas to stop and the warning shot she fired in the air. And finally, Dotson fired at close range into R.J.'s chest and killed him as soon as he gained full control of the rifle.

The State also suggests that the one- to two-minute pause between the shots Dotson fired into R.J.'s chest and the shots he fired into R.J.'s groin are persuasive evidence of premeditation. In the State's view, that pause provided Dotson a chance for thoughtful consideration before he overrode any cognitive brake and fired more shots. Dotson, on the other hand, insists that the record shows the first two shots to R.J.'s chest were fatal. So he argues that the pause and additional shots cannot factor into our premeditation analysis because they came "after the homicidal act." But we need not resolve that dispute because there is sufficient evidence supporting the jury's finding of premeditation even if we consider only those circumstances preceding the initial shots.

The jurors reasonably could have inferred from Dotson's decision to lunge for the lethal weapon when R.J. was distracted and from Dotson's decision to carry on the fight despite Carolyn's pleas and warning shot that Dotson had formed the intent to kill

R.J. before firing the fatal shots. And from the same evidence, the jury reasonably could have inferred that Dotson engaged in a period of reflection, sufficient to change his mind and abandon that intent, before killing R.J. In short, there was sufficient circumstantial evidence for the jury to find beyond a reasonable doubt that the State had proved both the temporal and the cognitive components of premeditation. See *State v. Holmes*, 278 Kan. 603, 633-34, 102 P.3d 406 (2004) (sufficient evidence of premeditation when defendant was initial aggressor, wrestled for control of gun, overpowered victim, shot victim after wresting control of the weapon, and did not seek medical attention).

We understand that Dotson may view the facts of his case very differently. But as an appellate court, we must defer to the jurors, who weighed the conflicting evidence, judged the credibility of witnesses, and determined questions of fact. And because the jurors convicted Dotson, we must accept Carolyn's version of the incident over Dotson's version where their accounts differ. Under that standard, we conclude that sufficient evidence supports Dotson's first-degree murder conviction.

II. *The Prosecutors Did Not Misstate the Law of Self-Defense, and Their Misstatements About the Law of Premeditation Were Harmless*

Dotson's other principal challenge is based on the prosecutors' statements during closing arguments. After a district court instructs the jury on the applicable law, the State and defense may offer closing arguments. K.S.A. 22-3414(4) (setting out the order of trial). The State goes first, followed by the defendant. And the State may then offer a rebuttal. K.S.A. 22-3414(4). At Dotson's trial, two prosecutors divvied up that task: one prosecutor delivered the initial closing argument, and the other delivered the rebuttal. Dotson argues that these prosecutors violated his federal constitutional right to a fair trial by misstating the law on self-defense and premeditation. See *State v. Sherman*, 305 Kan. 88, 108-09, 378 P.3d 1060 (2016) (prosecutor's misstatement of law in state criminal prosecution that prejudices defendant violates defendant's due-process right to fair trial under Fourteenth Amendment to United States Constitution). Dotson's trial counsel did not

object to these alleged errors at trial, but we review claims of prosecutorial error even without a timely objection. *State v. Guebara*, 318 Kan. 458, 480, 544 P.3d 794 (2024).

Our standard of review is well-established. We first decide whether the prosecutor's statement fell "'outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction.'" *State v. Anderson*, 318 Kan. 425, 437, 543 P.3d 1120 (2024). That is often a case-specific inquiry because "'the line between permissible and impermissible argument is [often] context dependent.'" 318 Kan. at 439. If the defendant shows error, then we decide whether the error is prejudicial under the constitutional harmless-error standard. Under that standard, we will reverse the defendant's conviction unless the State can show that it was harmless beyond a reasonable doubt, meaning that "'there is no reasonable possibility that the error contributed to the verdict.'" *Guebara*, 318 Kan. at 480.

A. *The Prosecutors Did Not Misstate the Controlling Law on Self-Defense*

Under Kansas law, "[a] person is justified in the use of deadly force" when he or she "reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person." K.S.A. 21-5222(b). The person using deadly force under those circumstances has no duty to retreat. See K.S.A. 21-5222(c). But if the person is the one who "initially provokes the use of any force" against themselves or another—that is, if the person is the initial aggressor—then the use of deadly force is not justified unless one of two safe-harbor provisions applies. K.S.A. 21-5226(c). Under the safe-harbor provision relevant here, an initial aggressor is justified in the use of deadly force if he or she "has reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force." K.S.A. 21-5226(c).

Dotson argues the prosecutors misstated this controlling law by asserting that an initial aggressor can never claim self-defense. He draws our attention to two statements that one prosecutor made during the initial closing argument. She said "[y]ou cannot claim

self-defense in a fight that you started" and that the "State argues that you do not get to say self-defense when you initially provoke an argument." Dotson then points us to rebuttal, when the other prosecutor said "[y]ou don't get to shoot somebody because you started a fight and they pull a knife and you're, like, oh crap, they're gonna kill me with a knife. That's not how that works." The State contends Dotson is taking the prosecutors' comments out of context.

We agree with the State. During the initial closing argument, the first prosecutor correctly stated the law and then asserted that Dotson could not claim self-defense as the initial aggressor because the evidence showed he had not used every reasonable means of escape:

> "The defendant is claiming he's not guilty because of self-defense. If you think that pumping round after round after round into a man who's laying on the floor is reasonable and lawful, first I would ask you to consider the initial aggressor instruction. That's Instruction Number 16. It talks about how a person who initially provokes the use of force against himself is not permitted to use force to defend himself unless that person reasonably believes he's in present danger of death or great bodily harm and has used every reasonable means to escape such danger. He was standing next to the back door. He did not use every reasonable means of escape as he stood there over R.J.
>
> "You cannot claim self-defense in a fight that you started. The State's evidence shows you that the defendant started this fight when he dove, lunged, slid, whatever word you want to use, for that gun. State argues that you do not get to say self-defense when you initially provoke an argument. Even if you're unsure about how it began, I submit to you that you can know how it ended, with [Dotson] standing over R.J. with an assault rifle."

And during rebuttal, the other prosecutor correctly stated the law on initial-aggressor self-defense and then argued Dotson could not successfully invoke self-defense because he had not tried to escape:

> "And you know what you don't get to do under Kansas law if you are the person that dives for that gun? You do not get to claim self-defense later, not unless you have exhausted every means necessary to remove yourself from that situation. You go start a fist fight with somebody and they pull a knife, you gotta run away. You don't get to shoot somebody because you started a fight and they pull a knife and you're, like, oh crap, they're gonna kill me with a knife. That's not how that works.
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> "And, ladies and gentlemen, I submit to you the evidence is cleanly consistent that [Dotson] went for that gun first. Even if you didn't buy it, did he

exhaust means of escape? As you will read in those instructions, he stood by the back door as he stood over R.J. in State's 78. I want you to remember this. That's the back door. That's freedom. That's safety. That is escape."

This context makes clear that the prosecutors properly stated the law and then argued the relevant safe-harbor provision did not apply given the trial evidence. Such comments are well within the wide latitude afforded prosecutors, so Dotson has failed to establish his first claim of prosecutorial error.

B. *The Prosecutors Erred by Diminishing the Temporal Element of Premeditation During Closing Argument, but that Error Was Harmless*

As we discussed above and at length in *Stanley*, premeditation has both a temporal and a cognitive element: a killing is premeditated when the intent "arises before the act takes place" and is "accompanied by reflection, some form of cognitive review (i.e., 'thinking over')." *Stanley*, 312 Kan. at 572. In his appellate briefing, Dotson argued the prosecutors had diminished the importance of the temporal element of premeditation during closing arguments by asserting that premeditation meant "just more than instantaneous." He then filed a letter under Supreme Court Rule 6.09, which allows a party to advise an appellate court of "persuasive or controlling authority that has come to the party's attention" after briefs were filed. See Supreme Court Rule 6.09(a)(1) (2024 Kan. S. Ct. R. at 40). That letter cited our recent decision in *Coleman*, which held that a prosecutor had erred "during closing arguments by making statements that contradict or obfuscate the cognitive aspect of premeditation by saying premeditation only requires time." *Coleman*, 318 Kan. 296, Syl. ¶ 1. But when pressed at oral argument, Dotson's appellate attorney repeatedly stated he had cited *Coleman* only as support for his argument on the temporal component of premeditation. Though the record shows little, if any, discussion of the cognitive component during closing argument, Dotson's attorney expressly disclaimed any challenge to the prosecutors' statements (or lack thereof) on that component of premeditation. The question before us, then, is whether the prosecutors misstated the law by minimizing the importance of the temporal component of premeditation.

To satisfy the temporal component of premeditation, the State must show that the intent to take another's life and the opportunity for cognitive reflection arose "'before the final act of killing,'" though "'there is no specific time period'" required. 318 Kan. at 301. As a result, our court has repeatedly cautioned prosecutors against making arguments that "essentially suggest[]" that premeditation could form instantaneously. See *State v. Hall*, 292 Kan. 841, 852, 257 P.3d 272 (2011). For example, our court has found error when a prosecutor argued that a defendant could have "'form[ed] premeditation after the pull of the first trigger, because remember, he pulls four times.'" 292 Kan. at 850. We also found error when a prosecutor argued that premeditation could have formed "just a half second before" the fatal shot. *State v. Kettler*, 299 Kan. 448, 474-76, 325 P.3d 1075 (2014). And when a prosecutor argued that premeditation "'can occur in an instant'" and "'can happen in a second.'" *Holmes*, 272 Kan. at 497-500. Such arguments can blur the line between a premeditated killing and an instantaneous, intentional killing. See *State v. Moncla*, 262 Kan. 58, 70-73, 936 P.2d 727 (1997) (adding phrase "it may arise in an instant" to pattern instruction on premeditation tended to diminish importance of the element of premeditation).

Dotson argues the prosecutors made the same error here. When discussing premeditation during the initial closing argument, one prosecutor said the State needed to show the killing was "more than just an instant act of taking [R.J.'s] life," not that Dotson had planned to kill R.J. far in advance:

> "Premeditation. In the instruction, it says it is more than an instantaneous, intentional act of taking another's life. I wish I could define for you what that instantaneous, what that amount of time is. I can't define that for you. That's up to you, but I can tell you that the State doesn't have to prove—I don't have to show you [Dotson]'s diary from the day before saying and I am going to kill R.J. I don't have to show that to you. I do have to show you that it's more than just an instant act of taking [R.J.'s] life, and I believe the State has shown that to you."

Then during rebuttal, the other prosecutor recounted Carolyn's testimony that Dotson had lunged for the gun when R.J. had turned to look at Carolyn. The prosecutor said that to establish premeditation, the State needed to show "[i]t's just more than instantaneous":

"She comes out fussin'. She said R.J. turned and looked at his mom. That was the opportunity, that was it. These men are locked eye to eye. She said they're standing there. I want you to picture an umpire and a baseball manager, right? But if we're locked and I turn and I look, that's what you need. That's it. The opportunity came and he took it, and that's why when [the co-prosecutor] was talking to you about premeditation. It sounds like a big deal from TV and movies. Like she said, we don't have to find someone's diary that talks about their plan. It's just more than instantaneous."

We agree with Dotson. Like assertions that premeditation can be formed "just a half second before" the fatal shot or "can happen in a second," the prosecutors' argument that premeditation is anything "more than instantaneous" improperly equated the temporal component to a near-instantaneous act. And by suggesting premeditation "sounds like a big deal from TV and movies" but only requires conduct that is "just more than instantaneous," the prosecutors' argument further diminished the temporal component. We do not mean to suggest the prosecutors' comments were flagrant or intentional. But given the caselaw described above, the comments cross just beyond the wide latitude afforded prosecutors and into the domain of improper argument.

Even so, the State has convinced us the error was harmless beyond a reasonable doubt. Dotson challenged the prosecutors' comments about the temporal component of premeditation only, not their statements (or lack thereof) about the cognitive component. And there was ample evidence to support the temporal component: Dotson's demeanor markedly changed when Carolyn told him that he could not stay at her house; Dotson argued with R.J. that R.J. was never there for him; when Carolyn interrupted that argument, Dotson seized on R.J.'s momentary distraction to dive for the gun; there was a protracted struggle; and Dotson was undeterred by Carolyn's pleas to stop, her warning shot, or her being knocked unconscious. We believe this circumstantial evidence overwhelmingly supports the jury's finding that Dotson's intent to kill R.J. arose before the lethal act and that there was an opportunity for a period of thoughtful deliberation.

Also, we "often weigh [jury] instructions when considering whether any prosecutorial error is harmless," and we "presume the jurors follow the instructions." *State v. Brown*, 316 Kan. 154, 170, 513 P.3d 1207 (2022). Here, the district court gave the standard

pattern jury instruction on premeditation, which correctly states that "[a]lthough there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." See PIK Crim. 4th 54.150 (2020 Supp.). The volume of evidence supporting the temporal component of premeditation coupled with the accurate jury instruction lead us to conclude that there is no reasonable probability the prosecutors' misstatements contributed to Dotson's conviction.

Before moving on, we briefly address one last prosecutorial-error argument Dotson makes. In a supplemental brief prepared and filed in our court without the help of an attorney, Dotson suggests that one prosecutor erred by mischaracterizing the evidence during the trial's opening argument. As Dotson frames it, the prosecutor told the jury that Dotson did not stop shooting R.J. until the magazine ran out of bullets. Dotson argues that the trial evidence did not support that assertion. See *Coleman*, 318 Kan. 296, Syl. ¶ 2 ("Prosecutors err by arguing facts not in evidence."). But the prosecutor argued that Dotson stopped firing only because he decided he was finished and specifically not because he ran out of bullets: "[H]e fired and kept firing 'til he decided he was done. It wasn't 'til the magazine ran out of bullets. It wasn't until someone got out of sight or he got out of range, it wasn't until he had decided he was done." Dotson's pro se argument lacks merit, and we turn to the remaining issues on appeal.

III. *Dotson Has Not Established that He Received Constitutionally Ineffective Assistance of Trial Counsel*

After he was convicted, Dotson filed a pro se motion for a new trial based on the allegedly ineffective assistance of his trial counsel, Brett Richman. The district court appointed a new attorney, who filed a new-trial motion that incorporated and supplemented the claims Dotson had raised himself. The district court held an evidentiary hearing on that motion, and Dotson and Richman both testified. The court denied Dotson's motion in an extended ruling from the bench.

Dotson renews three of the ineffective-assistance claims he raised below. He argues that Richman failed to adequately communicate with him, that Richman failed to secure the testimony of an important witness, and that Richman failed to call two officers who would have undermined the testimony of the victim's mother. We analyze those claims under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which our court adopted in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Under the first prong, Dotson must establish deficient performance by showing that Richman's representation fell below an objective standard of reasonableness. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485-86, 486 P.3d 1216 (2021). As we have often noted, "[j]udicial scrutiny of counsel's performance must be highly deferential." 313 Kan. 472, Syl. ¶ 4. Under the second prong, Dotson must establish prejudice by showing "with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence." 313 Kan. at 486. As we explain below, Dotson has failed to establish any prejudicial error.

A. *Dotson Has Not Shown that Richman Provided Ineffective Assistance by Failing to Communicate with Dotson*

Dotson's failure-to-communicate challenge has three parts. First, Dotson alleges that he could not make an informed decision about accepting a plea bargain because Richman did not inform him of the potential penalties he faced. Dotson testified to that at the evidentiary hearing. But the district court did not find Dotson's testimony credible. Instead, it found that Dotson had rejected the State's plea offers despite fully understanding the penalties he faced and the uncertain outcome at trial. We review that finding for substantial competent evidence, meaning we do not consider other evidence that might support a different result, provided sufficient evidence supports the district court's finding. See *Guebara*, 318 Kan. at 476. And here, substantial competent evidence supports the district court's finding. Richman testified that he informed Dotson that he faced "a Hard 25 or 50 depending on mitigating circumstances." He also testified that the potential penalties

were discussed during an unsuccessful plea mediation. And it was the district "court's opinion, from sitting on every single hearing where we discuss[ed] pleas," that "Mr. Dotson was emphatic that he would not take a plea anywhere close to what was offered by the State." The court added that it had "made it very clear that any decision about a plea offer is 100 percent that of the defendant."

Second, Dotson argues that Richman's overconfidence in the trial outcome improperly influenced his decision to reject a plea and go to trial. Dotson testified at the evidentiary hearing that Richman had told him "we had a good chance of winning," and "[t]here was no way they'd find me guilty of premeditated murder." And Richman testified that he continued to believe a first-degree-murder conviction was unwarranted. The district court ruled that Richman's statements were not unfounded. Though the evidence of premeditation was legally sufficient, it could have also supported convictions for the lesser charges in the case. And the State's evidence for premeditation rested almost entirely on Carolyn's testimony, meaning the jury reasonably could have reached a different result if it had assessed her credibility differently. Moreover, as Dotson acknowledged during his testimony, Richman never guaranteed acquittal or conviction on a lesser charge. As a result, we affirm the district court's conclusion that Richman's performance was not deficient.

And third, Dotson takes issue in his pro se brief with the amount of pretrial communication he had with Richman. Dotson asserts that Richman visited him just 14 times in the 2 and a half years before trial and that each meeting was less than 30 minutes. But Dotson offers no evidence suggesting that 14 visits was unreasonable given the circumstances of his case. Nor does Dotson acknowledge that the COVID-19 pandemic delayed his trial by nearly a year and a half during the time period in question. Thus, Dotson has not established that Richman's pre-trial communications were deficient.

B. *Dotson Has Not Established that Richman's Failure to Interview the Victim's Girlfriend Was Prejudicial*

In his second ineffective-assistance claim, Dotson argues Richman should have done more to secure the testimony of R.J.'s girlfriend, Jasmine Harris, who had been on the phone with R.J. and overheard part of the argument between Dotson and R.J. Harris apparently told

police she heard the gun cocking. In Dotson's view, she would have been "an important witness" because her testimony "would have bolstered [Dotson]'s testimony that [R.J.] was the aggressor" because it suggested that R.J. had the gun during the argument. Dotson claims "[i]t was vital that Richman track down Harris and determine what she knew" and that, "[w]ithout knowing what she would say, Richman failed to fully investigate the case and could not present a full defense."

At the evidentiary hearing, Richman testified that, as a matter of strategy, he did not want the "significant other of the deceased" to testify. He also believed Harris' statement to police bolstered the State's case because it suggested Dotson was the aggressor and R.J. had remained calm. But Richman conceded he did nothing to locate Harris besides leaving voicemails. Richman did not know whether Harris' testimony would be consistent with her statement to police because he never spoke to her. The district court found that Richman could have done more to locate Harris but that Dotson could not show "undue prejudice" because Richman had made a strategic decision.

The district court reached the right result for the wrong reason. "Strategic choices that counsel made after thoroughly investigating the law and facts relevant to plausible options are virtually unchallengeable." *State v. Hutto*, 313 Kan. 741, 750, 490 P.3d 43 (2021). But because Richman failed to do the relevant investigation, his decision not to call Harris is not entitled to deference as a "strategic decision," as the district court reasoned. That said, even though Dotson's new attorney subpoenaed Harris for the evidentiary hearing, she did not appear. Nothing in the record shows what she would have testified to at trial. Thus, Dotson cannot establish that "there is a reasonable probability that . . . the outcome of the trial would have been different" had Richman secured Harris' testimony. *State v. Evans*, 315 Kan. 211, 218, 506 P.3d 260 (2022).

C. *Dotson Has Not Established that Richman's Failure to Examine the Officers Who Took the Victim's Mother's Statement Was Prejudicial*

Finally, Dotson contends that Richman needed to call the officers who took Carolyn's initial statement as witnesses. Richman testified that because Carolyn had been an uncooperative witness at the preliminary hearing, he planned to aggressively question her on inconsistent

statements and "paint her as someone who is simply trying to protect her son." But he said that Carolyn's demeanor substantially changed at trial: "she would answer questions, she would not do anything that was untowardly difficult and I believe she cried at least once, maybe twice." As a result, Richman changed tactics to avoid attacking a sympathetic witness. Dotson argues that, for this very reason, Richman needed to call the officers who took her statement, otherwise, he "could not point to the officers to establish the inconsistencies in Carolyn's testimony at trial versus her statements to the police."

The district court found that Richman "pointed out numerous inconsistencies with the testimony of [Carolyn] from statements made to reporting officers, to detectives, to preliminary hearing to those statements made during the trial" and "did a good job of pinpointing the varying statements that she gave, and that was, as he indicated here today, very important to their argument of self defense and who was the initial aggressor." The court concluded that Richman's "inactions" did not "reach the level of *Strickland* prejudice."

While the court was correct that Richman cross-examined Carolyn on her inconsistent statements, Carolyn's answers were vague (e.g., "I don't remember," "I remember talking to several people, but that's all," "That's a good question."), which is exactly why Dotson contends the officers were needed. Even so, Dotson fails to explain in his briefing what specific inconsistent statements Carolyn made within her statements to police, her preliminary-hearing testimony, and her trial testimony. So, as above, Dotson cannot establish that "there is a reasonable probability that . . . the outcome of the trial would have been different" had Richman called these officers as witnesses. *Evans*, 315 Kan. at 218.

IV. *The Jury Instructions Were Not Erroneous*

Dotson raises four challenges to the jury instructions. He raised two of those in the brief his appellate attorney filed. Dotson contends that the district court should have supplemented its instruction on premeditation even though Dotson did not ask it to. He also argues that it was improper for the jury's verdict form—which we treat as a jury instruction—to list "guilty" above "not guilty." See *State v. Fraire*, 312 Kan. 786, 795-96, 481 P.3d 129 (2021) (challenges to a verdict form fall under the instructional-

error framework). The other two challenges were raised in Dotson's pro se supplemental brief. There, Dotson argued the district court failed to instruct the jury on imperfect self-defense and failed to include language addressing a heat-of-passion killing in its voluntary-manslaughter instruction. But none of these arguments demonstrate instructional error.

A. *The District Court Did Not Err when It Failed to Provide an Unrequested Supplemental Instruction on Premeditation*

The district court gave the standard pattern instruction on premeditation. See PIK Crim. 4th 54.150 (2020 Supp.). Dotson proposed no modifications to the instruction. But he now argues the district court erred by failing to supplement the instruction with language developed in *Stanley*. There, our court said it was best practice to provide additional clarifying language when a district court uses a *Bernhardt* instruction. *Stanley*, 312 Kan. at 573-74. A *Bernhardt* instruction explains that premeditation can "form during or after an initial altercation." *State v. Bernhardt*, 304 Kan. 460, 472, 372 P.3d 1161 (2016). *Stanley* observed that a district court giving a *Bernhardt* instruction should also specify that "[p]remeditation requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." 312 Kan. 557, Syl. ¶ 7.

We considered and rejected this very argument in two recent cases. See *Coleman*, 318 Kan. at 313-14; *Hilyard*, 316 Kan. at 332-37. Like Dotson, the defendants in those cases urged us to "take a step beyond *Bernhardt* and *Stanley* and hold a trial judge errs by not giving an expanded premeditation instruction, even if not requested to do so at trial." *Coleman*, 318 Kan. at 313. We declined to do so because the pattern instruction on premeditation "'is legally sufficient and generally not likely to mislead the jury.'" 318 Kan at 313-14; see *Hilyard*, 316 Kan. at 334 ("[T]here is no error for an appellate court to correct" when "[t]he instructions given were sufficient, meaning that they properly and fairly stated

the law and were not reasonably likely to mislead the jury."). As we explained, "it is immaterial" that "another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been *more* clear or *more* thorough than the one given." 316 Kan. at 334. This authority forecloses Dotson's challenge.

B. *A Verdict Form that Lists "Guilty" First Is Not Legally Erroneous*

Dotson argues the district court erred by placing "guilty" before "not guilty" on the verdict forms for both counts. Our court has repeatedly considered and rejected that argument. See, e.g., *Fraire*, 312 Kan. at 795-96; *State v. Wilkerson*, 278 Kan. 147, 159, 91 P.3d 1181 (2004). Dotson contends that our court wrongly decided those cases. But like the defendant in *Fraire*, Dotson "makes no showing at all that the order in which the verdict form presents the options has any bearing on the likelihood of a jury reaching one verdict or the other." 312 Kan. at 796. As a result, "[t]he verdict form presents no error of law." 312 Kan. at 797.

C. *The District Court Gave an Instruction on Imperfect Self-Defense*

Under K.S.A. 2018 Supp. 21-5405(a)(4), a person commits involuntary manslaughter when he or she kills a person "during the commission of a lawful act in an unlawful manner." A defendant might seek an instruction on that offense when the defendant argues he or she killed someone while lawfully defending themselves but used excessive force. *State v. James*, 309 Kan. 1280, 1302, 443 P.3d 1063 (2019). Hence, an *imperfect* self-defense instruction.

Dotson contends the district court should have given that instruction here. The problem with that argument is the court *did* instruct the jury on imperfect self-defense. That said, the instruction contained an obvious typo: the court told the jury that to establish the charge of involuntary manslaughter, the State needed to prove "[t]he killing was done in the commission of an *unlawful* act in an unlawful manner." (Emphasis added.) That instruction was incorrect because imperfect self-defense under K.S.A. 2018

Supp. 21-5405(a)(4) occurs when a defendant kills a person "during the commission of a *lawful* act in an unlawful manner." (Emphasis added.) But Dotson did not object to that language at trial. His trial counsel also explicitly drew the jury's attention to the instruction, correctly stated the law, and explained how it applied to the facts. And in any event, Dotson has not argued on appeal that the imperfect-self-defense instruction misstated the law—his only argument is that the instruction was not given at all. Thus, we reject this challenge. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (issues not briefed are considered waived or abandoned).

D. *Dotson Has Not Shown that the Voluntary Manslaughter Instruction Was Erroneous*

The district court instructed the jury on voluntary manslaughter—it said that to establish that charge, the State had to prove Dotson "knowingly killed Ronald Marks, Jr." and that "[i]t was done upon a sudden quarrel." Voluntary manslaughter under K.S.A. 21-5404(a)(1) occurs when a defendant "knowingly kill[s]" a person "[u]pon a sudden quarrel or in the heat of passion." Dotson appears to argue that the district court should have expressly referenced "heat of passion" in the instruction.

But even if this broader language would have been legally and factually appropriate—something Dotson makes only a cursory argument for—we explained above that a district court does not err just because it failed to give a legally and factually appropriate instruction. See *Hilyard*, 316 Kan. at 334-36. Instead, the defendant must show that the instructions given were insufficient because they failed to "properly and fairly state[] the law" or were "reasonably likely to mislead the jury." 316 Kan. at 334. Dotson does not explain why the voluntary manslaughter instruction given at trial was insufficient. Furthermore, Dotson failed to request the heat-of-passion language during the instruction conference, and he did not object to the district court's instruction. So even if the district court erred, Dotson would need to establish clear error—that is, he would have the burden to "firmly convince[] us that the jury would have reached a different verdict" if the district court had given the instruction. *State v. Shields*, 315 Kan. 814, 821, 511 P.3d 931 (2022). Dotson has not made that argument either. We therefore

reject this final instructional challenge. See *Davis*, 313 Kan. at 248 (issues not briefed are considered waived or abandoned).

V. *Our Precedent Forecloses Dotson's Identical-Offense Challenge*

Dotson next argues that under our court's caselaw, premeditated first-degree murder is identical to intentional second-degree murder, so the district court needed to sentence him for that lesser offense under the identical-offense doctrine. See *State v. Shelly*, 303 Kan. 1027, 1052, 371 P.3d 820 (2016) (under identical-offense doctrine, when "'two offenses have identical elements, an offender can be sentenced to only the less severe penalty applying to the two offenses'"). But in *Stanley*, our court affirmed its prior caselaw and held that "[p]remeditated first-degree murder and intentional second-degree murder are not identical, and the identical offense sentencing doctrine does not apply." 312 Kan. 557, Syl. ¶ 2. Dotson asserts that *Stanley* was wrongly decided, but he does not advance any argument to support this assertion. Thus, we reject his challenge.

VI. *Cumulative Error Did Not Deprive Dotson of a Fair Trial*

Lastly, Dotson alleges cumulative error deprived him of a fair trial. But the only error we identified above was the prosecutors' minor misstatement about the temporal component of premeditation. The cumulative-error doctrine does not apply when only one error has been identified. *State v. White*, 316 Kan. 208, 217, 514 P.3d 368 (2022).

For the reasons discussed above, Dotson has failed to establish any trial error warranting reversal of his convictions for first-degree murder and aggravated battery. Sufficient evidence supported Dotson's first-degree murder conviction. The prosecutors' misstatements of the law were harmless beyond a reasonable doubt. Dotson failed to establish that he received constitutionally ineffective assistance at trial. The jury instructions were not erroneous. Premeditated first-degree murder and intentional second-degree murder are not the same offense. And the cumulative-error doctrine does not apply. We therefore affirm Dotson's convictions.

Affirmed.

No. 124,759

STATE OF KANSAS, *Appellee*, v. BECKY ANNE WILSON, *Appellant.*

(552 P.3d 1228)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Order to Pay Restitution While Serving Probation—Statute Permits Extension of Probation if Restitution Is Unpaid.* If a defendant is ordered to pay restitution along with serving probation, K.S.A. 21-6608(c)(7) permits extending the probation for as long as restitution remains unpaid.

2. SAME—*Statutory Provision for Order to Pay Restitution—Two Considerations.* K.S.A. 21-6604(b)(1)'s provision that "the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime" has two considerations: (a) damage or loss, and (b) causation.

3. SAME—*Statutory Provision Permits Monetary Award When Damage or Loss Caused by Defendant's Crime.* K.S.A. 21-6604(b)(1) permits a district court to award monetary interest as part of restitution when evidence shows it is a "damage or loss caused by the defendant's crime."

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 30, 2023. Appeal from Norton District Court; PRESTON PRATT, judge. Oral argument held February 1, 2024. Opinion filed July 26, 2024. Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part.

Kasper Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Steven J. Obermeier, assistant solicitor general, argued the cause, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: The State prosecuted Becky Anne Wilson for financial theft from her employer. She pled guilty to three felonies carrying statutory probation terms of 24, 18, and 12 months. The district court, however, sentenced her to 24 months' probation on each conviction and ordered full restitution with "interest on [the restitution amount] at the rate that would apply to a civil judgment." Twenty-three months into her probation, the court revoked

it and ordered her to serve each felony's underlying sentence consecutively. She appealed, arguing the probations for the two lower-level felonies could not be revoked because she had completed their shorter statutory terms. She also challenged the order to pay interest. A Court of Appeals panel agreed with her. *State v. Wilson*, No. 124,759, 2023 WL 4284960, at *10 (Kan. App. 2023) (unpublished opinion). The State seeks our review. We reverse in part and affirm in part.

On the probation issue, we reverse the panel and affirm the district court. We hold the district court properly extended Wilson's probation until she fully paid her restitution obligation. This means the court had jurisdiction to revoke the probation on each conviction and impose the applicable prison terms. On the interest challenge, we affirm the panel on a different rationale and vacate that portion of the district court's order. We hold K.S.A. 21-6604(b)(1) permits monetary interest as part of restitution when the evidence shows the damage or loss caused by a defendant's crime requires it. But the district court here never made any findings supporting that required causal connection, so an error of fact occurred and the court abused its discretion.

FACTUAL AND PROCEDURAL BACKGROUND

By manipulating its accounting system, Wilson stole $65,864 from Valley Hope Association and attempted to steal another $24,650. She submitted fake invoices payable to a Missouri company providing services to Valley Hope that she would authorize. Once approved, she changed the invoice's address from the Missouri company to a Kansas company she had created with an identical name. She would deposit the checks into her Kansas company's bank account and then transfer the money to her personal account. She pled guilty to theft by deception (a level 7 felony), making a false information (a level 8 felony), and attempted theft by deception (a level 9 felony). As part of her plea, she agreed to pay Valley Hope $65,864 in restitution.

At sentencing, the court determined Wilson's criminal history score to be F. For the primary offense of theft by deception (Count No. 1), it imposed the presumptive 7-F sentence with probation for 24 months with an underlying prison term of 18 months. The

court's order provided: "The conditions of your probation will be those that are set forth on the Presentence Investigation Report." That PSI included a sheet of standard probation terms used by the 17th Judicial District's Local Rules including "[t]he term of probation shall automatically continue without further court order as long as the amount of restitution ordered remains unpaid."

For the secondary counts, the court imposed consecutive presumptive 8-I and 9-I sentences. On the count for making a false information, the court "granted probation for a period of . . . 24 months, which is the same period as Count No. 1," with an underlying eight-month prison term. And on the attempted theft by deception, the court granted probation of 24 months subject to "the same terms and conditions as Count 1" with an underlying six-month prison term. Neither the sentencing order from the bench nor the journal entry contain factual findings supporting the two extended 24-month probation terms.

As for restitution, Valley Hope requested in its victim impact statement "full restitution, with interest at a market rate." The court ordered Wilson pay $65,865 plus "interest . . . at the rate that would apply to a civil judgment" to Valley Hope. The court clerk applied a 12% interest rate, although no clear rationale explains where the clerk got that rate. *Wilson*, 2023 WL 4284960, at *12 (Atcheson, J., concurring) ("For reasons that aren't clear from the record, the clerk of the district court computed the interest at 12 percent a year, a fixed rate applicable to money judgments in Chapter 61 actions. See K.S.A. 16-204[e][2].").

About 23 months after sentencing, the State moved to revoke Wilson's probation alleging multiple violations of its terms. The district court accepted her stipulations about those violations, revoked probation, and imposed the original 32-month prison sentence, which included the combined 14 months for the secondary counts. At that time, she had paid $6,549.50 towards costs and restitution.

On appeal, the panel held the secondary convictions' probation terms and the imposition of interest illegally exceeded statutory limits. *Wilson*, 2023 WL 4284960, at *10. It determined that although K.S.A. 21-6608(c)(7) provides "the period may be continued as long as the amount of restitution ordered has not been

paid," the district court overstepped its authority by extending Wilson's probation until she fully paid her restitution. To explain, the panel provided three reasons. First, the record is unclear whether the district court affirmatively advised her of that possibility. Second, the court's conduct showed a lack of intent to follow subsection (c)(7). Third, the standard probation terms in the 17th Judicial District's Local Rules conflict with subsection (c)(7). *Wilson*, 2023 WL 4284960, at *5-6.

As for restitution, the panel majority heavily weighed the district court's statement that it awarded "'interest *on*'" the amount of restitution "not *as part of* the restitution." *Wilson*, 2023 WL 4284960, at *8. In a concurrence, Judge Atcheson noted "a different, though tangentially related, issue" of "[w]hether restitution may sometimes include a component for a demonstrable loss of return on investment attributable to the money the defendant has unlawfully taken from the victim." 2023 WL 4284960, at *12. He observed that "arguably, a full restitution award should include an amount for the investment loss," but Valley Hope made no such request. 2023 WL 4284960, at *12.

The State petitioned for review challenging the panel's adverse holdings, which we granted. Our jurisdiction is proper. K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

MOOTNESS

As oral argument approached, the State filed a Notice of Change in Custodial Status advising that Wilson had satisfied her prison sentence and postrelease supervision period. Even so, the State urged we resolve the issues despite any mootness concerns because they are capable of repetition and concern matters of public importance. Wilson's counsel agreed at oral argument.

Mootness occurs when circumstances, such as completing a sentence, would render a judicial decision ineffectual to a party's vital rights. *State v. Roat*, 311 Kan. 581, 596, 466 P.3d 439 (2020). Wilson completed her prison sentence and post-release supervision after we granted the petition for review, so we need to

consider the matter. Courts review mootness questions de novo. 311 Kan. at 590.

Discussion

Generally, Kansas appellate courts do not decide moot questions or render advisory opinions. *State v. McKnight*, 292 Kan. 776, 778, 257 P.3d 339 (2011). A case is moot after a clear and convincing showing "that the actual controversy has ended, that the only judgment that could be entered would be ineffectual for any purpose, and that it would not have an impact on any of the parties' rights." *Roat*, 311 Kan. 581, Syl. ¶ 1.

Under this general rule, the probation term issue here is moot because Wilson completed her sentence, but the interest question persists because the restitution remains unpaid. See K.S.A. 22-3504(a) ("The court may correct an illegal sentence at any time while the defendant is serving such sentence."); *Roat*, 311 Kan. 581, Syl. ¶ 6. ("In an appeal solely challenging a sentence, the party asserting mootness may establish a prima facie showing of mootness by demonstrating that the defendant has fully completed the terms and conditions of his or her sentence."); *State v. Eubanks*, 316 Kan. 355, 361, 516 P.3d 116 (2022) (providing restitution is part of a defendant's sentence). All agree Wilson had only paid $6,549.50 towards costs and restitution, which increased because of interest from the initial $65,865 award to $75,655.49 by the time the State moved to revoke probation. This means the interest issue is in controversy as the State concedes the restitution award remains on the books, along with any potential consequences associated with it.

But even when we might consider an issue moot under the general rule, a court may still consider cases "that raise issues that are capable of repetition and present concerns of public importance." *Roat*, 311 Kan. at 590. This is because mootness is a prudential doctrine in Kansas, not a jurisdictional bar. *Roat*, 311 Kan. at 591. So once there is "a prima facie showing of mootness, the burden shifts to the party opposing the mootness challenge to show the existence of a substantial interest that would be impaired by dismissal or that an exception to the mootness doctrine ap-

plies." *Roat*, 311 Kan. 581, Syl. ¶ 7. And "[a] case does not become moot simply because a defendant completed his or her sentence." *State v. Yazell*, 311 Kan. 625, 632, 465 P.3d 1147 (2020).

The State contends both issues here are capable of repetition and raise concerns of public importance, but we need only apply the mootness exceptions to the probation question.

The question of whether a district court can continue probation while restitution is unpaid is an issue that can easily repeat itself.

And we agree with the parties that the probation question raises concerns of public importance because courts statewide need to know "the permissible manner in which to structure" restitution and probation. See *State v. Hilton*, 295 Kan. 845, 851, 286 P.3d 871 (2012) ("[P]ublic importance means 'something more than that the individual members of the public are interested in the decision of the appeal from motives of curiosity or because it may bear upon their individual rights or serve as a guide for their future conduct as individuals.'").

We hold the probation question meets our mootness exceptions and the interest issue is not moot, so we will decide both on the merits.

EXTENDING PROBATION WHILE RESTITUTION REMAINS UNPAID

Wilson argues the district court exceeded its authority under K.S.A. 21-6608(c)(3)-(4) by imposing 24-month probation terms on her secondary convictions, making them illegal sentences. She contends the court lacked jurisdiction because she completed the applicable statutory maximum terms before the State's motion to revoke. The panel agreed with her. *Wilson*, 2023 WL 4284960, at *5-7. The State argues the panel erred because K.S.A. 21-6608(c)(7) permits extending probation for the duration that restitution remains unpaid. As explained, we agree with the State.

Standard of review

The correct probation term for each of Wilson's secondary convictions is a statutory interpretation question over which we exercise unlimited review. See *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). And to the extent a probation term exceeds

the statutory limit, it raises a question about the district court's jurisdiction to revoke it, which we also review de novo. *State v. Alonzo*, 296 Kan. 1052, 1054, 297 P.3d 300 (2013). Jurisdiction may be raised at any time. *State v. Clark*, 313 Kan. 556, 560, 486 P.3d 591 (2021).

Discussion

Wilson's primary conviction of theft by deception, a severity level 7 felony, presumptively receives a 24-month probation sentence. See K.S.A. 21-5801(a)(2), (b)(2); K.S.A. 21-6608(c)(1)(B). As for the secondary convictions, making a false information, a severity level 8 felony, permits a probation sentence of up to 18 months, and attempted theft by deception, a level 9 felony, permits a probation sentence of up to 12 months. See K.S.A. 21-5824(a) (making a false information); K.S.A. 21-5801(a)(2), (b)(2) (theft by deception); K.S.A. 21-5301 (attempt); K.S.A. 21-6608(c)(4) (probation term for making a false information) and (c)(3) (probation term for attempted theft by deception). She contends that because the district court exceeded the statutory terms of probation for those two convictions, her 24-month probation term is an illegal sentence. See K.S.A. 22-3504(c)(1) (defining "'[i]llegal sentence'" as a sentence "that does not conform to the applicable statutory provision, either in character or punishment").

But the inquiry does not end there. K.S.A. 21-6608 contemplates two exceptions that can extend probation beyond the statutory term. Subsection (c)(5) permits an extension "if the court finds and sets forth with particularity the reasons for finding that the safety of the members of the public will be jeopardized or that the welfare of the inmate will not be served by the length of the probation terms provided in subsections (c)(3) and (c)(4)." K.S.A. 21-6608(c)(5). And subsection (c)(7) permits an extension "[i]f the defendant is ordered to pay full or partial restitution . . . as long as the amount of restitution ordered has not been paid." K.S.A. 21-6608(c)(7). Subsection (c)(7)'s extension is specifically contemplated in subsection (c)(6) which states, "[E]xcept as provided in subsection[] (c)(7) . . . the total period in all cases shall not exceed 60 months." K.S.A. 21-6608(c)(6).

It is apparent the district court here did not make the necessary findings to extend the probation terms with the particularity contemplated by subsection (c)(5). But what about subsection (c)(7)? Its language states probation *may* be continued until restitution is paid, so the judge maintains discretion to impose that extension. See K.S.A. 21-6608(c)(7).

The district court ordered Wilson's probation conditions follow the Presentence Investigation Report, including its standard provision from the local rules that the "term of probation shall automatically continue without further court order as long as the restitution ordered remains unpaid." See 17th Judicial District Rule 717 (2019). The local rule simply sets out the "normal or standard conditions of probation" that may be modified as "[t]he presiding judge may impose any conditions of supervision the judge deems appropriate." And judicial districts are allowed to adopt local rules that are: "(1) clear and concise; (2) necessary for the judicial district's administration; (3) consistent with applicable statutes; and (4) consistent with—but not duplicative of—Supreme Court Rules." Supreme Court Rule 105 (2024 Kan. S. Ct. R. at 172-73). In other words, the local rule here permits—but does not require—extending probation for unpaid restitution in keeping with the statutory mandate. So, continuing probation until Wilson paid her restitution does not conflict with K.S.A. 21-6608, despite what the panel thought.

It also seems clear all parties understood probation would continue until restitution was fully paid. The panel majority observed what it saw as the record's murkiness on whether Wilson was affirmatively advised on her probation continuing. But that concern is contradicted by the court's order referencing the Presentence Investigation Report's conditions and her counsel's statements at sentencing when both the State and defense remarked on the matter. The exchange reflects:

"[STATE]: [T]he State would ask, as per the plea agreement . . . that Restitution be assessed. . . .

" . . . I would like at least the Court make her pay monthly payments while on probation with an order that probation can be extended. It's going to take her some time to pay off $66,000 of restitution.

. . . .

"[DEFENSE]: [W]e'd ask that the Court follow those recommendations. *I spoke with Ms. Wilson regarding the possibility of extending probation given the large amount of restitution. She's well aware of that.*" (Emphasis added.)

The court also allowed Wilson to comment before imposing sentence, and she expressed no qualms about the prior statements on extending her probation. She simply took responsibility for her actions and apologized, stating "I just want to do whatever is right here."

The panel majority relied on *State v. Baker*, 56 Kan. App. 2d 335, 429 P.3d 240 (2018), to support its statutory interpretation overturning Wilson's sentence, but *Baker* is inapplicable. It held a single unitary sentence of 24 months' probation for three convictions was an illegal sentence because K.S.A. 21-6819 requires a sentence to be imposed as to each conviction. 56 Kan. App. 2d at 338-39. But in Wilson's case, the district court did not impose a single unitary sentence. Rather, it imposed separate sentences of the same duration for each conviction.

We reverse the panel and affirm the district court. We hold the district court properly extended Wilson's probation until she fully paid her restitution obligation. And since that had not happened, the court had jurisdiction to revoke her probation and impose the applicable prison terms.

INTEREST ON RESTITUTION WITH APPROPRIATE FINDINGS

The panel majority did not explicitly answer whether K.S.A. 21-6604(b)(1) permits a district court to "impose interest on the principal restitution amount . . . to compensate a victim for any lost time-value of the stolen money." *Wilson*, 2023 WL 4284960, at *8. Rather, it focused on the court's order "to pay interest *on* [the restitution] amount," and held the court exceeded statutory bounds by attaching a supplemental cost to Wilson's restitution obligation. (Emphasis added.) 2023 WL 4284960, at *8.

The panel majority noted the Legislature recently amended K.S.A. 21-6604 in 2020 to correct another panel's interpretation of the statute and did not add a provision for interest on restitution. 2023 WL 4284960, at *9 (citing *State v. Roberts*, 57 Kan. App. 2d 836, 461 P.3d 77 [2018], *vacated and remanded* No. 120,377, 2020 WL 8269363 [Kan. 2020] [unpublished opinion]). The majority reasoned the Legislature knows how to require interest on judgments when it wants to do so, citing K.S.A. 16-204 (interest on civil judgments) and K.S.A. 21-5933 (interest as part of restitution for Medicaid fraud). 2023 WL 4284960, at *10.

The concurrence took a slightly different approach, agreeing with the majority's reasoning on restitution in Wilson's case, but also addressing the "different, though tangentially related, issue" of "[w]hether restitution may sometimes include a component [of interest] for a demonstrable loss." 2023 WL 4284960, at *12. Judge Atcheson concluded it can, but limited interest awards only to crimes affecting investment loss like embezzlement. He excluded interest for crimes like theft, because, in his view, the harm was limited to the stolen item's value. 2023 WL 4284960, at *12.

But there is no reason to carve out limited exceptions. The district court need only make factual findings based on the evidence that interest represents a component of the damage or loss from the crime. And on that basis, we affirm the panel on a different rationale because we hold the district court did not make the appropriate findings.

Standard of review

An appellate court reviews issues about a restitution award, including its amount and how it is made to the aggrieved party, for abuse of discretion. *State v. Meeks*, 307 Kan. 813, 816, 415 P.3d 400 (2018). Judicial discretion is abused if the judicial action at issue is (1) unreasonable, i.e., if no reasonable person would have taken the view adopted by the court; (2) based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a conclusion of law or the exercise of discretion is based. *State v. Shank*, 304 Kan. 89, Syl. ¶ 2, 369 P.3d 322 (2016). To the extent the question requires interpreting the restitution statute, that review is de novo. *Meeks*, 307 Kan. at 816.

The first—and often only—step in statutory interpretation is to consider a statute's plain meaning from its text. See *Betts*, 316 Kan. at 197-98. Statutory interpretation considers the statute's language to ascertain the legislative intent. A statute's plain and unambiguous language governs. But when the text is ambiguous, a court considers legislative history or other statutory construction methods. *State v. Nguyen*, 304 Kan. 420, 422, 372 P.3d 1142 (2016).

Discussion

We begin by reviewing the governing statute, K.S.A. 21-6604(b)(1), to determine whether the district court's interest award was permitted by the statutory text, then examine the record to consider if substantial competent evidence supports the interest award here, and finally assess whether no reasonable person would apply a 12% interest rate. If the award fails any of these questions, the court abused its discretion.

K.S.A. 21-6604(b)(1)'s provision that "the court shall order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime" can be broken into two parts: (1) damage or loss, and (2) causation. Although the "not limited to" language might suggest restitution includes other compensation, its accompanying statute K.S.A. 21-6607(c)(2) limits the remedy to only damage or loss caused by the crime. See K.S.A. 21-6607(c)(2) ("the court shall order the defendant to . . . make . . . restitution to the aggrieved party for the damage or loss caused by the defendant's crime in accordance with K.S.A. 21-6604[b]"). These statutes should be interpreted together because they were enacted as part of the revised Kansas Criminal Code and are closely related. See *State v. Newman-Caddell*, 317 Kan. 251, 259, 527 P.3d 911 (2023) ("The doctrine of *in pari materia* means that statutes relating to the same matter may be read together to discern intent. . . . Courts may look to the context in which the Legislature used the language and the broader context of the entire statute to discern legislative intent. In this way, the doctrine 'can provide substance and meaning to a court's plain language interpretation of a statute.'").

Neither statute defines these components. See K.S.A. 21-6603 (definitions for Chapter 21, Article 66). Without statutory definitions, we look at the dictionary definition because we assume the Legislature intends a word to be used in its ordinary and common meaning. *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶ 8, 834 P.2d 368 (1992). "A common dictionary definition is a good source to discern the ordinary, contemporary, and common meaning of a word." *State v. Hambright*, 318 Kan. 603, 608, 545 P.3d 605 (2024).

According to Black's Law Dictionary, damage means "[l]oss or injury to person or property" or "[b]y extension, any bad effect on something"; loss means a "disappearance or diminution of value"; and causation means "[t]he causing or producing of an effect." Black's Law Dictionary 488, 1132, 273 (11th ed. 2019). And under our caselaw, causation requires a causal link between the defendant's unlawful conduct and the victim's damages, with the consequences of criminal conduct creating "a range of possibilities for restitution." *State v. Alcala*, 301 Kan. 832, 837, 348 P.3d 570 (2015). On the spectrum's easy end, "losses directly or immediately caused by criminal conduct, such as injuries to persons or property, are clearly compensable"—e.g., medical bills and the value of stolen property. 301 Kan. at 837. But on the spectrum's other end, the outcome gets murkier "because the losses [are] more tangentially caused by the criminal conduct." 301 Kan. at 837. Permissible yet tangential losses include a victim's relocation expenses following a crime and an increased insurance premium after filing a theft claim. But attorney fees for advising on court procedures and preparing detailed losses caused by the crime are too tangential. 301 Kan. at 837-39.

K.S.A. 21-6604(b)(1)'s plain language requires interest when the State (or victim) proves the victim suffered a "bad effect" or "disappearance or diminution of value" and establishes a causal connection between the interest award it seeks and the defendant's crime. A court must order restitution in "the amount that reimburses the victim for the actual loss suffered." *Hand*, 297 Kan. at 738. This means restitution is not limited to fair market value, because "[a]lthough fair market value may be an accurate measure of loss in some cases, it may not be the best measure for all cases." 297 Kan. at 737. Interest may be a component of a victim's loss, especially when it represents compensation for the time value of money.

Interpreting the statute to permit interest on a proper evidentiary showing aligns with restitution's purpose to compensate victims and serve the "'rehabilitative, deterrent, and retributive goals of the criminal justice system.'" *State v. Arnett*, 314 Kan. 183, 191-92, 496 P.3d 928 (2021). Restitution is "rehabilitative because it forces the defendant to confront, in concrete terms, the harm his

actions have caused," it is a precise deterrent because of "the direct relation between the harm and the punishment," and it is retributive "in that it seeks to take ill-gotten gains from the defendant." *Arnett*, 314 Kan. at 192. When evidence shows a defendant's crime requires interest to be part of a restitution award, such an award serves these purposes.

This interpretation adheres to other state and federal court holdings. The Kentucky Supreme Court addressed this exact question in *Hearn v. Com.*, 80 S.W.3d 432, 434-35 (Ky. 2002):

> "The argument that there is no express statutory authority for the imposition of interest is without merit here. The courts of other states may ordain specific statutory language is necessary to require interest, see *State v. Akers*, 435 N.W.2d 332 (Iowa 1989), but that is not the case in Kentucky. Many federal and state courts have ordered interest on restitution without specific statutory language. As an example, we look to 18 U.S.C. § 3664(f)(1)(a), which is similar to our statute in that it requires restitution of the 'full' amount of the damages. *United States v. Patty*, 992 F.2d 1045 (10th Cir. 1993), and *United States v. Smith*, 944 F.2d 618 (9th Cir. 1991), upheld the payment of prejudgment interest on restitution ordered by a trial court. See also *Government of the Virgin Islands v. Davis*, 43 F.3d 41 (3d Cir. 1994) and *United States v. Rochester*, 898 F.2d 971 (5th Cir. 1990), which upheld both prejudgment and post-judgment interest on restitution orders.
>
> "A number of state courts have also decided that interest can be properly included in restitution even though the restitution statutes make no specific mention of interest. *People v. Law*, 459 Mich. 419, 591 N.W.2d 20 (1999), upheld the grant of interest on criminal restitution. *Dorris v. State*, 656 P.2d 578 (Alaska Ct. App. 1982), held that interest on restitution was proper 'since the purpose of the restitution statute is to make the victim whole.' For other cases allowing interest as part of restitution *see Ex parte Fletcher*, 2001 WL 306916, 849 So.2d 900; *Valenzuela v. People*, 893 P.2d 97 (Colo. 1995); *People v. Acosta*, 860 P.2d 1376 (Colo. Ct. App.1993); *Ebaugh v. State*, 623 So.2d 844 (Fla. Dist. Ct. App. 1993); *Woods v. State*, 418 So.2d 401 (Fla. Dist. Ct. App. 1982); *State v. Brewer*, 296 Mont. 453, 989 P.2d 407 (1999); *State v. Meyers*, 571 N.W.2d 847 (S.D. 1997); *Rodriguez v. State*, 710 S.W.2d 167 (Tex. App. 1986)."

We see no reason to adopt a narrow reading of "damage or loss caused by the defendant's crime" as the panel did. Its majority found comfort in K.S.A. 21-5933's explicit authorization of interest to show the Legislature knows "how to provide for interest payments when that is its intention." *Wilson*, 2023 WL 4284960, at *10; see K.S.A. 21-5933 (A person convicted of Medicaid fraud may be liable for "payment of interest on the amount of any excess

payments at the maximum legal rate in effect on the date the payment was made to the person for the period from the date upon which payment was made, to the date upon which repayment is made."). And the concurrence takes that reasoning a step further by deciding that permitting interest under K.S.A. 21-6604 would render K.S.A. 21-5933 superfluous. *Wilson*, 2023 WL 4284960, at *11. But K.S.A. 21-5933 limits the possible penalties to *specific* remedies, including interest, when a defendant commits Medicaid fraud, while K.S.A. 21-6604(b)(1) requires *any remedy*, including interest, *proven to be damage or loss caused by the defendant's crime*. See *State v. Gray*, 306 Kan. 1287, 1294, 403 P.3d 1220 (2017) ("[W]e read the statutory language *as it appears*, without adding or deleting words." [Emphasis added.]).

Wilson correctly observes "there is no common law history of district courts ordering interest to accompany restitution awards," but incorrectly argues K.S.A. 21-6604(b)(1) should be limited to common-law remedies. As the concurrence notes, criminal restitution "is purely a creature of statute." *Wilson*, 2023 WL 4284960, at *11 (citing *Arnett*, 314 Kan. at 189 ["(C)riminal restitution as we know it today was not part of the common law at all in 1859."]). Our statutory language, not common law, controls.

Even so, the State's problem in Wilson's case is that the district court never made findings establishing the required causal connection, and the parties put on no evidence about the interest rate, whether it was appropriate here or what rate should apply. Instead, the court simply awarded "interest . . . at the rate that would apply to a civil judgment" based on the victim's request without any factual findings this court can review. Worse yet, a district court clerk picked 12% without discernible reasoning in the record.

We hold K.S.A. 21-6604(b)(1) permits interest as part of a restitution award when the evidence shows a defendant's crime requires an interest award. But we also hold the record here does not support the district court's ruling. An error of fact occurred, which means the court abused its discretion. We affirm the panel on this issue and vacate Wilson's restitution sentence as to interest for the reasons explained.

Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part.

* * *

STEGALL, J., concurring in part and dissenting in part: I dissent from the portion of today's decision finding prudential grounds to issue an advisory opinion concerning Wilson's probation revocation. Because Wilson has served her sentence, any decision we make concerning the propriety of her probation revocation can have no impact on the legal rights of the parties and is wholly advisory. As I said in my concurrence in *State v. Roat*, 311 Kan. 581, 603-04, 466 P.3d 439 (2020) (Stegall, J., concurring), mootness is a jurisdictional bar and this court does not have the constitutional authority to issue advisory opinions, no matter how important the issue may be. "[W]e do not render advisory opinions—indeed, we are not constitutionally empowered to do so . . . . When a case or controversy has ended, our jurisdiction ends." 311 Kan. at 603-04 (Stegall, J., concurring).

LUCKERT, C.J., joins the foregoing concurring and dissenting opinion.

No. 124,861

STATE OF KANSAS, *Appellee*, v. CHRISTOPHER MICHAEL JACOBSON, *Appellant.*

(552 P.3d 1239)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Motion to Correct Illegal Sentence—Sentence's Legality Determined at Time of Original Sentencing.* The law existing at the time of the original sentencing determines a sentence's legality when a case arises from a motion to correct an illegal sentence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 22, 2023. Appeal from Johnson District Court; CHRISTINA DUNN GYLLENBORG, judge. Oral argument held March 28, 2024. Opinion filed July 26, 2024. Judgment of the Court of Appeals reversing the district court, vacating the sentence, and remanding the case with directions is reversed. Judgment of the district court is affirmed.

Emily Brandt, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Daniel G. Obermeier, assistant district attorney, argued the cause, and *Shawn E. Minihan*, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: The State seeks review of a Court of Appeals panel's decision ordering resentencing of Christopher Michael Jacobson, who appealed the denial of his motion to correct an illegal sentence. See *State v. Jacobson*, No. 124,861, 2023 WL 6171951, at *4 (Kan. App. 2023) (unpublished opinion). The State argues the panel's opinion conflicts with *State v. Clark*, 313 Kan. 556, 572-73, 486 P.3d 591 (2021), which held the date of original sentencing determines the applicable law for a motion to correct sentence. We agree with the State.

Our law distinguishes between a direct appeal from sentencing and an appeal from denial of a motion to correct an illegal sentence. In a direct appeal, the defendant benefits from changes in the law occurring during the appeal process. But that is not true for the latter, which is where Jacobson's case falls. See *Clark*, 313

Kan. at 572-73. The panel mistakenly treated the appeal of his motion to correct an illegal sentence like a direct appeal. We reverse the panel.

FACTUAL AND PROCEDURAL BACKGROUND

Jacobson pled guilty to one count of robbery, a severity level five, person felony, for his conduct of knowingly taking a vehicle by force on December 13, 2013. See K.S.A. 21-5420(a) ("Robbery is knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person."). The district court accepted his plea and sentenced him in May 2015 to 130 months in prison based on a criminal history score of A.

In 2019, Jacobson moved to correct an illegal sentence, claiming his criminal history score was wrong when he was sentenced four years earlier. The district court denied the motion and he appealed. During the appeal process, the parties agreed his sentence was illegal. The Court of Appeals granted a joint motion to remand in a dispositional order, relying on *State v. Smith*, 309 Kan. 929, 930, 441 P.3d 472 (2019) (remanding for resentencing to exclude defendant's Missouri municipal ordinance violation because municipal ordinance violations are not crimes in Missouri). The order directed the district court to exclude Jacobson's Missouri municipal ordinance violations from his criminal history score. It also noted the parties could raise other criminal history issues at resentencing.

Based on that invitation, Jacobson sought to reclassify his two attempted first-degree robbery convictions in Missouri as nonperson felonies. At the resentencing hearing, the parties debated whether the district court should apply *State v. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003), or *State v. Wetrich*, 307 Kan. 552, 412 P.3d 984 (2018). See *Clark*, 313 Kan. at 571 (noting *Wetrich* altered *Vandervort*'s interpretation of how K.S.A. 21-6811[e] classifies out-of-state convictions for calculating an offender's criminal history score). Jacobson argued *Wetrich* applied and required classification as nonperson crimes.

The district court ultimately followed *Vandervort* and declined to reclassify the Missouri convictions because Missouri first-degree robbery most closely compared to Kansas robbery and

aggravated robbery under *Vandervort*'s test. It then excluded Jacobson's Missouri municipal ordinance violations as directed by the earlier panel, reduced his criminal history score to B, and resentenced him to 120 months' imprisonment.

Jacobson appealed, insisting that *Wetrich* required the district court to classify the Missouri convictions as nonperson crimes. The new panel agreed, vacated the sentence, and remanded the case once again—this time ordering the district court apply *Wetrich*. *Jacobson*, 2023 WL 6171951, at *6. The State petitioned our court for review, which we granted. Jurisdiction is proper. K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

To decide whether *Vandervort* or *Wetrich* applies to Jacobson's case, we must determine if the panel correctly categorized his resentencing challenge as a direct appeal from sentencing instead of an illegal sentence proceeding's continuation. If not, the law in effect at his original sentencing hearing controls. See *Clark*, 313 Kan. at 572-73. We hold the panel erred, and that *Vandervort*, the law in effect when Jacobson was originally sentenced, controls.

Standard of review

"Whether a sentence is illegal within the meaning of K.S.A. 22-3504 is a question of law over which the appellate court has unlimited review." *State v. Claiborne*, 315 Kan. 399, 400, 508 P.3d 1286 (2022).

Discussion

K.S.A. 22-3504(a) allows courts to "correct an illegal sentence at any time while the defendant is serving such sentence." A sentence "that does not conform to the applicable statutory provision" is illegal. K.S.A. 22-3504(c)(1). So, Jacobson's sentence, which is partially based on the classification of his Missouri convictions, must conform to K.S.A. 2013 Supp. 21-6811(e) ("The

state of Kansas shall classify the crime as person or nonperson."). See *State v. Gales*, 312 Kan. 475, Syl. ¶ 2, 476 P.3d 412 (2020) ("The penalty parameters for an offense are fixed on the date the offense was committed.").

To classify out-of-state convictions under K.S.A. 2013 Supp. 21-6811(e), a court refers to "comparable offenses" in Kansas—but how to compare offenses changes based on whether *Vandervort* or *Wetrich* governs. Under *Vandervort*, the "closest approximation test" required comparable offenses "need only be comparable, not identical." *Vandervort*, 276 Kan. at 179. This test was in effect from its publication on July 25, 2003, to March 9, 2018, when the court reinterpreted K.S.A. 21-6118(e) in *Wetrich*. See *Wetrich*, 307 Kan. at 562. Under *Wetrich*, an out-of-state conviction is comparable to a Kansas offense only if the crime's elements are not broader than the Kansas crime's elements. 307 Kan. at 562 ("In other words, the elements of the out-of-state crime must be identical to, or narrower than, the elements of the Kansas crime to which it is being referenced."); see also *State v. Weber*, 309 Kan. 1203, 1209, 442 P.3d 1044 (2019) (confirming *Wetrich* was a change in the law); K.S.A. 22-3504(c)(2) ("'Change in the law' means a statutory change or an opinion by an appellate court of the state of Kansas, unless the opinion is issued while the sentence is pending an appeal from the judgment of conviction.").

Deciding which caselaw applies requires separately determining what K.S.A. 22-3504 means by "the sentence"—because *Vandervort* would govern Jacobson's original 2015 sentence, while *Wetrich* would govern his 2022 resentencing. See K.S.A. 22-3504(c)(1) (An illegal sentence "does not conform to the applicable statutory provision . . . at the time it is pronounced. A sentence is not an 'illegal sentence' because of a change in the law that occurs after the sentence is pronounced."), (c)(2) (An appellate court opinion "issued while the sentence is pending an appeal from the judgment of conviction" is not a change in the law.).

In the Court of Appeals, Jacobson argued "the sentence" must be his resentencing in 2022 because the original sentence was vacated. And from that perspective, he views the current proceeding as a "direct appeal," rather than a continuation of his 2019 motion to correct an illegal sentence, citing *State v. Smith*, No. 118,042,

2020 WL 2504566, at *10-11 (Kan. App. 2020) (unpublished opinion). The State countered that "the sentence" means the one pronounced in 2015 and that a sentence's legality is always determined by the law in effect on the original sentencing date, relying on *Clark*, 313 Kan. at 572, which effectively overruled *Smith*.

The panel tried to distinguish Jacobson's case from *Clark* in order to follow *Smith*. It was wrong to do so. In *Smith*, the defendant's original sentence in 2006 was upheld on direct appeal. That sentence was later vacated in a separate appeal stemming from a motion to correct an illegal sentence. On remand, the district court resentenced him in 2017. Smith appealed again, asking whether the law in effect at his original 2006 sentencing or at the 2017 resentencing should apply. The panel majority held the law in 2017 applied, reasoning:

"The order vacating Smith's original sentence became final when our Supreme Court denied the State's petition for review. That action marked the end of the proceedings on Smith's motion to correct illegal sentence. . . . Smith timely appealed from that sentence—his only sentence that has any operative effect. This constitutes a direct appeal of his sentence imposed by the district court on May 12, 2017." *Smith*, 2020 WL 2504566, at *11.

So, the *Smith* majority concluded the defendant should receive "'the benefit of a change in the law during the pendency of a direct appeal'" and applied *Wetrich*. 2020 WL 2504566, at *11 (quoting *State v. Murdock*, 309 Kan. 585, 591-92, 439 P.3d 307 [2019]). Judge Powell, however, dissented:

"I concur with the State's argument that *the appeal before us is not a direct appeal case but an appeal in a motion to correct an illegal sentence case, which is a collateral attack on a sentence.* I submit my view is bolstered by our illegal sentence statute, which describes a direct appeal as 'an appeal from the judgment of conviction.' K.S.A. 2019 Supp. 22-3504(c)." (Emphasis added.) 2020 WL 2504566, at *16 (Powell, J., dissenting).

About a year later, we examined that same question in *Clark*. There, the defendant was originally sentenced in 2005 and moved to correct his sentence in 2017, which the district court denied. On appeal, a Court of Appeals panel vacated the original sentence and remanded for resentencing in line with *Wetrich*. See *State v. Clark*, No. 119,076, 2019 WL 1746772 (Kan. App. 2019) (unpublished opinion). But before resentencing, new caselaw called the panel's

decision into question. Still, the district court resentenced Clark in 2019 under *Wetrich* based on the current law in effect, noting it was bound by the appellate court's mandate. The State appealed, arguing the new caselaw clarified that the sentence should be based on the law in effect in 2005. A different Court of Appeals panel agreed this time with the State. See *State v. Clark*, No. 121,789, 2020 WL 1903820 (Kan. App. 2020) (unpublished opinion).

On review, we identified the issue as "whether Clark's sentence is controlled by the law in effect at the time of his original sentence in 2005 or the law in effect at the time of his resentencing in 2019." *Clark*, 313 Kan. at 558. We determined "the sentence" in K.S.A. 22-3504(c) means the original sentence, explaining:

"[F]or purposes of determining the legality of Clark's sentence, *the law from the date of his original sentencing should control. After all, this case arose from Clark's 2017 motion to correct his 2005 sentence*. Clark's resentencing in 2019 only occurred because [the first panel] held his 2005 sentence was illegal—a holding that became erroneous as a result of decisions we issued prior to Clark's resentencing in 2019. Thus, if Clark's sentence was lawful in 2005, he should have never been resentenced in 2019.

. . . .

". . . The legality of Clark's sentence became 'fixed' when his sentence was pronounced in 2005. Thus, whether his prior Oklahoma conviction is comparable to a Kansas offense should be determined under the law as it existed in 2005." (Emphasis added.) 313 Kan. at 572-73.

As the State correctly observes here, our conclusion in *Clark* effectively overruled *Smith*. Compare *Clark*, 313 Kan. at 572 (determining the original sentencing date controls the law in effect), with *Smith*, 2020 WL 2504566, at *11 (determining the resentencing date controls the law in effect). But the *Jacobson* panel applied *Smith* anyway, believing *Clark* to be inapplicable. It reasoned:

"[O]ur Supreme Court determined Clark's original sentence was lawful and he never should have been resentenced. In other words, *the legality of Clark's sentence became '"fixed at a discrete moment in time"' when his* ***lawful*** *sentence was pronounced at his original sentencing*.

"*Here, Jacobson's original sentence was* ***illegal***. Thus, it was necessary for Jacobson's original sentence to be vacated and for the district court to resentence him. *The legality of Jacobson's sentence is controlled by the law in effect at the time of his resentencing in 2022 for his current crime of conviction.* The proceedings on Jacobson's motion to correct illegal sentence and the order vacating Jacobson's original sentence became final when we issued our mandate on August

20, 2021. *This appeal is not a continuation of the prior proceedings involving Jacobson's 2019 motion to correct illegal sentence*. On remand, the district court resentenced Jacobson as directed by this court. *Jacobson's current appeal is from the new sentence imposed in 2022—'the only sentence that has any operative effect*.' Because this is Jacobson's direct appeal from his new sentence, he "'may seek and obtain the benefit of a change in the law during the pendency of [his] direct appeal.'" [Citations omitted.]" (Emphases added.) *Jacobson*, 2023 WL 6171951, at *4.

The panel's logic misses the mark in several ways. First, it deviates from *Clark*'s unambiguous holding that a case arising from a motion to correct an illegal sentence determines legality by the law existing at the time of the original sentencing. *Clark* noted remand is part of the journey initiated by such a motion, which ends once the illegal sentence is corrected. See *Clark*, 313 Kan. at 572-73 ("After all, this case arose from Clark's 2017 motion to correct his 2005 sentence.").

Second, at no point does *Clark* suggest the law's application should vary based on the original sentence's legality. The statutory language does not differentiate between original sentencing and resentencing. See K.S.A. 22-3504. Instead, it merely provides a sentence's legality is fixed at a discrete moment when it is pronounced. K.S.A. 22-3504(c)(1). This is simple, fair, and consistent with K.S.A. 22-2103 ("[The Kansas Code of Criminal Procedure] is intended to provide for the just determination of every criminal proceeding. Its provisions shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.").

Third, nothing justifies how the panel's decision results in different law applying from one defendant to another, depending on their original sentence's legality. For example, consider a hypothetical defendant in similar circumstances to Jacobson. In this scenario, the defendant commits the same offense in 2013, was sentenced in 2015, and subsequently moved to correct an illegal sentence in 2019. But unlike Jacobson, the original sentencing court correctly sentenced the defendant in 2015 by excluding Missouri municipal ordinance violations in the criminal history score. To classify our hypothetical defendant's Missouri felony convictions, the *Jacobson* panel would apply *Vandervort*, even though it applied *Wetrich* to Jacobson because the original sentencing court

mistakenly included the municipal violations. In other words, the panel's reasoning allows Jacobson—but not our hypothetical defendant—to benefit from a change in the law. How is this fair?

Fourth, the *Jacobson* panel mistook the meaning of "direct appeal" when categorizing Jacobson's case. Typically, criminal defendants challenge their sentence in three ways: (1) a direct appeal from sentencing, (2) an appeal from a district court's denial of a motion to correct an illegal sentence under K.S.A. 22-3504, and (3) a civil proceeding collaterally challenging the sentence under K.S.A. 60-1507. *State v. Phinney*, 280 Kan. 394, 398-99, 122 P.3d 356 (2005). In *Murdock*, the court clarified:

"[*F*]*or purposes of a motion to correct an illegal sentence, neither party can avail itself of subsequent changes in the law.*

"*Here, we pause to note that today's holding does not disturb our longstanding rule that in a direct appeal, a defendant will receive the benefit of any change in the law that occurs while the direct appeal is pending*. See, e.g., *State v. Ford*, 302 Kan. 455, 471, 353 P.3d 1143 (2015) ('[I]t is generally true that changes in the law apply prospectively and only to cases on direct review.'). To the extent our prior caselaw confused the procedural mechanism of a direct appeal with a motion to correct an illegal sentence, we now clarify the distinction. Put simply, a party may seek and obtain the benefit of a change in the law during the pendency of a direct appeal, *but a party moving to correct an illegal sentence is stuck with the law in effect at the time the sentence was pronounced.*" (Emphases added.) *Murdock*, 309 Kan. at 591-92.

An appeal from sentencing or resentencing necessarily falls under the first method when that appeal is directly "from the judgment of conviction," not an appeal of a district court's ruling on a motion to correct an illegal sentence, which is the second method. See K.S.A. 22-3504(c)(2). But the *Jacobson* panel categorized the present case as a direct appeal based on an inapplicable statute by following *Smith*. *Jacobson*, 2023 WL 6171951, at *4; see also *Smith*, 2020 WL 2504566, at *11 (relying erroneously on an interpretation of K.S.A. 60-1507 in *Baker v. State*, 297 Kan. 486, Syl., 303 P.3d 675 [2013]). The panel's decision is inconsistent with K.S.A. 22-3504(c) and *Clark*.

Judgment of the Court of Appeals vacating the sentence and remanding the case for resentencing is reversed. Judgment of the district court is affirmed.

No. 124,998

AMERICAN WARRIOR, INC., and BRIAN F. PRICE, *Appellants*, v. BOARD OF COUNTY COMMISSIONERS OF FINNEY COUNTY, KANSAS, and HUBER SAND, INC., *Appellees.*

(552 P.3d 1219)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Occurrence of Mootness in Litigation—Judicial Decision Rendered Ineffectual.* Mootness occurs when something changes during litigation to render a judicial decision ineffectual to the parties' rights and interests.

2. ZONING—*Statutory Authorization for Counties to Adopt Zoning Regulations—Exception.* K.S.A. 12-741(a) grants counties the authority to enact zoning regulations without state interference so long as those local enactments do not conflict with the Planning, Zoning, and Subdivision Regulations in Cities and Counties Act, K.S.A. 12-741 et seq. In keeping with this statutory scheme, K.S.A. 12-755 authorizes counties to adopt zoning regulations providing for issuance of conditional use permits.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 123, 525 P.3d 789 (2023). Appeal from Finney District Court; WENDEL W. WURST, judge. Oral argument held November 14, 2023. Additional briefing completed January 29, 2024. Opinion filed July 26, 2024. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

Patrick A. Edwards, of Stinson LLP, of Wichita, argued the cause, and *David E. Bengtson*, of the same firm, and *Benjamin C. Jackson*, of Jackson Legal Group, LLC, of Scott City, were with him on the briefs for appellants.

Linda J. Lobmeyer, of Calihan Law Firm, P.A., of Garden City, argued the cause, and *Shane C. Luedke*, of the same firm, was with her on the briefs for appellees.

Jay Hall, general counsel, was on the brief for amicus curiae Kansas Association of Counties.

Johnathan Goodyear, general counsel, was on the brief for amicus curiae League of Kansas Municipalities.

The opinion of the court was delivered by

BILES, J.: K.S.A. 12-741(a) grants counties the authority to enact zoning regulations without state interference so long as those local enactments do not conflict with the Planning, Zoning,

and Subdivision Regulations in Cities and Counties Act, K.S.A. 12-741 et seq. Exercising that authority, Finney County adopted local rules delegating the issuance of conditional use permits to a separate Finney County Board of Zoning Appeals. A Court of Appeals panel majority held the County could not do that, while a dissenting judge agreed with the district court that it could. See *American Warrior, Inc. v. Board of Finney County Comm'rs*, 63 Kan. App. 2d 123, 525 P.3d 789 (2023). We granted review to resolve the dispute. We hold the County's regulations do not conflict with state law. The Zoning Board validly issued the conditional use permit that sparked this litigation. We reverse the panel majority and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The material facts are undisputed. Since 2017, American Warrior, Inc., owned an oil and gas lease covering about 177 acres southeast of the city of Pierceville, between Highway 50 to the north and the Arkansas River to the south, and between the town of Pierceville and South Pierceville Road to the west and the Finney County/Gray County line to the east. In 2020, Huber Sand, Inc., bought surface rights to the same tract, along with surface rights to an adjoining property to the east across the Finney County line into Gray County. The tract was zoned as an agricultural district.

In May 2021, Huber applied to the Finney County Board of Zoning Appeals for a conditional use permit to operate a sand and gravel quarry under the Finney County, Kansas, Zoning Regulations, adopted by the Board of Finney County Commissioners. The Zoning Board published notice of Huber's application, announcing a public meeting in June. At that meeting, affected residents commented about authorized uses within agricultural zoning districts, the location of crushing equipment and the access road, condition of the river pit, road maintenance, Huber's operating hours, and traffic on the Pierceville roads. The Zoning Board tabled the matter until the next month.

At the July meeting, the Zoning Board received a report prepared by a Garden City municipal department, an entity established to guide development and support community livability. It

recommended the application's approval. The Zoning Board also received protest petitions from more than 100 Pierceville residents. In the end, it approved the application on a 2-1 vote with conditions.

In August, Brian F. Price, a Finney County resident who owned land near the tract, and American Warrior (collectively "American Warrior") sued the Finney County Commission and Huber, challenging the permit's legality. They claimed the local procedure for issuing the permit violated state law, citing K.S.A. 12-757 (procedures for amending zoning regulations). They argued state statutes require a permit application be reviewed first by the county planning commission before the board of county commissioners consider it. Both sides submitted competing summary judgment motions.

The district court granted judgment for the County and Huber. It held the County properly delegated its power to issue conditional use permits to the Zoning Board. American Warrior appealed to the Court of Appeals, where a panel majority reversed the district court. The panel majority held the County's local procedure conflicted with K.S.A. 12-757, relying on *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 69 P.3d 601 (2003), and *Manly v. City of Shawnee*, 287 Kan. 63, 194 P.3d 1 (2008). *American Warrior*, 63 Kan. App. 2d at 133. Chief Judge Arnold-Burger disagreed. 63 Kan. App. 2d at 134 (Arnold-Burger, C.J., dissenting).

The County and Huber sought our review, which we granted. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

MOOTNESS

The County's zoning regulations create a threshold question about mootness because the Zoning Board approved Huber's permit on July 21, 2021, and section 28.070 states: "All conditional use permits shall be valid for one (1) year from the date it was approved by the Board of Zoning Appeals; if project has not been

substantially completed within one (1) year of approval, the conditional use permit shall expire." Section 2.020(4) defines "shall" as "mandatory."

Mootness occurs when something changes during litigation that may render a judicial decision ineffectual to the parties' rights and interests. See *State v. Roat*, 311 Kan. 581, Syl. ¶ 1, 466 P.3d 439 (2020). We asked the parties to discuss this at oral argument and later ordered additional briefing. Both sides agree the permit has not expired. We agree with them.

Standard of review

Courts review mootness questions de novo. *Roat*, 311 Kan. at 590. To the extent the question involves regulatory interpretation and construction, review is unlimited. We follow the express language used when it is plain and unambiguous, giving common words their ordinary meanings, without adding to or subtracting from the text. Courts resort to textual construction only when the language is ambiguous. *Central Kansas Medical Center v. Hatesohl*, 308 Kan. 992, 1002, 425 P.3d 1253 (2018). We apply the same rules to interpreting regulations as we do when interpreting a statute. See *Robinson v. City of Wichita Employees' Ret. Bd. of Trustees*, 291 Kan. 266, 272, 241 P.3d 15 (2010).

Discussion

American Warrior claims that "when read as a whole, [section 28.070] allows for a conditional use to continue as long as it is maintained if the 'project' is 'substantially completed' within one year of when the [Zoning Board] approved the [conditional use permit]." Similarly, the County and Huber contend "the notion that a conditional use would expire upon a technical failure of not reapplying for a permit yearly, creates an absurd result." Their points are well taken.

At a glance, section 28.070's first clause ("All conditional use permits shall be valid for one [1] year from the date it was approved by the Board of Zoning Appeals.") seems clear and implies conditional use permits expire after that one-year period. But read with the second clause ("[I]f project has not been substantially completed within one [1] year of approval, the conditional use

permit shall expire."), the text provides a second meaning—a permit remains valid for a minimum duration of one year and expires only if the project is not substantially completed within a year.

This second meaning is the better view and aligns with the second clause's purpose and function to provide a logical understanding of the regulatory language. See *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (2023) ("[C]ourts may consult canons of construction to resolve the ambiguity. 'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' [Citations omitted.]"). Reading section 28.070 to invalidate a permit after one year renders the second clause redundant and nonsensical. See *Fisher v. Kansas Crime Victims Comp. Bd.*, 280 Kan. 601, 613, 124 P.3d 74 (2005) (stating the Legislature "does not intend to enact useless or meaningless legislation and the obligation to interpret a statute in such a way that part of it does not become surplusage").

Simply put, section 28.070 means: a permit is valid for at least one year, which can extend beyond that year if the project is substantially completed. Here, neither side raises a substantial completion issue. We hold this litigation is not moot and proceed to decide the merits.

COUNTY AUTHORITY TO DELEGATE ZONING REGULATION

In keeping with the statutory scheme, K.S.A. 12-755 authorizes counties to adopt zoning regulations providing for issuance of conditional use permits. Here, the district court granted judgment to the County and Huber, holding the County properly issued the conditional use permit through its Zoning Board in accordance with the County's regulations. We agree.

Standard of review

Appellate courts review de novo a district court's grant of summary judgment. *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021). Likewise, we interpret statutes and regulations de novo based on their plain language. *Central Kansas Medical Center*, 308 Kan. at 1002.

Local enactments

The Board of Finney County Commissioners first adopted its zoning regulations in 1995. The 2021 version applies here. Article 4 governs agricultural districts, listing permitted uses and structures and specifying conditional uses, including sand and gravel quarries, "*may be permitted* only after they have been reviewed and approved as required by Article 29." (Emphasis added.) Regulations, §§ 4.020, 4.030. The regulatory definition of "conditional use" means:

> "A use of any building, structure or parcel of land that, by its nature, is perceived to require special care and attention in siting so as to assure compatibility with surrounding properties and uses. Conditional uses are allowed only after public notice, hearing and approval as prescribed in these Regulations and may have special conditions and safeguards attached to assure that the public interest is served." Regulations, § 2.030(36).

Meanwhile, a "conditional use permit" is a "written document of certification issued by the Zoning Administrator permitting the construction, alteration or establishment of a [c]onditional [u]se." Regulations, § 2.030(37). "Conditional use permit" is commonly interchanged with "special use" and "exceptions," a practice the County appears to follow. Compare 2 Am. Law Zoning § 14:1 (5th ed.), with Regulations § 2.030(61) ("Exception - An exception shall always mean the allowance of otherwise prohibited use within a given district, such use and conditions by which it may be permitted being clearly and specifically stated within this Zoning Regulation, and the allowance being granted by conditional use permit from the Board of Zoning Appeals."); see also Black's Law Dictionary 1685 (11th ed. 2019) ("special-use permit" is a "zoning board's authorization to use property in a way that is identified as a special exception in a zoning ordinance" and "[a]lso termed conditional-use permit"); Black's Law Dictionary 1683 ("special exception" is an "allowance in a zoning ordinance for special uses that are considered essential and are not fundamentally incompatible with the original zoning regulations" and "[a]lso termed . . . conditional use; special use").

Article 29 governs the Zoning Board's authority over conditional use exceptions. Under section 29.040, the Zoning Board may grant conditional use exceptions authorized by the Regulations, so long as

those uses comply with the relevant provisions and are appropriately integrated into the community. In pertinent part, it states:

"The Board of Zoning Appeals may authorize, as an exception to the provisions of these zoning regulations, the establishment of those conditional uses that are expressly authorized to be permitted as a conditional use in a particular zoning district . . . . No conditional use shall be authorized as an exception to these regulations unless the Board is specifically authorized, by these regulations, to grant such conditional use and unless such grant complies with all of the applicable provisions of these regulations.

"The purpose of the conditional use permit is to allow proper integration of uses into the community which may only be suitable in specific locations, and may have potentially detrimental characteristics if not properly designed, located, and conditioned. A conditional use permit may be granted only for uses listed as conditional uses in respective zones . . . ." Regulations § 29.040.

This same section outlines the application process for a conditional use permit, which Huber followed. It applied, detailing information like plots, plans, and drawings, showing how the conditional use will affect adjacent properties, to the Zoning Board at least 28 days before its meeting. See Regulations § 29.040(A)(1)-(8). Once submitted, the Zoning Board must consider section 29.050's factors to evaluate the requested use's impact on County inhabitants' well-being and zoning district stability. The Zoning Board must also impose safeguards as needed to protect neighboring properties.

Article 28 broadly governs the Zoning Board—dictating its composition, authority, and jurisdiction. The Zoning Board is made up of three members. Regulations § 28.010. It has the authority and jurisdiction:

"To hear and grant exceptions to the provisions of the zoning regulation in those instances where the Board of Zoning Appeals is specifically authorized to grant such exceptions and only under the terms of the zoning regulation. In no event shall exceptions to the provisions of the zoning regulation be granted where the use or exception contemplated is not specifically listed as an exception in the zoning regulation. Further, under no conditions shall the Board of Zoning Appeals have the power to grant an exception when conditions of this exception, as established in the Zoning regulation by the Governing Body, are not found to be present." Regulations § 28.030(6).

And it may make decisions as follows:

"The Board of Zoning Appeals may affirm or reverse, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the zoning administrator and *may issue or direct the issuance of a permit. The concurring vote of two (2) members of the Board of Zoning Appeals shall*

be necessary to reverse any order, requirement, decision, or determination of the Building Inspector or Zoning Administrator, or *to decide in favor of the applicant* upon any matter which it is required to pass under any such ordinance, or to effect any variation in such ordinance. . . ." (Emphases added.) Regulations § 28.050.

In summary, article 4 permits sand and gravel quarries in agricultural districts as conditional uses; article 29 delegates issuing power to the Zoning Board; and article 28 requires two of three Board members to agree when deciding in an applicant's favor.

Statutory scheme

To resolve whether the County's action complied with state law, we now dive into the Planning, Zoning, and Subdivision Regulations in Cities and Counties Act. This Act enables cities and counties to pass planning and zoning regulations "for the protection of the public health, safety and welfare, and is not intended to prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with the provisions of this act." K.S.A. 12-741(a).

The Act empowers counties, through their boards of county commissioners, to enact or amend zoning regulations by adopting resolutions using the applicable statutory procedure. K.S.A. 12-753; see also K.S.A. 12-756 (procedures to establish zones); K.S.A. 12-757 (procedures to amend the existing zones). The Act also grants the board of county commissioners power to regulate issuing special or conditional use permits. K.S.A. 12-755(a)(5). And it reflects legislative intent to enable counties' home rule powers on zoning matters. See K.S.A. 19-101 ("[E]ach organized county . . . shall be empowered . . . to exercise the powers of home rule to determine their local affairs and government authorized under the provisions of K.S.A. 19-101a . . . [and] to exercise such other and further powers as may be especially conferred by law."); *David v. Board of Norton County Comm'rs*, 277 Kan. 753, 755, 89 P.3d 893 (2004) ("Kansas counties derive all of their home rule authority from a statutory scheme originally enacted in 1974. See K.S.A. 19-101 et seq.").

That said, a county's zoning power may be limited by state law through preemption, which occurs when the "legislative intent to reserve exclusive jurisdiction to the state [is] clearly manifested

by statute—i.e., by expressly prohibiting cities from enacting any type of ordinance related to the state law." *DWAGFYS Manufacturing, Inc. v. City of Topeka*, 309 Kan. 1336, 1341, 443 P.3d 1052 (2019). But the Act contains no such express statement of preemption for conditional use permits. Still, K.S.A. 12-741(a) says state zoning law preempts any county regulations "in conflict with the provisions of this act." Cf. K.S.A. 19-101a(a)(1) ("Counties shall be subject to all acts of the legislature which apply uniformly to all counties."); *Crumbaker*, 275 Kan. at 886 (zoning legislation is generally considered as "'the field with a uniformly applicable enactment'").

Here, American Warrior argues state law preempts what it views as conflicting county regulations on conditional use permits. It claims the Zoning Board should have followed K.S.A. 12-757's amendment procedures before issuing Huber's permit. The panel majority agreed, citing *Crumbaker* and *Manly*, both of which analyzed whether a zoning board properly allowed a conditional use under K.S.A. 12-757. *American Warrior*, 63 Kan. App. 2d at 133; *Crumbaker*, 275 Kan. at 885-87; *Manly*, 287 Kan. at 67-68. On the other hand, Finney County and Huber contend state law does not preempt Finney County's regulations because the permit did not "supplement, change or generally revise the boundaries or regulations contained in zoning regulations." See K.S.A. 12-757(a). The panel's dissent concurred with them. *American Warrior*, 63 Kan. App. 2d at 146.

To decide this, we must consider whether the County's zoning procedures conflict with any of the Act's provisions. We begin with the statute at issue. K.S.A. 12-757(a) reads:

> "The governing body, from time to time, may *supplement, change or generally revise the boundaries or regulations contained in zoning regulations by amendment.* A proposal for such amendment may be initiated by the governing body or the planning commission. If such proposed amendment is not a general revision of the existing regulations and affects specific property, the amendment may be initiated by application of the owner of property affected. . . ." (Emphasis added.)

Put simply, any additions, modifications, corrections, or improvements to "the boundaries or regulations contained in zoning regulations," require counties follow K.S.A. 12-757's steps. See

Hatesohl, 308 Kan. at 1002 (courts give common words their ordinary meanings); Merriam-Webster Online Dictionary (to "supplement" means "to add") (defining to "change" as "to make different in some particular" or "to replace with another") (to "revise" means "to look over again in order to correct or improve" or "to make a new, amended, improved, or up-to-date version of"); Black's Law Dictionary 102 (11th ed. 2019) ("amendment" is "[a] formal and usu. minor revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or correction; esp., an alteration in wording"); cf. K.S.A. 19-101c ("The powers granted counties pursuant to this act shall be referred to as county home rule powers and they shall be liberally construed for the purpose of giving to counties the *largest* measure of self-government." [Emphasis added.]).

K.S.A. 12-757 applies only to changing zoning regulations by amendment. As the panel dissent observed:

> "A conditional-use permit does not change the existing zoning of a tract of land. The Tract here is zoned agricultural and remains zoned agricultural. Under the Finney County, Kansas, Zoning Regulations sand and gravel quarries are allowed on land zoned as agricultural. So anyone purchasing property around agriculturally zoned property is on notice that sand and gravel quarries are permitted. But the county may place conditions on the use of the land. The placement of these conditions does not constitute an amendment to the zoning regulations or the zoning of the tract. It is and remains agricultural. The zoning regulations of the county remained the same both before and after the issuance of the conditional-use permit here. That accords with both the county definition of a conditional-use permit and the generally accepted definition of a conditional use." *American Warrior*, 63 Kan. App. 2d at 136.

So did Huber's application ask the County to supplement, change, or revise the Regulations and thereby create a conflict with K.S.A. 12-757? In short: no.

Huber's "Application for Conditional Use or Exception" sought to use property zoned as agricultural for its sand and gravel quarry operation based on the existing county regulations. See Regulations § 4.030 (permitting "[s]tate approved . . . sand and gravel quarries" in agricultural zones "after they have been reviewed and approved" by the county). As explained, such a permit

is the Zoning Board's authorization to use property in a way identified as a conditional exception by the Regulations. This aligns with Huber's proposal and the necessary action to approve it—no supplement, change, or revision to existing boundaries or regulations needed.

Next, we turn to K.S.A. 12-759, which specifically contemplates zoning board authority and special uses. Under subsection (a), the Finney County Commission created the Zoning Board with article 28, dictating the Board's composition, authority, and jurisdiction. And under subsection (e), it gave the Zoning Board broad authority in article 29 to hear, vote upon, and grant conditional use permits through a standard application and evaluation process. See K.S.A. 12-759(e)(2) ("When deemed necessary by the board of zoning appeals, the board may . . . *grant exceptions* to the provisions of the zoning regulation in those instances where the board is specifically authorized to grant such exceptions and only under the terms of the zoning regulation." [Emphasis added.]).

Subsections (a) and (e) govern Huber's permit. The panel majority mistakenly believed subsection (d) applied, but it only specifies the process to appeal "any decision of the officer administering the provisions of the zoning ordinance" to a specific zoning appellate board. K.S.A. 12-759(d). Subsection (d) is inapplicable because the Zoning Board granted Huber's permit, not some individual officer through administrative action. By complying with subsections (a) and (e), the County's zoning regulations in articles 28 and 29 align and do not conflict with K.S.A. 12-759.

American Warrior argues for the first time on appeal that K.S.A. 12-757a supports its position. K.S.A. 12-757a states: "No city or county may establish procedures regarding the adoption of special use or conditional use permits for mining operations

. . . which require the approval of more than a majority of all members of the governing body." And American Warrior asserts the timing of K.S.A. 12-757a's passage after *Crumbaker* and *Manly* suggests the Legislature approved of how those cases interpreted K.S.A. 12-757. It argues the Legislature "could have and should have amended [K.S.A. 12-757] at that time to exclude

[conditional use permits]" if it disagreed. There is a lot wrong with this.

First, K.S.A. 12-757 never refers to conditional use permits and, in fact, excludes them from its governance. Further, K.S.A. 12-755(a)(5) (allowing counties to adopt their own regulations to issue conditional use permits) and K.S.A. 12-759(e) (allowing a board of zoning appeals to grant exceptions) make no reference to K.S.A. 12-757, and vice versa. Second, American Warrior's interpretation would make K.S.A. 12-757a duplicative of K.S.A. 12-757(g). In other words, if K.S.A. 12-757 uniformly applied to issuing conditional use permits, subsection (g) would already govern such exceptions and K.S.A. 12-757a would not need to exist. See *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 626, 413 P.3d 432 (2018) (courts generally presume the Legislature does not intend to enact useless or meaningless legislation); *Kansas One-Call System v. State*, 294 Kan. 220, 233, 274 P.3d 625 (2012) ("'[V]arious provisions of an act *in pari materia* must be construed together in an effort to reconcile the provisions so as to make them consistent, harmonious and sensible.'"; "'An appellate court's duty, as far as practicable, is to harmonize different statutory provisions to make them sensible.'").

The panel majority critically failed to engage in a straightforward, textual interpretation of the Act and Regulations. Instead, it looked first to *Crumbaker* and *Manly* and improperly extended their holdings to the present controversy. See *American Warrior*, 63 Kan. App. 2d at 126-32. But neither applies.

Crumbaker held K.S.A. 12-757 governed changing land use in a city whose local zoning regulations required compliance with state law, which is distinguishable from Finney County's regulations that have no such requirement. See *Crumbaker*, 275 Kan. at 885-86. And *Manly*'s use of K.S.A. 12-757 to evaluate a special use permit's validity is similarly inapplicable, because that court never had a chance to rule on the legal issue presented here since neither party nor the court questioned K.S.A. 12-757's applicability. The *Manly* decision interpreted the statute without answering the foundational inquiry of whether an appropriate city ordinance governed. See *Manly*, 287 Kan. at 67-68. As the district court here observed, applying *Manly* would be an unjustified stretch. The panel

majority's reliance on *Crumbaker* and *Manly* was unwarranted. See *American Warrior*, 63 Kan. App. 2d at 130-31.

The other cases cited by the panel majority or American Warrior are similarly distinguishable or inapplicable since they misunderstand *Crumbaker* or *Manly*. See *Zimmerman v. Board of Wabaunsee County Comm'rs*, 289 Kan. 926, 218 P.3d 400 (2009) (distinguishable; amending zoning regulations under K.S.A. 12-757); *Johnson County Water Dist. No. 1 v. City of Kansas City*, 255 Kan. 183, 871 P.2d 1256 (1994) (distinguishable; challenging the reasonableness of conditions imposed in granting a special use permit under K.S.A. 12-757[c] [judicial review of local government's final decision]); *Pretty Prairie Wind v. Reno County*, 62 Kan. App. 2d 429, 517 P.3d 135 (2022) (distinguishable; challenging a form of the protest petitions; here, discussing K.S.A. 12-757[f] created no problem since Reno County Zoning Regulations § 20-102 [2016] contained sufficiently similar requirements); *Kaw Valley Companies v. Board of Leavenworth County Comm'rs*, No. 124,525, 2022 WL 3693619, at *8 (Kan. App. 2022) (unpublished opinion) (misunderstanding *Manly*); *Ternes v. Board of Sumner County Comm'rs*, No. 119,073, 2020 WL 3116814, at *12 (Kan. App. 2020) (unpublished opinion) (misunderstanding *Crumbaker* and *Manly*); *Vickers v. Franklin Co. Bd. of Comm'rs*, No. 118,649, 2019 WL 3242274, at *4 (Kan. App. 2019) (unpublished opinion) (misunderstanding *Crumbaker* and *Manly*); *R.W.D. No. 2 v. Board of Miami County Comm'rs*, No. 105,632, 2012 WL 309165 (Kan. App. 2012) (unpublished opinion) (challenging the validity and reasonableness of decision denying a conditional use permit; like *Manly*, application of K.S.A. 12-757 was uncontested).

We hold K.S.A. 12-757 does not preempt a county's issuance of conditional use permits. Finney County's zoning procedures for issuing conditional use permits do not conflict with the governing state law. The panel majority erred by holding K.S.A. 12-757 controlled Huber Sand's application of a conditional use permit.

Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

No. 125,508

STATE OF KANSAS, *Appellee*, v. CHRISTOPHER D. KEMMERLY, *Appellant*.

(552 P.3d 1244)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Sixth Amendment Right to Self-Representation—Requirement of Knowing Waiver of Right to Counsel.* The right to self-representation, like the right to assistance of counsel, arises from the Sixth Amendment. Because these rights are in tension, a defendant who wishes to self-represent must waive their right to counsel knowingly and intelligently.

2. SAME—*Defendant's Right to Self-Represent—Three Requirements before Court Accepts Waiver of Right to Counsel.* To ensure a defendant's right to self-represent is exercised knowingly and intelligently, district courts must satisfy three things on the record before accepting a defendant's waiver of his right to counsel. First, the defendant must be advised of their right to counsel and to appointed counsel if indigent. Second, the defendant must possess the intelligence and capacity to appreciate the consequences of their decision. Finally, the defendant must comprehend the charges and proceedings, punishments, and the facts necessary for a broad understanding of the case. These three things need not be established in a single colloquy.

3. TRIAL—*Defendant's Right to Self-Represent—Court's Discretion to Appoint Standby Counsel.* The decision to appoint standby counsel rests within the discretion of the district court.

4. SAME—*Defendant's Exercise of Right to Self-Represent—Midtrial Request for Appointed Counsel.* Once a defendant has validly exercised their right to self-represent, they do not have an absolute right to reverse course midtrial and have counsel appointed to represent them. A district court's decision on a self-represented defendant's midtrial request for appointed counsel is discretionary. When faced with such a request, district courts should balance the reason for the request and alleged prejudice to the defendant if the request is denied with any disruption of the proceedings, inconvenience, delay, and possible confusion of the jury.

5. EVIDENCE—*Sufficiency of Evidence Challenge—Appellate Review.* When considering challenges to the sufficiency of the evidence, appellate courts do not assess witness credibility or reweigh evidence.

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Oral argument held May 8, 2024. Opinion filed July 26, 2024. Affirmed.

Hope E. Faflick, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Lance J. Gillett, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Christopher D. Kemmerly directly appeals his convictions for first-degree felony murder, theft, arson, and criminal possession of a firearm. He claims the district court violated his right to counsel, that his conviction was not supported by sufficient evidence, and that K.S.A. 21-6304(a)(3)(A) is unconstitutional. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

On the evening of February 17, 2019, Justin Gaston got out of a white Cadillac in the parking lot of a motel in Wichita. One of the Cadillac's occupants shot him in the back with a shotgun; he died shortly after the Cadillac sped off. Circumstantial evidence (including messages taken from Kemmerly's phone) eventually led investigators to arrest Kemmerly for Gaston's murder; statements by Reyna Wallace (Kemmerly's girlfriend and the Cadillac's driver) and Christopher Breedlove (the then-boyfriend of Kemmerly's sister) also implicated Kemmerly.

The State ultimately charged Kemmerly with felony murder, criminal possession of a weapon under K.S.A. 21-6304(a)(2), theft, and arson. The case went to trial, with two attorneys representing Kemmerly. After a five-day trial, a jury found Kemmerly guilty. Kemmerly then moved pro se for a new trial on a theory of ineffective assistance of counsel. After an evidentiary hearing, the district court granted Kemmerly's motion.

As discussed below, Kemmerly moved to represent himself at the second jury trial, which the district court granted. The second trial lasted nine days. Kemmerly represented himself throughout, calling numerous witnesses—including testifying himself—and presenting dozens of exhibits. His theory, broadly, was that Wallace and another man known as "Scooby Dooby Doo" or "Scoob" had killed Gaston, and that any text or Facebook messaging implicating Kemmerly was, in fact, the product of Wallace having stolen his phone.

At the end of the second trial, the jury again found Kemmerly guilty of first-degree murder, criminal possession of a weapon by a convicted felon, theft, and arson. Judge Goering—who presided over almost every hearing, including both jury trials and all relevant motion hearings—gave Kemmerly a controlling sentence of 620 months. Kemmerly appealed.

ANALYSIS

The district court did not violate Kemmerly's Sixth Amendment right to counsel.

Kemmerly claims the district court violated his Sixth Amendment right to counsel twice: first by allowing him to go to trial pro se without an adequate waiver, and later by denying him counsel when he requested it in the middle of his second trial.

Kemmerly also briefly mentions section 10 of the Kansas Constitution Bill of Rights but appears to treat it as indistinguishable from the Sixth Amendment. As in *State v. Couch*, 317 Kan. 566, 576, 533 P.3d 630 (2023), Kemmerly relies on Sixth Amendment caselaw and "does not use our established rules of constitutional interpretation to analyze whether the textual differences between section 10 and the Sixth Amendment are legally significant." *Couch*, 317 Kan. at 576. Thus, we treat Kemmerly's claim for relief as solely arising under the Sixth Amendment, as *Couch* did.

A. Kemmerly's pretrial decision to self-represent did not violate his Sixth Amendment right to counsel.

Standard of Review

"Waiver of the right to counsel must be knowingly and intelligently made and the determination of such a waiver depends on the particular facts and circumstances of each case." *State v. Buckland*, 245 Kan. 132, 137, 777 P.2d 745 (1989). Thus, to the extent the district court made findings in accepting Kemmerly's waiver, the court applies "a bifurcated standard of review, reviewing the district court's fact-findings for substantial competent evidence and the district court's legal conclusion de novo." *Couch*, 317 Kan. at 575. "Substantial competent evidence is that which possesses

both relevance and substance and which furnishes a substantial basis in fact from which the issues can reasonably be resolved." *State v. Sharp*, 289 Kan. 72, 88, 210 P.3d 590 (2009).

Additional Facts

After his first trial, Kemmerly moved to represent himself on his pro se ineffective assistance of counsel motion. The district court heard the motion on February 6, 2020, and held an extended colloquy with Kemmerly, even commenting at one point that it would "read [the factors from *State v. Lowe*, 18 Kan. App. 2d 72, 76-77, 847 P.2d 1334 (1993)] straight from the case." Kemmerly acknowledged his understanding throughout. At the end of the discussion, the court found that Kemmerly "made a knowing and intelligent decision to forego counsel and to represent himself in this case," and permitted Mark Sevart to act as standby counsel. (During oral argument before this court, Kemmerly's counsel conceded this waiver was adequate.) But Kemmerly quickly backtracked and asked for counsel again, and the court reappointed Sevart. Sevart then represented Kemmerly at the evidentiary hearing on the ineffective assistance of counsel motion, after which the court granted Kemmerly's motion and reversed Kemmerly's convictions.

On July 8, 2021, Kemmerly filed a motion for self-representation in his then-pending trial. In the motion, Kemmerly asserted:

> "1.) He has a right to represent himself.
> "2.) He is mentally competent.
> "3.) He has displayed an understanding of the law.
> "4.) He wishes to keep attorney Mr. Mark Sevart as an advisor or as standby in case he wishes to continue with court-appointed representation in the future. This is a reasonable request and not entirely uncommon."

On July 13, 2021, Kemmerly wrote to Judge Goering, stating, among other things: "Your Honor, I will be moving Pro Se. I will not be dissuaded from exercising that right. I don't need to have a Lowe Hearing. I will be formally waiving that. We need not to waste record space."

The district court heard Kemmerly's motion to self-represent on July 26, 2021. Sevart represented Kemmerly at first. The court noted that "this isn't the first *Lowe* hearing that we've had" and that

"[w]e've gone through these elements before in a prior hearing." Kemmerly recalled the date almost correctly—"February 5th. You're right."—and agreed that judges in other cases had reviewed the *Lowe* factors with him before. The district court said that it did not "see any need to repeat what's already been mentioned to you on numerous occasions." But the court still clarified a few matters:

"THE COURT: . . . There are two factors though that I want to review with you so that we're sort of on the same page right out of the gate. The first is if I grant your motion for self-representation, you are basically in charge of the case and, you know, it's up to you to figure out how to do the things the lawyers would typically do.

"Do you understand that?

"THE DEFENDANT: Yep.

"THE COURT: All right. So one of the things we've been talking about briefly, there's this motion for a private investigator. I think you should understand that my role in that is to approve of a private investigator.

"Once you get Court approval of a private investigator, then it's up to the lawyer to contact the Board of Indigents' Defense Services to convince them that one is necessary to your case. And then it's up to you to convince the Board of Indigents' Defense Services that the person that you're proposing to do the investigation is somebody that they would approve of.

"All of that stuff is usually done by the lawyers. So it would have to be done by you at this time if your request is granted. In other words, I don't appoint investigators in the same way that I appoint lawyers. I just approve them.

"So if they're approved, then I know you don't want Ms. Morss on your case, and that's fine. It's just a matter of it will be up to you to locate somebody that can do that and can do it with approval of BIDS, and I know that's an important request to you, and I just wanted everyone to be up front as to what that's going to mean if I grant your request.

"THE DEFENDANT: Okay.

"THE COURT: Do you have any questions about that?

"THE DEFENDANT: I just need that address.

"THE COURT: All right. The address for BIDS?

"THE DEFENDANT: Yeah.

. . . .

"THE COURT: . . . The second issue that I think that I need to review with you is that as an in-custody, you found that it is harder for you to represent yourself than it is when you're out of custody for the simple fact that your freedom is limited, your ability to communicate is limited. So the ability to issue subpoenas, to interview witnesses, to do those sorts of things is substantially harder for you as somebody in custody than it is for somebody out of custody.

"Do you understand that if I grant your motion to represent yourself that, you know, those are things that you're just going to have to figure out as an inmate of the Sedgwick County Jail?

"THE DEFENDANT: Correct."

The court also discussed discovery logistics with Kemmerly and Sevart, who relayed that it amounted to "several thousand" pages and included photographs and videos. The court further pointed out that trial was scheduled in just eight weeks; although Kemmerly said he would be ready for trial by then, the court characterized this as "a very aggressive, optimistic view." At the end of this discussion the district court said that:

"The purpose of going through the *State v. Lowe* factors is so that you're well educated and know enough about the pitfalls of self-representation to make voluntary and knowledgable [*sic*] decisions. So we've already been through that in this case before. You have been through it with other judges."

The court gave Kemmerly the chance to ask any questions; he did not. The court then granted Kemmerly's motion. Kemmerly remained pro se throughout the trial, although—as discussed below—he briefly requested counsel midway through trial. He also requested appointed counsel once the jury found him guilty, which the district court granted.

Analysis

"Neither the United States nor Kansas Constitutions explicitly provide for a right of self-representation. Instead, the United States Supreme Court implied the right to waive counsel and act as one's own attorney from the right to counsel granted in the Sixth Amendment to the United States Constitution." *State v. Burden*, 311 Kan. 859, 863, 467 P.3d 495 (2020). But "[b]ecause the right to represent oneself is 'at odds with the right to be represented by counsel, the courts must indulge every reasonable presumption against waiver of the right to counsel[ ] and will not presume acquiescence in the loss of fundamental rights, i.e., the right to counsel.'" *Burden*, 311 Kan. at 863. Thus, "in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits [associated with the right to counsel]." *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

"A defendant who clearly and unequivocally expresses a wish to proceed pro se has the right to represent himself or herself after a knowing and intelligent

waiver of his or her right to counsel. A knowing and intelligent waiver requires that the defendant be informed of 'the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.' The right to represent oneself is implicit in the structure of the Sixth Amendment. 'The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.' A trial court may not measure a defendant's competence to waive his or her right to counsel by evaluating the defendant's 'technical legal knowledge.' [Citations omitted.]" *State v. Jones*, 290 Kan. 373, 376-77, 228 P.3d 394 (2010).

Some cases have "suggest[ed] the [district] court explain" certain consequences of the decision to proceed pro se. *Burden*, 311 Kan. at 864. But we do not require district courts to follow a particular checklist to ensure that a defendant's waiver of the right to counsel is knowing and intelligent; rather, we assess the sufficiency of a waiver of the right to counsel "by examining the circumstances of each case." *Burden*, 311 Kan. at 864. While such checklists certainly exist—including the so-called "*Lowe* factors" made famous by *State v. Lowe*, 18 Kan. App. 2d 72, 76-77, 847 P.2d 1334 (1993), which Kemmerly mentioned in his pretrial motion to proceed pro se—we have instead "suggested a three-step framework . . . to use in determining if a waiver is knowing and intelligent." *Burden*, 311 Kan. at 863. Under this framework:

"First, a court should advise the defendant of the right to counsel and to appointed counsel if indigent. Second, the defendant must possess the intelligence and capacity to appreciate the consequences of his or her decision. And third, the defendant must comprehend the charges and proceedings, punishments, and the facts necessary for a broad understanding of the case." *Burden*, 311 Kan. at 863.

Kemmerly's arguments focus on the third component of the *Burden* framework. He complains that the district court provided insufficient warnings about what Kemmerly was giving up and what would be expected of him and failed to inquire about Kemmerly's state of mind.

But the law does not require us to wear blinders, ignoring everything *but* that colloquy. Instead, we "weigh whether a defendant has knowingly and intelligently waived the right to counsel by examining the circumstances of each case." *Burden*, 311 Kan. at 864. Cf. *State v. Armstrong*, 240 Kan. 446, 454, 731 P.2d 249 (1987) (looking to defendant's knowledge of the charges, penalties, and defenses from his previous two trials, at which he was represented

by counsel). See also, e.g., *United States v. Forrester*, 512 F.3d 500, 506-07 (9th Cir. 2008) (noting a "'limited exception'" when a district court's colloquy is insufficient but "'the record as a whole reveals a knowing and intelligent waiver'"); *United States v. Todd*, 424 F.3d 525, 531-33 (7th Cir. 2005) (failure to conduct a "full" *Faretta* inquiry "is not necessarily fatal"; analyzing full record of the case to consider whether defendant made a knowing and intelligent waiver); *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997) ("[W]e review the sufficiency of a waiver of the right to counsel by evaluating the complete profile of the defendant and the circumstances of his decision as known to the trial court at the time. This determination can be made by examining the record as a whole."); *United States v. Willie*, 941 F.2d 1384, 1389 (10th Cir. 1991) ("[T]he surrounding facts and circumstances, including [defendant's] background and conduct, demonstrate that [defendant] actually understood his right to counsel and the difficulties of pro se representation and knowingly and intelligently waived his right to counsel.").

Thus, we consider the whole record to gauge whether the district court had sufficient information to find that Kemmerly's waiver and decision to self-represent was knowing and intelligent. As noted, Judge Goering presided over almost all the hearings in the record—including both trials and both hearings on Kemmerly's motions to go pro se. He had ample opportunity to observe Kemmerly and, thus, to conclude that Kemmerly knew of his right to counsel, understood the nature of the charges and punishment, and possessed the intelligence and capacity to understand the consequences of the waiver. Further, Judge Goering knew that he had explained the consequences of a waiver both at the first waiver colloquy and—to a lesser degree, albeit with more specific trial-focus—at the second waiver colloquy 17 months later. And while Kemmerly complains that the district court took no steps at the second colloquy to ensure that Kemmerly *remembered* the first colloquy, Kemmerly's agreement that they covered the material before—in addition to his ability to recall *Lowe* by name and even, within a day, the date of the first colloquy—support the finding that Kemmerly knew those things *Burden* requires and had the intelligence and capacity to understand them.

Thus, despite the district court conducting an abbreviated colloquy immediately before accepting Kemmerly's waiver of his right to counsel, the record convinces us that the district court did not err in finding Kemmerly's waiver of his right to counsel and his decision to self-represent were knowing and intelligent under the three *Burden* requirements. We again emphasize that the district court need not go through a *Lowe* style checklist before accepting a waiver of the right to counsel—however advisable such a checklist may be to clearly document, on the record, that the defendant waived his rights knowingly and intelligently—so long as the requirements outlined in *Burden* have been satisfied. Here, the district court did not violate Kemmerly's rights in permitting him to proceed to trial pro se.

B. The district court did not abuse its discretion in denying Kemmerly's midtrial request for counsel.

Kemmerly next complains that the district court violated his right to counsel by denying his midtrial request for an attorney and by failing to appoint him standby counsel.

Standard of Review

Kemmerly's argument implicates the district court's discretion. "'A district court abuses its discretion when (1) no reasonable person would have taken the view adopted by the district court; (2) the judicial action is based on an error of law; or (3) the judicial action is based on an error of fact.'" *State v. Hillard*, 313 Kan. 830, 838, 491 P.3d 1223 (2021) (quoting *State v. Thomas*, 307 Kan. 733, 739, 415 P.3d 430 [2018]). The burden of establishing an abuse of discretion rests with the party alleging it. *Hillard*, 313 Kan. at 838.

Additional Facts

On the sixth day of trial and the fifth day of evidence, Kemmerly called his sister Heather to the stand. On redirect, Kemmerly tried to ask her about the quality of the questions she was asked during his first trial, but the district court blocked this line of questioning. After the district court sent the jury out for the afternoon recess, Kemmerly began to complain about his counsel

from the first trial; the district court explained that the conduct of the attorneys during the first trial was "just simply not admissible." The district court recognized Kemmerly's point that his sister had testified consistently and allowed him to highlight whether "you were never asked" a question but forbade him from asking "whether a question was proper or not." The court then took a recess.

After the recess, the court asked if the parties wished to add anything. Kemmerly said, "Outside my request for counsel, nothing, Your Honor." He then clarified:

> "Mr. Kemmerly: I said outside of a request for counsel since I'm, you know, getting stonewalled, nothing. Nothing else.
>
> "The Court: Okay.
>
> "Well, in terms of a request for counsel, I think it is a little late to appoint counsel, so—well, that request just isn't timely, so let's bring in the jury."

Kemmerly did not request counsel again until the end of his trial, when he asked for—and was given—counsel for post-trial matters and appeal.

Analysis

While there is some indication Kemmerly's midtrial request for counsel was more complaint than actual request, we assume for purposes of this analysis it was a genuine request. This court has not considered whether a district court's refusal to appoint midtrial counsel after a defendant's prior knowing and intelligent waiver of counsel rests in the district court's discretion. But we have held that a district court has discretion when faced with the inverse scenario: a represented defendant's midtrial request to proceed pro se. E.g., *State v. Collins*, 257 Kan. 408, 416, 893 P.2d 217 (1995); *State v. Cromwell*, 253 Kan. 495, 505, 856 P.2d 1299 (1993). When presented with such a request, district courts "should balance the alleged prejudice to the defendant with any disruption of the proceedings, inconvenience and delay, and possible confusion of the jury" and "should also consider the reason for the request and the quality of counsel's representation." *Collins*, 257 Kan. at 415. We now extend this reasoning to situations like Kemmerly's: a pro se defendant who requests counsel midtrial. See, e.g., *State v. Hubbard*, No. 121,757, 2021 WL 137398,

at *7-9 (Kan. App. 2021) (unpublished opinion); *State v. Campbell*, No. 116,551, 2018 WL 1352541, at *5-8 (Kan. App. 2018) (unpublished opinion). See also *United States v. Leveto*, 540 F.3d 200, 207 (3d Cir. 2008) ("[O]nce the [Sixth Amendment] right [to counsel] has been properly waived, as is the case here, we are persuaded by the broad consensus of other courts that the consideration of a defendant's post-waiver request for counsel is well within the discretion of the district court."). Thus, we must assess whether the district court abused its discretion.

Kemmerly's request for counsel arose almost as an aside following his unsuccessful attempt to question his sister about his counsel's questioning during his *first* trial. It appears his only reason for seeking appointed counsel was his belief that he was being "stonewalled" on this line of questioning.

Kemmerly suggests, without elaboration, that "the court could have avoided disruption by appointing standby counsel." But the decision to appoint "standby" counsel or authorize some other hybrid representation scheme is discretionary. E.g., *Buckland*, 245 Kan. at 139; *State v. Matzke*, 236 Kan. 833, 837, 696 P.2d 396 (1985); *Hubbard*, 2021 WL 137398, at *4-6. And appointed counsel in any capacity, standby or otherwise, would have had to come up to speed on the case before they could effectively represent Kemmerly—a delay that would have taken weeks, at a minimum, and caused inordinate disruption. Moreover, the appointment of counsel would not have addressed the object of Kemmerly's vexation: the district court would not have permitted appointed counsel to question the propriety of Kemmerly's first attorney's questioning any more than it allowed Kemmerly to do so.

Kemmerly fails to show that the district court's decision not to appoint counsel was based on an error of fact or law, much less that no reasonable person would have made the same choice—especially when nobody raised the matter of standby counsel at the hearing, even though the motion itself requested standby counsel. Thus, we find no error in the district court's refusal to appoint Kemmerly counsel mid-trial.

Sufficient evidence supported Kemmerly's convictions.

Kemmerly next argues that his felony murder conviction was not supported by sufficient evidence because Wallace—whom he calls the

State's "star" witness—suffered from such a lack of credibility that no rational fact-finder could have found Kemmerly guilty. Although Kemmerly acknowledges the general rule that appellate courts do not reweigh evidence or pass on credibility, he argues that "[a] witness can be so incredible that i[t] does not sustain a conviction when no rational factfinder could believe the testimony and find a defendant guilty beyond a reasonable doubt."

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. This court has also recognized that there is no distinction between direct and circumstantial evidence in terms of probative value.'" *Hillard*, 313 Kan. at 848 (quoting *State v. Colson*, 312 Kan. 739, 749-50, 480 P.3d 167 [2021]).

Kemmerly relies on *State v. Matlock*, 233 Kan. 1, 5-6, 660 P.2d 945 (1983), to support this extraordinary claim. Unlike the present case, *State v. Matlock* involved a conviction for rape based solely on the uncorroborated testimony of the complaining witness. 233 Kan. at 3. The court emphasized an apparently special rule that "in order to convict on the uncorroborated testimony of the prosecutrix, the testimony of the prosecutrix must be clear and convincing, and that where her testimony is so incredible and improbable as to defy belief, the evidence is not sufficient to sustain a conviction." 233 Kan. at 3. After "carefully examin[ing]" the myriad ways in which the defense witnesses undercut the testimony of the complaining witness, the court concluded that she was unbelievable and, thus, that insufficient evidence existed to support a conviction. 233 Kan. at 4-6.

Matlock provides Kemmerly no help. Even if *Matlock* were not so clearly distinguishable—a rape case with apparently no corroborating evidence to support a certain witness' claim—no other Kansas case has followed its "aberrant review." See *State v. Brinklow*, 288 Kan. 39, 53, 200 P.3d 1225 (2009) (*Matlock* "is perhaps the only case of its kind in this state where the Supreme Court directly weighed the evidence and assessed the credibility of the prosecutrix to reverse a conviction for rape."). Considering the mountain of precedent forbidding us to consider witness credibility as a component of a sufficiency of the evidence analysis, we see no reason to entertain *Matlock*.

If the jury disregarded Wallace's testimony, a wealth of circumstantial evidence admitted at trial supports the jury's finding beyond a reasonable doubt that Kemmerly shot and killed Gaston. Viewing that evidence in a light most favorable to the State, Kemmerly's claim fails.

Kemmerly failed to preserve his claim that K.S.A. 21-6304(a)(3)(A) violates section 4 of the Kansas Constitution Bill of Rights, and we decline to review it.

Finally, Kemmerly argues that K.S.A. 21-6304(a)(3)(A) is unconstitutional under section 4 of the Kansas Constitution Bill of Rights. Ignoring that he was actually convicted under K.S.A. 21-6304(a)(2), Kemmerly failed to raise this challenge before the district court. He argues that the court should address the issue for the first time on appeal anyway because—he claims—it poses a pure question of law, involves the "fundamental" right to bear arms, and is necessary to serve the ends of justice. He also highlights the "at least ten panels of the Court of Appeals" that have been presented with this issue but declined to reach the merits.

"Without a contemporaneous objection, constitutional issues cannot generally be raised for the first time on appeal. We have recognized some exceptions to this general rule, including situations where consideration of an issue is necessary to protect fundamental rights. But '[t]he decision to review an unpreserved claim under an exception is a prudential one' and '[e]ven if an exception would support a decision to review a new claim, we have no obligation to do so.' [Citations omitted.]" *Hillard*, 313 Kan. at 839-40.

The "prudential" exceptions to the general preservation rule arise when "'(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is determinative; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the trial court may be affirmed because it was right for the wrong reason.'" *In the Interest of N.E.*, 316 Kan. 391, 408, 516 P.3d 586 (2022) (quoting *State v. Perkins*, 310 Kan. 764, 768, 449 P.3d 756 [2019]).

Kemmerly claims the first two exceptions apply. But we disagree that his theory involves *only* a question of law. E.g., *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 669, 440 P.3d 461

(2019) (highlighting the parties' burdens within the constitutional challenge framework). As observed by some of the panels that have rejected the application of prudential exceptions to arguments like Kemmerly's, constitutional questions "often involve considerable factual development"—development which is also absent here. *State v. Foster*, 60 Kan. App. 2d 243, 255, 493 P.3d 283 (2021) (quoting *State v. Johnson*, No. 121,187, 2020 WL 5587083, at *5 [Kan. App. 2020] [unpublished opinion]). And while Kemmerly simply claims that section 4 always prohibits any restriction on the possession of firearms, the State—the party to whom the burden would shift if strict scrutiny were applied—has had no opportunity to develop a factual record "to establish the requisite compelling interest and narrow tailoring of the law to serve it." *Hodes*, 309 Kan. at 669.

Even assuming without deciding that the rights codified by section 4 are fundamental, we decline to extend a prudential exception to Kemmerly's claim. As noted, the absence of any factual development hampers our ability to consider several critical points necessary for the resolution of Kemmerly's constitutional challenge. Thus, we will not reach Kemmerly's challenge for the first time on appeal.

CONCLUSION

We affirm Kemmerly's convictions and sentence.

No. 127,337

In the Matter of DARREN E. FULCHER, *Respondent*.

(552 P.3d 1255)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Two-year Suspension, stayed pending successful completion of Two-year Probation Plan.*

Original proceeding in discipline. Oral argument held May 10, 2024. Opinion filed July 26, 2024. Two-year suspension stayed, conditioned upon successful participation and completion of two-year probation period.

Kate Duncan Butler, Deputy Disciplinary Administrator, argued the cause, and *Amanda G. Voth*, Deputy Disciplinary Administrator, was on the formal complaint for the petitioner.

M. Todd Moulder, of Morrow Willnauer Church, LLC, argued the cause for the respondent, and *Darren E. Fulcher*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in attorney discipline filed by the Office of the Disciplinary Administrator (ODA) against the respondent, Darren E. Fulcher, an attorney admitted to the practice of law in Kansas in 1999. The following summarizes the history of this case before the court.

After the ODA filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC), Fulcher timely responded. In due course, respondent filed a proposed probation plan. An appointed panel held a formal hearing on the complaint, during which respondent personally appeared. The hearing panel determined the respondent violated KRPC 1.8 (conflict of interest: current clients: specific rules) (2024 Kan. S. Ct. R. at 347) and KRPC 1.15 (safekeeping property) (2024 Kan. S. Ct. R. at 369).

More specifically, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"*Findings of Fact*

"11. The hearing panel finds the following facts, by clear and convincing evidence:

"12. On November 22, 2022, the Supreme Court of Missouri entered an order indefinitely suspending the respondent from the practice of law in Missouri, with no leave to apply for reinstatement for two years. The Missouri Supreme Court found that the respondent violated Missouri Rules of Professional Conduct 4-1.8(e) and 4-1.15(a), (d), and (f).

"13. The respondent's license to practice law in Missouri remains suspended as of the date of this Final Hearing Report.

"14. The United States District Court for the District of Kansas adopted the discipline imposed by the Missouri Supreme Court, suspending the respondent indefinitely with no leave to apply for reinstatement for two years.

"15. The Missouri Supreme Court based its ruling on the record before the Missouri Disciplinary Hearing Panel and briefs and argument by the parties. The Disciplinary Hearing Panel issued its decision on June 6, 2022.

"16. Before the Missouri Disciplinary Hearing Panel, Kelly Dillon, an investigator and financial examiner with the Missouri Office of Chief Disciplinary Counsel ('OCDC'), testified about an audit she performed of the respondent's trust account based on a complaint received by the OCDC.

"17. The respondent handled primarily personal injury cases and some criminal defense cases. Most of the personal injury cases were handled on a contingent fee basis. During the Missouri disciplinary hearing, the respondent admitted that the trust accounting system he set up was not sufficient, he thought he had all of the numbers in his head, and he was not reconciling the trust account as he should have been.

"18. Ms. Dillon audited the respondent's trust account for the timeframe December 4, 2017, through September 17, 2020. Ms. Dillon subpoenaed the respondent's bank records and also asked the respondent for certain client records so that she could compare them to the bank transactions.

"19. Ms. Dillon's audit revealed, as stipulated by the parties in this matter, that in some instances, the respondent's clients were not promptly and initially completely paid, and in other instances, third parties were not promptly and initially completely paid.

"20. The parties also stipulated in this matter, that after Ms. Dillon discovered, through her audit that some clients and third parties had not been promptly and completely paid, the respondent made the clients and third parties financially complete by paying them what the audit showed they were owed.

"21. Ms. Dillon's audit revealed issues with the respondent's accounting and disbursements from the trust account in the clients' cases discussed below. In all of the below cases, the respondent received settlement funds on his clients' behalf and deposited those funds into his trust account. Generally, after receiving the settlement funds, the respondent would draft settlement statements, asking his clients to sign the statements to show they reviewed them. In the settlement

statement, the respondent listed the amount of settlement funds received, which exceeded the sum of the liens and other payments listed in each case. The listed payments to come out of the settlement generally included payment to the client, attorney fees, case expenses, and any medical or other liens paid on the client's behalf.

"22. In P.R.'s September 2019 settlement, the respondent issued a settlement statement to P.R. showing $1,292.43 was owed to Coliseum Imaging Center, $499.72 in case expenses, and $19,000.00 for the respondent's attorney fee. However, the respondent did not make the transfers shown on this settlement statement. In fact, the Coliseum Imaging Center was not owed, because P.R.'s insurance ultimately paid this bill in full. The respondent issued a check to P.R. for the remaining $1,292.43 after the OCDC audit revealed this discrepancy.

"23. In T.S.'s January 2018 settlement, two of the medical lienholders agreed to accept amounts lower than their bills to settle the liens. However, the settlement statement provided to T.S. did not reflect the lower amounts for these liens. After the OCDC requested documentation of the two payments in 2020, the respondent paid one lien provider an additional $200.00 to pay that provider's bill in full, and paid T.S. the $283.16 difference in the other provider's bill.

"24. In F.G.'s April 2018 settlement, the settlement statement reflected a medical lien to Midwest Radiology Consultants for $181.00, however this payment was not made. After the OCDC requested proof of this payment in 2020, the respondent said he did not know how this payment was missed and afterward made the outstanding payment to the provider.

"25. In H.A.'s April 2018 settlement, the respondent received $28,000.00 in settlement funds. Before the respondent disbursed money to his client or the lienholder, the respondent's trust account balance fell to $12,148.06. Over six months later, the respondent distributed $11,623.08 to H.A. Over two months after that, the respondent distributed $3,995.94 to the lienholder.

"26. In G.I.'s April 2018 settlement, the respondent did not pay his client her recovery of $178.32, nor did he pay $237.84 to a medical group. When the OCDC asked the respondent about these two payments in 2020, the respondent said that his client did not ever come to pick up her check. Several months later, the respondent issued payment to his client and the medical group.

"27. In B.R-R.'s June 2018 settlement, the respondent listed a medical lien of $325.00 on the settlement statement. However, this amount was paid by insurance. Several months after the OCDC asked the respondent about this payment, the respondent issued . . . B.R-R. a payment for $325.00.

"28. In V.W.'s June 2018 settlement, the respondent paid a medical lienholder $1,890.34 instead of $1,906.90 it was due. When asked by the OCDC about the discrepancy in 2020, the respondent was unsure of the reason and paid the lienholder the $16.56 difference several months later.

"29. In R.S.'s July 2018 settlement, the settlement statement listed liens of $820.00 to Dr. Zimmerman and $139.05 to Interpreters Inc. The respondent did not pay these on receipt of the settlement funds for R.S.'s case, however, the respondent did pay half of the Interpreters Inc. bill prior to receiving the settlement funds. After the OCDC inquired about these two bills in 2020, the respondent made payment to Dr. Zimmerman and issued a check to his client for the $69.52 difference between the Interpreters Inc. bill and the payment he had previously made.

"30. In D.A.'s July 2018 settlement, the respondent issued a settlement statement showing a client recovery of $3,435.61 but issued a check to D.A. for only $3,035.61. When the OCDC asked the respondent about the $400.00 difference in 2020, the respondent did not know if the client asked for the $400.00 difference in cash or whether he paid for his traffic fines. The respondent advised that the client did not know either. Several months later, the respondent paid D.A. the $400.00 difference.

"31. In M.E.'s October 2018 settlement, the settlement statement showed a medical lien to Camren Health for $5,665.00, but the respondent paid Camren Health only $4,365.00. When the OCDC inquired about this payment in 2020, the respondent said he was waiting on confirmation of payment from the lienholder. Then, several months later, the respondent paid Camren Health $1,200.00 and paid M.E. the remaining $100.00.

"32. In G.B.'s late 2018 settlement, the respondent paid G.B. $1,427.32 from his trust account before depositing any funds into that account for the benefit of G.B. The check to G.B. was drawn against other clients' funds. The next day, settlement funds of $4,566.60 were deposited for the benefit of G.B.

"33. In C.D.'s January 2019 settlement, on March 26, 2019, the respondent's trust account balance fell to $5,603.69, below the $8,372.60 still owed to two lienholders in C.D.'s case. Those liens were paid three months later.

"34. In J.J.'s June 2019 settlement, the respondent deposited $100,000.00 in settlement funds, but his overall trust account balance fell to $40,000.00 before he made payment to J.J. and two lienholders. At the time the respondent's trust account balance fell to $40,000.00, the respondent owed J.J. $58,976.02 and owed the lienholders $1,100.00 and $950.00. The respondent eventually paid J.J. and the lienholders around one year later.

"35. In N.N.'s July 2019 settlement, the settlement statement reflected that N.N.'s client recovery was $1,783.59. However, the respondent paid N.N. only $1,283.59. When the OCDC asked the respondent about the $500.00 difference, the respondent stated that he had advanced $500.00 of the settlement to his client out of his operating account a few days before receiving the settlement funds because N.N. was in a financial crisis. The respondent knew he was not to advance fees to clients.

"36. In S.B.'s June 2019 settlement, the settlement statement showed a lien to Dr. McAllister for $375.00. When the OCDC asked the respondent for proof that this lien was paid, the respondent was unable to find a paid invoice. Several days after the OCDC's June 2020 inquiry, the respondent paid Dr. McAllister $375.00.

"37. In C.G.'s July 2019 settlement, the settlement statement reflected a lien to Optum for $11,049.29, but the respondent paid Optum only $10,000.00. After the OCDC asked the respondent about the $1,049.29 difference in June 2020, the respondent gave varying reasons for the difference between the two amounts. A month after the OCDC's inquiry, the respondent paid C.G. $1,049.29.

"38. In A.Br.'s November 2019 settlement, the OCDC asked the respondent about a medical lien shown on the settlement statement for $4,258.34. A little over a month after the OCDC's June 2020 inquiry, the respondent paid the lien.

"39. In G.S.'s November 2019 settlement, the OCDC asked the respondent in June 2020 about a medical lien of $387.92 on the settlement statement. The respondent initially responded to the OCDC that he thought this lien had been paid, but subsequently paid the lien approximately one month later.

"40. In D.M.'s December 2019 settlement, the settlement statement showed a lien for $1,585.23, but the respondent paid $1,541.28. When the OCDC inquired about the $43.95 difference in June 2020, the respondent stated he did not know why there was a discrepancy. A little over one month later, the respondent paid the remaining $43.95 of the lien.

"41. In T.B.'s November 2019 settlement, the settlement statement showed a payment to T.B. of $4,263.89, but the respondent paid T.B. $4,236.89. When OCDC asked about the discrepancy, the respondent said that the numbers were transposed and paid T.B. the $27.00 difference.

"42. In A.Bo.'s January 2020 settlement, the settlement statement reflected a medical lien of $3,168.64. When the OCDC requested proof of payment of this lien from the respondent in June 2020, he stated that he paid this lien from his operating account and then reimbursed from the settlement funds in the trust account. The OCDC audit did not reflect a corresponding withdrawal from the trust account. The proof of payment ultimately provided by the respondent showed a cash payment on June 12, 2020, which was after the OCDC's inquiry about the discrepancy.

"43. In T.S.'s January 2020 settlement, the respondent paid T.S. $3,288.37 and kept the remainder of the settlement funds in his trust account. The settlement statement reflected that part of the settlement funds were used to pay attorney fees in criminal cases in which the respondent represented T.S. The evidence in the Missouri disciplinary matter showed that money the respondent had already earned was held in his trust account. The respondent testified at the Missouri hearing that h[e] withdrew the money when he thought he earned it. The

Missouri audit showed that the respondent's withdrawals from his trust account were not based on any type of accounting or calculation of earned fees.

"44. In E.H.'s February 2020 settlement, the settlement statement showed a lien of $4,416.50 to Dr. Porter and of $131.00 to Midwest Radiology Consultants. The respondent did not pay these liens. The respondent told the OCDC that he did not pay Dr. Porter because his client asked him not to because he felt he was overcharged. The respondent testified that, after the complaint with the OCDC, the respondent's client gave him permission to pay Dr. Porter. The respondent stated he did not know why the $131.00 lien was not paid. The respondent paid both liens after the OCDC's June 2020 inquiry about the absence of payments.

"45. On October 23, 2018, $12,500.00 was deposited into the respondent's trust account with a memo 'Kenneth Jones.' According to the respondent, this deposit included attorney fees that were already earned. The respondent left these earned funds in his trust account.

"46. On October 26, 2018, there was a deposit of $13,711.34 from AT&T into the respondent's trust account. The respondent told the OCDC that he was unaware of what matter the AT&T payment was associated with but suspected it was associated with attorney fees and expenses on a case where he served as co-counsel.

"47. The respondent was the only authorized signer on the bank accounts and failed to keep accurate trust account records.

"48. During the time range of the OCDC audit, December 2017 through September 2020, the respondent frequently failed to pay clients and third parties funds that he held in his trust account on their behalf. During this time, the respondent routinely failed to withdraw earned attorney fees from his trust account.

"49. Further, from December 2017 through September 2020, the respondent frequently made withdrawals from his trust account in amounts as high as $90,000.00. From June 19, 2020, to September 1, 2020, the respondent made five cash withdrawals in amounts as high as $5,000.00. The respondent paid himself in large, round transfer amounts and not based on exact attorney fees earned.

"50. Further, the OCDC audit revealed that at times the respondent's trust account balance fell short when compared with known outstanding undisbursed amounts belonging to clients and third parties. On May 9, 2018, the respondent's trust account was over $4,000.00 short. On March 26, 2019, the account was over $6,700.00 short. On September 10, 2019, the account was over $29,000.00 short. On February 26, 2020, the account was over $60,000.00 short.

"51. The following clients' cases had undisbursed money when the trust account balance was short, owed either to clients or to third parties: P.R., T.S., F.G., G.I., B[.]R-R., V.W., R.S., D.A., M.E., D.D., J.J., S.B., C.G., A.Br., G.S., D.M., T.B., A.Bo., T.S., and E.H.

"52. In September 2020, the respondent opened a new trust account and hired an accounting firm to provide him with monthly reconciliations.

"53. The accounting firm hired by the respondent employs Tim Eaton, who testified during the formal hearing in this matter. Mr. Eaton is a bookkeeper and performs bookkeeping and tax services for the respondent's firm. Mr. Eaton reconciles the respondent's firm accounts, including his Kansas trust account, once per month.

"54. Mr. Eaton does not review any original documentation or client settlement statements as part of the bank account reconciliations he performs for the respondent. Mr. Eaton compares the information the respondent enters into QuickBooks to the respondent's bank account statements when performing reconciliations. Mr. Eaton's accounting firm does not perform audits of the respondent's account and does not verify that the respondent's clients or third parties are paid the amounts they are entitled to in a given case.

"55. The respondent had issues with his trust account on at least two prior occasions. The Missouri Disciplinary Hearing Panel found that in 2010, the respondent received a letter of caution relating to an overdraft of his attorney trust account. The letter of caution suggested the respondent attend a CLE entitled 'Fundamentals of Trust Accounting' and instructed him to notify the OCDC once he had completed the CLE. Two follow up letters were sent.

"56. In 2011, the respondent was issued an admonition for violation of Missouri Rule 4-1.15, for his trust account going into overdraft, not depositing advanced fees into his trust account, not reconciling monthly, and not keeping current and accurate client ledgers. The admonition again suggested the respondent attend the trust accounting CLE. The respondent never attended the CLE.

"*Conclusions of Law*

"57. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.8(e) (conflict of interest: current clients: specific rules), and 1.15(a) and (b) (safekeeping property), as detailed below.

"58. Had the parties not stipulated to violation of the KRPC, the hearing panel would look to Kansas Supreme Court Rule 221(c), which states that:

'Reciprocal Discipline. When the licensing authority of another jurisdiction disciplines an attorney for a violation of the rules governing the legal profession in that jurisdiction, for the purpose of a disciplinary board proceeding under these rules, the following provisions apply.

. . . .

'(2) If the determination of the violation was based on less than clear and convincing evidence, the determination is prima facie evidence of the commission of the conduct that formed the basis of the violation and raises a rebuttable presumption of the validity of the finding of misconduct. The respondent has the burden to disprove the finding in a disciplinary proceeding.'

"59. The burden of proof in a Missouri attorney discipline proceeding is preponderance of the evidence. Missouri Supreme Court Rule 1.15(g). The Missouri Supreme Court found that the respondent violated Missouri Rules of Professional Conduct 4-1.8(e), 4-1.15(a), (d), and (f) under the preponderance of the evidence standard. Because the Missouri Supreme Court's finding was based on less than clear and convincing evidence, its finding is prima facie evidence of the commission of the conduct that formed the basis of the violation and raised a rebuttable presumption of the validity of the finding of misconduct. The respondent had the burden to disprove the finding in this disciplinary proceeding.

"60. However, the respondent elected not to rebut this presumption. Instead, the respondent stipulated that his conduct violated KRPC 1.8(e), 1.15(a), and 1.15(b).

"61. As a result, the hearing panel will not apply Rule 221(c) to reach its recommendation and instead relies on the evidence presented, the parties' factual stipulations, and the stipulation that the respondent's conduct violated KRPC 1.8(e), 1.15(a), and 1.15(b).

"KRPC 1.8

"62. KRPC 1.8(e) provides:

'(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.'

"63. The respondent provided financial assistance to his client N.N.in the amount of $500.00. The circumstances under which the respondent provided financial assistance did not fit within either exception in KRPC 1.8(e)(1) or (2).

"64. The respondent stipulated that he violated KRPC 1.8(e).

"65. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.8(e).

"KRPC 1.15(a)

"66. Lawyers must properly safeguard their clients' property. KRPC 1.15(a) specifically provides:

'(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.'

"67. The respondent routinely failed to keep funds belonging to his clients and third-party lienholders separate from his own property in his trust account. The evidence shows that the respondent regularly failed to properly account for attorney fees, client funds, third party funds, and expenses held in his trust account. The respondent paid funds to his firm from the trust account without properly accounting that the amount withdrawn was the correct amount of earned attorney fees. This is evidenced, in part, from the fact that the respondent would routinely withdraw whole round numbered amounts as his attorney fees, even though settlement calculations did not include whole round numbered amounts; the respondent's delay in paying clients and third parties amounts belonging to them; and the fact that the respondent's trust account balance dropped below the amount of outstanding disbursements owed to others.

"68. The respondent stipulated that he violated KRPC 1.15(a).

"69. Accordingly, the hearing panel concludes the respondent violated KRPC 1.15(a).

"KRPC 1.15(b)

"70. Lawyers must also promptly notify others of receipt of funds and promptly deliver those funds belonging to clients and third persons. KRPC 1.15(b) provides:

'(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.'

"71. In the cases discussed above, the respondent failed to promptly deliver funds belonging to clients or third parties, or both. The respondent also failed to promptly notify clients and third parties that he had received funds on their behalf. In most of these cases, the respondent did not deliver payments owed to clients or third parties until the OCDC inquired about missing payments or discrepancies, in some cases many weeks or months later and in at least one case a full year later.

"72. The respondent stipulated that he violated KRPC 1.15(b).

"73. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15(b).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"74. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"75. *Duty Violated*. The respondent violated his duty to his clients and the third parties for whom he held funds.

"76. *Mental State*. The respondent knowingly violated his duty. Attorneys are obligated to know the professional rules governing their license, including the rules surrounding safekeeping property of others. Further, the respondent previously received a letter of caution and an admonition for his trust account going into overdraft and other improper trust accounting practices from the OCDC.

"77. *Injury*. As a result of the respondent's misconduct, the respondent caused injury to the clients and third parties who were not promptly paid funds the respondent was obligated to safeguard and promptly deliver to them.

"78. In addition to the above-cited factors in Standard 3, the hearing panel has thoroughly examined and considered the following Standards:

'4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

'4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'

"Aggravating and Mitigating Factors

"79. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"80. *Prior Disciplinary Offenses*. The respondent has been previously disciplined in Missouri. In 2010 the respondent received a letter of caution and in 2011 received an admonition as discussed above. Both the letter of caution and the admonition were regarding the respondent's improper handling of his trust account. This is an aggravating factor here, where the respondent again mismanaged his trust account.

"81. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated 1.8(e) (conflict of interest: current clients: specific rules) and 1.15(a) and (b) (safekeeping property). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"82. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1999. The respondent was admitted to the practice of law in Missouri in 1998. At the time of the misconduct, the respondent has been practicing law for around 20 years. The hearing panel concludes that the respondent had substantial experience in the practice of law when the misconduct occurred.

"83. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"84. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness. There was no evidence the respondent took funds belonging to others for his own benefit. The evidence indicates that the respondent's misconduct was the result of deficient accounting practices.

"85. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent fully cooperated with the disciplinary process. Additionally, the respondent admitted the facts that gave rise to the violations and stipulated that he violated KRPC 1.8(e), 1.15(a), and 1.15(b). The hearing panel concludes that this is a mitigating factor.

"86. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct. The respondent understood that his conduct violated the rules and had a negative impact on his clients and third-party lienholders. The respondent's remorse is also shown by his efforts to improve his accounting practices, including hiring an accounting firm to do his bookkeeping. The hearing panel concludes this is a mitigating factor.

"87. *Imposition of Other Penalties or Sanctions*. The respondent has experienced other sanctions for his misconduct. The respondent's Missouri license was suspended indefinitely by the Missouri Supreme Court without the ability to apply for reinstatement for two years.

"88. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of his community in Kansas City, Missouri. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by several letters received by the hearing panel. Further, the hearing panel heard testimony from Stan Archie, clinical director of several nonprofits that assist with housing, personal development, and transition to independence in the Kansas City Metro area. Mr. Archie testified that the respondent is a trusted and valued member of the community who volunteers his time and skills to the underserved community and serves as a mentor to young men in the Kansas City Metro area. The hearing panel concludes the respondent's reputation and good character is a mitigating factor.

"*Recommendation of the Parties*

"89. The disciplinary administrator recommended that the respondent be suspended for a period of two years, with the two-year suspension being retroac-

tive to the respondent's suspension of his Missouri license. Further, the disciplinary administrator recommended that as a condition of his reinstatement to practice law in Kansas, that the respondent show proof of his reinstatement to practice law in Missouri. The disciplinary administrator did not recommend that the respondent be subject to a reinstatement hearing in Kansas under Rule 232.

"90. The respondent recommended that he receive a published censure, or alternatively, if it is found that the respondent's misconduct was knowing, that he be placed on probation according to the terms of his proposed probation plan.

"*Discussion*

"91. When a respondent requests probation, the hearing panel is required to consider Rule 227, which provides:

'(d) Restrictions on Recommendation of Probation. A hearing panel may not recommend that the respondent be placed on probation unless the following requirements are met:

(1) the respondent complies with subsections (a) and (c) and the proposed probation plan satisfies the requirements in subsection (b);

(2) the misconduct can be corrected by probation; and

(3) placing the respondent on probation is in the best interests of the legal profession and the public.'

"92. The respondent developed a workable, substantial, and detailed plan of probation. The respondent provided a copy of the proposed plan of probation to the disciplinary administrator and each member of the hearing panel at least 14 days prior to the hearing on the formal complaint. The misconduct, in this case, can be corrected by probation. The probation plan designates a practice supervisor. Placing the respondent on probation is in the best interests of the legal profession and the citizens of the State of Kansas.

"93. The respondent put the proposed plan of probation into effect prior to the hearing on the formal complaint by complying with the terms and conditions of the probation plan. The respondent has hired an accounting firm to reconcile his accounts, testified that he has made the changes to his trust accounting process as recommended by Ms. Dillon with the OCDC, and, when available, will attend additional CLE's on trust accounting to continue to improve his understanding of this process. Further, since the respondent implemented these new accounting procedures, there is no evidence that the respondent has experienced further issues with his trust account. The hearing panel concludes that the actions taken by the respondent thus far, combined with the actions the respondent will take under his proposed probation plan when he is able to, are sufficient to meet the requirements of Rule 227.

"94. While the hearing panel concludes that the probation plan meets the requirements of Rule 227, the hearing panel further recommends that the respondent be required to undergo a full audit, performed by a qualified accountant, that compares the respondent's client settlement statements to the respondent's trust account bank statements within the first year of probation and on an annual basis thereafter. This compar-

ison of the respondent's trust account bank transactions to the client settlement statements will help ensure that the respondent's clients and the third-party lienholders receive the funds to which they are entitled and that the respondent is withdrawing the exact amount of earned fees to which he is entitled. Proof of the annual audits should be provided to the practice supervisor and to the disciplinary administrator's office.

"95. Further, the hearing panel recommends that it be a condition of the respondent's probation that the respondent be required to complete the 'Fundamentals of Trust Accounting' class recommended by the OCDC in 2010 and 2011. If this class is no longer available, the respondent should complete an equivalent class as approved by the disciplinary administrator's office. The respondent should also be required to read the 'Kansas Lawyer Trust Account Handbook,' published by the disciplinary administrator's office in September 2023, and provide written confirmation to the disciplinary administrator's office that he has read it within 90 days of the start of probation.

"*Recommendation of the Hearing Panel*

"96. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of one (1) year. The hearing panel further recommends that the suspension be stayed and the respondent be placed on probation for a period of two (2) years according to the terms of the respondent's proposed probation plan, adding the suggestions of the hearing panel regarding auditing, completing the 'Fundamentals of Trust Accounting' class, and reading the trust account handbook discussed above.

"97. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In an attorney disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so the court must determine whether it is supported by clear and convincing evidence. *In re Hodge*, 307 Kan. 170, 209-10, 407 P.3d 613 (2017). If so, the finding will not be disturbed. The court does not reweigh conflicting evidence, assess witness credibility, or redetermine questions

of fact when undertaking its factual analysis. *In re Hawver*, 300 Kan. 1023, 1038, 339 P.3d 573 (2014).

The respondent was given adequate notice of the formal complaint and timely responded. The respondent was also given adequate notice of the hearing before the panel and the hearing before this court. He did not file exceptions to the hearing panel's final hearing report.

With no exceptions before us, the panel's factual findings and conclusions of law are deemed admitted by the respondent and ODA. Supreme Court Rule 228(g)(1), (2) (2024 Kan. S. Ct. R. at 285). We agree with the panel in holding that respondent violated KRPC 1.8 (conflict of interest: current clients: specific rules), and KRPC 1.15 (safekeeping property).

The only remaining issue is to decide the appropriate discipline for these violations. The hearing panel recommended the respondent be suspended for a period of one year. The hearing panel further recommended that the suspension be stayed and the respondent be placed on probation for a period of two years according to the terms of the respondent's proposed probation plan, adding the suggestions of the hearing panel regarding auditing, completing the "Fundamentals of Trust Accounting" class, and reading the trust account handbook discussed above. After the hearing panel entered its recommendations, the respondent submitted an amended probation plan that now includes additional safeguards, structured practice supervision, and required audits and reporting of respondent's trust accounts that addresses the panel's concerns. At oral presentation before this court, the parties agreed to a two-year suspension and that the suspension be stayed and the respondent be placed on probation for a period of two years according to the terms of the respondent's proposed amended probation plan.

This court is not bound by any recommendations. *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). The court is cognizant that "'[o]ur primary concern must remain protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar.' [Citation omitted.]" *In re Jones*, 252 Kan. 236, 241, 843 P.2d 709 (1992).

After considering the evidence presented, all recommendations, and aggravating and mitigating circumstances, we conclude

appropriate discipline is that the respondent be suspended for a period of two years. The suspension is stayed conditioned on respondent's successful performance and completion of two years' probation, subject to the terms and conditions of the amended probation plan.

Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Darren E. Fulcher is suspended for a period of two years, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2024 Kan. S. Ct. R. at 278) for violations of KRPC 1.8 and 1.15. The suspension is stayed conditioned upon Fulcher's successful participation and completion of a two-year probation period. Probation will be subject to the terms set out in the amended probation plan. No reinstatement hearing is required upon successful completion of probation.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

CCR Nos. 1536-01-2017
1536-01-2018

In the Matter of JESSICA K. BELCHER, *Respondent*.

(552 P.3d 1213)

ORIGINAL PROCEEDING IN DISCIPLINE

COURTS—*Disciplinary Proceeding—Certificate Revoked.*

Original proceeding in discipline. Oral argument held September 15, 2023. Opinion filed July 26, 2024. Certificate revoked.

Todd N. Thompson, appointed disciplinary counsel for the State Board of Examiners of Court Reporters, argued the cause and was on the formal complaints for the petitioner.

No appearance by respondent.

PER CURIAM: These two cases are original proceedings in discipline filed by the State Board of Examiners of Court Reporters, in its prosecutorial capacity, against respondent, Jessica K. Belcher, a court reporter. These proceedings were heard by our court on September 15, 2023. The Board appeared by Todd Thompson, disciplinary counsel. Belcher did not appear.

BACKGROUND

On December 8, 2003, this court issued Belcher a certificate as a certified court reporter after she successfully passed an examination by the Board. In 2017, after it received the first of two complaints against Belcher, the Board appointed Todd Thompson to investigate and potentially prosecute disciplinary proceedings against her. On June 6, 2019, Thompson filed two separate Formal Complaints and Notices of Hearing, alleging respondent engaged in conduct that violated the provisions of Rules Adopted by the State Board of Examiners of Court Reporters, Supreme Court Rule 367 (2024 Kan. S. Ct. R. at 460), as follows:

- Board Rule No. 9.F.5 (2024 Kan. S. Ct. R. at 464)—Commission of any felony or misdemeanor if the misdemeanor is substantially related to the functions and duties of a

court reporter or if the misdemeanor erodes public confidence in the integrity of the court system; and

- Board Rule No. 9.F.11—Refusal to cooperate in an investigation conducted by the Board or obstructing such investigation.

The allegations in the Formal Complaints related to assertions contained in the two complaints and from Belcher's purported failure to cooperate with the Board's investigations into those complaints. After being served with the Formal Complaints and Notices of Hearing, Belcher filed no Answer and did not otherwise participate in any of the proceedings to date.

On February 3, 2021, the Formal Complaints came before the Board in its judicial capacity for hearing. The Board in its prosecutorial capacity appeared by Todd Thompson. Belcher did not appear. At the conclusion of the formal hearing, the Board made the following Findings of Fact and Conclusions of Law:

"*Findings of Fact.*

"[*1536-01-2017*]

"1. Respondent previously worked as a court reporter at the Wyandotte County District Court.

"2. Respondent was all times relevant hereto a court reporter subject to the Rules of the State Board of Examiners of Court Reporters.

"3. In October, 2017, Respondent attempted to blackmail her former boyfriend, deputy [M.B.], by threatening to 'out' him to 'everyone' and to 'blast [his] ass all over Facebook' if he did not pay her $2,000.

"4. Respondent threatened to publish 'pictures, emails, everything,' and demanded [M.B.] 'pay up' if he wanted her to 'keep [her] mouth closed.'

"5. Pictures of texts sent from Respondent to [M.B.] were admitted as Exhibit A, and read as follows:

'On October 25, 2017:
'[7:32 PM] Respondent: I need $2,000.
'[7:33 PM] Respondent: What's your daughter's number?
'[7:35 PM] Respondent: That's okay. I have her Facebook accounts.
'[7:36 PM] Respondent: If you don't pay me $2,000 by the end of this week, I'm letting everyone know about you, plain and simple.

'[7:36 PM] Respondent: I have pictures, emails, everything. If you want me to keep my mouth closed, pay up.

'[7:37 PM] Respondent: I will blast your ass all over my Facebook and I have thousands of friends. No sweat off my back, just elation.

'[7:39 PM] Respondent: You can make this difficult all you want, but please know I'm outing you if I don't get the money.

'[7:39 PM] Respondent:

'On October 26, 2017:

'[Unknown] Respondent: And you can talk to your friends all you want to. I will tell everyone that you and a lady named Crystal or Christina we're [*sic*] helping spread . . .'

"6. On or about October 28, 2017, Respondent sent to [M.B.'s] daughter's phone what he described as derogatory pictures.

"7. On November 16, 2017, the Honorable R. Wayne Lampson filed a Complaint against Respondent with the Board of Examiners of Court Reporters, Complaint No. 1536-01-2017.

"8. On December 6, 2017, the Board sent a copy of the Complaint to Respondent via certified mail to the Wyandotte County Courthouse.

"9. On January 8, 2018, the Board mailed an annual renewal letter to Respondent at the Wyandotte County Courthouse.

"10. On January 9, 2018, the Board sent copies of the Complaint to Respondent via certified mail to the Wyandotte County Courthouse and to Respondent's last known home address.

"11. On February 7, 2018, the Board sent a second annual renewal letter to Respondent to her last known home address.

"12. Respondent never responded to any attempt to contact her.

"13. The Board requested Special Investigator Terry Morgan to serve Respondent with the Complaint and with a letter from the Board.

"14. On June 23, 2018, Investigator Morgan attempted to contact Respondent at her last known home address.

"15. A woman outside the apartment building told Investigator Morgan that Respondent moved out several months ago and did not tell anyone where she was moving to.

"16. On June 26, 2018, Investigator Morgan located Respondent at the Clay County Courthouse in Liberty, Missouri, and served her with a letter from the Board containing the Lampson Complaint.

"17. Respondent read the Lampson Complaint, and said to Investigator Morgan: 'Fuck you. And tell Judge Lampson: "Fuck you!"'

"18. Respondent was given 20 days to provide a written answer to the Complaint.

"19. The 20-day period expired July 8, 2018, and Respondent made no response.

"*Conclusions.*

"1. The Board finds by clear and convincing evidence that Respondent violated the provisions of Rule 367 No. 9.F.5, and Rule 367 No. 9.F.11.

"2. Respondent violated . . . the Rules (i) when she attempted to blackmail her ex-boyfriend, [M.B.], by threatening to defame him on Facebook if he did not pay her $2,000 (a violation of two Kansas felony statutes, K.S.A. 21-6206 (Harassment by telecommunication device) and K.S.A. 21-5428 [Blackmail]); and (ii) by refusing to cooperate in an investigation conducted by the Board.

"*Recommendation.*

"The Board recommends that Respondent's certificate be revoked."

"[*1536-01-2018*]

"*Findings of Fact.*

"1. Respondent previously worked as a court reporter at the Wyandotte County District Court.

"2. Respondent was all times relevant hereto a court reporter subject to the Rules of the State Board of Examiners of Court Reporters.

"3. On July 14, 2018, Respondent committed several assaults at a shelter in Missouri.

"4. Respondent slammed a child's fingers in a door, and called the child an 'ugly asshole.'

"5. Respondent got into a verbal argument with [L.Y.], another resident at the shelter.

"6. Respondent became aggressive, and began shoving a shelter employee.

"7. In the lobby of the shelter, Respondent threatened multiple residents, stating: 'I can kill you.' 'You are all dope heads that use the system[,]' and 'I can get back in no problem.'

"8. Respondent told one girl she was 'going to fuck her up.'

"9. Lee's Summit Police Department officers arrived at the shelter to investigate.

"10. Officer Erica Osborn observed that [L.Y.'s] daughter's fingers were 'slightly swollen.'

"11. Officer Kent Miller observed Respondent driving away from the shelter, and stopped her.

"12. Respondent was transported by Officer Miller to detention.

"13. In detention, Respondent began telling Officer Osborn that she had a mental disorder and she was not sure if she was mentally stable.

"14. Officer Osborn began explaining to Respondent what Respondent was being charged with, and Respondent began screaming at Officer Osborn.

"15. Respondent was charged with two citations for assault: GOG #170439528 and GOG #170438529.

"16. Respondent was the named defendant in *Lee's Summit v. Jessica Kizziah Belcher*, Case No. 170439529.

"17. On October 2, 2018, Special Investigator William C. Delaney personally served Respondent with a copy of the Board's Complaint.

"18. The Complaint included a letter from the Board dated September 13, 2018, and a copy of the Lee's Summit Police Department's Complaint No. 1-18-006240, which details the events at the shelter.

"19. Respondent was given 20 days to provide a written answer to the Complaint.

"20. The 20-day period expired October 22, 2018, and Respondent made no response.

"*Conclusions.*

"1. The Board finds by clear and convincing evidence that Respondent violated the provisions of Rule 367 No. 9.F.5, and Rule 367 No. 9.F.11.

"2. Respondent acted in violation of the foregoing Rules by (i) verbally and physically assaulting individuals at a shelter in Lee's Summit, Missouri, including slamming a child's fingers in a door (a violation of Kansas battery statutes, K.S.A. 21-5413, had it occurred in Kansas), shoving a shelter employee, and verbally threatening people with physical violence and death; and (ii) by refusing to cooperate in the investigation conducted by the Board.

"*Recommendation.*

"The Board recommends that Respondent's certificate be revoked."

DISCUSSION

In court reporter discipline cases, "[t]he Board may, based upon clear and convincing evidence," impose certain discipline or recommend discipline for the Supreme Court to impose. Rule 367, Board Rule No. 9.E. of the Rules Adopted by the State Board of Examiners of Court Reporters. Based on the record, we find Belcher was sufficiently notified of each Formal Complaint and Notice of Hearing and also of the hearing before this court.

So we must first determine whether the Board's Findings of Fact are supported by clear and convincing evidence.

"Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."' "'In making this determination, the court does not weigh conflicting evidence, assess witness credibility, or redetermine questions of fact. If a disputed finding is supported by clear and convincing evidence, it will not be disturbed.'" [Citations omitted.]" *In re Morton*, 317 Kan. 724, 740, 538 P.3d 1073 (2023).

In our independent review of the record, and because the parties do not contest them, we find the Board's findings of fact are supported by clear and convincing evidence.

"As in any disciplinary proceeding, once we have ascertained the evidence sufficiently proved, we will consider that evidence, along with the parties' arguments to determine whether the rules applicable to court reporters were violated and, if so, what discipline to impose." *In re Rogers*, 318 Kan. 365, 369, 543 P.3d 549 (2024). Thus, we next turn to the Board's conclusions that respondent committed the violations of:

- Board Rule No. 9.F.5 (commission of any felony or misdemeanor if the misdemeanor is substantially related to the functions and duties of a court reporter or if the misdemeanor erodes public confidence in the integrity of the court system); and
- Board Rule No. 9.F.11 (refusal to cooperate in an investigation conducted by the Board or obstructing such investigation).

In Kansas, the crime of harassment by telecommunication device is a misdemeanor crime. K.S.A. 21-6206(b). Blackmail is defined as:

"intentionally gaining or attempting to gain anything of value or compelling or attempting to compel another to act against such person's will, by threatening to: (1) Communicate accusations or statements about any person that would subject such person or any other person to public ridicule, contempt or degradation; or (2) disseminate any videotape, photograph, film or image obtained in violation of K.S.A. 21-6101(a)(6) or (a)(8), and amendments thereto." K.S.A. 21-5428(a).

Blackmail is a felony crime. K.S.A. 21-5428(b). See also K.S.A. 21-5301(c) (attempt to commit felony scored as a felony).

Battery, as defined in K.S.A. 21-5413, is a crime of physical contact. It can be either a felony or misdemeanor, depending on the facts.

The Board carries the burden of proof to establish by clear and convincing evidence that its rules were violated, through (a) Belcher's commission of a felony; and/or (b) Belcher's commission of a misdemeanor that relates to her position as a court reporter or that erodes confidence in the integrity of the court system; and/or (c) Belcher's failure to cooperate in, or her obstruction of, the Board's investigation of the complaints against her.

We begin with Board Rule No. 9.F.11, which defines the prohibited conduct subject to Board investigation as: "Refusal to cooperate in an investigation conducted by the Board or obstructing such investigation." We conclude clear and convincing evidence establishes that Belcher violated Board Rule No. 9.F.11 by her refusal to cooperate in the Board's investigation of these two cases. Certified copies of the complaints were mailed to Belcher, but that mail was not picked up. Consequently, an investigator twice had to go and find Belcher so she could be personally served with the complaints in these two cases.

Although personally served, Belcher did not file any documents in her case or appear for her formal hearing before the Board. By affidavit the appellate record shows that Doug Shima, Clerk of the Appellate Courts, contacted Belcher in August 2023 by phone to inform her this disciplinary case was set for hearing before the Supreme Court on September 15, 2023, at 10:30 a.m. Belcher did not appear at the hearing before this court, nor did she provide any reason for her absence. From the time Belcher was first advised in May 2023 that her case was scheduled for hearing before this court, Belcher refused to cooperate with the Board's investigation. She filed no document responding to

the disciplinary complaints filed against her and failed to appear for her formal hearing before the Board. Her complete lack of participation in any part of these disciplinary proceedings constitutes clear and convincing evidence of a violation under Board Rule No. 9.F.11, refusing to cooperate in the investigation.

The findings of fact that relate to the Board's conclusions concerning Board Rule No. 9.F.5 are serious: respondent seems to have committed the crimes of misdemeanor harassment by telecommunication device in violation of K.S.A. 21-6206, felony blackmail in violation of K.S.A. 21-5428, and either misdemeanor or felony battery in violation of K.S.A. 21-5413 had it occurred in Kansas. But the rules require this court to determine whether those findings are sufficient to prove Belcher "committed" the crime or crimes. Citing due process concerns, some members of the court assert the only way to establish the Rule 9.F.5 violations is through criminal convictions, where the State is required to prove the crimes were "committed" beyond a reasonable doubt.

We acknowledge there was testimony concerning Belcher's actions that indicate crimes may have been committed for which she could be convicted. But the issue is not whether we approve of her actions; the issue is the degree to which the facts clearly and convincingly establish that a certain point of accountability has been crossed. We cannot tell from the rule where that point is located. Disciplinary proceedings based merely on charges that a court reporter committed a crime, without a subsequent conviction, must be careful not to presume guilt. This aligns with principles that ensure a court reporter is not disciplined without clear and convincing evidence of misconduct, which a mere charge does not provide. If conviction is required, conviction has not been proved, and thus Belcher would not have violated the disciplinary rule. Since resolution of this question would not change the discipline here, we will not address this issue and leave it unresolved for now.

The only remaining issue before us is the appropriate discipline for the respondent's violations. For attorney discipline, we receive guidance from the American Bar Association Standards for Imposing Lawyer Sanctions to help us determine appropriate discipline. That framework considers "four factors in determining punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual

or potential injury resulting from the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors." *In re Hodge*, 307 Kan. 170, 231, 407 P.3d 613 (2017).

While court reporter discipline has no counterpart to the ABA Standards for lawyers, we are similarly guided by their commonsense approach. Here, the ethical duty violated by respondent was her duty to cooperate with the Board's investigation of the complaints against her and not to obstruct the Board's efforts in that regard.

There was some evidence that respondent claimed to have mental problems. However, evidence submitted did not support that assertion. As to injury, Belcher's failure to file a response or appear for any hearing shows a lack of cooperation in the Board's resolution of these matters.

Finally, we address the existence of any aggravating or mitigating factors. Here, the Board did not address aggravating or mitigating factors other than in alluding to the serious nature of Belcher's proven misbehavior.

The Board may recommend the following discipline to the Kansas Supreme Court: (1) public reprimand; (2) imposition of a period of probation with special conditions which may include additional professional education or re-education; (3) suspension of the certificate; or (4) revocation of the certificate. Board Rule, No. 9.E.4 (2024 Kan. S. Ct. R. at 463). Here, the Board recommends revocation of Belcher's certificate.

Having considered all matters necessarily raised and proven, we find the appropriate discipline is revocation of Belcher's certificate as a certified court reporter.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Jessica K. Belcher be and is hereby disciplined by revocation of her certificate as a certified court reporter.

IT IS FURTHER ORDERED that this opinion be published in the official Kansas Reports.

No. 124,469

STATE OF KANSAS, *Appellee*, v. CRISTA G. HINOSTROZA, *Appellant*.

(552 P.3d 1202)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Concealing and Carrying Contraband into Correctional Facility—Voluntary Act.* An arrestee who consciously acts to conceal and carry contraband into a correctional facility acts voluntarily.

2 APPEAL AND ERROR—*Raising Constitutional Issues First Time on Appeal—Rule Requires Explanation Why Issue Properly before Court if Issue Not Raised Below*. Constitutional issues generally cannot be raised for the first time on appeal. Under Kansas Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36), a party must provide "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court."

3. CRIMINAL LAW—*Crime of Introducing Contraband into Correctional Facility—Arrestee's Admissions Sufficient for Proof of Crime.* When viewed in a light most favorable to the State, an arrestee's admissions to being asked on arrest about possession of a weapon, to intentionally not disclosing possession of a weapon, and to knowing that weapons were not allowed in a jail facility, are sufficient to allow a rational fact-finder to conclude the arrestee intended to introduce contraband into a correctional facility.

4. SAME—*Arrestee's Admission That Guns Not Permitted on Premises of Correctional Facility—Sufficient to Prove Crime.* An arrestee's admission to knowing that a correctional facility did not permit guns on its premises, when viewed in the light most favorable to the State, is sufficient to allow a rational fact-finder to conclude the arrestee had notice that a gun was considered contraband by the administration of the correctional facility.

5. SAME—*Crime of Contraband in Correctional Facility—A Notice by Administrators Required.* Administrators of correctional facilities must provide fair notice about what constitutes contraband in their facility under K.S.A. 21-5914. That warning need not be individualized.

Review of the judgment of the Court of Appeals in an unpublished opinion filed November 23, 2022. Appeal from Lyon District Court; W. LEE FOWLER, judge. Oral argument held September 12, 2023. Opinion filed August 2, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Brian Henderson, assistant county attorney, argued the cause, and *Laura L. Miser*, assistant county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: Crista Hinostroza requests review of the Court of Appeals decision affirming her conviction for trafficking contraband into a correctional facility. Law enforcement officers arrested Hinostroza and took her to jail where the contraband was discovered. She argues that she cannot be criminally liable because she did not commit a voluntary act, nor did she have the requisite culpable mental state to be guilty of trafficking contraband. She also contends she did not receive notice of what items were prohibited in the jail on the day of her arrest. Finally, Hinostroza challenges the jury instruction about trafficking contraband because the jury was not instructed that she must receive individualized notice of what items were prohibited in the jail.

We reject her arguments and affirm her conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Officers from the Lyon County Sheriff's department and the Emporia Police Department responded to a call about a person who refused to leave a property. The officers encountered Hinostroza, and discovered she had municipal warrants for her arrest. As an officer attempted to arrest Hinostroza, a brief struggle ensued during which the officer took Hinostroza to the ground. A deputy arrived and transported Hinostroza to the Lyon County jail in his patrol vehicle.

While putting Hinostroza in the car, the deputy asked Hinostroza whether she had any drugs or weapons. Hinostroza said she had a syringe but said nothing about a gun. The deputy did not perform a pat down search because he did not want to get poked by an uncapped needle. At the jail, the deputy drove his vehicle into the area where inmates are unloaded. Female officers met the patrol car and learned Hinostroza had reported a syringe in her bra. Female officers escorted Hinostroza, who was handcuffed, to a holding cell to conduct a search. The searching officer explained that Hinostroza "kind of hid herself in the corner and she said, 'I

will get it."' The officers would not allow Hinostroza to reach for any hidden item, and one of them "kind of got over in the corner and got her out." The officer felt the syringe along the side of Hinostroza's bra line and lifted the bra. The syringe and needle fell out and the officer discovered a small handgun tucked in the center of Hinostroza's bra.

The State charged Hinostroza with trafficking contraband (a weapon) into a correctional facility, possession of a weapon by a felon, interference with a law enforcement officer, and battery on a law enforcement officer. At trial, the State introduced into evidence several photographs of the jail and bodycam videos of the officers who responded to the scene, transported Hinostroza to jail, and searched her at the jail. In addition, those officers and the captain who oversees the jail testified. The captain explained the jail's contraband policy and testified it prohibited bringing a gun into the holding cell where it was found in Hinostroza's possession.

The State admitted photographs of signs at the jail warning against contraband. An officer testified that identical signs are posted on every entrance into the jail, in the intake area, and near the holding area where Hinostroza was taken upon her arrival at the jail. The officer explained that the sign near the holding area might have been blocked by the door when Hinostroza was brought in because officers came out the door to bring her directly from the patrol car to a holding cell. But the officer added that Hinostroza would have been brought in and out of the door shown in one of the photographs many times when she participated in a work release program during a previous incarceration four years earlier. Another photograph showed the identical sign in a room where work release inmates were brought on their return to the jail after they returned from their work assignment. The sign was located on a wall opposite a bench the inmates sat on while waiting to be searched upon their return. The officer explained that these signs had not changed during the time between when Hinostroza was a work release inmate and when she was arrested with the gun.

The signs had a large red stop sign at the top. Below the stop sign, it warned in large letters: "NO CONTRABAND PAST THIS POINT." Below that in smaller but still-large letters was a bullet-point list defining contraband as weapons, tobacco, illegal drugs, anything altered from original form, and any item that does not have prior approval of facility administration. At the bottom, again in larger letters,

the sign warned: "ANY PERSON BRINGING CONTRABAND PAST THIS POINT/ May be charged with K.S.A. 21-3826." K.S.A. 21-3826 was the trafficking contraband statute before a recodification caused the statute to be moved to its current location, K.S.A. 21-5914.

The officer also explained that Hinostroza signed a work release contract during her earlier incarceration that explained the contraband rules. The contract allowed Hinostroza to bring a wallet, keys, and work clothes back into the jail but nothing else. She would have been admonished not to have a weapon.

No evidence was admitted establishing that anyone orally advised Hinostroza on the day of her arrest that she could be charged with a crime for bringing a weapon into the jail.

After the State rested its case, Hinostroza testified. In response to her attorney's questions, she confirmed that she told the transporting officer she did not have a weapon on her. She explained that she was not comfortable with male officers touching her and if she told him she had a gun he probably would have grabbed it. But she thought he would not search her if he knew she had a concealed needle. She said she knew she would be safe with the jail's female staff who would search her when she got to the jail. Hinostroza testified that, once under arrest, she knew the jailers would find the gun. On cross-examination by the State, Hinostroza admitted she did not tell the female officer who searched her about the gun. Hinostroza also admitted that on the day of her arrest she knew she could not take a gun into the Lyon County jail.

A jury convicted Hinostroza of criminal possession of a firearm, trafficking contraband in a correctional facility, and interference with a law enforcement officer. The jury found Hinostroza not guilty of battery on a law enforcement officer.

Hinostroza appealed the conviction for trafficking contraband into a correctional facility, arguing the State failed to meet its burden to prove she intended to bring the firearm into the jail. She also argued the jury instruction on trafficking was incorrect because it did not require the jury to find Hinostroza received individualized notice that it was a crime to bring a firearm into the jail.

The Court of Appeals affirmed her convictions. *State v. Hinostroza*, No. 124,469, 2022 WL 17174546 (Kan. App. 2022) (unpublished opinion).

Hinostroza timely petitioned this court for review of the Court of Appeals' opinion affirming her convictions. We granted review and have jurisdiction under K.S.A. 20-3018(b) (allowing jurisdiction over petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions on petition for review).

ANALYSIS

In Hinostroza's petition for review, she argues the Court of Appeals panel erred in four ways. In the first three, she attacks the sufficiency of the evidence supporting her conviction for trafficking contraband, contending the State failed to prove: (1) she acted voluntarily because she was arrested and had no choice but to go to jail, (2) she possessed the requisite mental state because she did not intend to introduce contraband into the jail, and (3) that she had individualized notice of what constituted contraband. In her fourth issue she raises a jury instruction issue, contending the jury should have been instructed on the requirement of individualized notice.

ISSUE 1: SUFFICIENT EVIDENCE OF A VOLUNTARY ACT

The State charged Hinostroza under K.S.A. 21-5914(a)(1) with trafficking contraband—specifically, a weapon—into the Lyon County jail. K.S.A. 21-5914(a) defines the crime of trafficking contraband in a correctional institution as, "without the consent of the administrator of the correctional institution[,] . . . : (1) Introducing or attempting to introduce any item into or upon the grounds of any correctional institution."

She does not deny she had a gun in her bra when she was taken into the holding cell of the jail, but she contends the State failed to prove she committed a voluntary act.

Standard of Review

We review the first three issues under a well-established standard of review that directs us to examine "the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt." *State v. Buchanan*, 317 Kan. 443, 454, 531 P.3d 1198 (2023). In that review, we do not reweigh evidence, resolve evidentiary conflicts, or weigh

witness credibility. 317 Kan. at 454. The review includes direct and circumstantial evidence if the circumstantial evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021).

Hinostroza's arguments also require us to consider legal aspects of both the trafficking contraband statute and statutes that generally cover aspects of criminal liability. We exercise de novo review when interpreting statutes and considering questions of law. *State v. Edwards*, 318 Kan. 567, 570, 544 P.3d 815 (2024).

Applying those standards, we reject Hinostroza's arguments that the evidence was insufficient to support her conviction.

Discussion

Hinostroza's first argument is straightforward. She contends she did not voluntarily go to jail, and thus the State failed to prove she committed the voluntary act of introducing contraband into the jail.

The requirement that Hinostroza must have voluntarily acted when she brought contraband into the jail arises from a general principle of criminal liability codified at K.S.A. 21-5201(a), which explains that "[a] person commits a crime only if such person voluntarily engages in conduct, including an act, an omission or possession." No Kansas statute defines "voluntary act." But in *State v. Dinkel*, 311 Kan. 553, 465 P.3d 166 (2020) (*Dinkel I*), we explained that "voluntary conduct or a voluntary act is 'personal behavior' 'done by design or intention' or '[a] willed bodily movement.'" 311 Kan. at 559-60 (quoting Black's Law Dictionary 1886 [11th ed. 2019], defining "voluntary," and Black's Law Dictionary 369, defining "conduct"); see *State v. Dinkel*, 314 Kan. 146, 155, 495 P.3d 402 (2021) *(Dinkel II)* (discussing the definition).

Hinostroza cites *Dinkel I* to support her argument. There, a woman was charged with raping an underaged male victim. But the woman countered that the alleged victim had forcibly raped her. She contended that even though rape of a child is a strict liability crime she could not be liable because she committed a forced, not a voluntary, act. This court agreed the woman's theory should have been put before a jury because "evidence [the alleged victim] physically forced the sexual intercourse and [the woman] did not intend any of the bodily movements that resulted in the

sexual intercourse . . . is legally relevant to the voluntary act requirement." *Dinkel I*, 311 Kan. at 560.

Likewise, Hinostroza argues she was, in effect, physically forced to enter the jail because she was under arrest and in the control of officers. Thus, even though she brought a gun into the jail, it was not her voluntary act. In contrast, the State identifies the voluntary act in Hinostroza's case as "the decision to continue on into the jail with [a] weapon on her person." The Court of Appeals panel accepted the State's argument and explained: "While she probably did not hide the handgun intending to sneak it into jail, she did nothing to stop or prevent the introduction of the handgun into the jail when asked if she had any weapons, unlike admitting she had a syringe." *Hinostroza*, 2022 WL 17174546, at *3.

Hinostroza challenges this language and the panel's holding for two reasons. She contends it rests on an omission, not a voluntary act, and it requires her to incriminate herself in violation of the Fifth Amendment to the United States Constitution.

Voluntary Act

Discussing the first point, Hinostroza points out that criminal liability cannot usually rest on an omission. Indeed, K.S.A. 21-5201, after explaining that voluntary conduct is essential to criminality, states that "[a] person who omits to perform an act does not commit a crime unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act." K.S.A. 21-5201(b).

The act at issue is defined in the elements of the trafficking contraband statute, K.S.A. 21-5914(a)(1) as (1) introducing or attempting to introduce (2) any item (3) into a correctional facility (4) without the consent of the administrator. It thus requires commission, not omission. Here, the evidence considered in the light most favorable to the State, supported a conclusion that Hinostroza committed the act of trafficking by intentionally concealing a gun and bringing it into the facility. Under the Court of Appeals holding, her concealment occurred through nondisclosure. Even so, she is being penalized for committing a voluntary act of trafficking contraband by concealing the gun. While the panel's discussion did not refer to K.S.A. 21-5201(b), it did illustrate how

disclosure can avoid commission of the crime by contrasting the facts underlying two decisions of other panels, both of which briefly discuss voluntariness while focusing on whether the State met its burden to show the defendant intended to traffic the contraband.

In *State v. Conger*, No. 92,381, 2005 WL 1561369 (Kan. App. 2005) (unpublished opinion), the panel affirmed a trial court's dismissal of trafficking contraband charges where the defendant voluntarily took a legally prescribed pill from her shoe and handed it to the booking officer before being asked if she had contraband. The panel analyzed whether the State presented sufficient evidence of intent. It concluded that by handing over the contraband the defendant "did not show any criminal intent to introduce contraband into the correctional institution" and the State had not established probable cause at the preliminary hearing. 2015 WL 1561369, at *4. After discussing *Conger*, the *Hinostroza* panel discussed how those facts related to a voluntary act, noting that while the *Conger* defendant, like Hinostroza, entered the jail involuntarily, the *Conger* defendant, unlike Hinostroza, voluntarily handed over the contraband and did not attempt to hide the contraband past the book-in point. 2022 WL 17174546, at *3.

The panel then discussed *State v. Thompson*, No. 111,932, 2015 WL 9286794 (Kan. App. 2015) (unpublished opinion), which the panel concluded was more like Hinostroza's case. There, the defendant was arrested after a car stop that resulted in police finding marijuana in her car. Before the officers transported the defendant to jail, one of them advised her of the consequences of bringing illegal contraband into jail and asked her whether she had anything illegal on her person. She denied having anything, but police found marijuana when they searched her at the jail. After a preliminary hearing, the trial court dismissed the trafficking charges.

The State appealed, and the defendant relied on *Conger*. The Court of Appeals panel noted that the only similarity between the circumstances of *Thompson* and *Conger* was that "both defendants were arrested and taken to jail involuntarily." 2015 WL 9286794, at *3. Otherwise, the facts differed because the *Conger* arrestee

disclosed the contraband once at the jail while the *Thompson* arrestee did not. The panel found this significant and determinative. Using the words the *Hinostroza* panel would echo, the panel concluded that, while the defendant likely did not hide the marijuana on her person with the thought she might later be going to jail, "she did nothing to stop or prevent the introduction of the marijuana into the correctional institution." 2015 WL 9286794, at *3. The *Thompson* panel then approvingly quoted from the dissenting opinion in *State v. Lowe*, No. 110,103, 2015 WL 423664, *5 (Kan. App. 2015) (unpublished opinion) (Atcheson, J., dissenting), in which the judge said K.S.A. 21-5914(a)(1) "'would apply to the person who bakes a hacksaw blade in a cake and mails it to a relative in jail. *It also criminalizes the efforts of a person being booked into jail who attempts to secrete and bring in contraband*.'" *Thompson*, 2015 WL 9286794, at *3. Because the defendant in *Thompson* also attempted to bring contraband into the jail, the panel concluded the State had established probable cause she had the necessary intent to traffic contraband. 2015 WL 9286794, at *3.

Neither the *Conger* nor the *Thompson* panels considered voluntariness separate from intent, and this court has not previously considered the issue. Noting this, Hinostroza contends the panel in her case cited no legal authority that directly discussed the issue she raises. Even if Kansas courts have not directly addressed the voluntary act question, courts in our sister states have and a majority hold that arrestees commit a voluntary act of trafficking contraband in a jail facility when they continue to conceal contraband after an arrest. See *Beltz v. State*, 551 P.3d 583, 598-99 n.33 (Alaska Ct. App. 2024) (collecting and discussing cases).

The majority view is that "an arrestee . . . makes a voluntary choice to possess the contraband within the correctional facility when she continues to conceal, fails to disclose, the contraband on her person." *State v. Gneiting*, 167 Idaho 133, 137, 468 P.3d 263 (2020). *Gneiting*, in stating the majority view, required that the arrestee have notice that bringing an illegal substance into a correctional facility will constitute a separate offense. 167 Idaho at 137. For support it cited *Barrera v. State*, 403 P.3d 1025, 1028-29

(Wyo. 2017). More recently, the Wyoming Supreme Court clarified that *Barrera* did not "hold that a specific advisement was required before a finding of voluntariness could be made." *Borja v. State*, 523 P.3d 1212, 1216 (Wyo. 2023). Instead, in *Borja*, the court looked at other evidence, including the defendant's own testimony, to conclude there was evidence he voluntarily took methamphetamine into a jail. 523 P.3d at 1216-17.

Courts adopting the majority view that an arrestee can act voluntarily by concealing contraband through nondisclosure include ones applying definitions of "voluntary act" like the one we adopted in *Dinkel I*, 311 Kan. at 559-60—that is, "voluntary conduct or a voluntary act is 'personal behavior' 'done by design or intention' or '[a] willed bodily movement.'" For example, in Arizona, a voluntary act is one where the "defendant was performing a bodily movement 'consciously and as a result of effort and determination' when he carried the contraband into the jail." *State v. Alvarado*, 219 Ariz. 540, 545, 200 P.3d 1037 (Ct. App. 2008). And Alaska defines "voluntary act" "as 'a bodily movement performed consciously as a result of effort and determination.'" *Beltz*, 551 P.3d at 586. Several other courts besides *Gneiting* have reached similar conclusions and, in doing so, have emphasized that an arrestee has a choice. For example, the Ohio Supreme Court explained, "[T]the fact that [the defendant's] entry into the jail was not of his volition does not make his conveyance of drugs into the detention facility an involuntary act. He was made to go into the detention facility, but he did not have to take the drugs with him." *State v. Cargile*, 123 Ohio St. 3d 343, 345, 916 N.E.2d 775 (2009). And the Wyoming Supreme Court explained arrestees have a choice about whether they will introduce contraband and that choice "exists wholly independent of whether one chooses to be in a jail." *Barrera*, 403 P.3d at 1029.

Like Hinostroza, many defendants in majority states have argued for the minority view, which holds that arrestees who have contraband in their possession when brought into jail have involuntarily introduced the contraband. Hinostroza refers us to the courts in the minority. She discusses *State v. Tippetts*, 180 Or. App. 350, 43 P.3d 455 (2002), and cites but does not discuss *State v. Cole*, 142 N.M. 325, 327-28, 164 P.3d 1024 (Ct. App. 2007);

State v. Sowry, 155 Ohio App. 3d 742, 745-46, 803 N.E.2d 867 (2004); and *State v. Eaton*, 168 Wash. 2d 476, 487-88, 229 P.3d 704 (2010).

Five years after the Ohio Court of Appeals decided *Sowry*, the Ohio Supreme Court adopted the majority view by holding that a person who is taken to a detention facility after arrest and who at the time of entering the facility possesses contraband has voluntarily conveyed the contraband onto the grounds of a detention facility. *Cargile*, 123 Ohio St. 3d 343. While *Cargile* did not explicitly overrule *Sowry*, it did so implicitly. As for the other three cases, courts adopting the majority view have persuasively explained the reasons they reject a rule that being under arrest means the act of taking contraband into the jail is involuntary. They cite several reasons.

For starters, *Tippetts*, which is often cited as the leading case representing the minority view, analyzes a different theory of voluntariness than typically argued by prosecutors, including those who prosecuted Hinostroza. As the *Tippetts* court explained, "[i]n the state's view, as long as defendant was aware that he possessed the marijuana when the officers took him into the jail, that fact alone provides a sufficient basis for saying that he voluntarily introduced the marijuana into the jail." 180 Or. App. at 353. The *Tippetts* court distinguished this from the argument the prosecution often makes, and the State makes here—that the voluntary act was the decision, after arrest, to conceal the contraband and bring it into a jail. 180 Or. App. at 353 n.3. Given the difference in the arguments and the fact that the *Tippetts* court did not address the issue posed in cases before them, courts adopting the majority view have often distinguished *Tippetts* and rejected its application. See, e.g., *Gneiting*, 167 Idaho at 139-40. Likewise, courts adopting the majority view have distinguished *Eaton* because there was no evidence the defendant made a conscious choice to bring the contraband into the facility. See, e.g., *Gneiting*, 167 Idaho at 139-40.

This leaves only the decision by the New Mexico Court of Appeals in *Cole*, which reached its decision after citing to *Tippetts* and *Sowry*. It concluded that "[i]t is of no moment, as the State argues, that Defendant could have avoided the charge of bringing

contraband into a jail by admitting to the booking officer that he possessed marijuana. The dispositive issue is that Defendant cannot be held liable for bringing contraband into a jail when he did not do so voluntarily." *Cole*, 142 N.M. at 328.

Courts have rejected *Cole*'s holding after determining it conflicts with legislative intent expressed by the plain language of their state's statutes. These courts have distinguished *Tippetts* and *Eaton* for the same reason. For example, the Arizona Court of Appeals in *Alvarado*, 219 Ariz. at 545, observed that if it adopted the "defendant's interpretation, the statute would only apply to non-inmates, such as employees or visitors, who 'voluntarily' enter the jail while carrying drugs. The statute is not so limited and we decline, under the guise of interpretation, to modify the statute in a manner contrary to its plain wording." Likewise, in *Gneiting*, 167 Idaho at 140, the court concluded "[i]t would be inappropriate to read a 'voluntary presence in a correctional facility' element into the statute when its plain language explicitly applies to prisoners, whose presence within a correctional facility is not voluntary." And the Wyoming Supreme Court held that its state legislature "gave no sign" in its statute, which prohibited "any person" from introducing contraband, that "it intended to exclude arrestees and inmates from the reach of that term, but adoption of the minority position would effectively create such an exclusion under the guise of statutory interpretation." *Barrera*, 403 P.3d at 1029.

While the Kansas statute does not explicitly refer to prisoners like the statutes in Arizona and Idaho, K.S.A. 21-5914 is comparable to the Wyoming statute because it has no limitation on the statute's reach. It simply states that trafficking in contraband is introducing or attempting to introduce any item into a correction facility. We, too, would have to read words into the Kansas statute to reach the result requested by Hinostroza, and we decline to do so. See *Edwards*, 318 Kan. at 572 (when statute's language is unambiguous, courts do not add or ignore words).

The *Hinostroza* panel's decision aligned with the majority view. We agree and hold that an arrestee who consciously acts to conceal and carry contraband into a correctional facility acts voluntarily.

Here, viewing the evidence in the light most favorable to the State, a rational fact-finder could have found that Hinostroza engaged in a voluntary action by concealing the contraband on her person and introducing the prohibited item into the Lyon County jail. Hinostroza not only told the transporting officer she had no weapon, but she also continued to conceal the gun once at the jail. In the presence of female officers she testified to trusting, she hunched herself into a corner making the search more difficult and insisted she had and should retain control over the items hidden on her person by telling the officer, "I will get it"—never revealing that "it" included a gun. In the light most favorable to the State, a rational fact-finder could conclude she concealed the gun when asked on arrest whether she had any weapons and continued to conceal the gun when in the holding cell in the presence of the female officers. She thus could be found to have committed a voluntary act.

Fifth Amendment

We turn now to Hinostroza's second objection to the panel's conclusion that she acted voluntarily by bringing the gun into the jail because she did "nothing to stop or prevent the introduction of the handgun into the jail when asked if she had any weapons, unlike admitting she had a syringe." *Hinostroza*, 2022 WL 17174546, at *3. In her appellate brief, Hinostroza urged the Court of Appeals to reject the majority view on voluntariness, in part, because the majority view raises Fifth Amendment implications by holding that the only way for Hinostroza to have avoided committing introducing contraband in a jail upon her arrest was for her to confess to a separate crime, possession of a firearm by a felon. We conclude Hinostroza has not preserved her argument for our review.

Throughout the trial and on appeal, the theory of the State's case has consistently been that Hinostroza decided to enter the jail facility with the contraband concealed and she thus made a voluntary intentional act. *Thompson* laid out the State's theory that criminal liability could attach if "she did nothing to stop or prevent the introduction of the [contraband] into the correctional institution." 2015 WL 9286794, at *4. Hinostroza thus could have and needed

to present this Fifth Amendment issue to the trial court to preserve the issue for our review. But she did not.

Constitutional issues generally cannot be raised for the first time on appeal. Under Kansas Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36) a party must provide "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court." Hinostroza provides no citation or explanation. And to the extent Hinostroza's argument relates to the question asked of her by the transporting officer, she failed to make a timely objection, and in fact later testified to the same fact herself. She thus failed to preserve any evidentiary argument. See K.S.A. 60-404 ("A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.").

Hinostroza's failure to raise the issue below and argue an exception before us is fatal to her appeal on this issue. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018).

ISSUE 2: SUFFICIENT EVIDENCE OF INTENT

Hinostroza also argues the State failed to present sufficient evidence that she intended to introduce a gun into the jail when she was arrested and taken to jail involuntarily. A culpable mental state is an essential element of every crime. K.S.A. 21-5202(a). But K.S.A. 21-5914 does not specify a mental state. Despite this, no party argues about what culpable mental state is prescribed under K.S.A. 21-5202(d). We thus accept without deciding that the State had to prove Hinostroza acted intentionally—the culpable mental state the State charged. As the trial judge instructed the jury, a person acts intentionally "when it is such person's conscious objective or desire to engage in the conduct or cause the result." K.S.A. 21-5202(h). Intent may be inferred from circumstantial evidence. *State v. Frantz*, 316 Kan. 708, 741 521 P.3d 1113 (2022).

The Court of Appeals panel analyzed the evidence and highlighted Hinostroza's decision to not disclose the gun and her knowledge that the gun was contraband and not allowed in the Lyon County jail. *Hinostroza*, 2022 WL 17174546, at *4. In holding this evidence was sufficient to establish intent, the *Hinostroza* panel again relied on *Conger* and *Thompson*. *Thompson*, 2015 WL 9286794, at *4 (holding State failed to establish probable cause because, "[w]hile it is true that Thompson probably did not place the marijuana in her underwear with the intention of trying to sneak it into jail, she did nothing to stop or prevent the introduction of the marijuana into the correctional institution"); *Conger*, 2005 WL 1561369, at *4 (State failed to provide sufficient evidence of intent where defendant voluntarily handed over medication).

Here, we have Hinostroza's own testimony establishing (1) she was asked if she had a weapon and she failed to disclose the gun hidden in her bra; (2) she made the conscious choice to conceal the weapon; and (3) she knew she could not bring a weapon into the jail. Hinostroza explained her thought process, stating she did not want to tell the male officer because she did not want him to touch her. While many could empathize with that reasoning (and setting aside the question of whether even a good excuse is enough), Hinostroza, once in the presence of female officers, made bodily movements that could be viewed as an attempt to actively conceal the gun and she never disclosed that there was also a gun in her bra. A rational fact-finder thus could conclude she intended to possess, conceal, and maintain control of the gun once in the holding cell located within the premises of the Lyon County jail.

Viewing the evidence in the light most favorable to the State, a rational fact-finder could conclude that Hinostroza intentionally introduced an item not authorized by the jail administrator into the Lyon County jail.

ISSUE 3: THE STATE PRESENTED SUFFICIENT EVIDENCE OF NOTICE

Hinostroza argues the State failed to prove the jail provided her with notice that the gun was contraband. The Court of Appeals

panel rejected her argument for at least three reasons: signs were posted in the jail that specifically said weapons were prohibited; although providing an outdated statutory reference, the signs warned of possible criminal penalties; and "Hinostroza admitted she was familiar with the jail rules and was placed on notice weapons were not permitted." 2022 WL 17174546, at *5.

Although K.S.A. 21-5914, which defines the crime of trafficking contraband in an institution, does not require notice, the parties and the Court of Appeals accept that it is an element. So, too, has the pattern instruction committee. See PIK Crim. 4th 59.110 (2019 Supp.). And, consistent with the pattern instruction, the trial judge instructed the jury that it had to find beyond a reasonable doubt that Hinostroza "was provided notice that the weapon was forbidden within or upon the grounds of the" jail. This inclusion of notice as an element likely arises because of this court's discussion of K.S.A. 21-3826 (now codified at K.S.A. 21-5914) in *State v. Watson*, 273 Kan. 426, 435, 44 P.3d 357 (2002).

In *Watson*, the issue was whether the statute was unconstitutional because the Legislature had delegated to the administration of each correctional institution the task of defining what items were contraband. This court upheld the constitutionality of the provision, concluding it was "constitutionally permissible for the legislature to vest the administrators of correctional institutions with the authority to determine what items constitute contraband" as long as "[a]dministrators of correctional facilities . . . provide persons of common knowledge adequate warning of what conduct is prohibited." 273 Kan. at 435.

Because the trial judge instructed it had to find that Hinostroza had notice, we will assume along with the parties that notice is thus an element to be determined and not a potential due process defense that a defendant might raise. Basing the notice requirement on *Watson*, the requirement would simply be that there is "fair notice." 273 Kan. at 435.

Hinostroza relies on *State v. Taylor*, 54 Kan. App. 2d 394, 396, 401 P.3d 632 (2017), to argue something more is required. In *Taylor*, a Court of Appeals panel cited to *Watson* as authority for an "individualized notice" requirement, a term not used in *Watson* and not defined in *Taylor*. See *Watson*, 273 Kan. at 435; *Taylor*,

54 Kan. App. 2d at 396, 422, 426-27. Hinostroza seems to argue the notice requirement meant that the jail administration needed to tell her on the day of arrest that a gun—as opposed to the word "weapon" used on the signs—was contraband. We decline to impose unstated temporal or specificity requirements beyond *Watson*'s requirement of letting persons of common knowledge know what contraband was prohibited.

We have no hesitation in concluding that people of common knowledge would know that "weapon" includes a "gun." And the State presented evidence that Hinostroza had received notice, including her own testimony that she knew she could not bring a gun into the Lyon County jail.

Just as some of our sister state courts have concluded, we will not read into the statute any requirement for a specific type of advisement. See, e.g., *Beltz*, 551 P.3d at 591 (holding "the lack of affirmative warnings in a given case is not necessarily dispositive, as the requisite awareness may be proven through other evidence, including but not limited to, a defendant's pre- and post-arrest conduct and statements"); *Borja*, 523 P.3d at 1215-17 (holding evidence sufficient despite lack of a specific advisement because other evidence supported jury finding that defendant understood bringing controlled substance into jail was illegal).

A reasonable fact-finder could rely on Hinostroza's admission alone to find she received notice that a weapon was prohibited in the Lyon County jail. But there was more. The jury heard the officer's testimony that the jail put Hinostroza on notice during her previous incarceration that she could not bring a weapon into the jail. Based on our review of the evidence in a light most favorable to the State, we hold that a rational fact-finder could have found beyond a reasonable doubt that Hinostroza had received notice that the weapon was forbidden within or upon the grounds of the jail by the jail's administration.

ISSUE 4: NO JURY INSTRUCTION ERROR

Finally, Hinostroza argues the trial judge erred by failing to give an unrequested jury instruction telling the jury it had to find that Hinostroza received individualized notice about contraband.

To determine whether the judge erred, among other things, Hinostroza must show that the instruction she now proposes would have been legally appropriate. See *State v. Sinnard*, 318 Kan. 261, 291, 543 P.3d 525 (2024).

To do so, Hinostroza again relies on *Taylor* and its one reference to "individualized notice." But as we have discussed, we find no basis for that statement in the statute or in *Watson*, and the *Taylor* court offered no explanation for its use of the phrase or of its meaning. Nor does Hinostroza suggest what might be the basis for any requirement beyond notice that advises of what constitutes contraband. See *Watson*, 273 Kan. at 435. We thus conclude the trial judge committed no error by not sua sponte giving an instruction requiring the jury find that Hinostroza had received individualized notice.

CONCLUSION

We determine none of Hinostroza's arguments require us to reverse her conviction for trafficking contraband. We thus affirm her conviction.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

State v. Showalter

No. 124,598

STATE OF KANSAS, *Appellee*, v. RICHARD DANIEL SHOWALTER *Defendant*, (MATTHEW DOUGLAS HUTTO), *Appellant*.

(553 P.3d 276)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fifth Amendment—Liberal Construction by Supreme Court.* The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself or herself. The United States Supreme Court has long held this provision is to be liberally construed.

2. SAME—*Fifth Amendment Privilege against Self-Incrimination—Application to States.* The Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment to the United States Constitution.

3. KANSAS CONSTITUTION—*Section 10 Provides Same Protections against Self-Incrimination as Fifth Amendment.* Section 10 of the Kansas Constitution Bill of Rights provides that no person shall be a witness against himself or herself and extends the same protections against self-incrimination as the Fifth Amendment.

4. CONSTITUTIONAL LAW—*Fifth Amendment—Two Distinct Privileges against Incrimination.* The Fifth Amendment provides two distinct privileges against self-incrimination: (1) that of criminal defendants not to be compelled to testify at their own trial and (2) that of any person not to be compelled to answer questions which may incriminate him or her in future criminal proceedings.

5. SAME—*Privilege against Self-Incrimination—Application.* The privilege against self-incrimination protects a person from being forced to disclose information which would support a criminal conviction against that person as well as that which would furnish a link in the chain of evidence that could lead to a criminal prosecution of that person.

6. SAME—*Fifth Amendment Privilege—Standard for Determining Whether Privilege Protects Witness Being Compelled to Testify.* The proper standard to determine whether the Fifth Amendment privilege protects a witness from being compelled to testify is whether the testimony sought exposes the witness to a legitimate risk—meaning a real and appreciable danger—of incrimination, not a hypothetical or speculative one. The witness' fear of self-incrimination must be objectively reasonable and the threat discernible for the privilege to apply.

7. CRIMINAL LAW—*Guilty Plea—Constitutes Limited Waiver of Privilege against Self-Incrimination for Establishing Guilt.* A guilty plea constitutes

a limited waiver of the privilege against self-incrimination for purposes of establishing guilt. A defendant who waives the privilege by guilty plea retains it for sentencing and until the risk of incrimination terminates.

8. SAME—*Determination of Availability of Privilege against Self-Incrimination.* When determining the availability of the privilege against self-incrimination, the risk-of-incrimination standard applies equally when the information sought relates to a witness' prior conviction by verdict or by guilty plea. Language to the contrary in *State v. Longobardi*, 243 Kan. 404, 756 P.2d 1098 (1988), and *State v. Bailey*, 292 Kan. 449, 255 P.3d 19 (2011), is overruled.

9. SAME—*Fifth Amendment Privilege against Self-Incrimination—Remains Available When Appeal Not Final or Right to File Appeal Not Expired.* The Fifth Amendment privilege against self-incrimination remains available to a defendant or witness who has filed a direct appeal in a criminal case and a decision on appeal is not final (or whose right to file a direct appeal has not expired) when the testimony sought exposes the witness to a legitimate risk of incrimination.

10. SAME—*No Right to Take Direct Appeal When Conviction from Plea of Guilty or No Contest.* A defendant cannot take a direct appeal from a conviction flowing from a plea of guilty or no contest. The right to take such a direct appeal is one of the rights surrendered when the plea is entered.

11. SAME—*Motion to Withdraw Plea after Sentencing—Direct Appeal Allowed.* A defendant who pleads guilty and moves to withdraw the plea after sentencing pursuant to K.S.A. 22-3210(d)(2) can directly appeal the district court's denial of that motion.

12. SAME—*Fifth Amendment Privilege against Self-Incrimination—Remains Available if Postsentence Motion to Withdraw Plea Not Final.* The Fifth Amendment privilege against self-incrimination remains available to a defendant or witness who pled guilty but has filed a postsentence motion to withdraw plea pursuant to K.S.A. 22-3210(d)(2) and (e) and a decision on the motion or a decision on the timely appeal of denial of the motion is not final, when the testimony sought exposes the witness to a legitimate risk of incrimination.

13. SAME—*Conviction Final When Judgment of Conviction Rendered and Time for Final Review has Passed.* A conviction is generally not considered final until the judgment of conviction has been rendered, the availability of an appeal has been exhausted, and the time for any rehearing or final review has passed.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 675, 522 P.3d 292 (2022). Appeal from Shawnee District Court; DAVID B.

DEBENHAM, judge. Oral argument held September 11, 2023. Opinion filed August 2, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the sentence is vacated.

Shawna R. Miller, of Miller Law Office, LLC, of Holton, argued the cause and was on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: Matthew Douglas Hutto pled guilty to two counts of felony murder and received two consecutive hard 25 life sentences. After sentencing, Hutto filed a pro se motion to withdraw his pleas. The district court denied his motion and this court affirmed. In the interim period between this court announcing its decision and the deadline to file a motion for rehearing or modification, Hutto refused to testify against Richard Daniel Showalter, his accomplice in the felony murders, by invoking his Fifth Amendment privilege against self-incrimination. The district court ruled Hutto no longer had a privilege against self-incrimination, but Hutto still refused to testify. The district court entered an order finding Hutto in contempt and imposed a sanction of six months in jail.

Hutto appealed the district court's finding of direct contempt and the sanction. Relying on *State v. Smith*, 268 Kan. 222, 235, 993 P.2d 1213 (1999), Hutto argued he retained the privilege against self-incrimination at the time he refused to testify because he had not yet exhausted all methods of attacking his convictions and sentences, including a Supreme Court Rule 7.06 motion for rehearing or modification of this court's decision on his request to withdraw his guilty pleas and a possible K.S.A. 60-1507 motion for habeas corpus relief. (2024 Kan. S. Ct. R. at 51). A Court of Appeals panel rejected Hutto's argument, questioning *Smith*'s holding given the weight of our precedent establishing defendants lose their privilege against self-incrimination at sentencing when they plead guilty and do not move to withdraw their plea before sentencing. *State v. Showalter*, 62 Kan. App. 2d 675, 687-90, 522 P.3d 292 (2022). Because Hutto did not move to withdraw his guilty pleas before sentencing, the panel found the district court

correctly directed Hutto to testify because he lost his privilege against self-incrimination when sentenced for those crimes. Thus, the panel affirmed the finding of direct contempt for violating the district court's directive. 62 Kan. App. 2d at 692-93.

On review, we hold the proper standard to determine whether the Fifth Amendment privilege protects a witness from being compelled to testify is whether the testimony sought exposes the witness to a legitimate risk—meaning a real and appreciable danger—of incrimination, not a hypothetical or speculative one. The witness' fear of self-incrimination must be objectively reasonable and the danger discernible for the privilege to apply.

In line with controlling federal precedent on availability of the privilege when there is a legitimate risk of incrimination present, including after a guilty plea, we hold the risk-of-incrimination standard applies equally when the information sought relates to a witness' prior conviction by verdict or by guilty plea, overruling *State v. Longobardi*, 243 Kan. 404, 409, 756 P.2d 1098 (1988), and *State v. Bailey*, 292 Kan. 449, 461-63, 255 P.3d 19 (2011).

Consistent with this standard and the weight of authority across the country, we hold the Fifth Amendment privilege remains available to a defendant or witness who filed a direct appeal in a criminal case and a decision on appeal is not final (or whose right to file a direct appeal has not expired), when the testimony sought exposes the witness to a legitimate risk of incrimination.

Finally, we have construed a defendant's statutory right to withdraw a guilty plea postsentence under K.S.A. 22-3210(d)(2) as implying a right to directly appeal the district court's denial of that motion. In such a case, compelled testimony relating to the underlying crime could expose the defendant to a legitimate risk of incrimination if the relief was granted and the defendant was retried. Therefore, we hold the privilege similarly remains available to a defendant or witness who pled guilty but has filed a postsentence motion to withdraw plea pursuant to K.S.A. 22-3210(d)(2) and (e) and a decision on the motion or a decision on the timely appeal of denial of the motion is not final, when the testimony sought exposes the witness to a legitimate risk of incrimination.

Applying this standard and our related holdings to the facts here, we conclude Hutto faced a legitimate risk of incrimination if forced to testify to the specific question posed to him in Showalter's trial about how he caused the victims to die. At that time, Hutto still had a legally viable opportunity to challenge this court's decision denying him relief by filing a motion for rehearing or modification as part of his direct appeal. And if such relief was granted, Hutto's response to the question in Showalter's trial could have incriminated him in a new trial. Having properly invoked the Fifth Amendment privilege, Hutto could not be punished for refusing to testify. We therefore reverse the district court's order finding Hutto in contempt and vacate the sanction of six months in jail.

FACTS

The relevant facts relating to Hutto's felony-murder convictions are detailed in *State v. Hutto*, 313 Kan. 741, 490 P.3d 43 (2021). Highly summarized, the State charged Hutto with two counts of premeditated first-degree murder and single counts of conspiracy to commit first-degree murder and aggravated burglary. The charges were based on evidence suggesting Hutto and three other men took part in the July 2018 murders of Lisa Sportsman and 17-year-old J.P. The State later amended its complaint to include two alternative counts of felony murder and one count each of attempted first-degree murder and possession of methamphetamine. Hutto told law enforcement he and the other men traveled from Greenleaf, Kansas, to Topeka, Kansas, to kill Sportsman. Hutto claimed Showalter committed both murders but admitted he helped Showalter enter Sportsman's house and followed Showalter inside. 313 Kan. at 742-44.

On January 18, 2019, Hutto pled guilty to the two counts of felony murder in exchange for the State's dismissal of the remaining charges. The district court sentenced Hutto to two consecutive hard 25 life sentences on May 10, 2019. *Hutto*, 313 Kan. at 744.

Twelve days after he was sentenced, on May 22, 2019, Hutto filed a pro se motion with the district court seeking posttrial relief on several grounds, including various trial errors, prosecutorial misconduct, and ineffective assistance of his plea counsel he

claimed resulted in a manifest injustice that justified withdrawing his guilty pleas. *Hutto*, 313 Kan. at 744. The district court construed Hutto's motion as a postsentence motion to withdraw a guilty plea, which is permitted under K.S.A. 22-3210(d)(2). The court appointed new counsel, held an extensive hearing on the motion, and eventually found against Hutto on all points raised in his motion, issuing its decision on February 11, 2020. Less than a week later, on February 17, 2020, Hutto filed an appeal of the district court's denial of his postsentence motion to withdraw his guilty pleas.

We affirmed the district court in an opinion filed on July 9, 2021. *Hutto*, 313 Kan. at 751. Just days later, and before expiration of the deadline for filing a Supreme Court Rule 7.06 motion for rehearing or modification of this court's decision on his request to withdraw his guilty pleas, a jury trial began for Showalter, Hutto's felony-murder accomplice. The State subpoenaed Hutto to testify and granted him "use immunity" to do so. But when the State called him to the stand on July 13, 2021, he refused. Outside the jury's presence, the State questioned Hutto about his felony-murder convictions. When the prosecutor asked Hutto why he was convicted of felony murder, Hutto responded, "I told you guys that I'm not testifying. I plead the Fifth." The prosecutor advised the district court that Hutto "no longer ha[d] an evidentiary privilege to refuse to testify" because he was already sentenced for his crimes and because this court affirmed the denial of his postsentence motion to withdraw his guilty pleas.

The district court agreed and directed Hutto to testify. The court warned Hutto that, if he refused, it could find him in contempt of court and impose up to a six-month jail sanction. Despite the court's warning, Hutto still refused to testify, claiming there was no reason to do so because he was already serving "50-plus years" for his felony-murder convictions. As a result, the court found Hutto in direct contempt of court. The court did not immediately impose sanctions, opting instead to allow Hutto the opportunity to purge himself of contempt later in the proceedings. But when the State recalled Hutto to the stand again on July 16, 2021, he still refused to testify. Given the court's prior contempt ruling,

it ordered Hutto to serve 6 months in jail as a sanction, independent of his two existing, consecutive hard 25 life sentences.

Hutto appealed the district court's finding of direct contempt, arguing the court erred in deciding he no longer had a Fifth Amendment privilege against self-incrimination when he refused to testify at Showalter's trial. Relying on *Smith*, Hutto asserted that a person continues to have a Fifth Amendment privilege against self-incrimination until the person has exhausted all methods of attacking an underlying criminal conviction and sentence, which in his case would include a motion for rehearing or modification with this court under Supreme Court Rule 7.06 and a potential motion for habeas corpus relief under K.S.A. 60-1507.

A Court of Appeals panel acknowledged our holding in *Smith* but rejected Hutto's argument, holding the weight of our precedent establishes that defendants lose their privilege against self-incrimination at sentencing when they plead guilty and do not move to withdraw their plea before sentencing. Because Hutto was sentenced before he tried to withdraw his felony-murder guilty pleas, the panel found he lost his privilege against self-incrimination when sentenced for those crimes. As a result, the panel concluded the district court correctly directed Hutto to testify and affirmed the finding of contempt for violating the district court's directive. *Showalter*, 62 Kan. App. 2d at 686-87, 690-93.

We granted Hutto's petition for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

The issue presented is whether Hutto had a Fifth Amendment privilege against self-incrimination that protected him from testifying to matters underlying his convictions when he first refused to testify at Showalter's trial on July 13, 2021. To resolve this issue, we must determine (1) the proper standard to assess whether a witness can invoke the Fifth Amendment privilege to prevent compelled testimony; (2) whether that standard should be different when the witness has pled guilty rather than being convicted

by verdict; and (3) whether the privilege can be asserted after sentencing and, if so, under what circumstances.

Hutto argues the applicable standard permits a defendant to invoke the privilege to prevent compelled testimony until a defendant has exhausted all methods of attacking underlying criminal convictions and sentences, and the standard applies equally when the information sought relates to a witness' prior conviction by verdict or by guilty plea. See *Smith*, 268 Kan. at 235. The State disagrees, claiming Kansas applies a bright-line standard for termination of the privilege when a defendant pleads guilty in an underlying case: the privilege is lost at sentencing unless a motion to withdraw that plea was filed before sentencing. See *Longobardi*, 243 Kan. at 409.

The panel ultimately held Kansas Supreme Court precedent favors the State's position: "Because Hutto had entered his felony murder guilty pleas and had been sentenced for those crimes without first moving to withdraw his guilty pleas, his privilege against self-incrimination ended upon sentencing." *Showalter*, 62 Kan. App. 2d at 691. But missing from our privilege precedent, and in turn from the panel's analysis, is recognition of United States Supreme Court precedent on the limited effect of a guilty plea on the Fifth Amendment privilege. See *Mitchell v. United States*, 526 U.S. 314, 316, 321, 326, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (holding a guilty plea is not a waiver of the privilege against self-incrimination beyond the guilt-phase of a criminal proceeding). Because it is necessary to determine whether our precedent adheres to the high Court's interpretation of the federal Constitution, we begin with that review.

I. *Federal privilege law*

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. The resulting privilege against compulsory self-incrimination fulfills the essential role in our adversarial justice system of ensuring the State achieves criminal convictions by its own efforts, not by the forced disclosures of the accused. See *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55, 84 S. Ct. 1594, 12 L. Ed. 2d

678 (1964); *Ullmann v. United States*, 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511 (1956). Based on the fundamental importance of the privilege to principles of liberty and due process, the United States Supreme Court has long held this constitutional provision must be liberally construed. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

The Fifth Amendment privilege is far from absolute. It must be timely and affirmatively invoked or else it is lost. *Roberts v. United States*, 445 U.S. 552, 559, 100 S. Ct. 1358, 63 L. Ed. 2d 622 (1980). And it only protects individuals from making factual disclosures that are testimonial, compelled, and incriminating in nature. *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 189, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004).

The Fifth Amendment includes two distinct privileges against self-incrimination: (1) that of criminal defendants not to be compelled to testify at their own trial and (2) that of any person not to be compelled to answer questions which may incriminate him or her in future criminal proceedings. *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S. Ct. 16, 69 L. Ed. 158 (1924). This includes witnesses called to testify—"in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"—when the answer could subject them to criminal liability. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Along with protecting answers which would support a criminal conviction, the privilege also protects information which "would furnish a link in the chain of evidence" that could lead to a criminal prosecution. *Hoffman*, 341 U.S. at 486.

The scope of a witness' privilege differs depending on the status of the person asserting it. While defendants can invoke a blanket privilege not to testify at their own trial, a compelled witness may only assert the privilege on a question-by-question basis and must establish a legitimate risk of incrimination to justify silence. See generally 3 Crim. Prac. Manual § 88:9 ("The rights of an accused and the rights of a witness differ. The Fifth Amendment allows the accused to refuse even to take the stand. A witness, however, must take the stand when called and then assert the privilege in response to a particular question.").

A. *Risk-of-incrimination standard*

The United States Supreme Court first articulated a formal risk-of-incrimination standard well over a hundred years ago in *Brown v. Walker*, 161 U.S. 591, 599-600, 16 S. Ct. 644, 40 L. Ed. 819 (1896). The Court found a valid assertion of the Fifth Amendment privilege exists only when a witness faces a "real and appreciable" danger from compelled testimony based on an objective standard:

"[T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." *Brown*, 161 U.S. at 599-600.

Based on this standard, the risk of incrimination triggering Fifth Amendment protection is measured by a reasonable fear of an appreciable danger. These requirements reflect the underlying condition that the privilege is available only when the danger it is meant to protect against actually exists.

Since *Brown*, the Court has expressed this standard in various, similar ways to convey that the risk to be feared must be of a consequential nature to warrant the Fifth Amendment's protection. See, e.g., *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478, 92 S. Ct. 1670, 32 L. Ed. 2d 234 (1972) ("It is well established that the privilege protects against real dangers, not remote and speculative possibilities."); *Marchetti v. United States*, 390 U.S. 39, 53, 88 S. Ct. 697, 19 L. Ed. 2d 889 (1968) ("The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."); *Mason v. United States*, 244 U.S. 362, 365, 37 S. Ct. 621, 61 L. Ed. 1198 (1917) ("'The constitutional protection against self-incrimination 'is confined to real danger, and does not extend to remote possibilities out of the ordinary course of law.'").

More recently in *Mitchell*, the Court expressed the risk-of-incrimination standard in broader terms by recognizing that the danger faced by a witness in responding to questions extends to other "adverse consequences" beyond criminal prosecution and conviction. See 526 U.S. at 326. Mitchell was charged in federal court

for her alleged role in a cocaine distribution conspiracy. She pled guilty to all counts but reserved the right to contest the drug quantity at sentencing. When sentencing came and some of her codefendants put on evidence, Mitchell asserted her Fifth Amendment privilege against self-incrimination and opted not to testify. Because of her guilty plea, the district court found Mitchell had lost the right to remain silent about the details of her crime and held her silence against her when imposing a harsher sentence. The Third Circuit affirmed, holding a guilty plea constitutes a permanent waiver of the Fifth Amendment privilege. As part of that decision, the appellate court concluded the Fifth Amendment does not protect against the risk of an increased sentence after a guilty plea. See *United States v. Mitchell*, 122 F.3d 185, 189-90 (3d Cir. 1997).

The Supreme Court reversed, holding a defendant who pleads guilty retains the Fifth Amendment privilege at sentencing, resolving a circuit split on this issue in the process. See Phelps, *Applicability of the Fifth Amendment Privilege Against Self-incrimination at Sentencing: Mitchell v. United States Settles the Conflict*, 38 Brandeis L.J. 107, 109 (1999). One of the key aspects of the Court's decision was its recognition that a conviction, including one by guilty plea, does not eliminate the possibility of further incrimination. See *Mitchell*, 526 U.S. at 326. The Court noted the constitutional protection against compulsory self-incrimination was always meant to ensure "'that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips.'" 526 U.S. at 326 (quoting *Estelle v. Smith*, 451 U.S. 454, 462, 101 S. Ct. 1866, 68 L. Ed. 2d 359 [1981]). Since the risk of incrimination extends beyond conviction (the guilt-phase of criminal proceedings), the Court held the Fifth Amendment privilege must be available past this point at least through sentencing. 526 U.S. at 326.

In discussing the risk of postconviction incrimination, the Court first acknowledged the underlying principle "that where there can be no further incrimination, there is no basis for the assertion of the privilege." *Mitchell*, 526 U.S. at 326. The Court then explained this general rule "applies to cases in which the sentence

has been fixed and the judgment of conviction has become final." 526 U.S. at 326. Finally, the Court declared that the risk of incrimination is eliminated when "no adverse consequences can be visited upon the convicted person by reason of further testimony." 526 U.S. at 326.

Although the "adverse consequences" phrasing in *Mitchell* differs from the "real and appreciable" language previously used by the Court, the root concept is not new. The availability of the privilege has always required some legal detriment bearing on criminal liability. See *Rogers v. United States*, 340 U.S. 367, 373, 71 S. Ct. 438, 95 L. Ed. 344 (1951) ("the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure"); see generally Wigmore on Evidence § 2279, p. 481 (1961) ("Legal criminality consists in liability to the law's punishment. When that liability is removed, criminality ceases; and with the criminality the privilege."). The *Mitchell* Court also expressed that a convicted person's "fear of adverse consequences" warranting Fifth Amendment protection must be "legitimate"—evoking the underlying standard from *Brown* and its progeny that this fear be reasonable and based on a discernible risk from compelled testimony. See *Mitchell*, 526 U.S. at 326. Viewed in this context, the language in *Mitchell* complements the existing framework and roughly defines the outer limit of the privilege postconviction. It also implies a case-by-case analysis of the risk of incrimination is crucial.

B. *Waiver of the Fifth Amendment privilege*

Like other constitutional rights, the privilege against self-incrimination can be waived. A person waives the privilege by failing to assert it, by voluntarily testifying, or by pleading guilty to a crime. The type of waiver determines its scope and the extent of any privilege that remains. The State can also remove the risk of incrimination by a sufficient offer of immunity that is coextensive with constitutional protections. *Kastigar*, 406 U.S. at 449.

1. *Broad waiver by voluntary testimony—extends to all relevant information*

The Supreme Court has distinguished between a waiver of the privilege by agreeing to testify and a waiver by pleading guilty to a crime. The first type of waiver is a broad waiver, which removes the privilege for the information disclosed and requires a full disclosure of all relevant details. *Rogers*, 340 U.S. at 373-74 ("[W]here criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details."). In this situation, a strong judicial interest in preserving the integrity of the court's fact-finding mission warrants requiring an extensive waiver. To do otherwise would transform the Fifth Amendment from a constitutional "safeguard against judicially coerced self-disclosure" into "a positive invitation to mutilate the truth a party offers to tell." *Brown v. United States*, 356 U.S. 148, 156, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958).

2. *Narrow waiver by guilty plea—limited to guilt phase of trial*

By contrast, the Court has held an accused's waiver of the privilege by guilty plea serves an entirely different function and does not pose the same risks to the judicial process as voluntary, selective testimony. *Mitchell*, 526 U.S. at 319-25. In *Mitchell*, the Court acknowledged that a guilty plea necessarily removes the privilege against self-incrimination for establishing guilt by taking those matters out of dispute. 526 U.S. at 323. A plea also waives the right to a trial by jury, to be presumed innocent, and to force the State to put on evidence to prove guilt. See *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). But the *Mitchell* Court explained that "the defendant who pleads guilty puts nothing in dispute regarding the essentials of the offense." 526 U.S. at 323 (a "guilty plea is more like an offer to stipulate than a decision to take the stand"). The Court explained why a broader waiver in this instance would defeat the fundamental due process interest at stake:

"Were we to accept the Government's position, prosecutors could indict without specifying the quantity of drugs involved, obtain a guilty plea, and then put the defendant on the stand at sentencing to fill in the drug quantity. The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on

accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power." 526 U.S. at 325.

Since *Mitchell*, federal and state courts addressing the issue now recognize that a guilty plea does not constitute a broad waiver of the Fifth Amendment privilege against self-incrimination. See, e.g., *United States v. Rivas-Macias*, 537 F.3d 1271, 1280 (10th Cir. 2008); *United States v. Warren*, 338 F.3d 258, 263 (3d Cir. 2003); *United States v. Smith*, 245 F.3d 538, 543 (6th Cir. 2001); *Landeverde v. State*, 769 So. 2d 457, 462-64 (Fla. Dist. Ct. App. 2000); *State v. Garber*, 674 N.W.2d 320, 326 (S.D. 2004); *State v. Worthington*, 8 S.W.3d 83, 92 (Mo. 1999); *Carroll v. State*, 42 S.W.3d 129, 132 (Tex. Crim. App. 2001).

II. *Kansas privilege law*

The Fifth Amendment privilege against self-incrimination applies to the states through the Fourteenth Amendment to the United States Constitution. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *State v. Brown*, 286 Kan. 170, 172-73, 182 P.3d 1205 (2008). This court has held section 10 of the Kansas Constitution Bill of Rights grants the same protections against compelled self-incrimination as the Fifth Amendment. *State v. Faidley*, 202 Kan. 517, 520, 450 P.2d 20 (1969). Additionally, we liberally construe constitutional provisions securing personal rights, including the Fifth Amendment privilege. *State v. Morris*, 255 Kan. 964, 981, 880 P.2d 1244 (1994).

The Kansas Legislature has codified an individual's privilege against self-incrimination under K.S.A. 60-425 and also statutorily defined "incrimination" under K.S.A. 60-424. With regard to this definition, this court has held Kansas' "constitutional prohibition against self-incrimination is broader than [the state] statute's definition." *State v. Green*, 254 Kan. 669, 679, 867 P.2d 366 (1994).

Consistent with federal precedent, this court has held the State can remove the fear of incrimination, thereby eliminating the privilege, by a sufficient grant of immunity in return for the witness' testimony. The combination of "use and derivative use" immunity is sufficient to compel incriminating testimony because it protects a witness from the use of compelled testimony and any evidence

derived therefrom. *State v. Delacruz*, 307 Kan. 523, 525, 534-35, 411 P.3d 1207 (2018) (citing *Kastigar*, 406 U.S. at 453).

A. *Kansas standard to assess availability of the Fifth Amendment privilege*

As a general rule, this court's privilege decisions refer to a risk-of-incrimination standard when considering whether a convicted and sentenced witness has a valid Fifth Amendment privilege. See, e.g., *State v. George*, 311 Kan. 693, 708, 466 P.3d 469 (2020) (the privilege "'protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might so be used'"); *Delacruz*, 307 Kan. at 534 ("a witness who has no reasonable cause to fear incrimination cannot invoke the right"); *Green*, 254 Kan. at 679 ("The Fifth Amendment operates only where a witness is asked to incriminate himself or herself; that is, to give testimony which could possibly expose the witness to a criminal charge."); *State v. Larry*, 252 Kan. 92, 96, 843 P.2d 198 (1992) (same), *holding modified on other grounds by State v. Solomon*, 257 Kan. 212, 891 P.2d 407 (1995). Although this court has expressed the standard in different ways, the underlying principle is the same and aligns with our current interpretation of the federal standard: a convicted defendant or witness may invoke the privilege by establishing a legitimate—meaning a real and appreciable—risk of incrimination if compelled to testify.

But significant here, this court has departed from its own general risk-of-incrimination standard to create an exception when assertion of the privilege follows a guilty plea. Under those circumstances, we construed the plea as a broad waiver of the Fifth Amendment privilege that terminates absolutely upon sentencing, rather than when there is no longer a legitimate risk of incrimination. See, e.g., *Longobardi*, 243 Kan. at 409 (holding "once a plea of guilty has been regularly accepted by the court, and no motion is made to withdraw it, the privilege against self-incrimination ends after sentence is imposed"). This has resulted in different outcomes on availability of the privilege depending on the type of conviction. Compare *Delacruz*, 307 Kan. at 533-35 (reversing contempt order of convicted witness who refused to testify at

codefendant's trial because he was appealing his state conviction and the State's grant of immunity did not protect him from federal prosecution), with *Bailey*, 292 Kan. at 461-63 (finding a witness who pled guilty and had been sentenced, but was appealing his conviction, no longer had a Fifth Amendment privilege when called to testify at codefendant's trial). As we resolve this inconsistency in our Fifth Amendment jurisprudence, it helps to understand how we got here.

B. *Waiver of the privilege*

1. *Kansas* Anderson-Longobardi *bright-line rule*

Within Kansas caselaw, *State v. Anderson*, 240 Kan. 695, 732 P.2d 732 (1987), is the starting point for the scope of a witness' Fifth Amendment privilege after pleading guilty. In *Anderson*, this court held an accused who pled guilty but who had not yet been sentenced could still assert the Fifth Amendment privilege as a witness in an accomplice's trial. 240 Kan. at 700-01. Anderson pled guilty to aggravated robbery but then tried to withdraw his plea before sentencing, which the district court denied. When Anderson was called to testify against a codefendant, his time to appeal the denial of his motion to withdraw his guilty plea had not yet expired. On this basis, Anderson argued he should still be able to invoke his privilege against self-incrimination.

This court began its analysis by noting the "general rule" that "a witness cannot claim a Fifth Amendment privilege with respect to those matters to which he has pled guilty." *Anderson*, 240 Kan. at 699-700 (citing 9 A.L.R. 3d 990, § 2 [1966]). The court then considered a body of persuasive federal and state authority holding the privilege against self-incrimination extends *at least* until a sentence has been imposed and in some cases beyond that point. See 240 Kan. at 700-01 (citing multiple authorities holding the Fifth Amendment privilege may be invoked after a guilty plea where there is a continued risk of self-incrimination or impact on the disposition of an appeal). Ultimately, this court similarly held that a witness in Anderson's situation, having pled guilty but awaiting sentencing, had not waived his privilege against self-incrimination. 240 Kan. at 701. *Anderson* fit within the mainstream

of the considered authority at the time and followed federal precedent, which preserved the Fifth Amendment privilege through the penalty phase of a defendant's criminal proceeding. See *Estelle*, 451 U.S. at 462-63.

Just a year after *Anderson*, this court limited that ruling in *Longobardi*. While *Anderson* permissively held a witness who pled guilty could still invoke the privilege against self-incrimination through sentencing, the *Longobardi* holding was framed in restrictive terms—cutting off the privilege at sentencing without a successful withdrawal of the plea. See *Longobardi*, 243 Kan. at 409 ("[O]nce a plea of guilty has been regularly accepted by the court, and no motion is made to withdraw it, the privilege against self-incrimination ends after sentence is imposed."). In the process, the court considered two standards from Supreme Court caselaw: requirements for a valid waiver of a constitutional right and a version of the federal risk-of-incrimination standard. See 243 Kan. at 409 (citing *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 [1969], and *Ullmann*, 350 U.S. at 431). But the court was clearly more focused on the first of these, as to waiver, and appeared to conclude that as long as the guilty plea satisfied the knowing-and-voluntary-waiver standard, there could be no further risk of incrimination after sentencing. The witness in *Longobardi* asserted the Fifth Amendment privilege on grounds that the time for an appeal, rehearing, or sentence modification had not yet passed. This court rejected that contention outright. See *Longobardi*, 243 Kan. at 409.

Longobardi marks Kansas' adoption of a special, bright-line rule for terminating the privilege against self-incrimination after a guilty plea and once a sentence is imposed, which has since been the controlling precedent for this jurisdiction. See *George*, 311 Kan. at 709; *State v. Soto*, 301 Kan. 969, 980, 349 P.3d 1256 (2015); *Bailey*, 292 Kan. at 460; *Green*, 254 Kan. at 678. There are two problems with this line of precedent. First, the *Longobardi* rule treats a guilty plea as a broad waiver of the Fifth Amendment privilege and therefore a special kind of conviction which terminates the right absolutely upon sentencing. As discussed, this conflicts with *Mitchell*, which definitively held a guilty plea is only a

limited waiver of the privilege against self-incrimination to establish guilt and does not extend beyond that phase of the original criminal proceeding. See *Mitchell*, 526 U.S. at 315 ("Treating a guilty plea as a waiver of the privilege [beyond the confines of the guilt phase of trial] would be a grave encroachment on defendants' rights."). The Court's analysis in *Mitchell* confirms that a guilty plea is unrelated to the availability of the privilege postsentence, other than being the means of conviction and thereby limiting the types of postconviction challenges available. And second, the *Longobardi* rule cutting off the privilege at sentencing departs from the flexible federal approach that frames the availability of the privilege in terms of the risk of self-incrimination.

2. State v. Smith: *Extension of the Fifth Amendment privilege postsentence*

In his petition, Hutto focused exclusively on *Smith*, which was decided in the same year as *Mitchell* and appeared to extend the Kansas privilege rule "until there is a final judgment in a case and a right to appeal has expired." 268 Kan. at 235 (citing *State v. Aldape*, 14 Kan. App. 2d 521, 526, 794 P.2d 672 [1990]). *Smith* dealt mostly with the Sixth Amendment confrontation right and only speculated that codefendants would have retained the Fifth Amendment privilege and therefore would not necessarily have been available as exculpatory witnesses. Of note, the potential witnesses in *Smith* had not pled guilty so waiver was not an issue that was raised or discussed.

In *Smith*, this court properly looked to a risk-of-incrimination standard for when the privilege applies, noting "'it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used.'" 268 Kan. at 235 (citing *State v. Lekas*, 201 Kan. 579, 589, 442 P.2d 11 [1968]). This recitation of the rule is close to the United States Supreme Court's standards. See *Brown*, 161 U.S. at 599 ("danger to be apprehended must be real and appreciable"), and *Malloy*, 378 U.S. at 11 ("'The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute."). But

the *Smith* court did not engage in further analysis on the continued risk of incrimination the codefendants faced that would warrant continued availability of the privilege as contemplated by *Mitchell*. Instead, it simply announced the extent of the privilege postsentence as stated above: "until there is a final judgment in a case and a right to appeal has expired." *Smith*, 268 Kan. at 235.

The *Showalter-Hutto* panel found *Smith* incompatible with this court's privilege decisions in the context of a guilty plea. See *Showalter*, 62 Kan. App. 2d at 687-88. We note *Smith* is distinguishable from this line of cases because the witness in *Smith* had not pled guilty. See *Smith*, 268 Kan. at 226. *Smith* appears to be consistent with federal precedent in that it references the proper risk-of-incrimination standard and also agrees with the majority rule on availability of the privilege postsentence. Even so, we do not adopt its stated rule for availability of the privilege because it also terminates the privilege at a definite procedural point rather than when the risk of incrimination ends. Therefore, we neither overturn nor adopt *Smith*. It is merely one of many cases in our privilege decisions in which we referenced availability of the privilege up to a certain phase of the criminal proceedings in the context of the facts presented.

3. *Modern Application of* Longobardi *rule:* State v. Bailey

As explained, the *Longobardi* rule fails to use a risk-of-incrimination standard to test whether a witness may invoke the Fifth Amendment privilege. This court's decision in *State v. Bailey* aptly illustrates this problem.

On appeal, Bailey challenged the availability of the Fifth Amendment privilege for two of the State's key witnesses. For the first witness, Cheryl Starr, Bailey argued the court improperly advised Starr that she did not have a Fifth Amendment privilege. At the time of Bailey's trial, Starr was serving a 12-year sentence after pleading guilty to second-degree murder, robbery, and aggravated burglary. Notably, Starr did not file an appeal or otherwise challenge her conviction. Applying *Longobardi*, this court held Starr had no Fifth Amendment privilege with regard to the charges because she was sentenced and had not moved to withdraw her guilty

plea. *Bailey*, 292 Kan. at 461. As applied to Starr, the *Longobardi* rule largely achieved the right result, though not because Starr pled guilty and did not withdraw her plea before sentencing; rather, Starr had no privilege because she no longer faced a risk of incrimination as to the facts supporting her completed conviction.

Bailey made the opposite argument for a second witness, DaQuan Dean, who had also pled guilty and been sentenced but who *had* filed a notice of appeal. Bailey argued Dean still had a Fifth Amendment privilege, so the State should not have called him as a witness. This court affirmed the district court's finding that Dean had no privilege against self-incrimination because of his guilty plea and imposition of sentence, regardless of his pending appeal. *Bailey*, 292 Kan. at 461-63. In Dean's case, the *Longobardi* rule precluded the essential inquiry: whether he still faced a risk of incrimination after sentencing, pending his appeal. *Bailey* underscores the need to align our Fifth Amendment privilege standards with federal law.

III. *Aligning Kansas privilege law with risk-of-incrimination principles*

A. *Adopting the risk-of-incrimination standard as our guiding principle*

In its brief, the State argues the general rule expressed in *Mitchell* should be interpreted as a bright-line rule cutting off the privilege after sentencing. The State asserts *Mitchell's* reference to the privilege being available until "the judgment of conviction has become final" meant that the privilege terminates when a district court issues a final, appealable order. But the State fails to recognize the overarching guiding principle in this inquiry has always been whether there is a legitimate risk of incrimination to the witness, not the procedural point at which the judgment is considered "final" for purposes of appeal. Nor do we read *Mitchell* as establishing sentencing or finality of judgment as the clear and definitive point at which the risk of self-incrimination always ends. See, e.g., *Milke v. City of Phoenix*, 325 F. Supp. 3d 1008, 1015-16 (D. Ariz. 2018) ("[A] conviction should qualify as 'final' [under

Mitchell], such that the privilege does not apply, when an individual is no longer facing 'substantial and real . . . hazards of incrimination.'") (quoting *Marchetti*, 390 U.S. at 53).

In accordance with *Mitchell*, the proper standard to determine whether the Fifth Amendment privilege protects a witness from being compelled to testify is whether the testimony sought exposes the witness to a legitimate risk—meaning a real and appreciable danger—of incrimination, not a hypothetical or speculative one. The witness' fear of self-incrimination must be objectively reasonable and the threat discernible for the privilege to apply. Consistent with this approach, we decline to adopt a bright-line rule cutting off the privilege at any specific procedural point.

B. *Eliminating the* Longobardi *bright-line exception for guilty pleas*

Our privilege caselaw has yet to recognize that a guilty plea is only a limited waiver of the privilege against self-incrimination for establishing guilt and does not, on its own, impact the availability of the privilege beyond that point. This was the central holding in *Mitchell*, which we are duty-bound to follow when interpreting the Fifth Amendment. See 526 U.S. at 329-30. Thus, we hold the risk-of-incrimination standard applies equally when the information sought relates to a witness' prior conviction by verdict or by guilty plea, overruling *Longobardi* and *Bailey*.

"'We do not overrule precedent lightly and must give full consideration to the doctrine of stare decisis.'" *State v. Johnson*, 317 Kan. 458, 467, 531 P.3d 1208 (2023). "We recognize that '[t]he application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.'" *Herington v. City of Wichita*, 314 Kan. 447, 456, 500 P.3d 1168 (2021).

Yet stare decisis "'is not a rigid inevitability but a prudent governor on the pace of legal change.'" *Herington*, 314 Kan. at 456. "While this court is not inexorably bound by its own precedent, we generally will follow the law of earlier cases unless clearly convinced that the rule 'was originally erroneous or is no longer

sound because of changing conditions and that more good than harm will come by departing from precedent.'" 314 Kan. at 457. In this case, we are clearly convinced that we erred in *Longobardi* and subsequent caselaw applying that holding. Based on our analysis above, we correct our previous error and hold the Fifth Amendment extends the privilege against self-incrimination to a convicted defendant or witness who can establish a legitimate risk of incrimination, even if the basis for the conviction is a plea and no motion to withdraw plea is made before sentence is imposed.

C. *Availability of the privilege against self-incrimination after sentencing*

Yet our adherence to *Mitchell* does not definitively resolve the primary issue at hand, which is whether the privilege is available after sentencing and, if so, under what circumstances. The United States Supreme Court has yet to address this issue, so the outer limit of the privilege remains an open question.

1. *Privilege against self-incrimination available during direct appeal*

The weight of federal and state authority to consider whether the privilege extends past sentencing holds the privilege is available while a defendant challenges their conviction on direct appeal or until the time for such appeal has expired. McCormick is instructive on what appears to be the mainstream position:

"If direct appeal from a conviction is pending or remains available, defendants might harbor hope that their convictions will be reversed on appeal but fear that any disclosures they make could be used against them on retrial. Because of this possibility, the courts have generally held that a convicted defendant retains the protection of the privilege until either the appeal is exhausted or the time for appeal expires. The possibility of reversal and retrial is not so remote as to constitute a negligible risk under the prevailing standard." McCormick on Evid. § 121 (8th ed.).

Courts applying this majority rule use a risk-of-incrimination standard to determine whether an individual retains the privilege past sentencing. See, e.g., *United States v. Kennedy*, 372 F.3d 686, 691-92 (4th Cir. 2004) (a defendant convicted of drug trafficking retained privilege while appealing his conviction when called as a

witness to testify before a grand jury about the facts supporting his conviction) ("Because any post-conviction evidence could be used against a defendant if his conviction were to be overturned, the risk of coerced self-incrimination remains until the conviction has been affirmed on appeal."); *United States v. Duchi*, 944 F.2d 391, 394 (8th Cir. 1991) (noting split in authority on the issue of availability of the privilege postconviction but favoring majority rule that extends it "until the time for appeal has expired or until the conviction has been affirmed on appeal"); *Ottomano v. United States*, 468 F.2d 269, 273-74 (1st Cir. 1972) (holding witness could claim privilege postsentencing while motion to vacate sentence was still pending) ("Had this motion been granted, Ottomano could conceivably have been retried . . ." and in this event, his testimony "would have been admissible against him."); *Holsen v. United States*, 392 F.2d 292, 293 (5th Cir. 1968) (holding witness who was appealing his conviction retained the privilege during the appeal process and could not have been compelled to testify at codefendant's trial); *Mills v. United States*, 281 F.2d 736, 741 (4th Cir. 1960) (holding witness may claim privilege as long as time for an appeal has not expired); *Graham v. Durr*, 433 P.3d 1098, 1102-04 (Alaska 2018) (concluding "defendants appealing only their sentences—like defendants appealing their convictions—may invoke the privilege against self-incrimination until their convictions become final"); *State v. Gretzler*, 126 Ariz. 60, 88, 612 P.2d 1023 (1980) ("The Fifth Amendment privilege is available to a convicted person when his conviction or sentence is being appealed."); *People v. Villa*, 671 P.2d 971, 973 (Colo. App. 1983) ("[W]hen a defendant is appealing his conviction, or seeking other post-conviction relief, the privilege continues in order to protect him from the subsequent use of self-incriminating statements in the event relief is granted."); *State v. Johnson*, 77 Idaho 1, 8-9, 287 P.2d 425 (1955) (witness retained privilege not to testify at alleged accomplice's trial while his appeal was pending); *Ellison v. State*, 310 Md. 244, 258-59, 528 A.2d 1271 (1987) (holding witness who had been convicted and sentenced could invoke the privilege during the time to seek appellate review or while appealing the conviction or sentence); *People v. Lindsay*, 69 Mich. App. 720, 722-23, 245 N.W.2d 343 (1976) (witness who was appealing his guilty plea could assert the privilege during the pendency of his appeal); *Johnson v. Fa-*

bian, 735 N.W.2d 295, 310 (Minn. 2007) (holding "a convicted individual can claim the privilege against self-incrimination as long as a direct appeal of that conviction is pending, or as long as the time for direct appeal of that conviction has not expired"); *Myers v. State*, 154 P.3d 714, 714-15 (Okla. Crim. App. 2007) ("[T]he weight of authority permits a witness whose conviction has not been finalized on direct appeal to invoke the privilege against self-incrimination and to refuse to give any testimony whatever in regard to the subject matter which formed the basis of [the] conviction."); *State v. Ducharme*, 601 A.2d 937, 944-45 (R.I. 1991) (witness retained a privilege not to testify at an alleged accomplice's trial because he still had time to file a motion for a new trial or appeal his conviction).

At least two state appellate courts have found a witness may similarly invoke the privilege while appealing a denial of a postsentence motion to withdraw a guilty plea or until the deadline for such an appeal has expired. See, e.g., *State v. Marks*, 194 Wis. 2d 79, 92-96, 533 N.W.2d 730 (1995) (a real and appreciable fear of incrimination may exist for a witness who intends and still has the right to withdraw a guilty plea, who intends to appeal within the deadline or has an appeal pending, or a witness who intends to request a reduction in sentence); *State v. Harris*, 92 Wis. 2d 836, 846-49, 285 N.W.2d 917 (Ct. App. 1979) (witness who still had time to file an appeal or a postsentence motion to withdraw a guilty plea retained the Fifth Amendment privilege against self-incrimination).

We find these decisions persuasive. Thus, in applying the risk-of-incrimination standard, we hold the Fifth Amendment privilege remains available to a defendant or witness who has filed a direct appeal in a criminal case and a decision on appeal is not final (or whose right to file a direct appeal has not expired) when the testimony sought exposes the witness to a legitimate risk of incrimination.

2. *Privilege against self-incrimination available during direct appeal of motion to withdraw guilty plea*

Having determined the privilege is available until a decision on direct appeal becomes final, we now must determine whether the risk of compelled self-incrimination also justifies availability of the privilege until a final decision on direct appeal *of a motion to withdraw*

guilty plea. To resolve this issue, we begin with the statutes governing criminal appeals.

Under K.S.A. 22-3602(a), defendants generally have the right to appeal from any district court judgment to an appellate court having jurisdiction of the appeal. But the statute provides an exception to this general rule when a defendant has pleaded guilty or no contest. In those cases, a defendant has no right to file a direct appeal from a judgment of conviction because this is one of the rights surrendered by the plea. See K.S.A. 22-3602(a) ("No appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere[.]"). See also *State v. Hall*, 292 Kan. 862, 866-68, 257 P.3d 263 (2011) ("A defendant cannot take a direct appeal from a conviction flowing from a guilty plea. The right to take such a direct appeal is one of the rights surrendered" when the plea is entered by agreement or in open court.). A guilty plea without a subsequent motion to withdraw deprives the appellate court of jurisdiction over the conviction. 292 Kan. at 867 (explaining the district court is better equipped to address these types of issues); but see 292 Kan. at 868 ("A guilty plea *does not* surrender a defendant's right to [directly] appeal *a sentence*.") (Emphasis added.) (citing *State v. Patton*, 287 Kan. 200, 226, 195 P.3d 753 [2008]).

Rather, to challenge a conviction after a guilty plea, the defendant must first move to withdraw the plea in the district court pursuant to K.S.A. 22-3210. After sentencing, a judgment of conviction by guilty plea may be set aside to correct manifest injustice. K.S.A. 22-3210(d)(2); K.S.A. 22-3210(e) (A postsentence motion to withdraw plea must be brought within one year of a final appellate order on a direct appeal, termination of appellate jurisdiction, or denial or grant of a petition for writ of certiorari to the United States Supreme Court.). See also *White v. State*, 203 Kan. 687, 693, 455 P.2d 562 (1969) ("[O]nce a plea of guilty has been entered and sentence pronounced whether or not the plea can later be withdrawn is a matter within the sound discretion of the trial court, whose judgment will not be disturbed unless there has been an abuse of that discretion.").

Once a defendant has filed a postsentence motion to withdraw a guilty plea and it is denied, the defendant may *then* appeal the denial within the direct appeal time period. See K.S.A. 22-3608(c)

(time for appeal from judgment of district court). This court has held the statutory bar on a direct appeal from a judgment of conviction by guilty plea under K.S.A. 22-3602(a) does not preclude a direct appeal from the district court's denial of the motion to withdraw since K.S.A. 22-3210(d)(2) provides a means of withdrawing the plea postsentence. See *State v. McDaniel*, 255 Kan. 756, 758-59, 877 P.2d 961 (1994) ("Implicit in the legislature's enactment of K.S.A. 22-3210[d], permitting withdrawal of a plea of guilty or nolo contendere . . . is the right to a direct appeal from the trial court's denial of a motion to withdraw plea.").

In light of a criminal defendant's implicit right to directly appeal a district court's denial of a motion to withdraw plea under K.S.A. 22-3210(d)(2), we find this type of appeal indistinguishable from a direct appeal of a conviction by verdict under K.S.A. 22-3602(a) *as it relates to the risk-of-incrimination and applicability of the privilege*. To conclude otherwise would undermine the statutory right of a defendant to withdraw a guilty plea in the interest of manifest justice at the district court's discretion. Thus, we hold the Fifth Amendment privilege against self-incrimination similarly remains available to a defendant or witness who pled guilty but has filed a postsentence motion to withdraw plea pursuant to K.S.A. 22-3210(d)(2) and (e) and a decision on the motion or a decision on the timely appeal of denial of the motion is not final, when the testimony sought exposes the witness to a legitimate risk of incrimination.

3. *Finality of appeal*

As explained above, the risk of coercive incrimination justifies extending the privilege after sentencing while a direct appeal is pending. But this justification fades away when the direct appeal becomes final. Because finality is an issue here, we provide a brief overview on the subject.

In *State v. Heath*, 222 Kan. 50, 54, 563 P.2d 418 (1977), this court stated that "[a] conviction is generally not considered 'final' until (1) the judgment of conviction has been rendered, (2) the availability of an appeal has been exhausted, and (3) the time for any rehearing or final review has passed." The phrase "time for any rehearing or final review has passed" necessarily means that

the period during which a rehearing could be requested or a final decision could be reviewed has elapsed without any such action being taken. Relevant here, a motion for rehearing or modification can be filed within 21 days after an appellate decision is filed. Rule 7.06(a).

This brings us to the effect of a Kansas appellate court's mandate on the finality of a conviction, which is governed by Kansas Supreme Court Rule 7.03 (2024 Kan. S. Ct. R. at 45) and K.S.A. 60-2106. After an appellate court's decision is announced by the filing of an opinion, a certified copy of that opinion is mailed to the district court along with a "mandate" to enforce the decision. K.S.A. 60-2106(c); Supreme Court Rule 7.03(a), (b). The mandate issues 7 days after: "(i) *the time to file a petition for review or motion for rehearing or modification expires*; (ii) entry of an order denying a timely petition for review or motion for rehearing or modification; or (iii) any other event that finally disposes of the case on appeal." (Emphasis added.) Rule 7.03(b)(1)(A) (2024 Kan. S. Ct. R. at 45-46).

The mandate is effective when issued and becomes part of the final judgment. Rule 7.03(b)(1)(C); K.S.A. 60-2106(c) ("Such mandate and opinion, without further order of the judge, shall thereupon be a part of the judgment of the court if it is determinative of the action, or shall be controlling in the conduct of any further proceedings necessary in the district court."). Of course, the district court cannot enforce the judgment until the mandate has issued. Therefore, a judgment on appeal is not considered final until the mandate has issued.

V. *Applying Kansas rule on availability of the privilege to Hutto's facts*

Whether the privilege was available to Hutto when he was called to testify at Showalter's trial depends on whether Hutto faced a legitimate risk of incrimination. Hutto claims he faced such a risk because he still had the opportunity to file (1) a motion for rehearing or modification of this court's decision to affirm the denial of his motion to withdraw plea pursuant to Supreme Court Rule 7.06; and (2) a motion for writ of habeas corpus under K.S.A.

60-1507 alleging ineffective assistance of counsel for giving inaccurate advice to Hutto regarding the guilty plea. A review of the factual and procedural history of this case is necessary to determine whether Hutto's claim is legitimate.

Hutto pled guilty to two counts of felony murder and avoided going to trial. As we now recognize, a guilty plea does not waive the Fifth Amendment privilege beyond the point of conviction. See *Mitchell*, 526 U.S. at 321. Rather, a defendant convicted by plea—like a defendant convicted by verdict—retains the privilege until the risk of incrimination terminates.

The district court sentenced Hutto on May 10, 2019. Since Hutto pled guilty and did not withdraw his pleas before sentencing, he could not directly appeal his conviction, having waived that right. See *Hall*, 292 Kan. at 866-68 (A guilty plea waives the right to directly appeal the conviction.). Under these circumstances, the only way Hutto could directly appeal from his conviction was to first file a motion to withdraw his guilty pleas.

On May 22, 2019, Hutto filed a pro se motion with the district court seeking posttrial relief, including an ineffective assistance of counsel allegation that he claimed justified withdrawing his guilty pleas. *Hutto*, 313 Kan. at 744. The district court construed that motion to be a postsentence motion to withdraw plea, which can be granted to correct a manifest injustice under K.S.A. 22-3210(d)(2) within the deadlines set forth in K.S.A. 22-3210(e)(1). Hutto filed his motion to withdraw plea 12 days after the district court entered his sentence, well within the required deadline under K.S.A. 22-3210(e)(1)(A) requiring that the motion be filed within 1 year of termination of appellate jurisdiction. See *State v. Smith*, 315 Kan. 124, 127, 505 P.3d 350 (2022) ("When there is no appeal, appellate jurisdiction terminates 14 days after sentencing.") (citing K.S.A. 2020 Supp. 22-3608[c]).

After holding an evidentiary hearing on the motion and considering briefs filed by the parties, the district court denied Hutto's request to withdraw his pleas on February 11, 2020. Less than a week later, on February 17, 2020, Hutto filed a direct appeal of the district court's denial of his motion to withdraw his pleas. See K.S.A. 22-3608(c) ("[D]efendant shall have 14 days after the

judgment of the district court to appeal."). As discussed, a defendant who pled guilty but files a motion to withdraw the plea pursuant to K.S.A. 22-3210(d)(2) and (e) in the district court can directly appeal the denial of that motion. *McDaniel*, 255 Kan. at 758-59. For purposes of determining availability of the privilege against self-incrimination, we hold this type of appeal is no different than a direct appeal of a conviction by verdict.

We affirmed the district court in an opinion filed on July 9, 2021. *Hutto*, 313 Kan. at 751. In the interim period between this court filing its decision and expiration of the deadline in which Hutto could file a motion to reconsider or modify the decision, the State subpoenaed Hutto to testify at Showalter's trial. Hutto affirmatively invoked his Fifth Amendment privilege. The transcript reflects the most relevant exchange:

"Q. Good afternoon. Can you please tell us your name?
"A. Matthew Hutto.
"Q. Mr. Hutto, are you currently an inmate in the Kansas Department of Corrections?
"A. Yep.
"Q. And why are you an inmate?
"A. I was convicted, or pled guilty. I don't . . .
"Q. What crimes were you convicted of?
"A. Felony murder.
"Q. Was it one or two counts?
"A. Two counts.
"Q. And who were you convicted of murdering?
"A. Is that relevant?
"Q. Yes.
"A. Lisa Sportsman and [J.P.].
"Q. What did you do to cause them to die, and be convicted of felony murder?
"A. I don't see how this is relevant.
"Q. Okay. Well, it is, so answer my question.
"A. And it's my turn. I told you guys that I'm not testifying. I plead the Fifth."

Based on his answers, Hutto apparently believed he faced no risk of incrimination by naming the victims of the felony-murder conviction but believed he *did face* a risk of incrimination if he had to explain what he did to the victims to cause them to die. Was Hutto's assessment of the risk legitimate—real and appreciable? We conclude it was. As Hutto argues, the July 30, 2021, deadline

for filing a motion for rehearing or modification of this court's July 9, 2021, decision had not expired when he refused to testify on July 13, 2021, and again on July 16, 2021. See Rule 7.06(a), (b) ("A motion for rehearing or modification in a case decided by the Supreme Court may be served and filed no later than 21 days after the decision is filed . . . A motion for rehearing or modification stays the issuance of the mandate pending determination of the issues raised by the motion."). Thus, the direct appeal of the court's denial of his motion to withdraw guilty plea was not final. And as Hutto further argues, compelling him to explain in detail what he did to the victims to cause them to die—an explanation that goes far beyond a guilty plea limited to a factual basis establishing the elements of the crime—created a legitimate risk of compelled incrimination if his request for relief was granted. For these reasons, we conclude Hutto could assert the Fifth Amendment privilege to prevent answering this specific question.

We pause to note the panel correctly held the State did not remove Hutto's privilege by granting him "use immunity." *Showalter*, 62 Kan. App. 2d at 676-77. As the panel concluded, only a grant of use and derivative use immunity extinguishes the privilege against self-incrimination to permit compelled, self-incriminatory testimony. See *Delacruz*, 307 Kan. at 534-535 ("[I]f the government wants to compel testimony from a witness claiming the Fifth Amendment privilege against compulsory self-incrimination, it must grant the witness at least use and derivative use immunity, otherwise a citation in contempt must be reversed."). Thus, the State's grant of use immunity was insufficient to terminate Hutto's privilege against self-incrimination.

As such, Hutto properly invoked the Fifth Amendment privilege, and the district court could not punish him for his refusal to testify. We therefore reverse the district court's order finding Hutto in contempt and vacate the six-month jail sanction.

Our decision finding Hutto faced a legitimate risk of incrimination when he refused to testify is based on his pending direct appeal of the district court's denial of his postsentence motion to withdraw plea. Although we affirmed the district court's denial of Hutto's motion, the direct appeal was not final at the time he was called to testify at Showalter's trial because the deadline to file a

motion to reconsider or modify the decision had not yet expired, thus the mandate for our decision had not even begun to run, let alone issue.

We acknowledge Hutto's argument that he also faced a legitimate risk of incrimination because he might file a motion for writ of habeas corpus under K.S.A. 60-1507 alleging ineffective assistance of counsel for giving him inaccurate advice regarding his guilty plea. But as we held above, a risk of incrimination analysis must be conducted case-by-case to consider whether the risks of incrimination specifically identified by the person invoking the privilege are real and appreciable. The witness' fear of self-incrimination must be reasonable and the threat discernible for the privilege to apply. A hypothetical or speculative danger of self-incrimination is not enough to invoke the privilege.

Unlike Hutto's pending appeal of the district court's denial of his motion to withdraw plea, there is no evidence in the record to show Hutto had filed a K.S.A. 60-1507 motion related to his felony murder convictions, or that he intended to do so at the time he was called to testify in Showalter's trial. Thus, as it relates to a potential K.S.A. 60-1507 motion, Hutto has failed to establish a real and appreciable risk of incrimination to invoke the privilege.

The judgment of the Court of Appeals affirming the district court is reversed. The district court's order of contempt is reversed, and the sanction of six months in jail is vacated.

No. 124,614

STATE OF KANSAS, *Appellee*, v. GROVER D. JAMES, *Appellant*.

(553 P.3d 308)

SYLLABUS BY THE COURT

1. TRIAL—*Motion for New Trial Based on Newly Discovered Evidence—Requirements for Defendant to Establish*. When seeking to demonstrate that the interest of justice warrants a new trial based on newly discovered evidence, the defendant bears the burden of establishing that the newly proffered evidence could not, with reasonable diligence, have been produced at trial and that the evidence is so material that there is a reasonable probability it would produce a different result upon retrial.

2. APPEAL AND ERROR—*Law of the Case Doctrine—Application.* The law-of-the-case doctrine prevents a party from relitigating an issue already decided on appeal in successive stages of the same proceeding.

3. COURTS—*Doctrine of Stare Decisis—Application.* Under the doctrine of stare decisis, points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised.

4. ATTORNEY AND CLIENT—*Test for Effectiveness of Appellate Counsel—Same Test as Trial Counsel.* The test for effectiveness of appellate counsel is the same as for trial counsel. A defendant claiming ineffective assistance of appellate counsel must demonstrate counsel's performance, considering the totality of the circumstances, fell below an objective standard of reasonableness. And, to determine whether counsel's performance was objectively reasonable, the reviewing court judges the challenged conduct on the facts of the particular case, viewed as of the time of the counsel's conduct.

Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Submitted without oral argument November 3, 2023. Opinion filed August 2, 2024. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita was on the brief for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Grover D. James was convicted of first-degree premeditated murder and criminal possession of a firearm committed in 2015. This court affirmed his convictions in *State v. James*, 309

Kan. 1280, 1281, 443 P.3d 1063 (2019). He later filed several petitions for relief in district court, all of which were denied. His appeals from those various proceedings are consolidated for this appeal.

The background to this appeal is set out in *James*, 309 Kan. at 1281-83. Highly summarized, the events leading to James' convictions revolved around a birthday party for Rance Kindred at a shop in Wichita. Several participants in the party became confrontational with each other. Video surveillance footage at the business and the parking lot outside the business showed James, the victim (Leon McClennon), and others enter the store basement from the parking lot. 309 Kan. at 1282.

It was undisputed that James fired two shots, one of which fatally struck McClennon in the head. The shooting itself was outside the view of the surveillance cameras, but video footage showed McClennon collapsing onto the floor, and, about 37 seconds later, James walking past the body and up the stairs to the parking lot. 309 Kan. at 1282-83. James admitted firing two shots, but he denied he was aiming at anyone and claimed he did not intend to hit, let alone kill, McClennon. His intent was therefore a critical factor in the State's case.

Several witnesses testified about how the confrontation played out that evening, suggesting the killing was deliberate.

Kindred testified at the trial. In addition, the State introduced a videorecording of Kindred making statements to McClennon's sister when they got together the day after the shooting. This court set out his video testimony and his courtroom testimony in *James*, 309 Kan. at 1290-92.

In the video, Kindred was asked whether James had said he was leaving the party to get a gun. 309 Kan. at 1290. According to Kindred, James had told him he always had a gun with him and, if he had wanted to shoot anyone, he would have done so earlier. 309 Kan. at 1290. Kindred said he informed McClennon's sister that he told Kindred's son, Artadius Johnson, to leave James alone after an earlier altercation because they needed to keep James on their side. 309 Kan. at 1290-91. According to Kindred, James was "'a killer.'" He would "'kill [someone] out here and don't give a fuck about it.'" 309 Kan. at 1291.

The video further disclosed that Kindred also said Johnson and McClennon had run into the basement. They were telling Kindred that James was his "'boy'" and that he could stop James. 309 Kan. at 1291. Kindred said he walked toward James and tried to explain who McClennon and Johnson were and persuade James not to shoot them. Kindred thought he had convinced James to stop, but Johnson and McClennon were standing on the dance floor, acting as if they were preparing to fight, and saying "'let that nigga go.'" 309 Kan. at 1291.

Kindred said he told James that, if he wanted to fight Johnson and McClennon, he could, but he needed to put the gun away. Believing James had put the gun in his pocket, Kindred moved out of the way, expecting a fight to ensue. But, as soon as he moved out of the way, he saw James put the gun in his right hand and shoot into the air. 309 Kan. at 1291.

In the video testimony, Kindred further explained Johnson and McClennon ran in different directions when James fired the first shot. Kindred ran behind James. Kindred did not say whether he believed James intended to hit McClennon with the second shot. He saw McClennon start to stumble and go down. He initially thought McClennon was just ducking; Kindred realized McClennon had been hit when his body went limp. 309 Kan. at 1291.

Significantly, at trial, Kindred testified he lied when he told McClennon's sister that James always "'roll[ed]'" with a gun. 309 Kan. at 1291. In his trial testimony, Kindred said, "'[I]f I know he had a gun, I would have told him don't come to my party with no gun.'" *James*, 309 Kan. at 1291.

The jury found James guilty, and he was sentenced to a hard 50 life sentence for first-degree murder and a concurrent 21-month sentence for criminal possession of a firearm. *James*, 309 Kan. at 1297.

On November 12, 2019, James filed a pro se petition under K.S.A. 60-1507 seeking a new trial and asserting that he received ineffective assistance of both trial and appellate counsel. On June 15, 2020, he filed a motion to amend his petition to add a claim for relief based on newly discovered evidence. On July 6, 2020,

he filed essentially the same motion. He then filed another, very similar motion on July 9, 2020.

On May 27, 2021, the district court conducted a hearing and denied James' original claims. The order formally denying those claims was belatedly entered on October 26, 2022.

On December 2, 2021, the district court entered an order denying James' various remaining claims. James filed a timely notice of appeal from that order. On November 8, 2022, he docketed the appeal with the Court of Appeals under case number 125,729. He also filed a timely amended notice of appeal including the October 26, 2022 order.

Meanwhile, in his criminal case, James filed a "Motion for Newly Discovered Evidence" on June 16, 2020. He followed this motion up with an "Amended Motion for Newly Discovered Evidence & Motion for New Trial Based on Newly Discovered Evidence" on July 27, 2020. The district court denied this motion on October 29, 2021. James filed a timely notice of appeal from that order. He docketed his appeal on December 16, 2021, under case number 124,614. This did not deter James from continuing to file motions in district court. On February 25, 2022, he filed a "Motion for Relief from Judgment or Order under . . . K.S.A. 60-260(b)(2)". It appears this motion has never been ruled on, but that is not relevant to this appeal. A district court loses jurisdiction to entertain posttrial motions in a case after an appeal has been docketed in that case. See, e.g., *State v. Thurber*, 313 Kan. 1002, 1007, 492 P.3d 1185 (2021); *In re Care & Treatment of Emerson*, 306 Kan. 30, 35, 392 P.3d 82 (2017).

On December 19, 2022, this court granted James' motion to consolidate his two appeals, and the appeals proceeded under appellate case No. 124,614.

Discussion

James filed multiple redundant pleadings under two case numbers in district court. These pleadings focused on three primary issues: a claim that "newly discovered evidence" in the form of an affidavit that Kindred had lied in his police interview was exculpatory; a claim that his trial counsel was ineffective; and a

claim that his appellate counsel was ineffective in his direct appeal.

I. Newly Discovered Evidence

James filed at least four motions/petitions seeking a new trial based on his assertion that Kindred recanted his statements to police. These pleadings are evaluated under K.S.A. 22-3501(1), which specifically refers to newly discovered evidence and allows a court to "grant a new trial to the defendant if required in the interest of justice."

James relies on an affidavit apparently produced in James' own handwriting and signed by Kindred stating that Kindred's statements made in the days immediately following the shooting were untrue.

This court reviews the denial of a motion for a new trial based on newly discovered evidence for whether the district court abused its discretion. See *State v. Engelhardt*, 280 Kan. 113, 141, 119 P.3d 1148 (2005). A district court abuses its discretion when denying a motion for new trial based on newly discovered evidence if the decision was arbitrary, fanciful, or unreasonable; was based on an error of law; or was based on an error of fact. *State v. Lyman*, 311 Kan. 1, 16, 455 P.3d 393 (2020).

Our courts do not favor motions for new trial based on newly discovered evidence and view them with great caution. *State v. Thomas*, 257 Kan. 228, 233, 891 P.2d 417 (1995). When seeking to demonstrate that the interest of justice warrants a new trial based on newly discovered evidence, the defendant bears the burden of establishing that the newly proffered evidence is indeed "'new'—that is, it could not, with reasonable diligence, have been produced at trial" and that the evidence is so material "that there is a reasonable probability it would produce a different result upon retrial." *State v. Moncla*, 269 Kan. 61, 64, 4 P.3d 618 (2000).

James fails to satisfy either part of this test. Not only could the evidence of Kindred's change of heart about what he witnessed at the scene of the shooting have been produced at trial, it *was* produced: Kindred testified to the jury that he had made up earlier statements, in particular, those he made to McClennon's sister, tending to show James premeditated the shooting. On the witness

stand, Kindred repudiated his earlier statements to police and family members and denied having seen James shoot McClennon. He also repudiated his earlier statements that James always carried a gun on his person.

Having heard Kindred recant his earlier statements and having heard the testimony of other witnesses, it is unlikely the jury would have reached a different verdict if it had seen Kindred's affidavit. James admitted he had a gun and fired two shots. He either already had the gun on his person when he showed up at the party, or he went out and obtained the gun and returned to the party with it. There was no evidence suggesting anyone else had fired a gun. It made no material difference whether Kindred observed James fire the shot that killed McClennon.

When the person making the allegedly false statement at trial was subject to cross-examination and his credibility was attacked at trial and when that witness was only one of several to implicate the defendant in the crime, this court is disinclined to find that there was a reasonable probability that a subsequent impeachment of the trial testimony would produce a different result upon retrial. See *Engelhardt*, 280 Kan. at 141-42.

The district court did not abuse its discretion when it denied James' motion for a new trial based on newly discovered evidence.

II. Ineffective Assistance of Counsel Claims

James alleges both his trial and appellate counsel were ineffective to such an extent that he was denied fair hearings. His claim focused on a blend of speedy-trial violations and the manner in which his attorneys dealt with legal theories and continuances, maintaining he had acquiesced in the extensions. The district court denied his petition for relief without conducting an evidentiary hearing.

Standard of Review

In reviewing a district court's decision on claims of ineffective assistance of counsel, appellate courts review the district court's factual findings using a substantial competent evidence standard. Appellate courts review the district court's legal conclusions based

on those facts applying a de novo standard of review. *State v. Evans*, 315 Kan. 211, 218, 506 P.3d 260 (2022).

When the district court summarily dismisses a K.S.A. 60-1507 motion, an appellate court conducts a de novo review to determine whether the motion, files, and records of the case conclusively establish that the movant is not entitled to relief. *State v. Vasquez*, 315 Kan. 729, 731, 510 P.3d 704 (2022).

Claims of ineffective assistance of trial counsel are analyzed under the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984), and adopted by the Kansas Supreme Court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Under the first prong, the defendant must show that defense counsel's performance was deficient. If successful, the court moves to the second prong and determines whether there is a reasonable probability that, absent defense counsel's unprofessional errors, the result would have been different. *Evans*, 315 Kan. at 217-18.

To establish deficient performance under the first prong, the defendant must show that defense counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel must be highly deferential. A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, reconstruct the circumstances surrounding the challenged conduct, and evaluate the conduct from counsel's perspective at the time. *Evans*, 315 Kan. at 218. A court considering a claim of ineffective assistance of counsel must strongly presume that defense counsel's conduct fell within the wide range of reasonable professional assistance; that is, the defendant must overcome the strong presumption that, under the circumstances, counsel's action might be considered sound trial strategy. *Khalil-Alsalaami v. State*, 313 Kan. 472, 486, 486 P.3d 1216 (2021).

Under the second prong, the defendant must show that defense counsel's deficient performance was prejudicial. To establish prejudice, the defendant must show with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence. A court hearing a claim

of ineffective assistance of counsel must consider the totality of the evidence before the judge or jury. *Khalil-Alsalaami*, 313 Kan. at 486. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Evans*, 315 Kan. at 218.

To establish ineffective assistance of counsel on appeal, defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's deficient performance, the appeal would have been successful. *Khalil-Alsalaami*, 313 Kan. at 526.

James' Direct Appeal

This court discussed James' speedy trial issues in his direct appeal in the context of his right to appear at continuance hearings. Although he now reframes the issue in terms of ineffective assistance of counsel, whether his speedy trial rights were violated has already been determined.

This court described James' communications with Brad Sylvester, his attorney at that time:

> "James' first appearance on the charges was in later October 2015. On December 14, 2015, James filed with the clerk of the court a letter he had written to his then-attorney Brad Sylvester. The letter asked Sylvester to take certain actions in his case. James asked Sylvester to 'file and pursue any and all necessary paperwork to insure a speedy trial, I'd also ask you to file a 180 day writ [and] a motion for statutory speedy trial.' James later reiterated a request that Sylvester 'vigor[o]usly pursue' his 'speedy trial' and asked that Sylvester 'not continue my preliminary hearing . . . or continue my trial ever.' James also asked to be present at 'any and all hearings . . . when my case is d[i]scussed.'
>
> . . . .
>
> "On February 16, Sylvester requested a continuance in a filing titled, 'Notice and Order Concerning Defense Counsel's Request to Continue Trial after Consultation with the Defendant.' District Court Judge Jeffrey E. Goering granted the request to continue the case and reset trial for March 14, 2016. The form document, which was signed and submitted by Sylvester, contained the following paragraph:
>
> "'In submitting this request to the Court, the named defense counsel represents to the Court that counsel has consulted with the named defendant about this continuance and this continuance is to be charged to the defendant pursuant to K.S.A. 22-3402(g).'"
>
> "On March 16, Sylvester asked for another continuance, using an identical form document. Judge Goering again granted the request and reset trial for June 6, 2016.

"On April 14, James filed a motion seeking to dismiss counsel. James alleged an irreconcilable conflict and complete breakdown of communication. That same day, the motion was set for hearing on April 22, 2016.

"James was present for the motion hearing before District Court Judge John J. Kisner, Jr. On April 22 Judge Kisner acknowledged James' previous concerns over a speedy trial. Judge Kisner informed James that recent caselaw required that any further continuances would require James to sign off on them or attend a hearing. Judge Kisner denied the motion to dismiss counsel and informed James that any appointment of new counsel would mean more time for trial preparation. James responded, 'I'm not worried about the time.'

"During the hearing, the court and parties discovered that a June 6 start date for trial—the date that had been set on March 16—conflicted with the court's schedule. Trial was reset for July 11, 2016. Judge Kisner advised James that the time would not be charged to the State and asked if James was agreeable to the new trial date. James said he understood and agreed to the new date.

"On June 15, 2016, James filed an Objection to Continuance.

"'COMES NOW, the Defendant, pro se, formally objecting to any continuance sought by either the State or defense counsel in the above entitled action. The defendant further asserts his statutory, K.S.A. 22-3208(7), and Fourteenth Amendment Due Process right to appear at all "critical stages" in a prosecution including any proceeding where the court may order that the Defendant has waived any constitutional or statutory right.'

"The same day, James moved to dismiss the case with prejudice. James alleged that his 'statutory right to a fast and speedy trial, and his constitutional right to Due Process and fast and speedy trial' had been violated.

"In his motion, James set out a timeline of events, alleging that his trial had been continued by his attorney on February 16, March 14, and June 6, outside of James' presence and against his 'clear wishes.' James further alleged, 'At no time has the defendant been present in the courtroom or by video, and asked if he agreed to the continuance or given the opportunity to object to the continuance' and that '[t]here are no signed waivers of speedy trial or signed acknowledgments of continuance.' According to James, the time the State had to bring him to trial under K.S.A. 22-3402 began to run on January 13, 2016, the date of his preliminary hearing, and expired on June 12, 2016.

"The same day James filed his pro se motion, the district court clerk sent Sylvester a letter advising him of the filing and saying that no further action would be taken unless Sylvester directed otherwise.

"On June 20, James filed another motion seeking to have Sylvester replaced. In an affidavit filed the next day, James alleged he had informed Sylvester in writing that he wanted to be present at all hearings but Sylvester had nevertheless failed to consult him about any of the previous continuances. James further alleged that he had not been given the opportunity to appear at any of the continuance hearings and that, had he been present, he would have objected to any continuance.

"On July 1, Judge Kaufman heard James' motion for new counsel. James explained that he felt there was a communication breakdown between himself

and Sylvester because of the continuances Sylvester had requested without James' knowledge.

"The State contradicted James' assertion that he had not been present or known about any of the continuances, alerting the court to James' presence at the April 22 hearing and his agreement to the continuance granted that day.

"James acknowledged that the State was correct but insisted the April 22 continuance was not the only one.

"'It's several continuance[s]. I have it in my ROA that it's been continued by the defense that I did not sign off on or anything, didn't know it. I also filed a motion for . . . dismissal of case for fast and speedy trial violation, constitutional and statutory rights.'

"The State conceded that James had filed a motion to dismiss based on a speedy trial violation. The motion had not been docketed for hearing because it was filed pro se.

"Judge Kaufman ultimately granted James' request for new counsel.

"On July 11, Judge Goering continued the trial setting again despite James' in-court refusal to agree to it. James' new counsel had yet to receive any discovery. The State asked for a continuance of the trial until September 12 because of the unavailability of one of its witnesses. Judge Goering granted the State's request over James' objection and set a 'firm' trial date of September 12.

"New counsel was appointed on three occasions in late August and early September, culminating in Steven Mank's appointment on September 1. Mank would represent James through the trial but be replaced before sentencing.

"On September 12, Judge Goering signed off on another trial continuance, continuing the case from September 12 to November 14, 2016. His order is a form document similar to those filed by Sylvester in February and March. However, unlike the earlier forms, this one required the defendant's signature approving the continuance. The form shows James signed and dated it on September 10." *James*, 309 Kan. at 1283-86.

What follows is key to the posture of the present motion and appeal. This court determined, based on the limited record it had before it, that James did not establish a speedy trial violation based on a lack of waiver of his speedy trial rights:

"[T]he record is not silent on James' contemporaneous attitude toward the continuances obtained by Sylvester. Although generic forms were used, and there is no evidence of a waiver of James' right to be present, Sylvester represented to the court that he had consulted with his client and at least implied that James agreed with his counsel's course of action.

"In addition, the record establishes that James later acquiesced in other continuances that postponed his trial. On April 22, 2016, James agreed to his trial being moved from June to July to accommodate the court's calendar. At the same hearing, he told the court, 'I'm not worried about the time.' In September 2016, after Mank had finally been appointed, James again agreed to a continuance from September to November. James personally signed off on the form requesting the continuance. . . .James' initial unequivocal demand for no continuances charged

against him collapsed in the face of other exigencies, principally the need for adequate time to prepare for new counsel.

"Absent any consistent assertion of a violation of his speedy trial right or another sign of prejudice arising from James' absence from continuance hearings, any assumed error would not be reversible." *James*, 309 Kan. at 1310-11.

We see from the above discussion that this court has already determined that James' speedy trial rights were not violated and that he suffered no prejudice from Sylvester's conduct. His present claims of ineffective assistance by a series of attorneys all rest on the premise of prejudice, and those claims accordingly are unsupported. We consider each of these claims.

A. Brad Sylvester

Brad Sylvester was James' trial counsel until the court appointed new counsel. This court has already concluded that the record sufficed to show that James' speedy trial rights were not violated. It relied both on Sylvester's representations that James agreed to continuances and on James' implicit and express statements to the district court that he was agreeing to several continuances. The doctrines of res judicata and law of the case operate against James, and he offers no new evidence or arguments to support his claim.

The law-of-the-case doctrine prevents a party from relitigating an issue already decided on appeal in successive stages of the same proceeding. *State v. Parry*, 305 Kan. 1189, Syl. ¶ 1, 390 P.3d 879 (2017). Courts adhere to the law of the case """to avoid indefinite relitigation of the same issue, to obtain consistent results in the same litigation, to afford one opportunity for argument and decision of the matter at issue, and to assure the obedience of lower courts to the decisions of appellate courts. [Citation omitted.]""" *Parry*, 305 Kan. at 1194.

The doctrine of stare decisis "instructs that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised." *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362-63, 361 P.3d 504 (2015).

This court has held that, in the context of a claim of denial of his constitutional right to be present, James failed to demonstrate

a violation of his right to a speedy trial. To the contrary, the record tended to show *no* violation of his speedy trial rights.

There is no need to remand this case for an evidentiary hearing. The speedy trial issue has been resolved to James' disadvantage, and he may not relitigate it in a K.S.A. 60-1507 proceeding.

The district court relied on res judicata to deny James' speedy trial/ineffective assistance claims. This was correct. The summary denial was appropriate because the motion, files, and records of the case conclusively established James was not entitled to relief. As a consequence, the first prong of the *Strickland* and *Chamberlain* test was not met, a showing that counsel's performance was deficient.

B. Steve Mank

Steve Mank was eventually appointed as new counsel for James and represented him at trial. James argues Mank was ineffective because he did not argue to the district court that Sylvester was ineffective for waiving speedy trial rights. He acknowledges that this court ruled there was no speedy trial violation, but he contends that it is possible that making this argument prior to trial would have required an evidentiary hearing and might have produced a different result. This somewhat circuitous argument again implies this court was wrong in its previous opinion: Sylvester was ineffective for allowing continuances against James' wishes, and Mank was ineffective for failing to challenge Sylvester's assertions. But, in the end, this court has decided that the record supports a finding that there was no speedy trial violation resulting from Sylvester's conduct. 309 Kan. at 1311. Therefore, it follows that there was no viable ineffective assistance claim against either attorney.

C. Kai Tate Mann and Sam Schirer

This claim of error by appellate counsel relates to James' issues on direct appeal. Kai Tate Mann and Sam Schirer represented James in his direct appeal. James contends their representation was ineffective, specifically arguing his appellate counsel failed

to provide authority that would support a new standard for analyzing harmless error.

The test for effectiveness of appellate counsel is the same as for trial counsel. See *Baker v. State*, 243 Kan. 1, 7, 755 P.2d 493 (1988). A defendant claiming ineffective assistance of appellate counsel must demonstrate counsel's performance, considering the totality of the circumstances, fell below an objective standard of reasonableness. And, to determine whether counsel's performance was objectively reasonable, the reviewing court judges the challenged conduct on the facts of the particular case, viewed as of the time of the counsel's conduct. *Miller v. State*, 298 Kan. 921, 931, 318 P.3d 155 (2014). This court employs "a strong presumption that counsel's conduct was reasonable." 298 Kan. at 931.

In James' direct appeal, this court held:

"We now turn to harmlessness. James argues that each of the errors identified is a constitutional flaw in his trial. See *State v. Salary*, 301 Kan. 586, 599, 343 P.3d 1165 (2015). He urges us to reconsider our caselaw applying a statutory harmlessness test to such instruction error. He argues that these errors implicate federal and state constitutional guarantees of a defendant's right to present his or her theory of defense. See *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (2003) (defendant entitled to present theory of his or her defense; exclusion of evidence integral to theory violates defendant's fundamental right to fair trial).

"James does not cite any caselaw or other authority establishing the rule he seeks, and he does not otherwise articulate an argument sufficient to persuade a majority of this court to reconsider application of the statutory test in these circumstances. See *State v. Torres*, 280 Kan. 309, 331, 121 P.3d 429 (2005) (simply pressing point without pertinent authority, without showing why point sound despite lack of supporting authority or in face of contrary authority akin to failing to brief issue; when party fails to brief issue, issue considered waived, abandoned). We therefore continue to apply the statutory test today.

"Under that test we 'must be persuaded that there is no reasonable probability that the error will or did affect the outcome of the trial.' *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 565 U.S. 1221, 132 S. Ct. 1594, 182 L. Ed. 2d 205 (2012). The burden of demonstrating harmlessness is on the party benefiting from the error, which, in this case, is the State. See *State v. Preston*, 294 Kan. 27, Syl. ¶ 3, 272 P.3d 1275 (2012).

"To reach a verdict in this case the jury had to resolve the conflict between two competing versions of the critical moments surrounding the shooting of McClennon. Either James returned to the party intending to do harm to Johnson and McClennon or he returned for other reasons and then was forced to react to a lethal threat from Johnson, McClennon, and Travis. The jury found James guilty of first-degree murder, which required jurors to conclude not only that the killing was intentional but also premeditated. See K.S.A. 2018 Supp. 21-5402(a)(1).

This verdict eliminates the possibility that the jury viewed the killing as merely reckless, and we can safely say there is no reasonable probability the judge's refusal to instruct on either or both reckless second-degree murder and involuntary manslaughter affected the outcome of the trial." *James*, 309 Kan. at 1301-02.

James asserts that this court was, in essence, finding that his appellate counsel was deficient because they did not present authority supporting a novel theory relating to constitutional harmlessness analysis.

But, as the State points out in its brief, James makes no showing either that there is authority to be found supporting his novel argument or that this court would be likely to adopt such a novel argument or that, if it did adopt the argument he proposed in his direct appeal, the result would have been different. Any argument about ineffectiveness of his appellate counsel is entirely speculative.

James' claim is not supported by any showing that the theory was likely to succeed or could have been supported by plausible authority. We do not fault his appellate counsel for putting forward a novel theory, and we do not find counsel was ineffective for failing to present the novel theory in such a way that it would convince this court to adopt that theory. James fails to demonstrate performance by his appellate counsel that was objectively unreasonable. We therefore do not need to consider whether their actions were prejudicially deficient. James' argument fails as to his appellate counsel also.

CONCLUSION

James presented the trial court with several diverse claims of asserting he was entitled to a new trial based on newly discovered evidence or a hearing to determine whether the attorneys who represented him at trial and on appeal were prejudicially deficient in performing their professional duties. These claims were based on matters already established either by evidence produced at trial or by determinations made on appeal.

We find no error on the part of the trial court in dismissing James' various challenges to his conviction.

Affirmed.

No. 127,055

In the Matter of JUNE R. CROW-JOHNSON, *Respondent.*

(553 P.3d 328)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Order of Disbarment.*

Original proceeding in discipline. Oral argument held June 12, 2024. Opinion filed August 2, 2024. Disbarment.

Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator, argued the cause, and *Amanda G. Voth*, Deputy Disciplinary Administrator, was on the formal complaint for the petitioner.

Respondent did not appear for oral argument.

PER CURIAM: This is an attorney discipline proceeding against June R. Crow-Johnson, who was admitted to practice law in Kansas in September 1990 and whose last address as reported to attorney admissions was in Topeka.

The Office of the Disciplinary Administrator filed a formal complaint against Crow-Johnson alleging violation of the Kansas Rules of Professional Conduct (KRPC) and Supreme Court Rules. Crow-Johnson did not answer and failed to appear before the Kansas Board for Discipline of Attorneys or this court. Nevertheless, a hearing panel of the Board conducted an evidentiary hearing after which it issued a final hearing report setting forth its factual findings, legal conclusions, and recommended discipline.

The hearing panel determined that Crow-Johnson violated:

- KRPC 1.3 (2024 Kan. S. Ct. R. at 328) (diligence),
- KRPC 1.4(a) (2024 Kan. S. Ct. R. at 329) (communication),
- KRPC 1.15(a) (2024 Kan. S. Ct. R. at 369) (safekeeping property),
- KRPC 1.16 (2024 Kan. S. Ct. R. at 374) (declining or terminating representation),
- KRPC 3.3 (2024 Kan. S. Ct. R. at 387) (candor),
- KRPC 3.4(c) (2024 Kan. S. Ct. R. at 391) (disobeying an obligation of the tribunal),

- KRPC 8.1(b) (2024 Kan. S. Ct. R. at 427) (disciplinary matters),
- KRPC 8.4(d) (2024 Kan. S. Ct. R. at 430) (misconduct prejudicial to the administration of justice),
- Supreme Court Rule 206(o) (2024 Kan. S. Ct. R. at 258) (attorney registration), and
- Supreme Court Rule 210 (2024 Kan. S. Ct. R. at 260) (duty to assist).

Upon conclusion of the hearing, the panel made findings of fact and conclusions of law and recommended Crow-Johnson be disbarred, as follows:

"Findings of Fact

. . . .

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"12. In 2003, J.C. obtained a Living Trust Agreement that created a charitable share and a family share of the trust and also a separate charitable remainder trust (collectively, 'the Trust' or 'J.C.'s Trust'). Relatives of J.C. were listed as beneficiaries of the family share of the Trust, including J.C.'s brother, R.C.

"13. J.C. was a client of the law firm Coffman, DeFries, and No[]thern, P.A. For a period of time prior to mid-2019, Joshua A. Decker, an attorney with the Coffman firm, served as the Trustee of the Trust. Mr. Decker left the Coffman firm in mid-2019.

"14. Effective June 21, 2019, J.C. executed a Removal and Replacement of Trustee that removed Mr. Decker as Trustee and appointed the respondent as trustee of the Trust. The respondent accepted this appointment. At that time, the respondent was an associate lawyer employed by the Coffman firm.

"15. J.C. passed away on November 18, 2020. At this time, R.C. was over 90 years old and lived in California. Soon after J.C.'s passing, the respondent called R.C. to let him know a few things, including that the respondent had J.C.'s ashes in her possession. This was the only time that R.C. heard from the respondent.

"16. Sometime before the end of 2020, the respondent left the Coffman firm and became employed at BOK Financial.

"17 Attorney S. Lucky DeFries, who was a partner of the former Coffman firm, testified that in January 2021, the Coffman firm merged with the Morris Laing law firm. He said that when the respondent left the Coffman firm, the respondent told the firm she planned to continue to serve as trustee of the J.C. Trust

while employed at BOK Financial. The respondent also stated that she planned to continue preparing tax returns for the Topeka Bar Association, which is at issue in the DA13,964 matter and discussed further below. The Coffman firm ceased involvement in these matters after the respondent left, other than to assist others in locating documents and trying to contact the respondent.

"18. After that initial phone call, R.C. tried to reach the respondent by phone and by email numerous times. R.C. did not have a copy of the Trust and was receiving phone calls from an insurance company about a policy for J.C. R.C. needed information from the respondent and was concerned that the respondent was not properly handling J.C.'s affairs. R.C. left messages for the respondent, but never received a response.

"19. Eventually, in January 2022, R.C. hired Topeka lawyer Tom R. Barnes, II, to assist him in obtaining information from the respondent. Mr. Barnes contacted the respondent on January 18, 2022, and provided the respondent proof that he represented R.C., as requested by the respondent, on January 21, 2022. M[r]. Barnes tried to reach the respondent numerous times after that by phone and email but did not receive a response or any of the documents he had requested.

"20. Mr. Barnes did as much investigation as he could into the Trust matter, including contacting the respondent's former firm, the Coffman firm, in early February 2020. Mr. Coffman sent Mr. Barnes copies of documents the firm had for J.C., including a copy of the Living Trust Agreement and the Removal and Replacement of Trustee appointing the respondent as trustee effective June 21, 2019. This was the first time that R.C. learned that he had been listed as 'trust advisor' in J.C.'s Trust. R.C. also learned he was listed as a beneficiary.

"21. Because he received no response from the respondent despite numerous attempts to contact her, Mr. Barnes wrote a demand letter to the respondent asking for an inventory, accounting of all receipts and disbursements, and tax returns for the Trust. The letter also asked for copies of J.C.'s death certificate and the cremated remains of J.C. Mr. Barnes testified that R.C. was very frustrated with the respondent's lack of communication and wanted to resolve the matter quickly due to R.C.'s advanced age.

"22. When the respondent did not respond to Mr. Barnes' demand letter, Mr. Barnes filed an action in Shawnee County District Court on March 7, 2022. The respondent was served with a copy of the petition on March 16, 2022.

"23. A hearing was scheduled in the matter. The respondent failed to file an answer and failed to appear. On June 9, 2022, the court entered a partial default judgment against the respondent and ordered the respondent to provide a complete inventory and accounting of the property in the Trust within 14 days. The court noted that failure to comply with the order would be deemed an action in contempt of the court's order.

"24. The respondent failed to comply with the court's June 9, 2022, order. On July 7, 2022, Mr. Barnes filed an Accusation in Contempt against the respondent on R.C.'s behalf. Further, Mr. Barnes filed a motion for ex parte relief asking for appointment of a new trustee and other protections, which the court ultimately granted.

"25. Ms. Barnes testified that . . . after he filed the Accusation in Contempt, he personally went to the clerk's office to obtain a certified copy of the citation the court issued. The citation ordered the respondent to bring with her all records, files, and account documents the respondent had in her possession for the Trust to the contempt hearing.

"26. The respondent's employer, BOK Financial, was located on the way back to Mr. Barnes' office, so he stopped by BOK Financial and asked for the respondent. The respondent came to the lobby from her office and asked Mr. Barnes to walk with her back to her office to talk about the matter. Mr. Barnes personally served the respondent with the certified copy of the citation and told her that the matter was serious and that she needed to comply with orders of the court.

"27. On August 2, 2022, the respondent appeared at the hearing on the citation in contempt. The respondent informed the court and R.C. that she had scattered J.C.'s remains as J.C. had directed. Mr. Barnes testified during the formal hearing that R.C. did not take exception to the respondent having done this. Further, the respondent apologized for not doing a good job as a fiduciary, citing health issues of her parents, her husband, and herself making it difficult for her to keep up with all of her responsibilities.

"28. The respondent also told the court that she had some personal items belonging to J.C. and a box of records for the Trust that she was still trying to locate. Further, the respondent said she had filed tax returns for the Trust for the years 2020 and 2021, and that those returns were among the records she was trying to locate.

"29. The respondent agreed that she violated the court's order. The court expressed concern that the respondent still did not produce all of the information for the Trust she was ordered to provide. The court ordered that the respondent produce the remaining records within two weeks of the August 2, 2022, hearing. The hearing was continued to September 8, 2022.

"30. On September 8, 2022, the parties again appeared for the continued hearing on the citation in contempt. Mr. Barnes advised the court that the respondent delivered to him an empty leather suitcase bearing J.C.'s initials and a banker's box that did not contain any of the requested documents, including the spreadsheets the respondent told the court at the prior hearing she had prepared to track J.C.'s assets. Further, copies of the Trust's 2020 and 2021 tax returns were not present with the documents provided.

"31. The court placed the respondent under oath during the September 8, 2022, hearing. While testifying, the respondent admitted that she did not provide a copy of the trust to R.C. and did not respond to multiple requests for information from R.C. Further, in response to Mr. Barnes' question [about] whether she had prepared 2020 and 2021 income tax returns for the Trust, the respondent stated, 'Yes. Uh, but unfortunately I have not been able to locate those.' Again, later when asked, 'You personally prepared them?' the respondent stated, 'Yes, I did.'

"32. Further, the respondent testified that although the court had previously ordered her to produce copies of the income tax returns, she had not been able to locate them and had not contacted the IRS or the State of Kansas to try to obtain copies. The respondent also testified that she did not produce an accounting and inventory of the trust assets and did not produce the spreadsheets as she was ordered to do.

"33. The respondent testified during that hearing that her mother was diagnosed with Parkinson's disease, her parents moved in with her so that she and her husband could act as their caregivers, and in March 2022, her mother passed away. The respondent said that her father was not doing well as a result. Further, the respondent testified that her husband was recently diagnosed with a mental health condition. She said these circumstances made administering the Trust more than she was capable of dealing with.

"34. The respondent said that her house was in disarray from her parents moving in with her and then subsequently moving into an assisted living facility. The respondent believed she had more records for the Trust at her home but had not been able to locate them. The court ordered the respondent to turn over the records the respondent said were saved on her computer within one week.

"35. During the hearing, the respondent agreed that she should be responsible for paying R.C.'s attorney fees in the case. The court ordered the respondent to pay R.C.'s attorney fees and expenses for bringing the action, totaling $9,981.54, as a sanction for past violation of the court's prior three orders. The court further informed the respondent that if the tax returns and computer records were not produced within a week as presently ordered, the court would order the respondent to spend one weekend in jail.

"36. During a September 20, 2022, hearing, the respondent said she was unable to locate all of the records, including 2020 and 2021 income tax returns for the Trust, in order to purge the contempt finding. R.C. acknowledged that he received a check from the respondent paying the $9,981.54 attorney fee.

"37. At the formal hearing, the disciplinary administrator's office agreed during closing argument that the respondent paid this sanction in full.

"38. In its journal entry, the district court concluded:

'The Court expresses its disbelief that the Defendant as a former member of the bar, failed to segregate and preserve the files and documents of the trusts

from other files and documents in her home; its aggravation with the Plaintiff being forced to go to the measures he has to obtain information regarding his late brother's Trusts; and its extreme disappointment with the Defendant's contemptuous behavior in response to the Court's directives leading up to a Citation in Contempt being issued, prosecuted and sanctions being imposed. The foregoing being noted, the Court recognizes that requiring the Defendant to serve time in jail is not likely to change the circumstances.'

The court ordered the respondent to continue to turn over any records for the Trust in her possession. However, the case eventually terminated.

"39. Jason Walker, and later Mike Davies, with The Trust Company were appointed as the new trustees of the Trust. The Trust Company ultimately hired an accounting firm to assist with recreating an accounting for the Trust estate. The accounting firm obtained information from the IRS showing that income tax returns were not filed for the Trust in 2020 or 2021.

"40. Mr. Davies testified that on October 16, 2023, The Trust Company received notice from the IRS about income taxes owed for the Trust. For the tax year ending December 31, 2021, the IRS stated that the Trust owed $21,982.00 in unpaid income taxes, plus interest in the amount of $2,592.26, a failure to file penalty of $4,945.95, and a failure to pay penalty of $2,088.29.

"41. Mr. Davies testified that if the Trust had been administered properly, the $9,626.50 in interest and penalties would not have been owed and the income tax owed may have been lower. Mr. Davies explained that proper administration of a trust typically involves efforts to shift some of the tax burden away from the Trust and to the beneficiaries, because a trust typically pays taxes at a much higher rate than most individuals do.

"42. Mr. Davies expects further penalties from the IRS for the tax year ending December 31, 2022, because those tax returns were also not filed on time. The Trust Company has asked the IRS for a waiver of the penalties because the fiduciary in charge of the account during those times—the respondent—is no longer the trustee of record. Mr. Davies testified that it is unlikely the IRS will grant the Trust a waiver on that basis.

"43. Mr. Davies testified that The Trust Company received notice from the State of Kansas on October 10, 2023, that the Trust has a balance due for the tax year ending December 31, 2021, of $982.22.

"44. Further unnecessary expenses the Trust incurred during the time the respondent was trustee were an AT&T bill and United Healthcare premiums that both continued to be charged after J.C.'s death, according to Mr. Davies. United Healthcare agreed to reimburse the Trust for the premiums paid after J.C.'s death, but AT&T did not waive the total overpaid amount of over $2,300.00. Moreover, the accounting firm hired by The Trust Company to research and account for the Trust during the time the respondent was trustee charged more for these additional services; approximately $4,500.00. Mr. Davies testified that it had not yet been determined, but it was possible The Trust Company would need to charge

an additional approximately $500.00 for the reconstructing and research it did to determine the assets of the Trust in order to establish a new basis for tax purposes.

"45. Mr. Davies testified that Mr. Barnes' legal fees were another expense incurred by the trust as a result of the respondent's failure to perform her duties as trustee, but as noted above, the respondent paid that amount.

"46. Mr. Davies also testified that he saw no evidence that the respondent had taken any funds from the Trust estate.

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"47. The respondent, through her employment at the Coffman firm, had prepared the tax returns for the Topeka Bar Association ('TBA') for several years before the 2020 tax year. When Amanda Kohlman began as executive director of the TBA in March 2020, attorney S. Lucky DeFries with the Coffman firm told Ms. Kohlman about how his firm prepared the TBA tax returns and that the firm would file a standard filing extension and discuss what documents were needed from the TBA in August.

"48. Ms. Kohlman testified she met with the respondent in August 2020 and the respondent told Ms. Kohlman what documents she needed to complete the tax return. Ms. Kohlman provided physical copies of everything to the respondent during that meeting, except for two documents that Ms. Kohlman emailed later. The respondent also asked Ms. Kohlman to provide a check for the filing fee so that the respondent could mail it to the IRS with the tax return. Ms. Kohlman provided this check to the respondent.

"49. At the time, Ms. Kohlman knew that the Coffman firm was disbanding and that certain members planned to merge with the Morris Laing firm. The respondent assured Ms. Kohlman during a phone call that she was still going to prepare TBA's tax return for the 2020 tax year.

"50. Later, the respondent told Ms. Kohlman that the respondent had filed the TBA's tax return by mail. Ms. Kohlman relied on the respondent's statement, in part, because the respondent had prepared and filed the TBA's tax returns for years.

"51. The TBA later received a notice from the IRS that the TBA's tax filing for the 2020 year was delinquent. In a letter from the IRS dated October 11, 2021, the IRS informed the TBA that the IRS was charging a penalty of $220.00 for filing late.

"52. The TBA sent multiple communications to the respondent to try to find out what happened with the tax filing and get information and documents from the respondent.

"53. Ms. Kohlman last heard from the respondent that the respondent would continue to look into the issue and then never heard from the respondent after that. The respondent never returned the documents provided to her by the TBA, despite multiple

requests from the TBA to have the documents returned so that the organization could file its 2020 return.

"54. Janet Ward, an attorney with the Morris Laing firm, was hired by the TBA in 2022 to assist with the tax filing issue and to prepare its tax returns after the respondent stopped communicating with the TBA. Ms. Ward testified that she also tried to contact the respondent numerous times for information. Ms. Ward heard from the respondent that the respondent's mother had moved in with her and then later that her mother had passed away and that the respondent would try to find the TBA records. However, Ms. Ward never heard back from the respondent after this and was not able to get any information from the respondent to complete the TBA returns. Ultimately, Ms. Ward was not able to assist the TBA to complete the returns.

"55. Tana Griffith took over as the executive director of the TBA after Ms. Kohlman left in February 2022. Ms. Griffith learned that TBA had an agreement with the Coffman firm for completing TBA's tax returns and that for the past several years the respondent had taken over completing and filing the returns for TBA. Prior TBA meeting minutes showed the respondent agreed to prepare the TBA tax returns. Ms. Griffith also found documents from the respondent showing she had prepared prior tax returns for the TBA.

"56. Ms. Griffith also learned that the TBA tax returns for the 2020 fiscal year had not been filed. The following years' tax return filing problems dominoed because the 2020 tax return had not been filed. Ms. Griffith tried to reach the respondent at all places of contact information she had for the respondent. The respondent did not respond.

"57. The TBA received notices from the IRS showing a penalty of $220.00 on October 11, 2021, for filing late, a penalty of $5,769.65 on January 2, 2023, for filing late, and a penalty of $3,000.00 on February 6, 2023, for filing late.

"58. Ultimately, the IRS granted a waiver of the TBA's late tax filing penalties in October 2023.

"Disciplinary Investigation and Notice to Respondent

"59. Attorney Jon Blongewicz testified that he was assigned by the disciplinary administrator's office to investigate R.C.'s complaint against the respondent. Mr. Blongewicz tried to contact the respondent by email on August 26, 2022, by certified mail and regular mail on August 29, 2022, and by phone, leaving a voicemail, on October 7, 2022. The respondent never contacted Mr. Blongewicz in response to these communications.

"60. William T. Schilling, special investigator with the disciplinary administrator's office, testified that he tried to reach the respondent by calling her home and work phone numbers the respondent provided to attorney registration. Further, Mr. Schilling sent an email to the respondent's email address and letters to the respondent's home and office addresses she provided to attorney registration. Mr. Schilling received no response from the respondent.

"61. When Mr. Schilling called the respondent's work phone number at BOK Financial, the first time he selected the extension for the respondent. When he did not reach the respondent at that extension, Mr. Schilling called again and selected an extension for another employee. The person who answered told Mr. Schilling that the respondent had unexpectedly resigned and that the person had heard the respondent moved to Lincoln, Nebraska with her husband.

"62. Witness Jon Paul Washburn, treasurer for the TBA, also testified that he tried to contact the respondent by stopping by BOK Financial to speak with her in late 2022. Mr. Washburn was told that the respondent had left BOK Financial approximately two months prior, saying she retired and moved to Nebraska.

"63. Mr. Schilling looked up the respondent's home address that the respondent had listed with attorney registration, which was in Tecumseh, Kansas, on the Internet. Mr. Schilling saw the residence in Tecumseh, Kansas was listed for sale on realtor websites in January 2023.

"64. Mr. Schilling then tried to find another address for the respondent. Mr. Schilling found a street address and a PO Box address listed for the respondent in Lincoln, Nebraska.

"65. Mr. Schilling sent letters to the respondent asking her to contact him about this disciplinary matter to the respondent's registered Topeka area address, the street address in Lincoln, and the PO Box address in Lincoln. The Topeka letter was returned as undeliverable. Mr. Schilling never heard from the respondent in response to any of the mailings.

"66. Mr. Schilling also tried to search for the best phone number to reach the respondent. Mr. Schilling left a voicemail for the respondent at a new number found for the respondent asking her to return his call but did not receive a call back.

"67. Katie McAfee, assistant disciplinary administrator, made similar attempts to reach the respondent with no success.

"68. Mitzi Dodds, administrative secretary for the disciplinary administrator's office, testified that she prepared mailings to the respondent notifying the respondent of various actions and hearing dates that have occurred in this disciplinary matter. When Ms. Dodds sent a communication to the respondent, she regularly reviewed the Disciplinary Administrator's Database, which she testified is updated daily with the most up-to-date Kansas attorney information from attorney registration at the Office of Judicial Administration.

"69. Ms. Dodds testified that she reviewed the database the morning of the formal hearing and the respondent's information had not changed from the information shown in disciplinary administrator's exhibit 1.

"70. Ms. Dodds testified that numerous filings and notices in this matter were mailed to the home and office addresses listed with attorney registration for

the respondent and also to the addresses in Lincoln, Nebraska that Mr. Schilling had found for the respondent. Ms. Dodds noted that two of those Nebraska mailings as shown in Exhibits 16 and 17 were signed for by the respondent's husband. Further, a third mailing, which was a copy of the Notice of Deposition of R.C. in this matter, was signed for by the respondent at the same Nebraska street address.

"71. Ms. Dodds testified that a copy of the formal complaint and notice of hearing stating that the formal hearing was scheduled for October 24, 2023, were sent to the respondent at her email address and mailed to the BOK Financial office address the respondent provided to attorney registration at the time they were filed on August 22, 2023. Further, Ms. Dodds mailed copies of the formal complaint and notice of hearing to the PO Box address and the street address in Lincoln, Nebraska found for the respondent when these documents were filed.

"72. Later, in October 2023, Mr. Schilling found that the respondent had a vehicle registered at a different street address in Lincoln, Nebraska and records showed her husband resided at that new Lincoln, Nebraska street address as well.

"73. The disciplinary administrator's office received no response from the respondent to any of the communications sent to her.

"*Conclusions of Law*

"Service

"74. The respondent failed to appear at the hearing on the formal complaint. It is appropriate to proceed to hearing when a respondent fails to appear only if proper service was obtained. Kansas Supreme Court Rule 215 governs service of process in disciplinary proceedings. Rule 215 (2023 Kan. S. Ct. R. at 267). Rule 215 requires the disciplinary administrator to serve the respondent with a copy of the formal complaint and notice of hearing no later than 45 days before the hearing on the formal complaint. Rule 215(a)(2). Service on the respondent must be made by either personal service, certified mail to the respondent's most recent registration address with the Office of Judicial Administration, or on the respondent's counsel by personal service, first-class mail, or email. Rule 215(a)(3).

"75. In this case, the disciplinary administrator complied with Rule 215 by sending a copy of the formal complaint and the notice of hearing and prehearing conference by certified mail, return receipt requested, to the respondent's registered office address at BOK Financial in Topeka, Kansas, which the respondent provided as part of her attorney registration to the Office of Judicial Administration. This certified mailing was sent on August 22, 2023, which was more than 45 days prior to the formal hearing. This mailing was sufficient to establish service as required under Rule 215.

"76. Additionally, the disciplinary administrator's office made numerous other attempts to contact the respondent via phone, email, and regular and certified mail at new addresses found for the respondent in Lincoln, Nebraska as described in the Findings of Fact section above.

"77. The hearing panel concludes that the respondent was afforded notice of this disciplinary proceeding.

"78. The hearing panel notes that the disciplinary administrator's office declined to move forward on its allegation that the respondent violated KRPC 1.1 because Ms. Voth stated the respondent's conduct fit more closely with a violation of other rules asserted. The hearing panel agrees and does not conclude that the respondent violated KRPC 1.1.

"79. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property), 1.16 (withdrawing from or terminating representation), 3.3 (candor toward the tribunal), 3.4 (disobey an obligation of the tribunal), 8.1(b) (disciplinary matters), 8.4(d) (misconduct prejudicial to the administration of justice), Supreme Court Rule 206(o) (attorney registration), and Supreme Court Rule 210 (duty to assist), as detailed below.

"KRPC 1.3

"80. Attorneys must act with reasonable diligence and promptness in representing their clients. *See* KRPC 1.3.

"81. The respondent failed to diligently and promptly represent J.C. by failing to perform her fiduciary duties as trustee as she agreed to do as J.C.'s lawyer. The respondent's representation of J.C. while she worked for the Coffman firm included her performance of the duties as trustee of J.C.'s Trust. When the respondent left the Coffman firm to work for BOK Financial, she told the firm that she would continue to serve as the trustee of J.C.'s Trust.

"82. However, the evidence clearly shows that the respondent abandoned her duties as trustee. The respondent failed to handle, track, or account for assets held under the Trust, failed to cancel bills being improperly charged to the Trust estate after J.C.'s death, such as the United Healthcare premiums and AT&T billings, and failed to keep R.C. and other beneficiaries of the Trust properly informed after J.C.'s death. Most concerning, the respondent failed to provide documentation and property of the Trust to R.C. or the subsequent trustee, despite being ordered by the Shawnee County District Court to do so.

"83. While testifying under oath on September 8, 2022, the respondent admitted that she did not provide a copy of the trust to R.C. and did not respond to multiple requests for information from R.C.

"84. The respondent's lack of diligence with regard to J.C.'s Trust required R.C. to file a lawsuit against her in order to obtain information about the Trust. The respondent was ultimately held in contempt for her failure to provide Trust documents and other property in her possession. Further,

the respondent's conduct caused the Trust to have to pay increased taxes, tax penalties, and other additional costs to research and recreate documentation that the respondent should have completed.

"85. The respondent failed to diligently and promptly represent the TBA by failing to prepare and file the TBA's tax returns for the fiscal year ending in 2020. Despite having been provided all documents the respondent requested from TBA executive director, Amanda Kohlman, the respondent never filed the return and did not inform the TBA that she had not filed the return. In fact, the respondent told the TBA she did file the return, which was false.

"86. The respondent's lack of diligence in representing the TBA resulted in the TBA having to spend hours researching the issue, locating documentation, and resolving the tax filing issue. The TBA was charged $8,989.65 in IRA late filing penalties, which were later fortunately waived by the IRS.

"87. Because the respondent failed to act with reasonable diligence and promptness in representing J.C. and the TBA, the hearing panel concludes that the respondent violated KRPC 1.3 in both DA13,872 and DA13,964.

"KRPC 1.4

"88. KRPC 1.4(a) provides that '[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.'

"89. In this case, the respondent violated KRPC 1.4(a) when she failed to respond to requests from the TBA for information regarding the status of the TBA's 2020 tax return, which the respondent had agreed to prepare and file with the IRS. The TBA made multiple attempts through Ms. Kohlman, Ms. Griffith, Mr. Washburn, Ms. Ward, and others to reach the respondent to learn the status of its tax return filing and obtain documents that the TBA had provided to the respondent. The respondent's failure to communicate with the TBA caused unnecessary and significant problems for the organization, including IRS late filing tax penalties.

"90. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(a) in DA13,964.

"KRPC 1.15

"91. Lawyers must properly safeguard their clients' property. KRPC 1.15(a) specifically provides, in part, that:

'(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded.'

"92. In this case, the respondent failed to properly safeguard J.C.'s Trust estate property. The respondent acknowledged before the Shawnee County District Court that she did not properly safeguard J.C.'s property and that his property and documentation for the Trust became commingled with her personal property at her residence. When R.C. and the subsequent trustee needed access to the property and records, the respondent was unable to produce them, despite being ordered by the court and held in contempt for her failure to do so. Eventually, some of the Trust property was turned over to the new trustee, but it was not done promptly.

"93. Accordingly, the Trust property was not appropriately safeguarded or held separate from the respondent's own property. The hearing panel concludes that the respondent failed to properly safeguard J.C.'s Trust estate property, in violation of KRPC 1.15(a) in DA13,872.

"KRPC 1.15(b)

"94. Lawyers must deal properly with the property of their clients. Specifically, KRPC 1.15(b) provides:

'(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.'

"95. The respondent violated KRPC 1.15(b) when she failed to promptly deliver to the TBA the documents the TBA had provided the respondent to prepare its 2020 tax return. Despite numerous requests through individuals associated with the TBA for the respondent to return the documents, the respondent did not do so.

"96. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15(b) in DA13,964.

"KRPC 1.16(d)

"97. KRPC 1.16 requires lawyers to take certain steps to protect clients after the representation has been terminated. Specifically, KRPC 1.16(d) provides the requirement in this regard:

'Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property

to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.'

"98. The respondent violated KRPC 1.16(d) in both DA13,872 and DA13,964 when she failed to notify either J.C. or the TBA that she would be unable to perform the duties she had originally agreed to do and failed to surrender property and documents to which the subsequent trustee and beneficiaries of the Trust and the TBA were entitled.

"99. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.16(d) in DA13,872 and DA13,964.

"KRPC 3.3

"100. 'A lawyer shall not knowingly:

'(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]

. . . .

'(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.'

"KRPC 3.3(a)

"101. In the DA13,872 case, the respondent made a false statement of fact to the Shawnee Count[y] District Court, Judge Mary Christopher, when the respondent told the court on August 2, 2022, that she had filed tax returns for J.C.'s Trust for the years 2020 and 2021, and that she had copies of the returns she had prepared and filed that she was unable to locate.

"102. Further, on September 8, 2022, the respondent offered evidence she knew to be false and made a statement to the tribunal that she knew was false when the respondent testified under oath that she had personally prepared the 2020 and 2021 tax returns for the Trust.

"103. The subsequent trustee assigned to the Trust, The Trust Company, learned later that 2020 and 2021 tax returns for the Trust were never filed with the IRS as the respondent had represented to the court. In fact, the IRS assessed late filing penalties and interest against the Trust for the failure to file the 2020 and 2021 tax returns.

"104. The hearing panel concludes that by making a false statement to the court, including testifying falsely, the respondent knowingly made false statements of fact to the court in violation of KRPC 3.3(a).

"KRPC 3.4(c)

"105. Lawyers must comply with court orders. Specifically, KRPC 3.4(c) provides: '[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.'

"106. In this case, in the DA 13,872 matter, Judge Christopher entered three separate orders between June and October, 2022, ordering the respondent to produce documents and property belonging to the Trust in the respondent's possession. The respondent ultimately produced a few items very late, but did not produce all of the items, stating she was unable to locate them in her home.

"107. The respondent agreed that she violated the court's order.

"108. The court held the respondent in contempt for her failure to comply with the court's orders and ordered the respondent to pay R.C. $9,981.54, as a sanction for the respondent's violation of the court's first three orders.

"109. Judge Christopher even contemplated placing the respondent in jail for two days in order to obtain the respondent's compliance with the court's orders. However, later, Judge Christopher ultimately determined that sending the respondent to jail would not result in the respondent's compliance with the court's orders.

"110. The hearing panel concludes that the respondent's failure to comply with Judge Christopher's orders violated KRPC 3.4(c).

"KRPC 8.1(b) and Rule 210(b)

"111. Lawyers must cooperate in disciplinary investigations. KRPC 8.1(b) provides that 'a lawyer in connection with a . . . disciplinary matter, shall not: . . . knowingly fail to respond to a lawful demand for information from [a] . . . disciplinary authority.'

"112. Further, Supreme Court Rule 210(b) provides that, '[a]n attorney must timely respond to a request from the disciplinary administrator for information during an investigation and prosecution of an initial complaint or a report, a docketed complaint, and a formal complaint.'

"113. Volunteer attorney investigator Jon Blongewicz, special investigator W. Timothy Schilling, and assistant disciplinary administrator Katie McAfee collectively made numerous attempts to reach the respondent and made numerous requests for information from the respondent in the DA13,872 and

DA13,964 matters. The respondent was requested to provide a written response to the initial complaints in both matters and failed to do so in either case.

"114. While some of the mailings to the respondent during the investigation were returned as undeliverable, some sent to the Lincoln, Nebraska address[es] were not, indicating that the respondent received them and knew she needed to respond. In fact, later mailings in the disciplinary case were signed for by the respondent and her husband, showing that they indeed received mail at that address.

"115. Because the respondent knowingly failed to provide a written response to the initial complaints filed in DA13,872 and DA13,964, the hearing panel concludes that the respondent violated KRPC 8.1(b) and Supreme Court Rule 210(b).

"KRPC 8.4(d)

"116. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d).

"117. The respondent engaged in conduct that was prejudicial to the administration of justice when she obtained documents she said she needed from the TBA to prepare and file the TBA's 2020 tax return, did not prepare and file the 2020 return, and later lied to Ms. Kohlman by stating she had filed the tax return when she had not.

"118. As a result of the respondent's misconduct, the IRS imposed late filing penalties on the TBA that would not have been imposed but for the respondent's failure to prepare and file the returns as she had agreed to do.

"119. Further, individuals employed by and associated with the TBA had to put a significant amount of work into trying to obtain its original records from the respondent, after the respondent did not return the organization's original financial records to the TBA, and other efforts to try to resolve the 2020 tax filing issue. The respondent's conduct was prejudicial to the administration of justice.

"120. As such, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"Rule 206(o)

"121. 'No later than 30 days after a change occurs, an attorney must use the attorney registration portal to update any of the required information in subsection (n).' Rule 206(o). The required information in subsection (n) includes an attorney's residential address, business address, email address, business telephone number, and personal telephone number.

"122. `The disciplinary administrator's office learned through its investigation, as Mr. Schilling testified, that the respondent's home address was listed for

sale on realtor websites in January 2023. Further, Mr. Schilling located new residential addresses for the respondent in Lincoln, Nebraska, and mailings from the disciplinary administrator's office sent to the respondent at the Lincoln address were signed for by the respondent and her husband.

"123. However, Ms. Dodds testified that as of the morning of the formal hearing, she had checked the attorney registration database information and the respondent's residential address had not been changed with attorney registration from the Topeka area address of the house that was listed for sale in January 2023.

"124. Further, Mr. Schilling learned through his investigation that the respondent had unexpectedly resigned from her employment at BOK Financial and moved to Nebraska with her husband. Mr. Washburn, treasurer for the TBA, also testified that he tried to contact the respondent by stopping by BOK Financial to speak with her in late 2022. Mr. Washburn was told that the respondent had left BOK Financial approximately two months prior, saying she retired and moved to Nebraska.

"125. Ms. Dodds testified that as of the morning of the formal hearing, she had checked the attorney registration database information and the respondent was still listed as employed at BOK Financial.

"126. The evidence showed that phone calls to the respondent's registered residential and business phone numbers were unanswered and unreturned. Also, mailings sent to the respondent's registered residential and business address were returned to the disciplinary administrator's office as undeliverable and went without response.

"127. The respondent's failure to update her contact information with attorney registration caused significant wasted time and resources during the investigation of the complaints in DA13,872 and DA13,964

"128. Accordingly, the hearing panel concludes the respondent violated Supreme Court Rule 206(o).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"129. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"130. *Duty Violated*. The respondent violated her duty to her clients, to the legal system, and to the legal profession.

"131. *Mental State*. The respondent knowingly and intentionally violated her duties.

"132. *Injury*. As a result of the respondent's misconduct, the respondent caused injury to her clients in the form of unnecessary stress, wasted time and resources, deprivation of property and documents to which the clients were entitled, and unnecessary tax penalties and additional financial costs. The respondent caused injury to the legal profession by failing to follow court orders, ultimately being held in contempt, and by making false statements to the tribunal, which interfered with the administration of justice. Finally, the respondent violated her duty to the legal profession to cooperate in the disciplinary investigations, which unnecessarily wasted time and resources.

"Aggravating and Mitigating Factors

"133. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"134. *Dishonest or Selfish Motive*. The respondent lied under oath, to the Shawnee County District Court, and lied to the TBA about her preparation and filing of tax returns. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by dishonesty. The hearing panel did not find a selfish motive.

"135. *A Pattern of Misconduct*. The respondent engaged in a pattern of misconduct in both DA13,872 and DA13,964 by consistently and continuously failing to provide documents and information to the subsequent trustee and beneficiaries of the Trust and to the TBA, making false statements to the court and to individuals who asked about the status of the tax returns the respondent claimed to have prepared and filed, and failing to respond[] to reasonable requests for information. This pattern was consistent throughout and between both cases at all stages.

"136. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property), 1.16 (withdrawing from or terminating representation), 3.3 (candor toward the tribunal), 3.4 (disobey an obligation of the tribunal), 8.1(b) (disciplinary matters), 8.4(d) (misconduct prejudicial to the administration of justice), Supreme Court Rule 206(o) (attorney registration), and Supreme Court Rule 210 (duty to assist) between two separate docketed matters. Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"137. *Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Process*. The respondent failed to provide written responses to the complaints in both cases after she was repeatedly instructed to do so. Further, the respondent failed to

provide updated contact information to attorney registration for the disciplinary administrator's office to reach her about this case. The respondent's repeated failure to provide written responses to the complaint amounts to bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules and orders of the disciplinary process.

"138. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas on September 20, 1990. At the time of the misconduct, the respondent had been practicing law for more than 30 years.

"139. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"140. *Absence of a Prior Disciplinary Record*. The respondent has not previously been disciplined. This is a mitigating factor.

"141. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. There was some evidence that the respondent may have been dealing with personal problems. The transcript of hearings before the Shawnee County District Court show the respondent told the court she was serving as a caretaker for her parents who had moved into her home, her mother was ill and later passed, and the respondent and/or her husband may have also been dealing with health issues. However, without the respondent's appearance at the formal hearing to assert that these issues indeed occurred and contributed to her misconduct, the hearing panel cannot conclude that there is sufficient evidence this is a mitigating factor.

"142. *Imposition of Other Penalties or Sanctions*. The respondent was sanctioned by the Shawnee County District Court and ordered to pay R.C. $9,981.54 in attorney fees and costs for bringing the action to obtain Trust records from the respondent. Therefore, the hearing panel concludes the respondent has experienced other sanctions for her misconduct. The disciplinary administrator's office agreed that the respondent paid this sanction in full.

"143. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'4.41 Disbarment is generally appropriate when:

'(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

'(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

'(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.'

'6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improp-

erly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.'

'6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.'

'7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.'

"*Recommendation of the Parties*

"144. The disciplinary administrator recommended that the respondent be disbarred.

"145. The respondent was not present to present a recommendation.

"*Recommendation of the Hearing Panel*

"146. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be disbarred.

"147. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In an attorney discipline proceeding, we consider the evidence, the disciplinary panel's findings, and the parties' arguments and determine whether KRPC violations exist and, if they do, the appropriate discipline. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279). Evidence is clear and convincing if it "causes the factfinder to believe that 'the truth of the facts asserted is highly probable.'" 315 Kan. at 147.

Here, we find that clear and convincing evidence supports the hearing panel's findings and conclusions about Crow-Johnson's misconduct. In addition to the evidence presented at the hearing, we consider Crow-Johnson's admission to the panel's findings and

conclusions. That admission results by operation of Supreme Court Rule 228(g)(1) (2024 Kan. S. Ct. R. at 285), which provides that "if the respondent fails to timely file an exception, the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent."

Based on these admissions and our review of the evidence in the record, we find that Crow-Johnson violated:

- KRPC 1.3 (2024 Kan. S. Ct. R. at 328) (diligence),
- KRPC 1.4(a) (2024 Kan. S. Ct. R. at 329) (communication),
- KRPC 1.15(a) (2024 Kan. S. Ct. R. at 369) (safekeeping property),
- KRPC 1.16 (2024 Kan. S. Ct. R. at 374) (declining from or terminating representation),
- KRPC 3.3 (2024 Kan. S. Ct. R. at 387) (candor),
- KRPC 3.4(c) (2024 Kan. S. Ct. R. at 391) (disobeying an obligation of the tribunal),
- KRPC 8.1(b) (2024 Kan. S. Ct. R. at 427) (disciplinary matters),
- KRPC 8.4(d) (2024 Kan. S. Ct. R. at 430) (misconduct prejudicial to the administration of justice),
- Supreme Court Rule 206(o) (2024 Kan. S. Ct. R. at 258) (attorney registration), and
- Supreme Court Rule 210 (2024 Kan. S. Ct. R. at 260) (duty to assist).

The only remaining issue is determining the appropriate discipline for Crow-Johnson's violations. At the panel hearing, the Deputy Disciplinary Administrator recommended disbarment, and the hearing panel unanimously agreed respondent should be disbarred. The hearing panel's recommendations are advisory only and do not prevent us from imposing greater or lesser sanctions. Supreme Court Rule 226(a)(1)(D) (2024 Kan. S. Ct. R. at 279); *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). At oral argument, the Chief Deputy Disciplinary Administrator again recommended disbarment.

Here, our consideration of the appropriate discipline begins with the panel's and the Disciplinary Administrator's recommendation of disbarment. But we also take into consideration Crow-Johnson's failure to appear at oral argument despite the requirement in Supreme Court Rule 228(i) (2024 Kan. S. Ct. R. at 286) that both the Disciplinary Administrator and the respondent attend the hearing. The Clerk of the Kansas Appellate Courts filed an affidavit establishing that Crow-Johnson had notice of the hearing, so we consider this violation along with the others found by the hearing panel.

Considering Crow-Johnson's violation of Rule 228(i) and the findings, conclusions, recommendations, and the American Bar Association Standards for Imposing Lawyer Sanctions, we conclude the severe sanction of disbarment is warranted.

DISCIPLINE

IT IS THEREFORE ORDERED that June R. Crow-Johnson is hereby disbarred from the practice of law in the state of Kansas, effective on the filing of this opinion, in accordance with Supreme Court Rule 225(a)(1) (2024 Kan. S. Ct. R. at 278).

IT IS FURTHER ORDERED that the Office of Judicial Administration strike the name of June R. Crow-Johnson from the roll of attorneys licensed to practice law in Kansas.

IT IS FURTHER ORDERED that Crow-Johnson comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

IT IS FURTHER ORDERED that the costs of these proceedings be assessed under Supreme Court Rule 229 (2024 Kan. S. Ct. R. at 287) to Crow-Johnson and that this opinion be published in the official Kansas Reports.

No. 121,643

STATE OF KANSAS, *Appellee*, v. ALONZO UNION, *Appellant*.

(553 P.3d 320)

SYLLABUS BY THE COURT

CRIMINAL LAW—*No Contest Plea to Charged Offense—Use of Facts as Evidence to Support Restitution.* A no contest plea to a charged offense operates to establish every essential well-pleaded element of that offense. When one of those essential elements requires the taking of resources having a certain value, the well-pleaded facts in the charging document necessary to support this "value" element may be considered as evidence to support restitution.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 21, 2022. Appeal from Wyandotte District Court; AARON T. ROBERTS, judge. Oral argument held February 1, 2024. Opinion filed August 9, 2024. Judgment of the Court of Appeals affirming the district court is affirmed in part and vacated in part. Judgment of the district court is affirmed in part and vacated in part.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Ivan Moya, assistant district attorney, argued the cause, and *Daniel G. Obermeier*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: This case challenges a restitution order.

Alonzo Union was the caretaker of Jean Miller, an elderly woman with dementia. For several years, at one time serving as Miller's power of attorney, Union had access to Miller's finances. When a nursing home bill went unpaid, the Kansas Department for Children and Families (DCF) investigated Union's activities. Union entered a no contest plea to mistreatment of a dependent adult. As part of his sentence, the court ordered Union to pay the nursing home Miller's outstanding balance as part of his restitution, and also ordered Union to pay restitution to Miller for certain payments and cash withdrawals from Miller's account, including one-half of the Walmart purchases and one-half of the ATM withdrawals.

Union appealed and a panel affirmed the restitution amount. We granted review on one issue: whether the restitution order was supported by substantial competent evidence. Within this issue, Union argues the nursing home restitution award was not causally linked to his crime of conviction, and he also argues the evidence did not support the Walmart and ATM withdrawal restitution figures. We vacate the nursing home restitution award and affirm the rest.

FACTS AND PROCEDURAL BACKGROUND

Alonzo Union met Jean Miller in 2007. They soon became friends, and within a few years, Union moved in with Miller and they shared the rent. After Miller began to suffer from dementia, Union acted as her caretaker. By 2014, Union was authorized to use Miller's bank account.

Union became Miller's durable power of attorney in March 2016. That summer, Miller moved into Riverbend, a nursing home. Miller left Riverbend in March 2017, with an outstanding account balance of around $9,000. Union set up a payment schedule, but the payments stopped after two or three months. Miller moved back in with Union after leaving Riverbend.

At this point, Riverbend notified DCF that there was potential abuse or neglect. Katrina Racklyeft, a social worker for DCF, opened an investigation. She interviewed both Union and Miller. She also reviewed Miller's finances and became concerned elder abuse was occurring. Her office requested and received an emergency guardianship and conservatorship to protect Miller and her finances.

Racklyeft went with a member of the sheriff's office to serve Union and remove Miller from the home. Union was not there but they found Miller. The front door was screwed shut and the backdoor was blocked by a lawnmower. Miller appeared to be in good health. A member of the sheriff's office left the guardianship papers in the home. Racklyeft returned the next day and spoke with Union. She explained he was required to turn over Miller's accounts and cards. Yet Union continued to access Miller's funds.

District Court Proceedings

In November 2018, Union agreed to plead no contest to mistreatment of a dependent adult, a level 5, person felony. In turn, the State

agreed to be open to probation and would argue restitution. After advising Union of his right to a trial and asking questions about the plea agreement, the court accepted the no contest plea and found Union guilty. At the sentencing hearing, the court imposed a 43-month underlying sentence and suspended the sentence in favor of probation. Miller passed away before sentencing.

At the March 2019 restitution hearing, Racklyeft testified about her investigation of Miller's finances from November 2014 to November 2017. First, all the income in Miller's account, totaling $52,787.54, was traced to Miller and consisted solely of her social security and a pension. Second, Racklyeft testified to the expenses during that period she believed contributed to Miller's care. These expenses included utilities.

Third, Racklyeft testified to the expenses she believed did not contribute to Miller's care. These expenses were broken into many categories, with the two largest being ATM withdrawals, which came to a "ballpark figure" of $30,000, and Walmart purchases, which totaled $9,365.28. Other expenses included liquor, the YMCA, USPS, several purchases in Minnesota, a dating website, a casino, Men's Wearhouse, and a shoe store. Racklyeft presented three spreadsheets as demonstrative evidence in support of her testimony.

Racklyeft testified she could not account for the $30,000 of ATM withdrawals because "[t]here's no way to show receipts of where that money was spent." She explained she did not know what the withdrawals were used for. When asked what the withdrawals revealed, based on her training and experience, she responded: "I can't answer that. I don't know that it went to her care. I can't say that it did, but I can't say that it didn't because there's no trail with it like with the other purchases." She explained she had to presume the money was not spent for Miller. She asked Union about the withdrawals during their initial interview, and Union said he spent the money on the house they were renting and the items in the home. Union never provided receipts for rent, though Racklyeft never requested this information. Racklyeft also noted she did not know what Union purchased at Walmart.

Racklyeft asserted Union owed Riverbend $7,632.74 for Miller's stay because, at the time, he was Miller's durable power of

attorney and he signed the paperwork admitting Miller to the facility. Separately, Union had personally guaranteed the Riverbend bill.

In summary, Racklyeft asserted damages incurred by Miller consisted of Miller's entire income figure, $52,787.54, plus the Riverbend bill, $7,632.74, leading to a grand total loss of $60,420.28.

Union also testified at the restitution hearing and provided his account of the expenditures. He acknowledged that some expenditures were not for Miller, including the liquor purchases and the shoe purchase. But he testified all the ATM withdrawals were for "[t]he house, us, food." He explained some of the Walmart purchases were money orders or cash used to pay for Miller's car, including "some large amounts" around $1,000, which were required to catch up on payments that her previous caretaker, her brother, failed to make. Union drove the vehicle to Minnesota several times and used Miller's money to pay gas and to register the vehicle in Minnesota.

He explained that before Miller moved into Riverbend, they split rent down the middle. After Miller left Riverbend and they moved into a new residence, they paid $750 in rent, which came from the account he was authorized to use. He also used this account to pay utilities, insurance, and other household requirements. Miller and Union rented both residences from the same company. Union testified that he tried to contact the rental company to get proof of payments, but he failed because the company's phone was not set up and the company's business location had moved.

Union testified his income came from a VA pension and social security. He did not put the VA pension in the account he was authorized to use. Though the testimony is unclear, it appears he began drawing social security after Miller was removed from the home.

Union also testified about the outstanding bill at Riverbend. He acknowledged he owed Riverbend $7,632.74 for Miller's stay. He explained he stopped making payments because he reached out to Riverbend and Racklyeft to discuss Riverbend adding an extra $900 to the bill that he did not understand.

Union also acknowledged that, as a durable power of attorney, he had a duty to record how he used Miller's money. He testified he kept records of what was spent on himself and what he spent on Miller, but he explained these records were lost except for receipts related to furniture purchases.

The final witness at the restitution hearing was Miller's niece, Crystal Cartwright. She visited Miller when Miller was living with Union. Cartwright felt Miller was well cared for and never worried about Miller's financial or emotional stability.

After the witness testimony, the court heard arguments and then took the issue under advisement. The court issued its restitution order in June 2019. The court ordered Union to pay $31,511.26 in restitution. It reached this figure by adding up these amounts:

- $7,632.74 - Riverbend
- $15,244.89 - one-half of the total ATM withdrawals
- $531.67 - liquor store purchases
- $3,115.59 - out of state purchases
- $119.70 - dating website
- $184.03 - Men's Wearhouse
- $4,682.64 - one-half of the total Walmart purchases

The $7,632.74 was to be paid to Riverbend, and the remaining $23,878.52 was to be paid to Miller. The court observed Union provided no documentation to support his claim that the ATM withdrawals and Walmart purchases were for Miller's benefit. It explained:

"The Court finds that based upon the admitted dishonesty of this crime and the failure of Mr. Union to keep a proper account of the expenditures from Ms. Miller's account, there is clear and convincing circumstantial evidence that Defendant spent a significant portion of Ms. Miller's money on himself, with no concurrent benefit to her. The Court finds it is likely he used cash as a way to conceal this improper spending. Accordingly, the Court attributes a generously low 50% of the unaccounted-for expenditures to the benefit of the Defendant."

Union filed a notice of appeal.

Appellate Proceedings

On appeal, Union made three arguments. *State v. Union*, No. 121,643, 2022 WL 12127306, at *1 (Kan. App. 2022) (unpublished opinion). First, he argued sufficient evidence did not support the district

court's restitution order. Second, he argued the Kansas criminal restitution statutes violate section 5 of the Kansas Constitution Bill of Rights. Third, he argued the Kansas criminal restitution statutes violated *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The panel rejected the first and third arguments. It vacated the order that the restitution award was a civil judgment. The panel affirmed the balance of Union's restitution order. *Union*, 2022 WL 12127306, at *5-6.

Union petitioned for review with this court, and we granted review only on the sufficiency argument. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review.).

DISCUSSION

Union asserts much of the district court's restitution order must be vacated by this court for two reasons: (1) the amount owed to Riverbend was not caused by the crime of conviction, and (2) insufficient evidence supports the district court's restitution awards of half the Walmart purchases and half the ATM withdrawals.

Standard of Review

Appellate review of restitution orders may require three standards of review. *State v. Shank*, 304 Kan. 89, 93, 369 P.3d 322 (2016). First, "[q]uestions concerning the 'amount of restitution and the manner in which it is made to the aggrieved party' are reviewed under an abuse of discretion standard." 304 Kan. at 93 (quoting *State v. King*, 288 Kan. 333, 354-55, 204 P.3d 585 [2009]). "A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact." *State v. Hillard*, 315 Kan. 732, 760, 511 P.3d 883 (2022).

Second, "'[a] district court's factual findings relating to the causal link between the crime committed and the victim's loss will be affirmed if those findings are supported by substantial competent evidence.'" *Shank*, 304 Kan. at 93. "'Substantial competent evidence is 'such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.'"

State v. Smith, 312 Kan. 876, 887, 482 P.3d 586 (2021). "'In evaluating the evidence to support the district court's factual findings, an appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact.'" *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 481, 509 P.3d 1211 (2022).

Third, "'appellate courts have unlimited review over legal questions involving the interpretation of the underlying statutes.'" *Shank*, 304 Kan. at 93.

Analysis

K.S.A. 21-6604(b)(1) provides a sentencing court may "order the defendant to pay restitution, which shall include, but not be limited to, damage or loss caused by the defendant's crime." K.S.A. 21-6607(c)(2) "gives the district court the authority to order restitution payments as a condition of probation." *State v. Arnett*, 314 Kan. 183, 186, 496 P.3d 928 (2021) *(Arnett II*). "And the most accurate measure of this loss depends on the evidence before the district court." *State v. Hall*, 297 Kan. 709, 713-14, 304 P.3d 677 (2013). "'Although the rigidness and proof of value that lies in a civil damage suit does not apply in a criminal case, the court's determination of restitution must be based on reliable evidence which yields a defensible restitution figure.'" *State v. Hunziker*, 274 Kan. 655, 660, 56 P.3d 202 (2002) (quoting *State v. Casto*, 22 Kan. App. 2d 152, 154, 912 P.2d 772 [1996]).

Riverbend

In *State v. Arnett*, we explained "the causal link between a defendant's crime and the restitution damages for which the defendant is held liable must satisfy the traditional elements of proximate cause: cause-in-fact and legal causation." *State v. Arnett*, 307 Kan. 648, 655, 413 P.3d 787 (2018) (*Arnett I*).

Cause-in-fact "requires proof that it is more likely than not that, but for the defendant's conduct, the result would not have occurred." *Arnett I*, 307 Kan. at 654. The other element, legal cause, "limits the defendant's liability even when his or her conduct was the cause-in-fact of a result by requiring that the defendant is only liable when it was foreseeable that the defendant's conduct might

have created a risk of harm and the result of that conduct and any contributing causes were foreseeable." 307 Kan. at 655. As noted above, we review a causation finding for substantial competent evidence. *Shank*, 304 Kan. at 93.

Union makes two specific arguments related to the Riverbend restitution order. First, he contends failing to pay Riverbend did not harm *Miller*. He essentially asserts his restitution order cannot be based on damage to someone other than the victim of his crime. The panel rejected this argument based on the language of K.S.A. 21-6604(b)(1). *Union*, 2022 WL 12127306, at *4. But we need not decide whether restitution may be based on damage to someone other than the victim of his crime because Union prevails on his second argument.

Union's second argument related to Riverbend is that *Riverbend* was not damaged by Union's conduct in committing the crime for which he was convicted. To evaluate this, it is necessary to understand Union's crime of conviction. He pled no contest to one count of mistreatment of a dependent adult, in violation of K.S.A. 21-5417(a)(2)(A). The statute criminalizes taking the property or financial resources of a dependent adult for the use of the defendant or another through "[u]ndue influence, coercion, harassment, duress, deception, false representation, false pretense or without adequate consideration to such dependent adult." See *State v. Mayfield*, No. 121,552, 2021 WL 935715, at *2 (Kan. App. 2021) (unpublished opinion) ("Without parsing the statutory language too finely, we recognize the Legislature intended K.S.A. 2014 Supp. 21-5417[a][2][A] to criminalize a wide range of ways to divert or take the financial resources of a dependent adult, such as the 'use' of those resources.").

Even assuming, without deciding, that restitution might be owed to someone other than a victim of the crime of conviction, assessment of restitution for the nursing home arrearage would only be appropriate if Union's crime of conviction was the proximate cause of the nursing home's damage or loss. See *State v. Martin*, 308 Kan. 1343, 1352, 429 P.3d 896 (2018) ("At the restitution hearing, the district court must first determine which of the claimed damages were caused by Martin's crimes of conviction."). For proximate cause to exist, Union's specific crime must have

been the but-for cause of Riverbend's damage. See *State v. Miller*, 51 Kan. App. 2d 869, 874, 355 P.3d 716 (2015) ("But our statutes do not provide for restitution orders beyond those caused by the crime of conviction without the defendant's agreement.").

After a searching review of the record, we conclude no evidence shows Union's crime of conviction caused the Riverbend bill or caused this bill to go unpaid. The Riverbend bill was caused by Miller's independent need for care. And the State presented no evidence that Union's use of Miller's financial resources led to the outstanding debt. Union's crime and the unpaid bill are two independent and unrelated events. Put differently, Union's misuse of Miller's money was not necessary for the bill's existence. The outstanding bill did not result from Union's crime.

Unlike here, causation in other cases has been found when the crime of conviction caused cascading effects. See, e.g., *Arnett I*, 307 Kan. at 652-56 (finding property loss from thefts, damage to a home caused by the burglary, and a homeowner's out of pocket expenses were causally related to the crime of conspiracy to commit burglary, even though the defendant did not personally commit the burglary but loaned the burglars her mother's vehicle to commit the crime); *State v. Wills*, No. 122,493, 2021 WL 5143798, at *2-5 (Kan. App. 2021) (unpublished opinion) (finding victims' lost wages for part-time jobs, costs associated with hypnosis and therapy appointments, and expended sick and vacation leave were causally related to the crimes of aggravated sexual battery and aggravated domestic battery); *State v. Boyd*, No. 118,925, 2019 WL 2312875, at *11-12 (Kan. App. 2019) (unpublished opinion) (finding restitution order for a lost Pell Grant was permissible because the lost grant was caused by psychological effects of the sexual assault crimes of conviction).

The district court's restitution order provided no analysis of causation and the Riverbend restitution award. That said, the panel concluded the following pieces of evidence supported the causation finding: "Union's admission that he was responsible for the bill, Racklyeft's testimony that Union was supposed to pay the bill as Miller's power of attorney, and the undisputed evidence on the amount of the bill." *Union*, 2022 WL 12127306, at *4. But this evidence only suggests Union was responsible for paying the bill.

It does not suggest Union's *crime* caused the bill to accrue or caused the bill to go unpaid.

Accordingly, we find insufficient proof of causation because there is not substantial competent evidence supporting the State's position that Union's crime was the cause-in-fact of Riverbend's unpaid bill. We thus need not consider legal cause. We vacate the portion of the restitution order directing Union to pay Riverbend $7,632.74.

Walmart Purchases and ATM Withdrawals

Union next asserts the district court erroneously ordered him to pay one-half of all Walmart purchases and one-half of all ATM withdrawals. The crux of his argument is that the court's order is "speculative," and Union suggests the burden of proof was erroneously shifted, causing him to prove the *proper* use of the funds. He asserts the only evidence the district court could have relied upon was from Racklyeft, who testified she did not know what Union purchased at Walmart and did not know how he used the money withdrawn from the ATMs. While the district court may have found that Union's uncorroborated assertions of appropriate purchases lacked credibility, Union asserts the burden is the State's to prove wrongdoing, not his to prove the purchases were for Miller's benefit.

The panel found this argument unpersuasive. It asserted "there was ample circumstantial evidence to support the district court's finding that the funds were not for Miller's benefit." *Union*, 2022 WL 12127306, at *4. We agree the evidence from the restitution hearing supports the district court's findings that Union misused at least some of Miller's funds. For example, Union testified that he made many liquor purchases even though Union did not drink and conceded that he improperly used her money to buy shoes. And Union testified that while Miller was in Riverbend receiving care for all her needs, he took Miller's car to Minnesota, used her money for gas, and used her money to register the vehicle in Minnesota, all with no ascertainable benefit to anyone other than himself.

Further, Union's testimony supported the district court's finding that he failed to properly account for his expenditures. The

court considered Union's testimony that he tried to find the rental company to verify rent payments, but the company had apparently changed buildings and disconnected its phone line. And the court heard Union explain that he had kept records of how he and Miller split costs but had lost those records. After hearing this testimony, the district court concluded "there is clear and convincing circumstantial evidence that [Union] spent a significant portion of Ms. Miller's money on himself" and that it was "likely he used cash as a way to conceal this improper spending."

But we also agree with Union that the State bears the burden of identifying the restitution award amount with specificity. See *State v. Smith*, 317 Kan. 130,138-40, 526 P.3d 1047 (2023) (observing the district court likely erroneously imposed a $4,100 restitution award when the evidence only supported a $3,200 restitution award). Union is correct the evidence at the restitution hearing, including Racklyeft's testimony, did not identify *how* the ATM withdrawals were spent or *what* was purchased at Walmart, so there is no evidence in the record at the restitution hearing that specifically supports the district court's assessment of one-half rather than, say, one-third or two-thirds of the purchases and withdrawals.

Accordingly, we cannot affirm the district court and panel on this evidence alone. But we conclude the portion of the restitution order owed to Miller is supported by substantial competent evidence when considering Union's no contest plea, the well-pleaded facts of the charging document, and the district court's finding of guilt.

Union entered a plea of no contest to the statutory version of mistreatment of a dependent adult. This crime contains an element requiring proof beyond a reasonable doubt that the accused misappropriated at least $25,000, but no more than $100,000, from the victim to make the crime of conviction a level 5, person felony. Accordingly, Union did not contest the element of the crime of conviction *that he unlawfully took between $25,000 and $100,000 from Miller*.

A no contest plea "is 'a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if

he were guilty.'" *State v. Case*, 289 Kan. 457, 461, 213 P.3d 429 (2009) (quoting Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions*, 93 Minn. L. Rev. 670, 729-30 [2008]); see also K.S.A. 22-3209(2) ("A plea of nolo contendere is a formal declaration that the defendant does not contest the charge.").

A sentencing court may consider the elements of a charged crime as met following a no contest plea. See *State v. Holmes*, 222 Kan. 212, 214, 563 P.2d 480 (1977) ("Under [K.S.A. 22-3209(2)] when a court accepts a tendered plea of nolo contendere and adjudges a finding of guilt thereon, the defendant at that point has been convicted of the offense covered by the plea of nolo contendere."). Notably, K.S.A. 22-3209(2) prevents a defendant's no contest plea from being used against them "as an admission in *any other action based on the same act.*" (Emphasis added.) Union's no contest plea could not, for example, be used against him in a later civil action based on the same acts in the charging document. 21 Am. Jur. 2d Criminal Law § 645 ("A plea of nolo contendere is used by the accused in criminal cases to save face and avoid exacting an admission that could be used as an admission in other potential or subsequent litigation, whether civil or criminal.").

But by making a no contest plea "the offender admits *to all of the well-pleaded facts of the information* for purposes of the case." (Emphasis added.) *Farris v. McKune*, 259 Kan. 181, 194, 911 P.2d 177 (1996); *State v. Gibson*, No. 125,769, 2024 WL 3219339, at *5 (Kan. App. 2024) (unpublished opinion). Restitution is part of a criminal sentence, which is part of the criminal case. See *State v. Johnson*, 309 Kan. 992, 996, 441 P.3d 1036 (2019) ("Restitution is part of a sentence."); *Mitchell v. United States*, 526 U.S. 314, 328, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999) (noting "[a] sentencing hearing is part of the criminal case"). And here, the First Amended Information includes the well-pleaded allegation concerning the element of the crime of mistreatment of a dependent adult addressing the value of what Union took from Miller—"at least $25,000 but less than $100,000" of Miller's personal property or financial resources. Because of Union's no contest plea, this essential element, well-pleaded in the charge, may be

considered when evaluating the sufficiency of the evidence of the restitution award.

We therefore conclude Union misused between $25,000 and $100,000 of Miller's funds based on his no contest plea and the court's subsequent finding of guilt. The no contest plea and the elements of the crime of conviction provide substantial competent evidence that, minimally, Union caused $25,000 in damage or loss to Miller. See *Spotts v. State*, No. 107,909, 2013 WL 2991294, at *3 (Kan. App. 2013) (unpublished opinion) (explaining a "no contest plea prevents [a defendant] from contesting the factual assertions alleged in the amended complaint").

So there is reliable evidence supporting the restitution award. Though Union argues the district court did not have reliable evidence to support *how* the court calculated the award, this argument is obviated by Union's no contest plea, which established the element requiring the value of the property taken to be at least $25,000. Not including the Riverbend award, the district court ordered Union to pay $23,878.52, slightly less than the lower limit of his crime of conviction. We therefore affirm the restitution award owed to Miller.

The Riverbend restitution order is vacated. The rest of the restitution order is affirmed.

Judgment of the Court of Appeals affirming the district court is affirmed in part and vacated in part. Judgment of the district court is affirmed in part and vacated in part.

No. 124,160

BENCHMARK PROPERTY REMODELING, LLC, *Appellant*, v. GRANDMOTHERS, INC., COREFIRST BANK & TRUST, KANSAS DEPARTMENT OF REVENUE, ROBERT ZIBELL, and STATE OF KANSAS, *Appellees*.

(553 P.3d 974)

SYLLABUS BY THE COURT

1. JURISDICTION—*Subject Matter Jurisdiction—Court's Power to Hear and Decide Case.* Subject matter jurisdiction is a court's power to hear and decide a case. It cannot be conferred by the parties' stipulation, consent, or waiver, and a court may consider its own jurisdiction—even sua sponte—at any time.

2. SAME—*Jurisdiction of Appellate Courts in Kansas Governed by Statutes.* The jurisdiction of Kansas appellate courts is governed by statutes. K.S.A. 2023 Supp. 60-2102(a)(4) grants appellate courts jurisdiction to hear appeals arising from a district court's final decision.

3. CIVIL PROCEDURE—*Final Decision Disposes of Entire Merits of Controversy—No Further Action of District Court.* Although K.S.A. 2023 Supp. 60-2102(a)(4) does not define the term, a final decision disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the district court.

4. SAME—*Partial Summary Judgment Not Final Decision—If Remaining Claims Dismissed, Previous Partial Summary Judgment Becomes Final Judgment.* A district court's entry of partial summary judgment on some claims, but not all, does not constitute a final decision, so it is not appealable under K.S.A. 2023 Supp. 60-2102(a)(4) absent certification under K.S.A. 2023 Supp. 60-254(b). But if the remaining claims are dismissed, the previous partial summary judgment becomes a final judgment adjudicating all claims.

5. SUMMARY JUDGMENT—*Conflicting Evidence or More Than One Inference—Question of Fact—Improper Summary Judgment.* When the evidence pertaining to the existence of a contract or the content of its terms is conflicting or permits more than one inference, a question of fact is presented—and thus summary judgment is improper.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 2, 2023. Appeal from Shawnee District Court; MARY E. CHRISTOPHER, judge. Oral argument held April 23, 2024. Opinion filed August 9, 2024. Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded.

Diane Hastings Lewis, of Brown & Ruprecht, PC, of Kansas City, Missouri, argued the cause and was on the briefs for appellant.

Bryan W. Smith, of Smith Law Firm, of Topeka, argued the cause, and *Christine Caplinger*, of the same firm, was with him on the briefs for appellees Grandmothers, Inc., and Robert Zibell.

Adam D. King, of Kansas Department of Revenue, was on the brief for appellees Kansas Department of Revenue and State of Kansas.

The opinion of the court was delivered by

WILSON, J.: Although it rarely makes front-page news, the concept of jurisdiction lies at the heart of the rule of law. But jurisdiction is not merely some obscure legal technicality. A court's jurisdiction is its very power to hear and decide cases, perhaps the most fundamental check on the improper exercise of judicial power. After all, a court without jurisdiction is no court at all, but an expensive debate club overseen by a powerless spectator in a black choir robe.

In this appeal, Grandmothers, Inc., claims that neither the Kansas Court of Appeals nor this court may exercise appellate jurisdiction to consider the appeal of Benchmark Property Remodeling, LLC, which appealed the district court's entry of summary judgment in Grandmothers' favor and its entry of judgment on the pleadings against the Kansas Department of Revenue. After the district court's entry of partial summary judgment, Benchmark dismissed without prejudice its four remaining claims against Grandmothers and appealed. Grandmothers claims that the dismissal without prejudice renders the district court's entry of judgment nonfinal—which means there is nothing for Benchmark to appeal (yet), and we have no authority to allow an appeal.

We disagree. Under the specific facts of the case, the district court's judgment was final and thus appellate jurisdiction is proper. Further, since appellate jurisdiction is proper, we note review was not sought of the Court of Appeals panel's reversal of the district court's entry of judgment on the pleadings, so the panel's decision on that judgment is final. (If appellate jurisdiction were lacking, the panel's decision would have been void.) Finally,

we affirm the panel's reversal of the district court's summary judgment and remand the matter to the district court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Benchmark is a construction and remodeling company in Topeka, Kansas, and is owned by Mark McBeth. Robert Zibell owns Grandmothers, which in turn owns the building at 300 SW 29th Street in Topeka. KDOR is the building's tenant.

In August 2018, KDOR and Benchmark finalized quotes for remodeling work on the building, which Benchmark offered to perform. That same month, Grandmothers and KDOR entered a "Third Amendment to Lease" that said, in part:

> "This Amendment governs construction contemplated per the quotes dated 05/28/2018, 06/04/2018, 08/01/2018, and 08/02/2018 from [Benchmark], attached hereto as Exhibit A and corresponding floor plans, attached as Exhibit B. [KDOR] shall pay a lump sum payment of $136,052.39 to [Grandmothers] for the satisfactory work completed upon successful installation. Payment by [KDOR] is contingent on [KDOR's] satisfaction of all work completed. The related items will become a fixture to the leased premises and will remain upon and be surrendered with the leased premises at the termination of the Real Estate Lease Agreement."

Benchmark's estimates, which were attached to the third amendment, matched the figure quoted in the third amendment: $136,052.39. Benchmark and Grandmothers never made a written contract for the remodeling work, and the Third Amendment to Lease does not require Grandmothers to pay Benchmark. Nor did Benchmark contract with Zibell in his personal capacity.

Even so, Benchmark got started on the work. At some point, Zibell apparently tried to have another entity take over the remodel. But in an email to Zibell and Grandmothers, KDOR wrote:

> "The [KDOR] does not authorize the construction work you have commenced at [the building] and we will not make payment for this construction. The bid and third amendment to the lease agreement was for [Benchmark] to complete this project."

Benchmark finished the remodel work on December 4, 2018. Benchmark then submitted invoices to Grandmothers and KDOR for payment. In two installments, KDOR paid Grandmothers the

full amount set out in the third amendment. Grandmothers "was aware that under the Third Amendment and lease that payment from KDOR triggered Grandmothers' responsibility to pay Benchmark."

On December 9, Grandmothers paid Benchmark $21,192.67 (with $100 missing because of a mathematical error). But when Grandmothers received KDOR's second payment of $114,759.72, it tried to pay Benchmark only $94,551.39. Grandmothers attempted to justify the $94,551.39 figure by claiming withholdings of $9,702.62 (for legal bills plus a 5 percent "fee") and a further $10,505.71 (for a 10 percent "retainage"). KDOR never told Grandmothers to withhold money from Benchmark, and Grandmothers never had an agreement with KDOR or Benchmark that would permit it to withhold 10 percent "retainage." (Though not uncontroverted, Zibell testified at his deposition that he thought an oral agreement with McBeth permitted him to withhold the 5 percent; McBeth remembered a phone conversation with Zibell, but not an agreement to give Zibell 5 percent.)

Grandmothers later paid $54,248.33 to some of Benchmark's subcontractors, leaving $60,611.30 outstanding to Benchmark. Grandmothers eventually paid Benchmark $40,303.06, leaving about $20,308 at issue. (Because these sums were presented in the parties' uncontroverted facts, it is unclear whether these amounts accounted for the earlier $100 mathematical error.)

District Court Proceedings

After filing a mechanic's lien, Benchmark initially sued Grandmothers alone. It later added claims against CoreFirst Bank & Trust, KDOR, and Robert Zibell. Finally, in its second amended petition, Benchmark sued:

- Grandmothers, KDOR, and the State for breach of contract (Count I);
- Grandmothers, for quantum meruit/unjust enrichment (Count II);
- Grandmothers, for quantum meruit/unjust enrichment relating to extra work (Count III);

- Grandmothers, KDOR, and the State for violating the Kansas Fairness in Private Construction Contract Act and, alternatively, the Kansas Fairness in Public Construction Contract Act (Counts IV and V);
- Grandmothers and Zibell, for conversion (Count VI);
- Grandmothers, KDOR, the State, and CoreFirst, for foreclosure of mechanic's lien (Count VII); and
- Zibell, for tortious interference with a contract (Count VIII).

KDOR moved for judgment on the pleadings. The district court ultimately granted KDOR judgment on the pleadings on counts I, IV, V, and VII.

Zibell and Grandmothers moved for summary judgment, while Benchmark moved for partial summary judgment. The district court granted summary judgment to Grandmothers on Counts I (breach of contract), IV and V (violation of Kansas Fairness in Private Construction Contract Act and of the Kansas Fairness in Public Construction Contract Act), and VII (mechanic's lien). The court concluded Benchmark provided insufficient evidence to show that a contract existed with Grandmothers and held that "there was not consideration or a meeting of the minds sufficient for a contract to form."

Benchmark moved to dismiss its remaining claims (II, III, VI, and VIII) without prejudice, asserting that it "intends to appeal [the court's adverse rulings on KDOR's motion for judgment on the pleadings and Grandmothers' motion for summary judgment] regarding the Breach of Contract and related claims . . . but cannot do so until the[re] is a final judgment as to all claims." The district court dismissed Benchmark's remaining claims on April 19, 2021. Benchmark appealed on May 17, 2021. On July 16, 2021, it filed a docketing statement reflecting an appeal from a final order under K.S.A. 2020 Supp. 60-2102(a)(4). The docketing statement said:

> "Benchmark appeals the District Court's July 1, 2020 Journal Entry granting Defendant KDOR's Motion for Judgment on the Pleadings and January 13, 2021 Journal Entry granting in part Defendant Grandmothers, Inc.'s Motion for Summary Judgment, both of which were made final by the Court's Journal Entry of Dismissal Without Prejudice entered on April 19, 2021."

Under K.S.A. 2020 Supp. 60-518, Benchmark would have had until October 19, 2021, to refile its four dismissed claims; the record does not reflect that Benchmark did so.

Appellate Proceedings

On appeal, a panel of the Kansas Court of Appeals asked the parties to brief appellate jurisdiction, focusing on *Smith v. Welch*, 265 Kan. 868, 869-70, 872, 967 P.2d 727 (1998), and *Arnold v. Hewitt*, 32 Kan. App. 2d 500, 503-05, 85 P.3d 220 (2004). *Benchmark Property Remodeling, LLC v. Grandmothers, Inc.*, No. 124,160, 2023 WL 3775017, at *3 (Kan. App. 2023) (unpublished opinion). The panel then concluded jurisdiction was proper because Benchmark never refiled its four dismissed claims (and was then out of time to do so) and because "even though Benchmark never requested findings for the entry of a final judgment pursuant to K.S.A. 2020 Supp. 60-254(b), there are no pending claims in the district court." 2023 WL 3775017, at *4.

The panel also reversed the district court's entry of judgment on the pleadings to KDOR, concluding that "significant fact issues surrounding the parties' intent" undercut the district court's finding that no contract existed between KDOR and Benchmark. 2023 WL 3775017, at *6. Because KDOR did not petition for review, we leave aside further discussion of the panel's decision concerning KDOR.

Finally, the panel reversed the district court's entry of summary judgment on counts I, IV, V, and VII. After noting that the district court had analytically linked all four claims by its conclusion that no contract existed, the panel looked at the deposition testimony and the parties' conduct to conclude that, when viewed in a light most favorable to Benchmark, the evidence could support a finding that a contract existed between Benchmark and Grandmothers. 2023 WL 3775017, at *7-8.

Grandmothers and Zibell petitioned this court for review; KDOR did not.

ANALYSIS

Appellate jurisdiction is proper.

Like the Court of Appeals, we begin by assessing our own jurisdiction. Grandmothers argues that, at the time of Benchmark's appeal, the district court's summary judgment decision was not a final order

under K.S.A. 2020 Supp. 60-2102(a)(4) because Benchmark could have simply refiled the claims it had dismissed without prejudice. Grandmothers also claims that Benchmark failed to request a certification under K.S.A. 2020 Supp. 60-254(b), which—it suggests—was required to render the district court's partial summary judgment final. We disagree.

Issues of subject matter jurisdiction and statutory interpretation constitute questions of law, over which an appellate court exercises unlimited review. *Chalmers v. Burrough*, 314 Kan. 1, 7, 494 P.3d 128 (2021). "Subject matter jurisdiction is the power of the court to hear and decide a particular type of action." *Burrough*, 314 Kan. at 7. The parties cannot grant a court jurisdiction by stipulation, consent, or waiver, and a court may consider its own jurisdiction—even sua sponte—at any time. *State v. Garcia-Garcia*, 309 Kan. 801, 806, 441 P.3d 52 (2019); *Bartlett Grain Co. v. Kansas Corporation Comm'n*, 292 Kan. 723, 726, 256 P.3d 867 (2011). "[W]hen the record discloses lack of jurisdiction, it is the duty of the court to dismiss the appeal." *Materi v. Spurrier*, 192 Kan. 291, 292, 387 P.2d 221 (1963).

Under article 3, section 3 of the Kansas Constitution, we have "appellate jurisdiction as may be provided by law." The right of appeal is, thus, purely statutory. *State v. McCroy*, 313 Kan. 531, 534, 486 P.3d 618 (2021). K.S.A. 2023 Supp. 60-2102(a)(4) provides that:

> "[T]he appellate jurisdiction of the court of appeals may be invoked by appeal as a matter of right from:
>
> . . . .
>
> (4) A final decision in any action, except in an action where a direct appeal to the supreme court is required by law. In any appeal or cross appeal from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable."

Despite its wording, we have construed K.S.A. 2023 Supp. 60-2102(a)(4) "as applying to the Supreme Court as well as to the Court of Appeals." *Brower v. Bartal*, 268 Kan. 43, 45-46, 990 P.2d 1235 (1999).

Our statutes do not define "final decision." But we have consistently recognized that the phrase is "self-defining." E.g., *Kaelter v. Sokol*, 301 Kan. 247, 250, 340 P.3d 1210 (2015); *Honeycutt v. City of Wichita*, 251 Kan. 451, 457, 836 P.2d 1128 (1992) (quoting 2 Gard's Kansas C. Civ. Proc. 2d Annot. § 60-2102,

Comments [1979]). A final decision is thus one "that finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the court." *Honeycutt*, 251 Kan. 451, Syl. ¶ 1. See also *Sokol*, 301 Kan. at 250 (defining "final order" as "an order that definitely terminates a right or liability involved in an action or that grants or refuses a remedy as a terminal act in the case"); *American Trust Administrators, Inc. v. Sebelius*, 267 Kan. 480, 480, Syl. ¶ 1, 981 P.2d 248 (1999).

Our jurisdictional quandary arises from Benchmark's voluntary dismissal without prejudice of the four claims that survived the district court's decisions on partial summary judgment and judgment on the pleadings: Counts II, III, VI, and VIII of its second amended petition. We begin with Grandmothers' argument that Benchmark could have simply refiled its dismissed claims (though it did not), which raises the dreaded specter of piecemeal litigation and concurrent jurisdiction.

But we find Grandmothers' argument unpersuasive. As the panel correctly noted, the dismissal of Benchmark's remaining claims left the district court with nothing more to do. Whatever else Benchmark could have done in the future, in terms of refiling the claims, at the time of this appeal there were no remaining claims and nothing more for the court to do. Moreover, as the panel also noted, there is no indication Benchmark ever tried to refile its dismissed claims, which are now more than three years in the rear-view mirror. 2023 WL 3775017, at *4. There is no danger of piecemeal litigation here—the overriding concern behind the requirement of a final decision. E.g., *AMCO Ins. Co. v. Beck*, 258 Kan. 726, 728, 907 P.2d 137 (1995).

Grandmothers' claim of jurisdictional infirmity thus hinges entirely on hypotheticals, including the nightmare scenario of *Arnold*, 32 Kan. App. 2d 500. There, as here, after the district court granted summary judgment on some (but not all) of the plaintiffs' claims, plaintiffs moved to dismiss without prejudice the remaining claims. 32 Kan. App. 2d at 501. Then—unlike this case—after the plaintiffs appealed, they *refiled* the claim they had previously dismissed, which was pending in district court as of the time of the oral argument. 32 Kan. App. 2d at 501. On appeal, the Court

of Appeals panel held that the district court had issued no final decision and thus appellate jurisdiction could not lie. 32 Kan. App. 2d at 505.

But *Arnold* is factually inapposite. This is a critical distinction, given that *Arnold*'s holding was limited to the specific facts before it: a partial summary judgment order followed by a voluntary dismissal without prejudice, an appeal, and then a *refiling* of the dismissed claims. 32 Kan. App. 2d 500, Syl. ¶ 5 (couching the holding "under the facts presented"). *Arnold* was at pains to distinguish a "pattern . . . repeated in other Kansas appellate court cases where a similar procedural history resulted in the court hearing the merits of the case without specifically ruling that a 'final decision' had been reached" by pointing out that, in those cases, "there is no indication in the opinions that the plaintiffs refiled the dismissed claim in district court while their appeal was pending." 32 Kan. App. 2d at 502-03. Because the case before us is factually distinct, we need not—and do not—consider whether *Arnold* correctly concluded that it lacked appellate jurisdiction.

Instead, we clarify that the word "final" in K.S.A. 2023 Supp. 60-2102(a)(4)'s "final decision" language refers to matters actually before the district court—not claims that could have been filed (but were not), and not claims that are *no longer* before the court because of their dismissal. This interpretation reflects the "liberal construction to be given our procedural statutes and rules and the intent of our code of civil procedure and our appellate rules"—even in matters of jurisdiction. *Cornett v. Roth*, 233 Kan. 936, 939, 666 P.2d 1182 (1983). Thus, if, as here, a district court rules on the merits of some of the parties' claims, and then the parties themselves remove the rest of the claims from the case, nothing remains for the district court to do; the case is over, unless someone appeals. To conclude otherwise would subordinate the concept of appellate jurisdiction to an indefinite universe of hypothetical scenarios—a universe we need not consider in determining that *here*, the district court's partial summary judgment order *became* final with the dismissal (even without prejudice) of Benchmark's final four claims.

Nor are we persuaded that K.S.A. 2023 Supp. 60-254(b) serves as the only mechanism by which an otherwise nonfinal

judgment may become final. While K.S.A. 2023 Supp. 60-254(b) no doubt provides one such procedural pathway to finality when a district court decides only some claims before it, we see no reason why the voluntary dismissal of all remaining claims—with prejudice or not—cannot provide another pathway in circumstances like the case before us.

Finally, we note the line of cases holding that appellate jurisdiction cannot lie from appeals from orders of dismissal without prejudice. See *Arnold*, 32 Kan. App. 2d at 503 (discussing, inter alia, *Bain v. Artzer*, 271 Kan. 578, Syl. ¶ 2, 25 P.3d 136 [2001]). As in *Arnold*, those cases are not on point because Benchmark is not appealing the order of dismissal. Here, by removing all remaining matters from the district court's consideration, the dismissal without prejudice of Benchmark's remaining four claims cleared the way for the district court's partial summary judgment decision to *become* final—a final decision over which both we and the Court of Appeals may exert appellate jurisdiction.

The Court of Appeals panel correctly reversed the district court's entry of partial summary judgment.

We next turn to the merits. Grandmothers claims the panel misconstrued the evidence in holding that questions of fact remain that *could* show a contract between Benchmark and Grandmothers. Again, we disagree.

An appellate court reviews a district court's summary judgment order de novo:

> "'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.'" *Fairfax Portfolio v. Carojoto*, 312 Kan. 92, 94-95, 472 P.3d 53 (2020) (quoting *Hansford v. Silver Lake Heights*, 294 Kan. 707, 710-11, 280 P.3d 756 [2012]).

"When the evidence pertaining to the existence of a contract or the content of its terms is conflicting or permits more than one inference, a question of fact is presented. However, whether undisputed facts establish the existence and terms of a contract raises a question of law for the court's determination." *Nungesser v. Bryant*, 283 Kan. 550, 566, 153 P.3d 1277 (2007); see also *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012).

We have reviewed the parties' uncontroverted facts presented at summary judgment and the attachments. Like the panel, we conclude that Grandmothers' actions in the case could—if viewed in a light most favorable to Benchmark—support a finding that a contract existed between Benchmark and Grandmothers. As the panel noted, Grandmothers authorized Benchmark to begin the work, while Zibell admitted "that he understood Grandmothers was obligated to pay Benchmark for the work it performed." 2023 WL 3775017, at *7.

Zibell's deposition testimony also supports the inference that *some* form of oral agreement existed:

> "I think I made all but maybe $10,000 that I've held back for a verbal agreement that I had for a 5 percent fee. There might have been some retainage, but I think that's been paid.
>
> . . . .
>
> "[P]art of it was 5 percent fee that—that I had talked to Mark [McBeth] about. I said if I have to do this work, be the middleman, give me a 5 percent fee, or you drop out, I'll to [*sic*] the work and give you 5 percent for putting the bid together and I'll just do it. So the 5 percent of that 136 [thousand] would be approximately 6,500 bucks, I guess."

More, Zibell testified that he told McBeth he wanted "5 percent for all this headache." Zibell thus claimed that he withheld the money based on an "oral agreement" with McBeth that occurred, "Prior to his actually beginning the work." Zibell also claimed that, at the time he signed the third amendment, his intention was "to see if Benchmark could perform the work."

McBeth testified that Zibell "directed [him] to do the work" and "let me know that the job was supposed to start." Indeed, McBeth claimed Zibell was frustrated that Benchmark did not begin the project sooner and told McBeth he wanted the work to start as soon as possible. McBeth also testified that, during a phone call, Zibell told him "that my contract was really good and he

could make some money off of it, so he was willing to take it." He also claimed that he had gone back to the job site and "corrected [some] issues" he characterized as "warranty work" at the direction of a KDOR representative. Still, McBeth denied that he and Zibell ever agreed that Zibell would pocket 5 percent.

Between the parties' uncontroverted actions—Benchmark in performing the work and Grandmothers in (partially) paying Benchmark—and the above testimony of their respective owners, the panel correctly concluded that, viewed in a light most favorable to Benchmark, there is a genuine dispute of material fact as to the existence of an oral contract and its terms. The district court erred by resolving this dispute on summary judgment. Thus, we reverse the district court's decision and remand for further proceedings.

CONCLUSION

We affirm the panel's reversal of the district court's entry of summary judgment in Grandmothers' favor and remand the matter to the district court. Further, although the panel's ruling of the district court's entry of judgment on the pleadings in KDOR's favor is not before us, our decision on appellate jurisdiction necessarily leaves intact the panel's reversal and remand on that issue.

No. 124,726

STATE OF KANSAS, *Appellee*, v. PETTIX MCMILLAN, *Appellant*.

(553 P.3d 296)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentences in Multiple Count Case—Requirements to Conform to Statutory Provisions—Appellate Review.* Sentences in a multiple count case fail to conform to applicable statutory provisions and are illegal when the judge fails to identify the primary count, to assign sentences to each count, and to identify criminal history scores on each count and the record makes it impossible to otherwise determine the sentences the judge imposed. Under those circumstances, an appellate court may vacate all sentences and remand for resentencing on all counts.

2. SAME—*Sentences in Multiple Count Case—Illegal and Vacated Sentences by Appellate Court—Jurisdiction of Resentencing Judge to Consider Departure Issues.* In a case involving a multiple count sentence, if an appellate court holds the sentences are illegal and vacates all sentences and thus new sentences need to be imposed, the revised Kansas Sentencing Guidelines Act, K.S.A. 21-6801 et seq., opens the door to consideration of departure issues the defendant may raise and the resentencing judge has jurisdiction to consider those issues.

3. SAME—*Resentencing on Remand—Jurisdiction of District Court to Consider Departure Motion.* On a remand for resentencing on all counts, a district court has jurisdiction to consider a departure motion unless a mandate explicitly states otherwise, or it is determined consideration is otherwise precluded.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 13, 2023. Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Oral argument held September 14, 2023. Opinion filed August 9, 2024. Judgment of the Court of Appeals vacating the judgment of the district court is affirmed in part and reversed in part. Judgment of the district court is vacated, and the case is remanded with directions.

Ryan J. Eddinger, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: After a jury convicted Pettix McMillan of three counts of attempted first-degree murder, he filed three direct

appeals attacking the legality of his convictions or his sentences. In his second appeal, a Court of Appeals panel vacated his sentences on all counts and remanded his case to the district court for resentencing. See *State v. McMillan*, No. 115,229, 2021 WL 642297 (Kan. App.) (unpublished opinion) (*McMillan II*), *rev. denied* 313 Kan. 1044 (2021). On remand, McMillan received a new sentence and appealed again. The *McMillan III* panel disagreed with the *McMillan II* panel's decision to vacate all counts. It held the resentencing judge lacked authority to impose a new sentence on two counts the *McMillan* II panel had vacated because McMillan had received a legal sentence on those counts. It also held that the resentencing judge erred by not considering McMillan's departure motion. *State v. McMillan*, No. 124,276, 2023 WL 176653 (Kan. App. 2023) (unpublished opinion) (*McMillan III*).

On review of that decision, we hold McMillan's entire original sentence was illegal and thus the *McMillan II* panel correctly vacated all sentences and the *McMillan III* panel erred when it concluded the second sentencing judge had authority to impose a sentence on only one count. We also conclude, in agreement with the *McMillan III* panel, that the second sentencing judge should have considered McMillan's departure motion when conducting the resentencing. We thus remand for a third sentencing hearing.

FACTS AND PROCEDURAL BACKGROUND

McMillan's three convictions arise out of a single incident in which McMillan shot members of his family. Each count involved McMillan shooting a different family member: count one, his then-wife; count two, his then 13-year-old son; and count three, his then 5-year-old son. The State charged McMillan with three counts of attempted first-degree murder, a severity level 1 person felony.

Before trial, the State notified McMillan it intended to ask for upward durational departure sentences on counts two and three—the charges relating to his sons. At trial, the jury determined the State had proved two aggravating sentencing factors beyond a reasonable doubt: (1) each child victim was particularly vulnerable due to his age, and McMillan knew the children's ages, and (2) McMillan owed a fiduciary responsibility to each child victim.

Post-trial, McMillan filed a motion asking for a downward departure from the presumptive sentences. He argued several mitigating factors offset the aggravating factors found by the jury.

During arguments by the attorneys about the appropriate sentence, the prosecutor asked the judge to impose an upward departure sentence for a total of 1,068 months. Defense counsel argued the downward departure factors offset the aggravating factors found by the jury.

After hearing arguments, the sentencing judge denied McMillan's downward departure motion. He described McMillan's offenses as "terrible" and added that "[i]t is very lucky that no one was killed." When addressing the fact that McMillan shot his five-year-old son, the judge called the act "horrible" and noted the child required multiple surgeries. The judge concluded there was no substantial and compelling reason to depart downward. Instead, the judge held that the aggravating factors found by the jury warranted granting the upward durational departure requested by the State. The judge found the State had met its burden of establishing McMillan's criminal history, which scored as category D.

The judge then asked the prosecutor several questions about sentencing rules, confirmed that the State was relying on the aggravating factors found by the jury, and asked the prosecutor for the State's recommendation on each count. The prosecutor started to answer but was cut off before completing the explanation. During the answer, the prosecutor referred to doubling count one and then doubling it again. As the answer continued the prosecutor referred to all counts and said, "You would give a sentence of the aggravated number on each count and then pronounce the doubling after you find—." It was at this point, before the prosecutor had fully laid out the findings the judge needed to make, that the judge interrupted and stated, "Okay. And that will be the Order of the court for a total sentence of 1,068 months." The judge provided no other explanation of the sentence.

The journal entry reflected consecutive, upward departures on each count. Count one was shown as the primary count with a prison sentence of 534 months, which is double the aggravated presumptive sentence of 267 in the revised Kansas Sentencing Guidelines Act (KSGA) grid box for a level 1, criminal history D

conviction. The journal entry showed that counts two and three ran consecutive to count one and to each other, and it recorded a 330-month sentence of imprisonment on both; 330 months is double the aggravated presumptive sentence of 165 months in the KSGA grid box for a level 1, criminal history I conviction. See K.S.A. 2013 Supp. 21-6804 (sentencing grid at time crimes committed).

McMillan I *and Remand Proceedings that Followed*

McMillan appealed, arguing he had been denied his statutory right to a speedy trial and his constitutional right to appear personally at all critical stages of the case. McMillan did not seek appellate review of his sentence or of the judge's decision to deny his departure motion. The Court of Appeals affirmed McMillan's convictions. *State v. McMillan*, No. 115,229, 2017 WL 3447000 (Kan. App. 2017) (unpublished opinion) (*McMillan I*), *summarily rev'd and remanded* by unpublished order (Kan. 2018).

McMillan sought review, and this court granted his request. This court summarily reviewed the panel's decision, and remanded McMillan's appeal to the Court of Appeals with directions to consider a then-recent decision of this court about the right to be present during critical stages of a trial. In turn, the Court of Appeals remanded the case to the district court for an evidentiary hearing and factual findings. After conducting these proceedings, the district court ruled against McMillan.

McMillan II *and Remand Proceedings that Followed*

McMillan appealed again. He renewed his argument that the district court violated his statutory speedy trial rights and erred in denying him relief for a violation of his constitutional right to be present at a critical stage of his trial. He also raised a new argument, contending for the first time in any court that his sentence was illegal because an aggregate sentence of 1,068 months of imprisonment exceeded the statutory maximum sentence. *McMillan II*, 2021 WL 642297, at *1.

A Court of Appeals panel first considered the district court's rulings that McMillan suffered no violation of his constitutional right to be present at critical stages of the trial proceedings or his

speedy trial right. The panel agreed with the district court's conclusions, and it affirmed McMillan's convictions. 2021 WL 642297, at *5-7. At that point, this issue essentially became settled and has not resurfaced in later proceedings.

The panel then considered the issue still being disputed: McMillan's newly raised challenge about the legality of his sentence. The State conceded that McMillan's sentence exceeded the length allowed under the KSGA, and the *McMillan II* panel agreed "the aggregate prison term of 1,068 months exceeds the statutory maximum and must be set aside." 2021 WL 642297, at *7. The panel added that "the district court clearly intended to impose the longest term of imprisonment permitted under the guidelines," which the panel determined was 1,029 months. The panel concluded: "We, therefore, vacate McMillan's sentences and remand to the district court for resentencing." 2021 WL 642297, at *8. It also directed the district court to "resentence McMillan consistent with this opinion." 2021 WL 642297, at *8.

On remand to the district court, McMillan moved again for a downward durational departure sentence. He renewed the arguments he had made during the original sentencing hearing and offered the new mitigating factors of his productive behavior and good disciplinary record while incarcerated.

At the resentencing hearing, the judge and the attorneys discussed the *McMillan II* decision. Each agreed that the original sentences on all counts were vacated and new sentences needed to be imposed on each count. The prosecutor cited *State v. Jamerson*, 309 Kan. 211, 433 P.3d 698 (2019), and explained that it "basically says what the Court just said on the record which is when one or more of the sentences in a multi-conviction case is illegal, District Courts may only correct the illegal sentence." The State then addressed all three counts, stating it understood that all the original sentences were illegal, and asked the resentencing judge to designate either count two or three as the primary count and to double the sentences for both counts. McMillan's counsel also recognized that *McMillan II* could be read to hold that the error made at the original sentencing "is inextricably bound between counts, we are back here with an instruction[] that there is currently no sentence. There is a conviction but no sentence imposed at this

time and it must be corrected as a whole." McMillan's counsel then asked the judge to also consider the downward departure motion.

The judge stated he did not think he had jurisdiction to consider the departure motion. Turning to the sentencing, the judge observed that "even the Court of Appeals did not consider the primary offense to be Count 1." The judge then designated count two as the primary count, found McMillan had a criminal history of D that applied to the primary count, and doubled the aggravated presumptive grid box sentence. Applying a criminal history of I to the other counts, the judge doubled the sentence for count three but did not double the sentence for count one and ran the sentences consecutive to each other for a total term of 1,029 months.

McMillan III

McMillan appealed for the third time, arguing the district court had jurisdiction to consider his departure motion and erred in not doing so. *McMillan III*, 2023 WL 176653, at *1. A Court of Appeals panel of different judges raised a new issue and ordered supplemental briefing "'on the question of whether the district court had authority to modify McMillan's sentence on count two in resentencing him.'" 2023 WL 176653, at *6.

After reviewing the supplemental briefing, the panel held the original sentencing judge had imposed an illegal sentence on count one only. The panel focused on the journal entry of judgment and remarks by the prosecutor during the original sentencing hearing about how to structure the sentence. It then concluded the original judge had intended for count one to be the primary count, even if he did not orally designate the primary or base count. But it agreed with McMillan that no upward departure factors applied to count one, so the upward durational departure imposed by the sentencing judge made McMillan's sentence illegal as to count one. The panel also held the sentencing judge had imposed legal sentences on counts two and three and those sentences could not be changed. 2023 WL 176653, at *10.

The panel remanded for a third sentencing hearing and directed "that the district court must designate count one as the primary offense and impose consecutive sentences of 330 months on counts two and three." 2023 WL 176653, at *13. The panel added

that if the district court decided in the exercise of its discretion "to again impose the maximum presumptive sentence of 267 months on count one, [McMillan's] maximum controlling sentence would be limited to twice that figure: 534 months." 2023 WL 176653, at *13.

The State timely sought review. We have jurisdiction under K.S.A. 20-3018(b) (allowing jurisdiction over petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions on petition for review).

ANALYSIS

In the State's petition for review, it argues the *McMillan III* Court of Appeals panel erred by holding the resentencing judge could not modify McMillan's sentence on count two and by holding the resentencing judge could not designate count two as the primary count. It also argues the panel erred by holding the resentencing judge should have considered McMillan's departure motion on remand.

We agree with the State's arguments that the panel erred in concluding the resentencing judge could not designate count two as the primary count and impose a new sentence. But we reject its arguments about the departure motion.

ISSUE 1: *The resentencing judge did not err in resentencing McMillan on count two.*

We will first address the issue the *McMillan III* panel raised and asked the parties to brief: Did the resentencing judge have authority to modify McMillan's sentence on count two? As revealed in our factual summary of the resentencing hearing, the resentencing judge understood he had a mandate to do so, as did the parties. The *McMillan II* decision stated as much because the panel explicitly vacated the "sentences," which meant, as defense counsel stated, there was no sentence when the resentencing judge started the resentencing hearing. The question is thus better phrased as whether the *McMillan II* panel correctly vacated the sentence on count two.

To resolve that question, we must look to Kansas statutes because, as this court has stated, courts have "no authority to modify a sentence unless plain statutory language provides such authority." *State v.*

Guder, 293 Kan. 763, 766, 267 P.3d 751 (2012). Both the KSGA and the illegal sentence statute, K.S.A. 22-3504, address when courts have such authority.

The KSGA states that "the appellate court shall not review: (1) Any sentence that is within the presumptive sentence for the crime." K.S.A. 21-6820(c)(1). Ultimately, the *McMillan III* decision that the resentencing judge could not impose a new sentence on count two rests on this statute. But our statutes also empower courts to correct an illegal sentence, which is one that, among other things, "does not conform to the applicable statutory provision, either in character or punishment[] or that is ambiguous with respect to the time and manner in which it is to be served at the time it is pronounced." K.S.A. 22-3504(c)(1). Thus, while many presumptive sentences must evade appellate review, appellate courts may review even a presumptive sentence if some aspect of it is illegal under another sentencing statute or is ambiguous as to time and manner of service. See *State v. Steinert*, 317 Kan. 342, 529 P.3d 778 (2023) (remanding to district court for determination of whether presumptive sentence was illegal due to questions about criminal history score).

The question of whether the resentencing judge had authority to resentence on count two (or whether the *McMillan II* court erred in vacating the sentence on count two) puts us in the unusual situation of, in effect, reviewing a Court of Appeals decision that is not technically before us. But we must do so to determine whether the resentencing judge imposed legal sentences. The determination of whether McMillan's sentences were illegal requires interpreting KSGA sentencing requirements and presents a question of law subject to our unlimited review. *State v. Newman-Caddell*, 317 Kan. 251, 258-59, 527 P.3d 911 (2023).

Undisputedly, Some Aspects of the Original Sentence Were Illegal

One aspect of the analysis about whether McMillan's original sentences conformed to applicable statutes is straightforward and clear. That clarity is revealed by the parties' agreement that the original journal entry recorded a departure sentence for count one relating to the shooting of McMillan's then-wife and that the departure was illegal because it did not conform to applicable statutory provisions. As the parties agree, K.S.A. 21-6815(a) allows a departure only when substantial

and compelling reasons support a departure factor. The jury verdict established substantial and compelling reasons on the counts arising from McMillan shooting his sons—counts two and three—but provided no basis for a departure on the count relating to his then-wife—count one. Thus, no legal basis existed for a departure sentence on count one. The *McMillan II* panel appropriately vacated that count, and the *McMillan III* panel likewise did not err in recognizing the illegality of the original sentence on count one. *McMillan III*, 2023 WL 176653, at *10; *McMillan II*, 2021 WL 642297, at *8; see K.S.A. 21-6820(d) (allowing appeal of departure sentence based on claim departure was not supported by evidence and did not constitute a substantial and compelling reason for departure).

The parties also agree that the total sentence of 1,068 months announced at the first sentencing was illegal. In *McMillan II*, this was the focus of the appeal and was undisputed. But then the *McMillan III* panel raised the more nuanced question of whether the discrete sentence on count two was legal. In other words, did the *McMillan II* panel err when it vacated the sentence on count two?

We Cannot Discern the Original Sentences on Individual Counts

The *McMillan III* panel's discussion of count two in isolation from counts one and three rests on the concept that each count must be considered discreetly when analyzing whether the sentence is illegal. This discrete consideration flows from the provisions of the KSGA that alter previous law. Before the KSGA was adopted, sentences for multiple counts "were regarded as a singular entity that could not be subdivided into correct and incorrect counts. So remand for resentencing on one count allowed all counts to be resentenced as the courts saw fit." *State v. Warren*, 307 Kan. 609, 612, 412 P.3d 993 (2018). But this court held that the KSGA changed the common-law rule. *Guder*, 293 Kan. at 766-67. As we would later state, the holding in *Guder* stands for the principle that the KSGA "bars the district court from resentencing on any nonvacated counts." *Warren*, 307 Kan. at 609. That statement taken on its face would mean the resentencing judge had jurisdiction because all sentences had been vacated. But we recognize the tension between that statement and the combination of K.S.A. 21-6820(c)(1), which does not allow review of presumptive sentences, and recogni-

tion that an appellate court may vacate only illegal sentences when acting under the jurisdiction conferred by the illegal sentencing statute. Likewise, the resentencing district court judge does not have "authority to resentence anew for all of the convictions" and may only resentence for the illegal sentences. *Jamerson*, 309 Kan. at 216.

The *McMillan II* panel did not explain why any individual count's sentence might be illegal, focusing on the illegality of the total controlling sentence. But it correctly determined that the total sentence exceeded the maximum allowed by law. See *McMillan II*, 2021 WL 642297, at *8; see also K.S.A. 2013 Supp. 21-6819(b)(1), (4). Even so, it may not have been necessary to vacate the sentences on all three counts to fix the illegality identified in *McMillan II* if indeed that were the only illegality. But the State contends the original sentencing judge made more errors than just setting the overall total beyond the maximum allowed.

On appeal, the State emphasizes that the judge did not designate a primary count, the criminal history applied to the individual counts, or the prison term of each sentence. In this sense, the State argues both that the sentence was ambiguous as to time and place and failed to conform to applicable statutes. It also initially argued that the original sentencing judge implicitly designated count two as the primary count by referring at one point to the first departure count.

The *McMillan III* panel rejected the argument that the sentence was ambiguous as to time and place, concluding the time and place was clear: 1,068 months and prison. 2023 WL 176653, at *13. It also rejected the State's argument that the sentencing judge implicitly designated count two as the primary count. The State does not counter those rulings before us. But it does continue to point out that the original sentences failed to comply with many KSGA provisions. And it argues the *McMillan III* panel erred when it concluded the original sentencing judge implicitly designated count one as the primary count and in holding the judge thus imposed lawful sentences on counts two and three that were not subject to modification on remand. See 2023 WL 176653, at *10-13. It now contends that we cannot discern the individual sentences on any count. McMillan disagrees and asks us to affirm the Court of Appeals decision.

Sorting out whether the sentencing judge designated a primary count and what he intended as the sentence on each count requires both an examination of the record and of statutory requirements in the KSGA for imposing a sentence. We start by summarizing the statutory scheme to provide the framework for our discussion of the record.

The KSGA provides direction in multiple conviction cases like this one. In such cases, "the sentencing judge shall establish a base sentence for the primary crime." K.S.A. 21-6819(b)(2). The KSGA builds the sentence for the remaining counts on that base. "The primary crime is the crime with the highest crime severity ranking" except when, as here, multiple counts have the same crime severity ranking. In that circumstance, the statute directs "the sentencing judge [to] designate which crime will serve as the primary crime." K.S.A. 21-6819(b)(2). The criminal history applied to each count varies depending on whether the count is the base or nonbase count. See K.S.A. 21-6819(b)(5) ("Nonbase sentences shall not have criminal history scores applied, as calculated in the criminal history I column of the grid, but base sentences shall have the full criminal history score assigned."). And the base count sets the cap on the ultimate length of a consecutive sentence. See K.S.A. 21-6819(b)(4) (capping aggregate term at double the base sentence no matter how many convictions or the individual sentences imposed for each conviction). Here, the transcript raises questions about how the sentencing judge applied these rules.

Our review of the transcript of the original sentencing hearing confirms that neither the original sentencing judge nor the prosecutor explicitly designated a primary count. The only place we find the word "primary" in the transcript of the original sentencing is when the judge observed that "when there are multiple counts the most someone can be sentenced to is double the high number in the first primary count." The prosecutor agreed, and the judge added, "And that happens to come to 534 months," which would be double the aggravated number in the grid box representing the intersection of a level one severity felony and a criminal history of D.

The *McMillan III* panel concluded that even without an explicit designation it could tell the primary count was count one. It

based this on two things: statements made by the prosecutor and the journal entry. The panel quoted an exchange in which the original sentencing court asked the prosecutor how it would allocate the 1,068-month sentence it had requested between the three counts. The State responded it would "doubl[e] Count I and then you are permitted, under [K.S.A. 21-]6818, to then double that number. You would give a sentence of the aggravated number on each count and then pronounce the doubling after you find—." The judge interrupted and said: "Okay. And that will be the Order of the Court for a total sentence of 1,068 months." The *McMillan III* panel also noted another statement by the prosecutor requesting the judge sentence McMillan to 267 months on count one and 165 months on counts two and three, run the counts consecutive, and depart up to a controlling sentence of 1,068 months. "These statements, taken together, implied that the district court imposed a sentence of 534 months on count one and 330 months on counts two and three, as these sentences represent double the aggravated number on each count." 2023 WL 176653, at *12. Those sentences align with the journal entry, which designated count one as the primary count.

The panel noted the general rule is that once a count is legally designated as the primary count it remains the primary count, even on resentencing and even if the designation were unintended. For support, it cited the unpublished Court of Appeals decision of *State v. Hayden*, No. 118,506, 449 P.3d 445 (2019) (Kan. App. 2019) (unpublished opinion) (*Hayden II*). McMillan had cited *Hayden II* as persuasive authority arguing it presents a factual situation comparable to the one here because in *Hayden II* the sentencing judge designated a nondeparture count as the primary offense and departed on that count only. The appellate court ruled the departure was illegal but the count, once designated as primary, remained the primary offense. See *McMillan III*, 2023 WL 176653, at *9-10.

The situation reviewed in *Hayden II* differs from McMillan's situation in several significant ways, however. Unlike the facts of *Hayden II*, McMillan's first sentencing judge did not pronounce the primary or base count (nor did the prosecutor in those explicit terms), did not specify what criminal history applied to each

count, and did not pronounce the sentence as to each count. The individual sentences in *Hayden II* were thus crystal clear as compared to the situation in *McMillan* where they are unknown and where the prosecutor and judge made many inconsistent and ambiguous statements causing a lack of clarity not present in *Hayden II*, 449 P.3d at 450.

The *McMillan III* panel acknowledged the lack of clarity in the record of McMillan's original sentencing hearing. But it relied on *State v. Finley*, 18 Kan. App. 2d 419, 422, 854 P.2d 315 (1993), to conclude the record was sufficient to determine that count one was the primary count. *McMillan III*, 2023 WL 176653, at *12. In *Finley*, the defendant pleaded no contest to three counts of attempted terroristic threat. The maximum presumptive sentence for each count was one year of imprisonment or, in the defendant's situation, detention in the state security hospital. The district court ordered a period of detention "'not exceed[ing] three years.'" 18 Kan. App. 2d at 420. On appeal, the parties agreed the court apparently imposed the maximum sentence on each count. But the defendant cited K.S.A. 21-6606(a) to argue the court must modify the journal entry to show concurrent sentences because under that statute "[w]henever the record is silent as to the manner in which two or more sentences imposed at the same time shall be served, they shall be served concurrently." The *Finley* panel rejected the defendant's argument after concluding the order for consecutive sentences could be implied for the overall period of detention. 18 Kan. App. 2d at 422.

The *McMillan III* panel found similarities and distinctions with *Finley*. 2023 WL 176653, at *12. Addressing the similarities, the *McMillan III* panel observed that neither the *Finley* sentencing judge nor the judge who originally sentenced McMillan announced the length of the individual sentences or whether they were to be served consecutively. Even so, according to the panel, in both cases, the total controlling sentence implied the terms of the individual sentences. The panel reasoned: "Based on the district court's pronounced sentence of 1,068 months, it was implied that the district court had imposed upward departure sentences on all three counts and ran the counts consecutively." 2023 WL 176653, at *12. Turning to the differences, the panel noted that

McMillan's overall sentence of 1,068 months did not imply the specific length of each sentence, requiring it to rely on the individual sentences for each count that the prosecutor "seemed" to suggest. 2023 WL 176653, at *12. Despite these differences, the *McMillan III* panel found sufficient clarity in the State's suggested sentences to discern the sentences.

The *McMillan III* panel's conclusion ignores that neither the judge nor the State explicitly designated a primary count in their remarks. Granted, the State proposed a sentence for count one consistent with it being the primary count. But many statements throughout the hearing convey the State intended the primary count to be one of the counts relating to McMillan's sons. And the only comment by the judge about a primary count conveys he understood the departure facts applied to the counts relating to McMillan's sons only. Thus, when the transcript is read as a whole, neither the prosecutor's arguments nor the judge's pronouncement clearly designate the primary count. Plus, the contradictory statements make it unclear what the State meant, much less what the judge intended. We have a void in place of the necessary finding about which count is the primary. That void is significant because that designation forms the foundation for a KSGA sentence in a multiple count case. See K.S.A. 21-6819(b)(2).

This is not a unique situation, and appellate courts have sometimes filled the gap by looking at the journal entry. That is what the *McMillan III* panel did as well. In doing so, the panel recognized the general rule that a sentence "is effective upon its pronouncement from the bench; the filing of a formal journal entry is but a record, evidence of what has been done. The court's order does not derive its effectiveness from the journal entry, or from any act of the clerk; it is effective when announced." *State v. Moses*, 227 Kan. 400, 402-03, 607 P.2d 477 (1980). A corollary to this rule is that the journal entry is intended to enshrine the pronounced sentence, not correct any errors or omissions made during its pronouncement. See *State v. Hilt*, 307 Kan. 112, 127-28, 406 P.3d 905 (2017).

On the other hand, we have recognized that a district court retains jurisdiction to file a journal entry of sentencing that clarifies an ambiguous sentence pronounced from the bench. The

McMillan III panel relied on this line of cases, citing *State v. Jackson*, 291 Kan. 34, 36, 238 P.3d 246 (2010); *State v. Garcia*, 288 Kan. 761, 765-67, 207 P.3d 251 (2009); and *State v. Crawford*, 253 Kan. 629, 649-50, 861 P.2d 791 (1993), *abrogated on other grounds by State v. Marinelli*, 307 Kan. 768, 415 P.3d 405 (2018). 2023 WL 176653, at *10. It then concluded the journal entry clarified the original sentencing judge's intent to use count one in the complaint as the primary count and to impose consecutive sentences.

In reaching this conclusion, the *McMillan III* panel recognized that it needed to examine whether there is an "actual variance between what occurred at the hearing and what is reflected in the journal entry memorializing the hearing." 2023 WL 176653, at *11. The panel thus looked to the transcript to provide that clarification, emphasizing that "the State clearly requested that the district court designate count one as the primary offense" and, "[i]n describing how it believed McMillan should be sentenced, the State repeatedly suggested that count one should operate as the primary offense." 2023 WL 176653, at *11. But we again note that in the portion of the transcript relied on by the *McMillan III* panel, the judge interrupted the prosecutor midsentence as she was saying you should "pronounce the doubling after you find—." It is those missing findings that are key.

Also, while portions of the transcript read in isolation arguably support the *McMillan III* panel's reading other portions suggest, as the *McMillan II* panel concluded, that the judge intended for McMillan to "properly receive[] a 534-month sentence on the primary crime (one of the convictions on which the jury found aggravating circumstances)." 2021 WL 642297, at *8. Our reading of the transcript leads us to conclude this reading is as reasonable as the *McMillan III* panel's reading. We thus cannot conclude on this record that the journal entry clarified the judge's orders.

We find more support for our conclusion in inconsistent statements found in the journal entry itself. In the departure section, the journal entry cites the two reasons found by the jury as departure factors applying to "two of the victims." It identified those victims as McMillan's two sons. To this extent, the journal entry provides no basis for the departure on count one and is, at best,

ambiguous rather than clarifying and, at worst, internally inconsistent. This leads us to conclude that the lack of clarity and the ambiguity in the statements of both counsel and the judge leave no room for confidence that the journal entry clarified—rather than modified—the judge's order about which was the primary count.

Vacating All Counts Was Appropriate

In sum, the overall original sentence and its component sentences violated KSGA provisions and thus were illegal, and the *McMillan II* panel properly vacated all sentences. The overall illegality of the sentence derives chiefly from the judge's failure to explicitly assign sentences to each count and to identify the primary count, making it impossible to definitively say what sentences the judge imposed or to hold that the journal entry clarified rather than modified the sentence. This situation distinguishes this case from *Abasolo*, *Jackson*, and *Garcia*. Cf. *Abasolo v. State*, 284 Kan. 299, 306, 160 P.3d 471 (2007) (stressing that judge's statements in probation revocation hearing were unambiguous and consistent with statutes and thus controlled over journal entry); *Jackson*, 291 Kan. at 36-37 (district court clarified the sentence pronounced); *Garcia*, 288 Kan. at 765-66 (clarification not modification occurred). We cannot conclude which count was the primary count, and, if it was count two, the sentence reflected in the journal entry is an illegal sentence because it uses the wrong criminal history score. See K.S.A. 21-6819(b)(5).

The *McMillan III* panel erred in concluding the sentencing court designated a primary count and in concluding count two was not illegal and not subject to resentencing on remand. We reverse this portion of the *McMillan III* opinion.

ISSUE 2: *The district court on remand must consider McMillan's departure motion.*

In its petition for review, the State also argues the resentencing judge lacked jurisdiction on remand to consider McMillan's departure sentence or, in the alternative, that the mandate rule prevented the resentencing judge from considering McMillan's downward departure motion. These arguments present questions

of law subject to our de novo or unlimited review. See *State v. Edwards*, 318 Kan. 567, 570, 544 P.3d 815 (2024) (jurisdiction); *State v. Morningstar*, 299 Kan. 1236, 1240-41, 329 P.3d 1093 (2014) (interpretation of appellate court mandate and determination of whether district court complied with it on remand).

Applying our unlimited review, we affirm the *McMillan III* panel and hold the resentencing judge had jurisdiction to consider McMillan's departure motion, the mandate rule did not preclude consideration of the motion, and the judge should have considered the motion.

Jurisdiction

On remand from the *McMillan II* decision, McMillan essentially argued the fact his sentences were vacated brought the parties back to their original position and required sentencing anew, including consideration of his new departure motion. But the State counters that because the *McMillan II* panel did not find error or illegality relating to McMillan's original departure motion, the resentencing judge could not consider it.

The *McMillan III* panel found no controlling authority. 2023 WL 176653, at *4. But it noted that "the KSGA contemplates that both mitigating and aggravating factors should be considered whenever a district court decides whether to impose a departure sentence. See *State v. Jolly*, 301 Kan. 313, 321, 342 P.3d 935 (2015)." 2023 WL 176653, at *4; see K.S.A. 21-6815. It also cited K.S.A. 21-6819(b)(5), which states: "Upon resentencing, if the case remains a multiple conviction case the court shall follow all of the provisions of this section concerning the sentencing of multiple conviction cases." Finally, the panel found guidance in this court's holding in *Jamerson*, 309 Kan. at 218, that on remand a resentencing judge must correct the sentence by complying with KSGA requirements. The panel reasoned:

"This means [the district court] must apply K.S.A. 2021 Supp. 21-6815 as its starting point in resentencing McMillan. And under that statute, the requirement that a district court impose the presumptive sentence in a case is intertwined with its authority to grant a departure. A district court must impose the presumptive sentence unless substantial and compelling reasons justify a departure sentence. Because the requirement to consider if substantial and compelling reasons supporting a departure exist is in the same provision as the requirement to impose the presumptive sentence under the guidelines,

we find a district court can consider a departure whenever it is sentencing a defendant—including on remand for resentencing." 2023 WL 176653, at *5.

Before us, the State argues this holding made sense in *Jamerson* because, there, the defendant was being resentenced under a different grid box than the one used during the original sentence. Thus, the resentencing judge had to determine which number—the mitigated, middle, or aggravated number—in the grid box to use. In contrast here, according to the State, "correcting the illegality in defendant's sentence did not necessitate reconsideration of defendant's downward departure motion."

We conclude the State draws a distinction without a difference, especially because all sentences were vacated and sentencing essentially starts anew. As we have discussed, *Jamerson* considered the extent to which a district court "can . . . modify multiple sentences when only some of them are held to be illegal following a motion to correct an illegal sentence." 309 Kan. at 212. Applying the illegal sentencing statute, the *Jamerson* court also discussed what needed to happen on remand after an appellate court determined a sentence was illegal: "Reading K.S.A. 22-3504 for the correction of an illegal sentence and the KSGA together would logically advise that correcting an illegal sentence should follow the same statutory rules as resentencing after a remand." 309 Kan. at 216.

Extending the *Jamerson* rule here, a district court has jurisdiction on remand for resentencing to consider the existence of aggravating or mitigating factors consistent with the KSGA after an appellate court vacates a sentence and remands for a resentencing. We add that McMillan presented a new motion, arguing new factors, so the original sentencing judge's findings did not cover all facets of the motion. Both the original and new motion put into play the language of the KSGA stating that a "sentencing judge shall impose the presumptive sentence provided by the sentencing guidelines unless the judge finds substantial and compelling reasons to impose a departure sentence." K.S.A. 21-6815(a). In a case involving a multiple count sentence, if an appellate court holds the sentences are illegal and vacates all sentences and thus new sentences need to be imposed, the KSGA opens the door to consideration of departure issues the defendant may raise. Jurisdiction exists.

Mandate Rule

The resentencing judge seemed mostly concerned about the mandate rule and whether that constrained his consideration of the departure motion. The State also argues the *McMillan II* panel's mandate precluded consideration of McMillan's motion.

K.S.A. 20-108 and K.S.A. 60-2106(c) discuss the effect of the mandate. K.S.A. 20-108 requires district courts "to carry the judgment or decree of the appellate court into execution; and the same shall be carried into execution by proper proceedings, by such district court, according to the command of the appellate court made therein." Similarly, K.S.A. 60-2106(c) states that an appellate court's mandate "shall be controlling in the conduct of any further proceedings necessary in the district court."

As explained in *State v. Soto*, 310 Kan. 242, 252, 445 P.3d 1161 (2019), these statutes "enforce the hierarchy of Kansas courts, ensuring that appellate orders [are] not . . . ignored by lower courts. They were not designed to set up broad limits on subject matter jurisdiction once a case was remanded." In other words, "To the extent an appellate court has spoken, the district court must listen and, as required, act." 310 Kan. at 252. The mandate rule thus incorporates preclusion principles by preventing district courts from acting contrary to points finally settled by appellate courts. But the statutes do not prohibit district courts from taking other steps necessary to dispose of the case. "Such issues may have been allocated for decision in the district court in the first place and then untouched by appellate proceedings." 310 Kan. at 256.

We understand the resentencing judge's reading of *McMillan II* as setting out parameters for resentencing. But the panel did not address the departure motion, much less the renewed departure motion filed on remand. The motion thus falls into the category *Soto* referred to as a matter "untouched by appellate proceedings." 310 Kan. at 256. Thus, the mandate rule did not preclude the resentencing judge's consideration of McMillan's departure motion raised after remand to correct an illegal sentence. The KSGA would allow the imposition of the presumptive sentence set out by the *McMillan II* panel only if the judge did not find substantial and compelling reasons to depart. K.S.A. 21-6815. Further, because this case involved a complete resentencing on remand after all counts had been vacated, the *McMillan II* holding

opened the door for sentencing anew, and the mandate rule did not prevent the resentencing judge from considering McMillan's departure motion.

We finally note that no party briefed whether the law of the case or any other preclusive doctrine means the *McMillan III* panel should have accepted the *McMillan II* order that vacated the sentences or whether those doctrines would change our analysis about consideration of the departure motion. The law-of-the-case doctrine "prevents a party from relitigating an issue already decided on appeal in successive stages of the same proceeding." *State v. Parry*, 305 Kan. 1189, 1194, 390 P.3d 879 (2017). While an appellate court may raise questions of preclusion sua sponte, see *Parry*, 305 Kan. at 1194, we decline to do so without having permitted the parties to brief the various doctrines' application on a motion for illegal sentence—a motion that can be raised at any time. We raise the point only to explain why it is not addressed and to caution that our holdings do not account for the effect those doctrines might have on the issues.

CONCLUSION

McMillan suffered two rounds of flawed sentencing. The first round failed to designate a primary crime and failed to specify sentencing terms for each count. The second round did not begin anew by considering McMillan's departure motion or other considerations in K.S.A. 21-6815. We vacate McMillan's sentences and remand to the district court for sentencing anew after considering any departure or other motion, the parties' arguments, and relevant provisions of the KSGA.

Judgment of the Court of Appeals vacating the judgment of the district court is affirmed in part and reversed in part. Judgment of the district court is vacated, and the case is remanded with directions.

No. 125,740

In the Matter of the Wrongful Conviction of ROBERT WILLIAM DOELZ.

(553 P.3d 969)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Wrongful Conviction Claim—Three Requirements Claimant Must Prove for Compensation.* Before a person can be compensated for time spent incarcerated while wrongfully convicted of a crime, K.S.A. 2023 Supp. 60-5004(c)(1)(C) requires the claimant for compensation to prove three things. First, that he or she did not commit the crime of conviction. Second, that he or she was not an accessory or accomplice to the crime. And third, that by demonstrating the first two requirements, the claimant obtained one of three possible outcomes: (1) the reversal of his or her conviction; *or* (2) dismissal of the charges; *or* (3) a finding of not guilty upon retrial.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held November 1, 2023. Opinion filed August 9, 2024. Affirmed.

Greg N. Tourigny, of The Tourigny Law Firm, LLC, of Kansas City, Missouri, argued the cause, and *Sophie Woodworth*, of Holman Schiavone, LLC, of Kansas City, Missouri, was with him on the brief for appellant.

Dwight R. Carswell, deputy solicitor general, argued the cause, and *Kris W. Kobach*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 2019, this court reversed Robert William Doelz' conviction for possession of methamphetamine with intent to distribute. We found Doelz' Fourth Amendment rights had been violated by a warrantless search and concluded that the fruits of that search should have been suppressed. *State v. Doelz*, 309 Kan. 133, 142, 432 P.3d 669 (2019). On remand, the State dropped the charge and did not pursue a retrial.

Doelz then filed a petition under K.S.A. 2020 Supp. 60-5004 seeking compensation for the more than four years he spent in prison for the now reversed conviction. In order to recover statutory compensation under our wrongful conviction scheme, a claimant must establish by a preponderance of evidence that:

"(A) The claimant was convicted of a felony crime and subsequently imprisoned;

"(B) the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty;

"(C) the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial; and

"(D) the claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction. Neither a confession nor admission later found to be false or a guilty plea shall constitute committing or suborning perjury, fabricating evidence or causing or bringing about the conviction under this subsection." K.S.A. 2023 Supp. 60-5004(c)(1).

The State and Doelz filed cross-motions for summary judgment. The parties agreed that Doelz had satisfied the requirements in K.S.A. 2023 Supp. 60-5004(c)(1)(A), (B), and (D)—he was convicted of a felony crime, imprisoned because of that conviction, his conviction was reversed, the charges were dismissed, and he did not commit perjury or fabricate evidence. At issue both in the district court—and now here on appeal—was what, precisely, a claimant must prove under subsection (c)(1)(C).

In denying both motions for summary judgment, the district court held that K.S.A. 2023 Supp. 60-5004(c)(1)(C) requires a claimant to establish that the fact the claimant did not commit the crime *resulted in* one of three outcomes—either the reversal or vacation of the conviction, the dismissal of the charges, or a finding of not guilty on retrial. As to the first possible outcome, the lower court found that Doelz' conviction was reversed on appeal because of a Fourth Amendment violation, not because Doelz did not commit the crime. As to the third possible outcome, the court noted that Doelz was not retried. Finally, considering the second option—a dismissal of the charges—the lower court found that because the summary judgment record contained no evidence as to why the charges were dismissed, there remained a disputed issue of material fact to be resolved at trial.

The district court then conducted a bench trial in August 2022. Doelz testified that he was innocent of the charged crime because the drugs were not his. After Doelz rested, the State moved for judgment as a matter of law because Doelz did not produce any evidence that the charge against him was dismissed because he did not commit the crime. The district court granted the motion. In

doing so, the district court declined to make a factual finding one way or the other concerning Doelz' alleged innocence. Instead, the district court found that Doelz "did not offer any evidence that the reason for the dismissal was because he did not commit the crime for which Claimant was convicted." As such, the district court held that this "lack of evidence of one element required to be proven under the Act means the rest of the claim fails as well. Because Claimant has failed to prove a necessary element of his claim, there is no need to address the other elements."

Doelz timely filed a direct appeal to this court. See K.S.A. 2023 Supp. 60-5004(l) ("The decision of the district court may be appealed directly to the supreme court pursuant to the code of civil procedure."). His appeal puts this question squarely before us: does K.S.A. 2023 Supp. 60-5004(c)(1)(C) require—as an element of a claim for compensation—a causal connection between a claim of innocence and an ultimate outcome? We answer yes. Today we adopt the district court's interpretation of the statute and affirm the district court's grant of the State's motion for judgment as a matter of law, because Doelz failed to prove by a preponderance of the evidence that the State dismissed the charge against him *because* he did not commit the crime.

DISCUSSION

We apply the same standard as the district court when evaluating a district court's ruling on a motion for judgment as a matter of law, resolving all facts and inferences drawn from the evidence in favor of the party seeking review. *Scott v. Hughes*, 294 Kan. 403, 412, 275 P.3d 890 (2012). When the district court's decision is based on the interpretation of a statute, we exercise unlimited review. The most fundamental rule of statutory interpretation is that the intent of the Legislature governs if that intent can be ascertained. We look first to the plain language of the statute, giving common words their ordinary meaning. Only if a statute is ambiguous will we resort to examining legislative history or canons of statutory construction. *State v. Angelo*, 316 Kan. 438, 450-51, 518 P.3d 27 (2022).

Here, the plain language of the statute is inadequate to determine its meaning. K.S.A. 2023 Supp. 60-5004(c)(1)(C) reads in full:

> "[T]he claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial."

The sentence structure is grammatically obtuse, if not simply wrong. The phrase "and resulted in" has no predicate, leaving a reader to wonder without clear answer—*what* resulted in? We cannot tell from the plain language. Although a simple word substitute does fix the plain meaning into grammatically sensible prose. Changing the phrase "and resulted in" to "which resulted in" makes the meaning plain and gives rise to at least a suspicion that this is what the Legislature meant. We are not free, however, to simply rewrite statutes or alter words to achieve greater clarity. *League of Women Voters of Kansas v. Schwab*, 317 Kan. 805, 814, 539 P.3d 1022 (2023) (this court relies only on the text of the statute, and cannot "determine what the law should or should not be"); *State v. Gray*, 306 Kan. 1287, 1294, 403 P.3d 1220 (2017) ("[W]e read the statutory language as it appears, without adding or deleting words.").

Instead, we must conclude that this error in the language creates an ambiguity of meaning. Thus, we will "move to construction—employing canons, searching legislative history, and identifying substantive background considerations—to define and accomplish legislative purpose." *State v. Jordan*, 303 Kan. 1017, 1021, 370 P.3d 417 (2016).

The legislative history of K.S.A. 2023 Supp. 60-5004 demonstrates that the Legislature only intended this statute to compensate the factually innocent. The three legislators who explained their votes discussed the importance of providing compensation for those that are wrongfully convicted and later exonerated because of actual innocence. The written testimonies reflected the same concerns. The Innocence Project referred to those who have spent time "behind bars for crimes they did not commit." Hearing on S.B. 336 Before the Kansas Senate Judiciary Committee (Feb. 14, 2018) (testimony of Michelle Feldman). The ACLU Policy

Director pointed to individuals that have been proven innocent due to DNA testing. Hearing on H.B. 2579 Before the House Committee on the Judiciary (Feb. 14, 2018) (testimony of Vignesh Ganapathy). The testimonies frequently referenced Lamonte McIntyre, Richard Jones, and Floyd Bledsoe, all three of whom were exonerated after their convictions were set aside because they were determined to be actually innocent. Professor Alice Craig referred to pop culture story lines, "[f]rom Roger Thornhill in North by Northwest, Andy Dufresne in Shawshank Redemption and Tom Robinson in To Kill a Mockingbird." Hearing on S.B. 336 Before the Kansas Senate Judiciary Committee (Feb. 14, 2018) (testimony of Prof. Alice Craig). And many of the testimonies discussed expungement and exoneration, rather than simply reversed convictions. See Exonerate, Black's Law Dictionary 721 (11th ed. 2019) ("To clear of all blame; to officially declare [a person] to be free of guilt."); Exoneree, Black's Law Dictionary 722 (11th ed. 2019) ("Someone who is relieved of blame, responsibility, or accusation; esp., someone who is officially cleared from a wrongful criminal conviction."); Expunge, Black's Law Dictionary 727 (11th ed. 2019) ("To remove from a record, list, or book; to erase or destroy."); Expungement of Record, Black's Law Dictionary 727 (11th ed. 2019) ("The removal of a conviction . . . from a person's criminal record.").

This history plainly indicates the Legislature intended to compensate only individuals who are determined to be actually or factually innocent. It did not intend to compensate every criminal defendant whose conviction was reversed on appeal. See *In re Spangler*, 318 Kan. 697, 700, 706, 547 P.3d 516 (2024) (concluding the Legislature intended to restrict compensation under K.S.A. 2023 Supp. 60-5004 to "[o]nly someone innocent of the criminal conduct," and holding "the claimant must show factual innocence from the charges giving rise to criminal liability before receiving compensation").

Given this clear legislative purpose, it is apparent that the suspected meaning of K.S.A. 2023 Supp. 60-5004(c)(1)(C) is in fact its intended meaning—that is, the Legislature intended to require in this subsection that a claimant for compensation must prove

three things. First, that he or she did not commit the crime of conviction. Second, that he or she was not an accessory or accomplice to the crime. And third, that by demonstrating the first two requirements, the claimant obtained one of three possible outcomes: (1) the reversal of his or her conviction; *or* (2) dismissal of the charges; *or* (3) a finding of not guilty upon retrial. In other words, that the first two elements "resulted in" one of three possible outcomes.

Below, the trial court provided Doelz the opportunity to prove up his central claim—that the prosecutor, on remand, dismissed the charges because Doelz did not actually commit the crime. But Doelz offered no evidence to show this, and in fact he now admits there is no such evidence. Instead, he makes a legal argument that because his conviction was reversed, he is once more cloaked in the presumption of innocence which is sufficient as a matter of law to prove both that he "did not commit the crime" and that his case was dismissed because of his innocence.

Doelz' arguments are unavailing. As demonstrated above, the statute's legislative history makes it clear that the overarching intent of the statute is to provide redress for individuals who are *actually* innocent. This is a distinct category from the "legal" innocence that Doelz attempts to rely on. Legal innocence is "'"[t]he absence of one or more procedural or legal bases"'" supporting a conviction and sentence, while "actual innocence refers to '"[t]he absence of facts that are prerequisites for the sentence given to a defendant."'" *Nadeem v. State*, 298 Neb. 329, 337, 904 N.W.2d 244 (2017). Determining whether a person is "actually innocent" does not require inquiring into "the legal status of a petitioner's conviction . . . . Rather, actual innocence is an inquiry of historical fact." *In re Lester*, 602 S.W.3d 469, 475 (Tex. 2020). "In other words, actual innocence means that a defendant did not commit the crime for which he or she is charged. Or, as the U.S. Supreme Court has explained, 'A prototypical example of "actual innocence" in a colloquial sense is the case where the State has convicted the wrong person of the crime.'" *Nadeem*, 298 Neb. at 337. "The discretionary decision of the State to dismiss the case does not establish actual innocence." *Rhoades v. State*, 880 N.W.2d 431, 447 (Iowa 2016).

When K.S.A. 2023 Supp. 60-5004(c)(1)(C) mandates a claimant for compensation prove both that he "did not commit the crime" and that this "resulted in" either a reversal, a dismissal, or a not guilty verdict, the statute is describing "actual innocence" as opposed to mere "legal innocence." Doelz objects that because he cannot control the fact that he was not retried, this result is "unfair" because it burdens him more heavily than other claimants who could seek relief under one of the other two alternatives (either reversal or a not guilty verdict because of actual innocence).

We take his point to heart—that it is possible a criminal defendant could be *both* actually innocent *and* the victim of an unconstitutional search. But the Legislature clearly anticipated this possibility by providing that a claimant can also prevail by demonstrating that a charge was dismissed after remand because of actual innocence. Doelz—and similarly situated claimants in the future—would have been free to use the evidentiary tools of this civil proceeding to investigate and present to a fact-finder the motivating reason and underlying facts that sit behind a prosecutor's decision not to continue to pursue charges after a reversal by the appellate courts. But he did not.

Affirmed.

No. 125,274

RODNEY L. ROSS and TONDA R. ROSS; RODNEY L. ROSS, as Trustee of CAROL J. ROSS REVOCABLE TRUST; RODNEY L. ROSS, as Trustee of MAYNARD O. ROSS REVOCABLE TRUST; and LAURA E. FIELD, as Trustee of LAURA E. FIELD TRUST NO. 1, *Appellees*, v. NORMAN TERRY NELSON; STILLWATER SWINE, LLC; HUSKY HOGS, LLC; and NTN, L.P., *Appellants.*

(554 P.3d 636)

SYLLABUS BY THE COURT

1. REAL PROPERTY—*Rights of Fee Owners of Land Containing Highway Easement—Owner has Standing to Sue for Alleged Trespass if Outside Scope of Easement.* A person who owns the fee to land dedicated to a highway easement retains all rights in the land not included in the easement, including rights above, on, and under the surface of the ground within the limits of the highway. Such rights are subject only to the condition that the owner does not interfere with the public's use of the easement. The owner has standing to sue for an alleged trespass based on uses outside the scope of the easement.

2. HIGHWAYS AND STREETS—*Scope of Public Highway Easement—Limitations.* The scope of a public highway easement is limited to public uses that facilitate the highway's purposes of travel, transportation, and communication.

3. SAME—*Permanent Occupation of Part of Public Highway Easement for Private Use—Outside Easement's Scope.* The permanent occupation of a portion of a public highway easement for private and exclusive use is inconsistent with the public nature of the easement and thus falls outside the easement's scope.

4 AGRICULTURE—*Kansas Right to Farm Statute—Statutory Presumption Agricultural Activities Are Not a Nuisance—Requirements.* K.S.A. 2-3202(a) creates a statutory presumption that agricultural activities do not constitute a nuisance when the statute's several requirements are met. To receive the benefit of that presumption, the nuisance must arise from an agricultural activity, the activity must be conducted on farmland, the activity must have been established prior to surrounding agricultural and nonagricultural activities, and the activity must be consistent with good agricultural practices.

5. SAME—*Right to Farm Statute—Statutory Presumption Is Rebuttable.* K.S.A. 2-3202(a)'s statutory presumption is rebuttable. Even if the require-

ments for invoking the presumption are met, the presumption does not attach when the activity has a substantial adverse effect on public health and safety.

6. SAME—*Right to Farm Statute—Presumption of Good Agricultural Practices—Requirements*. K.S.A. 2-3202(b) creates a presumption that an agricultural activity is consistent with good agricultural practices when it is undertaken in conformity with federal, state, and local laws and rules and regulations.

7. COMMON LAW—*State Law Includes Kansas Common Law*. A statutory reference to Kansas law includes the Kansas common law.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 634, 534 P.3d 634 (2023). Appeal from Phillips District Court; PRESTON A. PRATT, judge. Oral argument held May 8, 2024. Opinion filed August 23, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Patrick B. Hughes, of Adams Jones Law Firm, P.A., of Wichita, argued the cause and was on the briefs for appellants.

Randall K. Rathbun, of Depew Gillen Rathbun & McInteer LC, of Wichita, argued the cause, and *Braxton T. Moral*, of the same firm, was with him on the brief for appellees.

Aaron M. Popelka, vice president of legal and governmental affairs, and *Jackie Newland*, associate counsel, Kansas Livestock Association, and *Terry D. Holdren*, general counsel, and *Wendee D. Grady*, assistant general counsel, Kansas Farm Bureau, were on the brief amici curiae.

The opinion of the court was delivered by

WALL, J.: Norman Terry Nelson runs an industrial hog-farming operation a few miles east of Almena, a small town in northwest Kansas near the Nebraska border. The hogs generate enormous volumes of waste. To manage that waste, Nelson decided to use it as fertilizer on his farmland. So he piped treated waste from his facilities to his nearby farmland, where he used a pivot irrigation system to spray it onto the fields.

But this arrangement has ruffled more than a few feathers—or should we say wrinkled more than a few noses. Two neighbors sued for trespass and nuisance. They prevailed in the district court and on appeal. Nelson now asks us to overturn these judgments, arguing that he needed no permission to install the pipelines and

invoking Kansas' right-to-farm statutes to shield him from nuisance liability. We decline.

Nelson exceeded the scope of the public easement by installing pipelines beneath a public road for his private and exclusive use. Because the landowners did not authorize this installation, Nelson committed a trespass. This trespass, in turn, precludes him from relying on the presumption of "good agricultural practice" under the right-to-farm statutes. To rely on that presumption, the statute requires conformity with all applicable laws, a condition Nelson's trespass violates. The lower courts correctly applied these principles, and we affirm their judgments.

FACTS AND PROCEDURAL BACKGROUND

Nelson's neighbors, Rodney and Tonda Ross and Laura Field, sued Nelson and his corporate entities. They alleged that Nelson had trespassed on their land by installing pipes in the subsurface of the county road. Those pipes carry the treated pig waste (effluent) from his facilities to his farmland, and water from the farmland to the facilities. According to their petition, the plaintiffs owned the land the road was located on, and they had not given Nelson permission. The petition also alleged that Nelson had created a nuisance for the Rosses. They own a farmhouse that sits just across the road from the cropland where Nelson sprays the effluent. They alleged that the resulting odors and fly infestations had unreasonably interfered with their use and enjoyment of that property. To simplify matters, we follow the lead of the district court and use "Ross" to denote all the plaintiffs and "Nelson" to denote all the defendants.

Nelson moved for partial summary judgment on both the trespass and nuisance claims. On the trespass claim, Nelson argued he needed no permission to lay pipelines along the county road. And if he did, he had the implied consent of the county. Ross insisted that only public utilities could install pipelines in the highway easement without permission from the landowner. And he filed his own motion for summary judgment on the trespass claim. On the nuisance claim, Nelson argued that the right-to-farm statutes shielded his conduct from nuisance liability. Ross maintained that

the statutory right-to-farm protections did not apply because Nelson's agricultural activity violated the applicable laws and regulations.

The district court granted Ross summary judgment on the trespass claim after concluding that Nelson needed Ross' permission to install the pipelines. The court also denied Nelson's motion for summary judgment on the nuisance claim after ruling that he was not entitled to the statutory presumption under K.S.A. 2-3202(b). Under that provision, conduct is presumed to be a "good agricultural practice"—which is one of the conditions for invoking the right-to-farm protections—if the conduct is "undertaken in conformity with federal, state, and local laws and rules and regulations." But since Nelson had trespassed on Ross' land, the district court concluded that his conduct failed to conform to state law. Thus, he was not entitled to the statutory presumption.

After a four-day trial, the jury awarded Ross damages on the trespass claim, found in his favor and awarded him damages on the nuisance claim, and found that Nelson's conduct warranted punitive damages, which the district court later awarded. On appeal to the Court of Appeals, Nelson challenged "several aspects of the district court's summary-judgment rulings on the trespass and nuisance claims, the jury verdicts on each, and the $50,000 punitive-damage award." *Ross v. Nelson*, 63 Kan. App. 2d 634, 643, 534 P.3d 634 (2023). The Court of Appeals panel held that Nelson had failed to show error, so it affirmed the district court's judgment. 63 Kan. App. 2d at 643.

Nelson petitioned our court for review of the panel's trespass and nuisance rulings, but he did not renew his challenge to the punitive-damages award. We granted Nelson's petition and heard oral arguments on Wednesday, May 8, 2024. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

I. *Ross Was Entitled to Summary Judgment on the Trespass Claim*

We first address whether Nelson trespassed by installing pipelines in the subsurface of several county roads without Ross' permission. Ross owns the land on which the county roads are located. Both parties acknowledge the roads at issue are public highways. See L. 1874, ch. 111, § 1 (declaring all section lines in Norton County to be "public

highways"). In Kansas, owners of real property containing a public highway generally retain fee title to the land. But the public obtains an easement over the land for travel and transportation. *Comm'rs of Shawnee Co. v. Beckwith*, 10 Kan. 603, 607-08, 1873 WL 699 (1873). Thus, Ross owns the fee to the land. But the public has a right to use the portion of Ross' land dedicated to the road for travel and transportation.

Nelson asserts he did not trespass on Ross' land. He argues that his use of the road—installing and operating a pipeline system—falls within the permissible scope of the highway easement. And such uses do not require landowner permission. But both the district court and the Court of Appeals disagreed. They concluded that Nelson exceeded the scope of the public highway easement by installing a pipeline in the road exclusively for his private use. Thus, Nelson needed Ross' permission, which he did not have. *Ross*, 63 Kan. App. 2d at 644, 651.

On review, Nelson challenges the lower courts' holdings on several grounds. First, he argues Ross lacks standing to bring a trespass claim because Ross does not have a possessory interest in the highway easement. Second, Nelson renews his argument that installing pipelines below the road's surface is a permissible use of a highway easement because it facilitates transportation. Nelson believes this to be true even if the pipelines were not a public use. And even if his use exceeds the scope of the easement, Nelson argues he had the implied consent of the county to install the pipelines. To resolve these issues, we first discuss the facts that frame the legal challenges. Then, we outline the controlling legal framework before addressing Nelson's standing argument and his challenges on the merits.

A. *Additional Facts Necessary to Frame Nelson's Challenge*

According to the summary-judgment record, a Norton County resolution requires anyone desiring to install a pipeline in a county road to obtain a permit before starting any work. Sometime in August 2017, Nelson applied for a permit to install three pipelines in the rights-of-way of several county roads. The application was undated, and the signature line for the county clerk to approve the permit was unsigned.

That month, Nelson attended a meeting of the Norton County Board of County Commissioners. Nelson said he wanted to install

two freshwater pipelines and one effluent pipeline in the county road rights-of-way for a new hog unit. He also told the commissioners he had contacted the landowner's tenant. An employee of the Norton County Road Department explained that the roads would need to be elevated and that the existing fencing would need to be moved to accommodate the pipelines. The commission approved that road construction.

County employees completed the roadwork to accommodate Nelson's pipelines in late August 2017. But early the next month, the Norton County sheriff received word that Nelson was installing pipelines without the necessary permits. The sheriff told Nelson's employee that it would be in Nelson's best interest if the installation stopped.

At a Board of County Commissioners meeting held a few days later, Nelson asked why permits were needed to use county road rights-of-way. The commissioners said the permits were necessary so pipelines could be located for safety and maintenance purposes. Someone at the meeting asked why road work had started when the permit had not been issued. Apparently, the commissioners believed Nelson had received permission from the landowners. But the commissioners later received a letter from one landowner stating that she had never been contacted. At the time of that meeting, the permit had not been signed. But Nelson still believed he had the county's permission to proceed.

Nelson installed the pipelines. Ross sued Nelson for trespassing. And both Nelson and Ross moved for summary judgment on that claim.

The district court granted summary judgment to Ross on the trespass claim. It found the following facts were uncontroverted:

"Nelson owns a hog confinement facility. Nelson transports water to the facility, and liquified hog waste from the facility, via pipes buried along a county road in the road right of way. Ross owns land adjoining the road where the pipes are buried. At the beginning of oral argument all parties agreed that Nelson is a private entity, not a public utility. They also agreed Ross owns the fee to the road. They also agreed that Nelson did not acquire Ross's permission before installing the pipeline in the road right of way."

The district court noted that Kansas law requires individuals to obtain landowner permission before using a public highway easement for private purposes other than traveling on road surfaces.

The district court found that Nelson had buried the pipelines below the roads' surfaces exclusively for his private benefit. Thus, it concluded that he needed Ross' permission to do so. The parties agreed that Nelson did not have Ross' permission. So the district court ruled that Nelson was trespassing as a matter of law.

The Court of Appeals affirmed the district court's judgment. *Ross*, 63 Kan. App. 2d at 651. The panel held that a private person may install a pipeline in a public highway right-of-way if the pipeline has a public use—"like providing a utility to the community." 63 Kan. App. 2d at 651. If it does not, the person must get permission from either the landowners or the Legislature, depending on the nature of the installation and the property. 63 Kan. App. 2d at 645-46, 651. The panel affirmed the district court's ruling because Nelson installed the pipelines for a private purpose without permission from the landowners or the Legislature. 63 Kan. App. 2d at 646-51.

The panel also rejected Nelson's argument that Ross lacked standing. Nelson argued that a landowner's right to possess a public highway easement is limited. And he believed these limited interests did not give Ross authority to sue for trespass. But the panel disagreed. It held that Ross, as the abutting landowner, has a distinct property interest in the land that other members of the public do not. 63 Kan. App. 2d at 650-51.

On review, Nelson renews his argument that Ross lacks standing to bring a trespass claim. And on the merits, he argues that his use falls within the scope of the easement—no matter who is installing the pipeline or whether the pipeline is only for private use—because a pipeline is a method of transporting property. After identifying the controlling legal framework, we address both issues in turn.

B. *Appellate Courts Use the Same Summary Judgment Standard as the District Courts*

The legal standard for summary judgment is well-established:

""Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to

resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case."'" *Fairfax Portfolio LLC v. Carojoto*, 312 Kan. 92, 94-95, 472 P.3d 53 (2020).

We apply these same rules when reviewing an order granting summary judgment. 312 Kan. at 94.

We have unlimited review over an order granting summary judgment. 312 Kan. at 94. Likewise, our review is unlimited when addressing standing because the issue implicates the court's jurisdiction. *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008). And when the material facts are undisputed, we also have unlimited review when deciding the appropriate scope of an easement. *Stroda v. Joice Holdings*, 288 Kan. 718, 720, 207 P.3d 223 (2009).

C. *Ross Has Standing to Sue Nelson for Trespass*

Nelson first claims that Ross lacks standing to bring a trespass claim—that is, Ross lacks a personal stake in the outcome of this case. See *Baker v. Hayden*, 313 Kan. 667, 672, 490 P.3d 1164 (2021) (Standing "means the party must have a personal stake in the outcome."). Standing is a component of subject-matter jurisdiction. 313 Kan. at 673. So, if Ross lacks standing, the courts lack jurisdiction to adjudicate Ross' trespass claim. And while Nelson did not raise this issue before the district court, a party may challenge the court's subject-matter jurisdiction at any time. 313 Kan. at 673.

Nelson's standing challenge turns on whether Ross can show he personally suffered an injury due to Nelson's actions. See *City of Wichita v. Griffie*, 318 Kan. 510, 516, 544 P.3d 776 (2024) ("Under Kansas' traditional standing test, parties must demonstrate they *personally* 'suffered a cognizable injury' and 'a causal connection between the injury and the challenged conduct.'"). A trespass occurs when a person "enters the premises of another without any right, lawful authority, or express or implied invitation or license." *Armstrong v. Bromley Quarry & Asphalt, Inc.*,

305 Kan. 16, 22, 378 P.3d 1090 (2016). Put another way, a trespass occurs when a person "enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." *Riddle Quarries, Inc. v. Thompson*, 177 Kan. 307, 311, 279 P.2d 266 (1955). Thus, to have standing to sue for trespass, Ross must have a property interest—such as ownership or possession—in the land in which Nelson installed the pipelines.

Nelson contends Ross has no private interest in the land subject to the easement because highway easements belong to the public. But highway easements, like other easements, create only a nonpossessory right to enter and use land in the possession of another. See *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 105, 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014) ("An easement is a 'nonpossessory right to enter and use land in the possession of another . . . .'"). When a public highway is created, "nothing connected with the land passes to the public except what is actually necessary to make the road a good and sufficient thoroughfare for the public." *Beckwith*, 10 Kan. at 607. The public has only the right to use the highway for travel and transportation and "obtains only so much of the land, soil, trees, etc., as is necessary to make a good road." 10 Kan. at 607. This includes subsurface rights that promote the public's use of the easement. See *City of Chandler v. Ariz. Dept. of Transp.*, 224 Ariz. 400, 403, 231 P.3d 932 (Ct. App. 2010) ("Generally, a roadway easement includes any subsurface rights incident to use of the surface."); *Harlingen Irr. Dist. v. Caprock Commun.*, 49 S.W.3d 520, 527 (Tex. App. 2001) ("Roadway easements include the use of the subsurface for sewers, pipelines and other methods of transmission and communication that serve the public interest.").

When, as is the case here, land is bounded by a public highway easement, the landowner owns the fee up to the center of the road. See *Mall v. C. & W. Rural Electric Co-operative Ass'n*, 168 Kan. 518, 521, 213 P.2d 993 (1950) (after township road was created on land, the public acquired only an easement for highway purposes and the landowner "continued to own the fee to the center line of the township road"). And the landowner "continues to own the trees, the grass, the hedges, the fences, the buildings, the

mines, quarries, springs, watercourses, in fact everything connected with the land over which the road is laid out, which is not necessary for the public use as a highway." *Beckwith*, 10 Kan. at 607-08. The landowner may continue to use the land in any way so long as he or she does not interfere with the public's use of the highway easement. 10 Kan. at 608. "In fact, the original owner has as complete and absolute dominion over his land, and over everything connected therewith after the road is laid out upon it, as he had before, except only the easement of the public therein." 10 Kan. at 608; see also 3 Nichols on Eminent Domain § 10.02[1][d] (3d ed. rev. 2010) ("The land owner may make every use of the land within the limits of the highway, above, upon, or below the surface of the ground, that does not interfere with the public easement as it is actually exercised . . . .").

Here, Ross owns the fee to the land dedicated to the highway easement up to the center of the road. He retains all rights in the land not included in the easement—including rights above, on, and under the surface of the highway. And those rights are subject only to the condition that he does not interfere with the public's use of the easement. "As against everything but a proper exercise of [a highway] easement, the rights of the owner of the fee are absolute; the owner may maintain a trespass action or an ejectment action against a stranger who makes an unwarranted use of the way." 3 Nichols on Eminent Domain §10.02[d] (3d ed. rev. 2010); see also *Mayor and City Council of Baltimore v. United States*, 147 F.2d 786, 788 (4th Cir. 1945) (when land is dedicated to a city for use as a street, the abutting fee owner retains substantial rights in the land and may maintain actions for trespass and ejectment); *Hark v. Lumber Co.*, 127 W. Va. 586, 597, 34 S.E.2d 348 (1945) (placing private tramway in a public road on plaintiff's land without legal authority constituted trespass). Thus, Ross has a private property interest in the subsurface of the highway. And he has standing to sue for trespass based on allegations that Nelson's use was outside the scope of the easement.

Nelson cites several cases to support his claim to the contrary. But these cases are distinguishable.

First, Nelson cites *Ruthstrom v. Peterson*, 72 Kan. 679, 83 P. 825 (1905). There, the court held that an abutting landowner had

no right to an injunction restraining the defendant from fencing up one side of a public highway. The fence did not obstruct the side of the road belonging to the landowner or prevent him from accessing his land. So the landowner based his claim only on his right to travel on the highway. But that right was no different from the public's right. 72 Kan. at 680. The court held that the landowner was not entitled to relief because "an injunction will not be granted at the suit of a private citizen to protect public interests." 72 Kan. at 680. From this, Nelson concludes that Ross has standing to bring a claim only if the pipelines interfered with his right of access to the easement.

But unlike the landowner in *Ruthstrom*, Ross is not suing to enforce a public right. He is not claiming that Nelson interfered with the public's use of the easement. Rather, Ross alleged that Nelson's use of the subsurface of the road exceeded the scope of the highway easement. And as the fee owner, Ross retains all rights in the land not included in the easement, including rights to the subsurface. See *Beckwith*, 10 Kan. at 607-08; *Hale County v. Davis*, 572 S.W.2d 63, 66 (Tex. Civ. App. 1978) (recognizing fee owner of land subject to road had "the right to the undisturbed possession and use of the subsurface"). If Nelson's use of the subsurface is outside the scope of the highway easement, then it violates Ross' private property rights. Thus, Ross' claim is based on an enforceable private interest, not a public right. This fact distinguishes the case from *Ruthstrom*. See *Hark*, 127 W. Va. at 595-97 (recognizing plaintiffs could not bring claim in private capacity to abate public nuisance, but finding that plaintiffs, as fee owners, could seek injunction to restrain private use of public highway easement as such use constituted trespass on plaintiffs' land).

Second, Nelson cites *State v. Natural-gas Co.*, 71 Kan. 508, 80 P. 962 (1905). There, the court explained that a landowner "has no power to transfer to another any right to occupy the highway for any purpose." 71 Kan. at 509. Nelson reasons that if a landowner cannot grant another the right to occupy a highway easement, then the landowner must also lack standing to bring a trespass claim based on a party's occupation of the easement. But Nelson misconstrues *Natural-gas Co.*

In *Natural-gas Co.*, the State tried to prevent a gas company from installing pipelines in a public highway. The company argued it had a right to occupy the highway because it had obtained permission from

the abutting fee owners. The court rejected that argument because an abutting fee owner cannot authorize uses that interfere with the public's use of the easement:

> "The right of the gas company to bury its pipes in the public highway for the transportation and distribution of gas depends largely upon the effect such use would have on the subsequent use of the highway as a thoroughfare for public travel. It may be said that the gas company could not, and did not, as against the state, obtain from the abutting fee-owners any right to use the public highway for any purpose. Its use belongs to the public and not to the owners of adjoining property. It is true that there are some privileges which such an owner may exercise for the betterment of the adjacent estate, but he has no power to transfer to another any right to occupy the highway for any purpose." 71 Kan. at 509.

Natural-gas Co. does not suggest that individuals who own land subject to a highway easement cannot bring trespass claims when a person's use exceeds the scope of the easement.

Finally, Nelson cites *Ruby Drilling Co., Inc. v. Billingsly*, 660 P.2d 377 (Wyo. 1983). There, the Wyoming Supreme Court held that homeowners in a subdivision lacked a sufficient possessory interest to bring a trespass claim based on a water line installed in the right-of-way of a subdivision road. But the homeowners in *Billingsly* "claimed no ownership rights to the roadway." 660 P.2d at 381. Thus, they lacked any private property interest sufficient to support a trespass claim. But here, Ross owns the fee to the land subject to the easement. So *Billingsly* is not on point.

In short, Ross owns the fee to the subsurface of the road and retains all rights in the subsurface not included in the easement. He alleged and offered supporting evidence that Nelson's use constitutes a trespass because it exceeds the scope of the highway easement. Thus, Ross has a real-property interest that gives him legal standing to bring a trespass claim against Nelson.

D. *Nelson Committed Trespass as a Matter of Law*

Nelson next argues that the lower courts erred by concluding that his use of the roadway easement constituted a trespass. The issue turns on whether Nelson's decision to install pipelines in the subsurface of the county roads fell within the scope of the public highway easement. If not, Nelson needed permission from Ross. And without such permission, Nelson would have committed trespass as a matter of law.

To decide whether Nelson had a right or lawful authority to install the pipelines, we first consider the scope of the public highway easement. Caselaw confirms that the scope of this easement is limited to public uses facilitating the highway's purposes—travel, transportation, and communication. Second, we consider whether Nelson's use fell within the permissible scope of the easement. We conclude it did not because the pipelines were permanent structures intended for Nelson's private and exclusive use. Finally, we consider whether Nelson had any other lawful authority for this use. We conclude he did not because Ross did not give permission and the county had no authority to permit a private use of the roads' subsurface.

1. *The Scope of a Highway Easement Is Limited to Public Uses that Facilitate the Highway's Purposes*

When a public highway is established over privately owned land, the public obtains an easement for travel, transportation, and communication. *Beckwith*, 10 Kan. at 607; *McCann v. Telephone Co.*, 69 Kan. 210, 213, 76 P. 870 (1904). In the early years of Kansas' statehood, the use of highway easements generally involved only travel across the surface of the road. See *Beckwith*, 10 Kan. at 607 (public "obtains the right . . . to pass and repass, and to use the road as a public highway only"); *Caulkins v. Mathews*, 5 Kan. 191, 200, 1869 WL 422 (1869) ("Men may pass and repass with their stock upon the public highways, but we think that that is the extent of their right."). And such use was plainly within the scope of the easement, regardless of the means. See *Natural-gas Co.*, 71 Kan. at 509 (recognizing that while "the means of travel were on foot or on the backs of beasts" when public roads first came into use, "[i]t could not . . . be held that the highway could not be used for the transportation of passengers and for traffic by automobiles").

In later years, our court considered whether highway easements permitted uses other than traveling over the road's surface. In deciding whether such uses fell within the scope of the easement, the court generally considered two criteria. First, did the proposed use directly relate to the purpose of the highway easement? That is, did the use facilitate travel, transportation, or communication? And second, was the proposed use a public one?

For example, in *McCann*, this court considered whether the placement of telephone poles for a telephone line is a "contemplated and appropriate use of a highway." 69 Kan. at 212. It noted that "[t]he highway is established for the use of the public, and the telephone line is not only a public convenience, but it is a recognized public use." 69 Kan. at 212. The court further acknowledged that a highway's purpose is "for passage, travel, traffic, transportation, transmission, and communication." 69 Kan. at 213. Thus, *McCann* held that installing telephone poles was a permissible use of the highway easement because the telephone line was a public means of communication. 69 Kan. at 219.

The next year, in *Natural-gas Co.*, the court held that burying gas pipelines for the transportation and distribution of gas for light, fuel, and power was a proper use of a highway easement. The court reasoned that "'the production and distribution of natural gas for light, fuel and power is a business of a public nature.'" *Natural-gas Co.*, 71 Kan. at 509 (quoting *La Harpe v. Gas Co.*, 69 Kan. 97, Syl. ¶ 1, 100, 76 P. 448 [1904]). And the pipelines transported commodities, which is one of the purposes of a highway. 71 Kan. at 509.

Several years later, the court held that installing electric lines was a permissible use of a highway easement. See *State, ex rel., v. Weber*, 88 Kan. 175, 180-81, 127 P. 536 (1912). In *Weber*, the court recognized that the Legislature may regulate use of a highway easement. But in the absence of any contrary regulation, the highway "was open for any proper public use which the people might choose to make of it." 88 Kan. at 178. And we concluded, that "[t]he transmitting and carrying of light, heat and power over and along a highway for distribution among consumers is a public use as well as one of the proper uses of a highway." 88 Kan. at 178.

Nelson insists the takeaway from *McCann*, *Natural-gas Co.*, and *Weber* is that a proposed highway use need only facilitate travel, transportation, or communication. And the use need not be a public one. But this reading is too narrow. These decisions considered both whether the use fit the purpose of a public highway and whether it served a public use or benefit. See, e.g., *Weber*, 88 Kan. at 178 (recognizing transmission of light, heat, and power

along highway for distribution among consumers is a public use and the electric line is a public utility); *Natural-gas Co.*, 71 Kan. at 509 (recognizing that companies distributing gas are quasi-public and that distributing gas is a public business); *McCann*, 69 Kan. at 212 (recognizing "[t]he purpose of a telephone . . . is a public one" and Legislature has authorized telephone companies to maintain lines in highways and granted them power of eminent domain).

This view is not an outlier. Other jurisdictions have likewise held that any proposed use of a highway easement must serve the public interest or have a public benefit. See *Bello v. ABA Energy Corp.*, 121 Cal. App. 4th 301, 315-16, 16 Cal. Rptr. 3d 818 (2004) (to fall within the scope of a highway easement, a proposed use must "serve either the public interest or a private interest of the underlying landowner that does not interfere with the public's use rights"); *Bentel v. County of Bannock*, 104 Idaho 130, 134, 656 P.2d 1383 (1983) ("It is clear from the contract that the City of Pocatello will derive a direct and substantial benefit from construction of the pipeline, and that public benefit makes construction of the pipeline allowable within the scope of the county's public easement."); *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 399, 65 N.E. 835 (1903) ("The permanent structures above referred to [including water and gas pipes] are permitted because they are used by the public or a part of the public, or are held and used in private ownership for the benefit of the public."); *Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 539, 546, 63 N.W. 111 (1895) ("No such structures [as telephone and telegraph lines] can be put in the highways except by authority of the state, and then only for a public use."); *Vertex Holdings, LLC v. Cranke*, 217 P.3d 120, 126 (Okla. Civ. App. 2008) ("[A] private use of [a public road] easement is . . . an additional servitude requiring consent of and compensation to parties owning the fee interest below the roadway."); *46 S. 52nd St. Corp. v. Manlin*, 398 Pa. 304, 314, 157 A.2d 381 (1960) ("[A] purely private use of the public highway with no reasonable benefit to the public generally not only may be prevented by the municipality, but is not even permissible."); *McCullough v. Interstate Power &*

Light Co., 163 Wash. 147, 150, 300 P. 165 (1931) (holding transmission of electricity for distribution among consumers is a public use and proper use of highway, and noting that jurisdictions that held transmission of electricity was not proper use of highway did so because those jurisdictions did not consider it a public use); *Hark*, 127 W. Va. at 595 ("A public easement lawfully acquired cannot be broadened to include a private and exclusive right.").

Nelson believes that two Kansas Supreme Court decisions undercut this conclusion. But these decisions do little to advance Nelson's cause.

In *Thompson v. Traction Co.*, 103 Kan. 104, 106, 172 P. 990 (1918), and *Murphy v. Gas & Oil Co.*, 96 Kan. 321, 329, 150 P. 581 (1915), the court stated that the corporate defendants had a right to lay oil and gas pipelines in a highway, even though the pipelines were ostensibly for private purposes. But the issue in both *Thompson* and *Murphy* was whether the defendants were negligent in installing the pipelines. The court did not directly consider the permissible scope of the highway easement in either case. Nor did the plaintiffs argue that the defendants exceeded the scope of the easement by installing the pipelines. Thus, these decisions carry little weight—especially when compared to our precedent squarely addressing the scope of a highway easement.

Furthermore, both *Thompson* and *Murphy* involved the installation of pipelines to transport gas or oil. And both cases cited *Natural-gas Co.* for the rule that gas and oil pipelines may lawfully be laid along a public highway. *Thompson*, 103 Kan. at 106; *Murphy*, 96 Kan. at 329. *Natural-gas Co.* developed this rule based on the public nature of the gas-distribution industry. See *Natural-gas Co.*, 71 Kan. at 509; see also *La Harpe*, 69 Kan. at 100 ("The production and distribution of natural gas for light, fuel and power affect the people generally to such an extent that the business may be regarded as one of a public nature, and is almost, if not quite, a public necessity."). The defendants in *Thompson* and *Murphy* were similarly regarded as businesses of a public nature.

In sum, to fall within the scope of a public highway easement, any proposed use must generally be a public use that facilitates the highway's purposes of travel, transportation, or communication.

This rule is grounded in our caselaw and buttressed by authority from other jurisdictions.

2. *Nelson's Pipeline Exceeded the Scope of the Public Highway Easement*

Having determined the scope of a highway easement, we now consider whether Nelson's use fell within that scope. That is, did Nelson's pipelines constitute a public use that facilitated one of the highway's purposes? This court has determined that pipelines are a means of transporting products—one of the purposes of a highway easement. See *Natural-gas Co.*, 71 Kan. at 509. Thus, the focus of our analysis is on whether Nelson's use was a public one.

Nelson contends that as a member of the public, he has a right to transport property along the highway. Thus, Nelson believes he is exercising that public right by installing pipelines within the easement.

He cites *Wood v. Fowler*, 26 Kan. 682, 690, 1882 WL 910 (1882), in support. There, the court held that the first individual to appropriate publicly owned ice is entitled to it. Nelson claims that like *Fowler*, he is simply the first person to appropriate use of the road's subsurface.

But an individual's right, as a member of the public, to transport property on the highway does not translate into a right to permanently appropriate a portion of the highway easement for private and exclusive use. See *Commissioner of Transp. v. Lane*, 144 Misc. 2d 680, 684, 544 N.Y.S.2d 925 (1989) (right to enter public highway "does not carry with it the right to remain or the right to appropriate a portion of the public highway to a private use which excludes all other members of the public [citations omitted]"). Highway easements belong to the public, and "all of the public is entitled" to use them. *Weber*, 88 Kan. at 181. But "the rights held by the public do not permit the occupancy over a long period of time of a public road by a structure privately and exclusively used." *Hark*, 127 W. Va. at 595. Permanently excluding all other members of the public from using a portion of the highway would be inconsistent with the public nature of the easement. Thus, the permissible scope of a public highway easement does

not include the right to permanently occupy a portion of the highway for private and exclusive use.

Nelson also argues that his right to install pipelines in the easement without permission of the landowner or Legislature is supported by our court's decision in *Walker v. Armstrong*, 2 Kan. 198, 1863 WL 328 (1863). According to Nelson, *Walker* held that all persons have a right to land a ferry boat at the mouth of a public highway without the consent of the landowner unless the Legislature has granted an exclusive right for ferrying. 2 Kan. at 220, 225. But in *Walker*, the court assumed, without deciding, that all persons have a right to land a ferry at the mouth of a public highway without the landowner's consent. See 2 Kan. at 225 ("Without examining whether it was so—or the question raised by Armstrong's counsel whether a ferry-boat may be landed at the mouth of a public highway without the consent of the owner of the soil—but for the purpose of the argument concede both these propositions to the plaintiff."). Also, the nature of the use in *Walker* further distinguishes the decision. Landing a ferry at the mouth of a public highway is a temporary occupation of the easement. And ferries generally have a public benefit. See 2 Kan. at 220 (noting Armstrong's exclusive ferry privileges "are granted for the benefit of the traveling public, and until he is prepared to serve them he has acquired no right to prohibit others from doing so"). In contrast, Nelson wants to permanently occupy a portion of the road's subsurface for his private and exclusive use.

This is not to say that permanent structures never fall within a highway easement. Rather, such structures must promote the highway's purposes *and* serve the public. For example, telephone lines fall within highway easements because the public uses them to communicate. See *McCann*, 69 Kan. at 212. And electric lines and gas pipelines fall within highway easements because the public uses them to access energy. See *Weber*, 88 Kan. at 178; *Natural-gas Co.*, 71 Kan. at 509. It is this public use or benefit that prevents these permanent structures from being viewed as improper private appropriations.

According to the uncontroverted summary-judgment evidence, Nelson's pipelines had no such public use. The evidence shows Nelson installed the pipelines to transport fresh water and

effluent for his private farming business. Based on this uncontroverted evidence, the district court found Nelson's pipelines were not a public use. And the Court of Appeals affirmed this finding, explaining that Nelson "installed [the pipelines] for a purely private farming operation" and "Nelson does not run a quasi-public corporation or conduct a 'business of public nature'—one that is 'almost, if not quite, a public necessity.'" *Ross*, 63 Kan. App. 2d at 646-47 (quoting *La Harpe*, 69 Kan. 97, Syl. ¶ 1).

Nelson contests the lower courts' conclusion that his pipelines were not a public use on two grounds. We are not persuaded by either argument.

First, he argues the right to install permanent structures in a highway easement is not limited to public utilities. But neither the district court nor the Court of Appeals suggested otherwise. Rather, the Court of Appeals discussed public utilities to illustrate how a permanent fixture in a highway easement could be a public use. See *Ross*, 63 Kan. App. 2d at 645-46 (recognizing Kansas caselaw regarding the scope of highway easements often involved public utilities).

Second, Nelson argues that a public use is not mutually exclusive with his own private benefit. In other words, a permanent fixture can have both a public and private benefit. He points to Kansas eminent domain caselaw holding that the State may lawfully take property even when the taking provides a direct private benefit. But these same cases make clear that the condemnation of the property must still be for a public use. See, e.g., *State, ex rel., v. Urban Renewal Agency of Kansas City*, 179 Kan. 435, 438, 296 P.2d 656 (1956) (condemnation of private property for urban renewal project was for public use even if private individuals or corporations might profit from the undertaking).

In sum, to fall within the scope of the highway easement, it is not enough that Nelson's pipelines were a mode of transportation. They also needed to be a public use. But Nelson installed the pipelines for his private and exclusive use. Permanently occupying a portion of a highway easement for private and exclusive use is inconsistent with the public nature of the easement. Thus, Nelson's pipelines were not a permissible use of the highway easement.

3. *Nelson Had No Other Lawful Authority to Install the Pipelines in the Subsurface of the Road*

Because Nelson's use exceeded the scope of the public highway easement, he needed some other lawful authority for the project. Otherwise, the pipelines trespass on Ross' land. See *Armstrong*, 305 Kan. at 22 (trespass occurs when person enters another's premises without any right or lawful authority).

The parties agree that Nelson did not have Ross' permission to install the pipelines. But Nelson claims he had implied consent from the county. Nelson notes that the county adopted a resolution that merely required him to register any pipelines he placed in county roads. And the county approved and completed the road construction necessary to accommodate his pipelines.

As both the district court and the Court of Appeals recognized, the parties disputed whether the county consented to Nelson's installation of the pipelines. See *Ross*, 63 Kan. App. 2d at 649. This prevented the district court from granting Nelson's motion for summary judgment on the trespass claim.

And even if we were to accept Nelson's assertions, it does not affect the lower courts' decisions to enter judgment for Ross. See *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000) (if disputed fact, however resolved, could not affect judgment, it is not a genuine issue of material fact precluding summary judgment). Quite simply, the county had no authority to permit a permanent fixture within the subsurface of the public highway easement for an exclusively private benefit. See *Hale County*, 572 S.W.2d at 65 ("[T]he county possesses no authority in law to grant an easement in the road's subsurface owned by an individual for the exclusive private use of a nonowner."); see also *Gerstley v. Globe Wernicke Co.*, 340 Ill. 270, 280, 172 N.E. 829 (1930) ("[A] municipality has no power or authority to grant the exclusive use or control of any part of the highway to any private person or for any private purpose."). In other words, the county lacks authority to authorize uses that exceed the scope of the highway easement and encumber the private property rights of the landowner. And nothing suggests that the Legislature has adopted a contrary position.

In sum, Nelson installed permanent structures—pipelines—for his private use in the subsurface of a public highway. The pipelines exceeded the scope of the public highway easement because Nelson permanently occupied the easement for his private and exclusive use, rather than a public one. Nelson's pipelines thus infringed on the private property rights of Ross—the fee owner who retained all rights in the subsurface not included within the easement. Nelson did not have Ross' permission to install the pipelines. Nor did he have permission from any other body with authority to permit the installation. Thus, Nelson committed trespass as a matter of law. And we affirm the judgments of the lower courts.

II. *Nelson Was Not Entitled to Summary Judgment on Ross' Nuisance Claim*

We turn now to the constellation of issues surrounding Ross' nuisance claim. Unlike the trespass claim, Ross was the only plaintiff to sue defendants for nuisance. Thus, we refer to Ross individually in this section. And we continue to refer to all defendants as Nelson.

The district court denied Nelson's motion for summary judgment. The panel affirmed this ruling. The same summary-judgment standards we described above apply. See *Fairfax Portfolio*, 312 Kan. at 94. Nelson argues that he was entitled to summary judgment on that claim for two reasons.

First, Nelson argues that the odors and fly infestations that Ross complains about are legally insufficient to support a nuisance claim under our court's decision in *Dill v. Excel Packing Co.*, 183 Kan. 513, 331 P.2d 539 (1958). But we disagree that *Dill* created a general rule of nonliability. It held only that the operators of a cattle feed lot had not created a nuisance under the case-specific facts. 183 Kan. at 526.

Second, Nelson argues that spraying the effluent is shielded from nuisance liability under our right-to-farm statutes. Those statutes create a presumptive defense to nuisance claims when an agricultural practice meets certain requirements. See K.S.A. 2-3202. But we agree with the lower courts that the spraying of effluent was not "undertaken in conformity with" state law because

the pipelines trespassed on Ross' land. K.S.A. 2-3202(b). As a result, Nelson is not entitled to the statutory presumption that he was engaging in a "good agricultural practice"—one of the conditions that must be met to invoke the presumption that a challenged agricultural practice is not a nuisance. See K.S.A. 2-3202(b). We explain these conclusions in more detail below, but we begin by noting a preservation issue that could potentially derail Nelson's challenge.

A. *Panels of the Court of Appeals Have Declined to Review a Denial of Summary Judgment when the Losing Party Fails to Raise the Issue at Trial, but We Decline to Apply that Rule Under the Circumstances*

In the district court, Nelson moved for summary judgment on Ross' nuisance claim, arguing that the right-to-farm statutes shielded him from liability. After the district court denied that motion, the court held a four-day trial, and the jury found Nelson liable for nuisance. But Nelson never raised the right-to-farm issue after the summary-judgment stage. He never, for example, incorporated those arguments into a motion for judgment as a matter of law under K.S.A. 60-250.

That could pose a preservation obstacle to addressing Nelson's arguments on appeal. Several Court of Appeals panels have recognized a rule that requires a party who has lost on summary judgment to "preserve legal issues or defenses for appeal by incorporating them into a trial motion for judgment as a matter of law." *Evergreen Recycle v. Indiana Lumbermens Mut. Ins. Co.*, 51 Kan. App. 2d 459, 490, 350 P.3d 1091 (2015); see *Thoroughbred Assoc. v. Kansas City Royalty Co.*, 58 Kan. App. 2d 306, 316-17, 469 P.3d 666 (2020); *J and B Oil & Gas v. Ace Energy*, No. 122,242, 2021 WL 3708002, at *9 (Kan. App. 2021) (unpublished opinion); *Sigg v. Sevart*, No. 118,631, 2019 WL 1213245, at *4-5 (Kan. App. 2019) (unpublished opinion). Since Nelson did not do that, the Court of Appeals' preservation rule suggests that we should not review the denial of his summary-judgment motion.

But we decline to apply that rule here. Ross has not suggested that Nelson's challenge is unpreserved for appeal. The panel below did not apply the rule. Nor has our court ever addressed this rule.

And the United States Supreme Court caselaw that panels have drawn on continues to evolve. The first panel to apply the rule relied on *Ortiz v. Jordan*, 562 U.S. 180, 184, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2011). See *Evergreen Recycle*, 51 Kan. App. 2d at 490. There, the Court held that a denial of summary judgment is not preserved for appellate review without a post-verdict motion for judgment as a matter of law. The Court reasoned that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion," and the issue "must be evaluated in light of the character and quality of the evidence received in court." *Ortiz*, 562 U.S. at 184. But in *Dupree v. Younger*, 598 U.S. 729, 736, 143 S. Ct. 1382, 215 L. Ed. 2d 636 (2023), the Court recognized that the same rationale does not apply to purely legal questions resolved at the summary-judgment stage because the question of law is not affected by future developments in the case. Even if we found this caselaw persuasive authority in interpreting our own preservation rules (as Court of Appeals panels have), the parties have not briefed this evolving caselaw. Nor have they addressed whether the right-to-farm issues involve factual determinations or are instead purely legal. Judicial restraint counsels us not to wade into those issues on our own initiative.

Of course, we would not have that discretion if the rule adopted by the Court of Appeals panels was jurisdictional. See *City of Shawnee v. Adem*, 314 Kan. 12, 14, 494 P.3d 134 (2021) (appellate court has duty to question jurisdiction on its own initiative). But it is not. K.S.A. 2023 Supp. 60-2102(a)(4) gives the Court of Appeals jurisdiction over an appeal from "[a] final decision in any action," and it expressly provides that "[i]n any appeal . . . from a final decision, any act or ruling from the beginning of the proceedings shall be reviewable." And we have subject-matter jurisdiction to review judgments of the Court of Appeals. See K.S.A. 60-2101(b). So the preservation issue does not divest the appellate court of jurisdiction to review a denial of summary judgment after a trial on the merits. Instead, the panels have simply recognized that in some cases, there may be prudential reasons for declining to do so. Even so, for these reasons we gave above, we will address Nelson's challenges on the merits.

B. *Our Caselaw Does Not Shield Nelson from Nuisance Liability*

Nelson first seeks to shield his application of effluent from nuisance liability under our court's 1958 decision in *Dill*. In Nelson's view, *Dill* "established a legal principle that residents choosing to live in agricultural areas assume certain unavoidable inconveniences, including strong odors and fly infestations." He therefore argues that, as a matter of law, "applying animal waste to farm ground in a rural agricultural area" cannot "be an actionable nuisance as a result of producing smells that bother nearby residents." Nelson insists that any overruling of *Dill*'s common-law rule "should have only prospective effect." That is because "[s]ince *Dill*'s 1958 publication, farmers and feed yard owners have relied on the understanding that living in agricultural areas involves accepting inherent annoyances and odors." Ross did not file a brief in our court. But he insisted in his petition-for-review response that Nelson was "greatly overstat[ing] the import of *Dill*."

We agree with Ross. *Dill* did not create the broad protection from nuisance liability that Nelson claims. The "primary question" in *Dill* was "whether a cattle feeding operation carried on in a sparsely populated agricultural area of Sedgwick County constitutes a nuisance under all the facts, circumstances and conditions presented by the record." 183 Kan. at 514. *Dill* held that the case-specific facts did not support the district court's nuisance finding because, among other things, the feed lot was "'average kept,'" the injury was only an "occasional annoyance to any one individual," the feedlot was in an "area primarily agricultural with the exception of a few suburban tracts with homes," and the area had "been used for feeding livestock since 1924 with only occasional interruption." 183 Kan. at 524-26. So while the unavoidable inconveniences of agricultural settings were an important factor in the decision, *Dill* did not hold that those inconveniences were, as a matter of law, insufficient to create a nuisance.

Instead, *Dill* emphasized that "each nuisance case must stand upon its own particular facts and circumstances." 183 Kan. at 522. And in fact, Kansas appellate courts recognized odor-induced nuisance claims involving livestock in agricultural areas after *Dill*. See *State v. Johnson*, 196 Kan. 208, Syl. ¶ 1, 410 P.2d 423 (1966)

(upholding criminal statute that prohibits creating a nuisance by maintaining unclean livestock building closer than 25 feet to another's dwelling); *Fields v. Anderson Cattle Co.*, 193 Kan. 558, 559-60, 396 P.2d 276 (1964) (jury verdict for plaintiffs in nuisance action against feedlot owners for noxious odors); *Finlay v. Finlay*, 18 Kan. App. 2d 479, 489, 856 P.2d 183 (1993) (right-to-farm statutes did not apply, so plaintiff's nuisance claim against cattle-feeding operation for noxious odors of feed and manure could proceed to trial).

Nelson's reading of *Dill* does not entitle him to relief. Thus, we turn to his arguments on the right-to-farm statutes.

C. *Nelson Did Not Establish that His Agricultural Practices Were Entitled to the Statutory Right-To-Farm Presumptions*

Nelson next contends that he is shielded from nuisance liability by K.S.A. 2-3202, one of the right-to-farm statutes. The right-to-farm statutes "provide agricultural activities conducted on farmland protection from nuisance lawsuits." K.S.A. 2-3201. To that end, K.S.A. 2-3202(a) creates a statutory presumption that "[a]gricultural activities . . . do not constitute a nuisance" when the statute's several requirements are met. To receive the benefit of that presumption, the nuisance must arise from an "agricultural activity." The activity must be conducted on "farmland." K.S.A. 2-3201. The activity must have been "established prior to surrounding agricultural or nonagricultural activities." And the activity must be "consistent with good agricultural practices." K.S.A. 2-3202(a). But the
statutory presumption is rebuttable. For even if those requirements are met, the presumption does not attach when "the activity has a substantial adverse effect on the public health and safety." K.S.A. 2-3202(a)

Another subsection of the statute, K.S.A. 2-3202(b), establishes another statutory presumption. Under that provision, an agricultural activity is "presumed to be [a] good agricultural practice"—which would satisfy one of the requirements described above—if it is "undertaken in conformity with federal, state, and

local laws and rules and regulations." K.S.A. 2-3202(b). The district court's summary judgment ruling turned on this provision. The district court said Nelson was not entitled to this presumption because "his pipeline transporting the hog waste from the facility to the center pivot violates Kansas law by trespassing on Ross's property." In other words, Nelson's agricultural activity was not "undertaken in conformity with . . . state . . . laws." K.S.A. 2-3202(b).

Nelson challenges the district court's ruling (and the panel decision that affirmed it) on two grounds. First, he contends that an agricultural activity can still be "undertaken in conformity with federal, state, and local laws and rules and regulations" if it involves a trespass because that statutory language does not incorporate common-law torts. Second, he argues that K.S.A. 2-3202(b)'s presumption turns on whether the agricultural activity that occurred within the boundaries of the farmland was "undertaken in conformity" with the applicable laws. In other words, he believes the statute does not allow the court to consider whether upstream activities off the farmland complied with applicable laws. So even if the common law of torts is one of the applicable laws, Nelson argues a trespass that occurred off the farmland does not deprive him of right-to-farm protections for activities that occur on the farmland. As we explain below, we disagree on both counts.

But before turning to those discussions, we briefly note another subsection of the statute, K.S.A. 2-3202(c), which the Legislature added in 2013. See L. 2013, ch. 93, § 2. That provision allows owners of farmland to retain existing right-to-farm protections even when expanding, changing, or temporarily ceasing or decreasing the scope of an agricultural activity. See K.S.A. 2-3202(c). At the Court of Appeals, the Kansas Livestock Association and Kansas Farm Bureau submitted a brief as amici curiae. They argued that subsection (c) better fit the facts here and, "[a]s a result, the district court analyzed the presumption under the wrong subsection of the statute, K.S.A. 2-3202(b)." But Nelson's summary-judgment filings in the district court never asserted that K.S.A. 2-3202(c) applied. Then during oral argument on his dis-

trict-court motion, Nelson's counsel specifically asserted that subsection (c) did not apply. And most importantly, Nelson did not make this argument before the Court of Appeals, and he has not made it before us. See *In re Adoption of Baby Girl G.*, 311 Kan. 798, 803, 466 P.3d 1207 (2020) (issues not briefed are waived). As a result, we will not address the application of K.S.A. 2-3202(c) to this dispute.

1. *K.S.A. 2-3202(b)'s Presumption that an Agricultural Activity Is Consistent with Good Agricultural Practices if "Undertaken in Conformity with" State Law Includes the Kansas Common Law of Torts*

As we mentioned, under K.S.A. 2-3202(b), an agricultural activity is "presumed to be good agricultural practice" if it "is undertaken in conformity with federal, state, and local laws and rules and regulations." At the Court of Appeals, Nelson argued that "laws," "rules," and "regulations" are all "types of legislative regulatory controls." Nelson argues this language suggests that the Legislature did not intend the right-to-farm protections to turn on "whether the agricultural activity violates a third person's common-law rights." The panel rejected that argument. It held that general references to state law in Kansas include the common law. *Ross*, 63 Kan. App. 2d at 656.

We agree with the panel. In *State v. Dunn*, 304 Kan. 773, 788, 375 P.3d 332 (2016), our court recognized that state law includes "the Kansas Constitution, Kansas statute, or Kansas common law." Nelson does not address that caselaw in his briefing to our court.

Instead, he makes a textual inference based on the language of K.S.A. 2-3202(c)(1). The Legislature added this provision in 2013 to address changes in agricultural activities. Under that subsection, a landowner "[m]ay reasonably expand the scope of [the] agricultural activity . . . so long as [the] agricultural activity complies with all applicable local, state, and federal *environmental* codes, resolutions, laws and rules and regulations." (Emphasis added.) K.S.A. 2-3202(c)(1). In Nelson's view, the Legislature's use of the word "environmental" in (c)(1) shows that its focus is on compliance with environmental laws, rules, and regulations, not the common law. And he believes we should read

K.S.A. 2-3202(b)'s presumption with that in mind. But the problem with that argument is that, even if Nelson correctly interprets (c)(1) as limited to environmental laws, the Legislature did not amend subsection (b) when it added subsection (c) in 2013. The textual dissimilarity in the two subsections suggests that the Legislature did not intend subsection (b) to have the same limitation.

Nelson also argues that the general reference to "federal, state, and local laws" in K.S.A. 2-3202(b) would typically encompass rules and regulations from those jurisdictions. And since that subsection then expressly references "rules and regulations," Nelson argues that reference to "laws" must encompass only legislative enactments, not the common law. See K.S.A. 2-3202(b) (good-agricultural-practice presumption applies when activity conforms to "federal, state, and local laws and rules and regulations"). To read the statute otherwise would create surplusage, he reasons. We note that in *Dunn*, we said only that state law includes the Kansas Constitution, statutes, and the common law, not "rules and regulations" too. *Dunn*, 304 Kan. at 788. And even if some surplusage exists, "the presence of some redundance is rarely fatal on its own to a statutory reading." *White v. United Airlines, Inc.*, 987 F.3d 616, 622 (7th Cir. 2021). Indeed, courts have expressed skepticism of rigid application of the anti-surplusage canon because legislatures often intentionally include redundant language. See, e.g., *Schutte v. Ciox Health, LLC*, 28 F.4th 850, 862-63 (7th Cir. 2022) (summarizing commentary from courts, academics, and the scholarly work of federal judges). Given our precedent recognizing Kansas common law as "state law," we are not convinced that some surplusage would make Nelson's reading of the statute more accurate.

2. *The Lower Courts Did Not Err by Considering Nelson's Trespass when Determining that His Agricultural Activity Did Not Conform to State Law*

Nelson's second challenge to the district court's denial of summary judgment involves the scope of the right-to-farm protections. He contends that when courts evaluate whether an agricultural activity "is undertaken in conformity with federal, state, and local laws and rules and regulations," they must look only to activities conducted within the territorial boundaries of the farmland. See K.S.A. 2-3202(b). Nelson points to the statutory text for support. He notes that K.S.A. 2-3202(a)

provides nuisance protections for "[a]gricultural activities conducted *on farmland*." (Emphasis added.) Under his view, even if that statutory language incorporates the Kansas common law of torts, and even if Nelson's pipelines trespassed on Ross' land, he is still entitled to the good-agricultural-practices presumption in K.S.A. 2-3202(b) because that trespass did not occur within the boundaries of the farmland. The district court and panel rejected this argument. See *Ross*, 63 Kan. App. 2d at 657-59.

We first note that the Legislature has defined "agricultural activity" in the right-to-farm statutes to include activities that often occur outside the farmland. See K.S.A. 2-3203(a) ("'Agricultural activity' . . . includes activities related to the handling, storage and transportation of agricultural commodities."). But even if we assume that Nelson has properly interpreted the scope of K.S.A. 2-3202(b)'s good-agricultural-practices presumption, we disagree that he is entitled to that presumption under the facts here.

Nelson developed a physically interconnected irrigation system that pipes water from his farmland to his hog-confinement facilities. The system also pipes effluent from the facilities' holding pond back to the center-pivot sprayers on his farmland. The effluent pipes travel through Ross' property and onto Nelson's farmland. There, the pipes eventually connect to a central distribution point that pushes the effluent to the center-pivot sprayers. Because this interconnected system is located, in part, on the farmland, and because its function and utility are realized on the farmland, it is appropriate for courts to consider whether this integrated system conforms to the applicable law. This is true even though portions of the integrated system are located outside the farmland. As the panel put it, Nelson's application of the fertilizer "was made possible by the infrastructure he installed to transport that effluent from the hog farm," and under the facts here, "the application and infrastructure that enabled it are logically indistinguishable." 63 Kan. App. 2d at 658.

We agree with the district court and panel that Nelson's agricultural activity failed to conform to state law. As such, he is not entitled to K.S.A. 2-3202(b)'s presumption that he was engaging in good agricultural practices. And because Nelson did not otherwise seek to establish that he was engaging in good agricultural

practices, he is not entitled to K.S.A. 2-3202(a)'s statutory presumption that his agricultural activity was not a nuisance. We therefore affirm the Court of Appeals' decision affirming the district court's judgment.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

No. 125,160

In the Matter of FORREST A. LOWRY, *Respondent.*

(554 P.3d 674)

ORDER OF DISCHARGE FROM PROBATION

ATTORNEY AND CLIENT—*Order of Discharge from Probation*.

On December 2, 2022, the court suspended Forrest A. Lowry's Kansas law license for a 90-day period, stayed pending the successful completion of a 3-year probation plan beginning January 21, 2021. *In re Lowry*, 316 Kan. 684, 520 P.3d 727 (2022).

On August 7, 2024, Lowry sought discharge from probation. See Supreme Court Rule 227(g)(1) (2024 Kan. S. Ct. R. at 281) (probation discharge). The Office of the Disciplinary Administrator (ODA) responded that Lowry has complied with his probation, confirmed Lowry's eligibility to be discharged from probation, and voiced no objection to such discharge.

The court notes the ODA's response, grants Lowry's motion, and fully discharges Lowry from probation. Accordingly, this disciplinary proceeding is closed.

The court orders the publication of this order in the Kansas Reports and assesses any remaining costs of this proceeding to Lowry.

Dated this 27th day of August 2024.

ROSEN and BILES, JJ., not participating.

State v. Z.M.

No. 123,216

STATE OF KANSAS, *Appellee*, v. Z.M., *Appellant*.

(555 P.3d 190)

SYLLABUS BY THE COURT

1. ATTORNEY AND CLIENT—*Counsel's Statement Regarding Alleged Conflict of Interest with Client.* A statement by counsel outlining the facts underlying an alleged conflict of interest with their client does not create a conflict of interest, but it may illuminate an existing one.

2. TRIAL—*Discussion of Aiding and Abetting Doctrine Not Legal Error if Jury Not Misled*. There is no requirement that each discussion of aiding and abetting must include every aspect of the doctrine. It is not legal error to discuss the doctrine's various aspects separately so long as the jury is not confused or misled.

3. SAME—*Jury Instruction for Aiding and Abetting—"Mental Culpability" Does Not Need Definition.* The phrase "mental culpability" in an aiding and abetting jury instruction based on K.S.A. 21-5210(a) is readily comprehensible and does not need additional explanation or definition.

4. SAME—*Jury Instructions—Court Should Instruct Jury How It May Reach Unanimous Verdict if Alternative Theories.* A district court should instruct the jury on how it may reach a unanimous verdict when a defendant is charged with a single crime of first-degree murder that is charged under the alternative theories of premeditated murder and felony murder.

Appeal from Shawnee District Court; DAVID B. DEBENHAM, judge. Oral argument held November 3, 2023. Opinion filed August 30, 2024. Affirmed.

Jennifer C. Roth, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: A jury convicted Z.M. of premeditated first-degree murder, first-degree felony murder, and criminal discharge of a firearm at an occupied vehicle. The charges arose from an incident in 2019 where Z.M. drove a vehicle from which a passenger shot at a second car. The driver of the second car, J.M., was killed. The court sentenced Z.M. to a controlling hard 50 life sentence for his crimes.

On direct appeal, Z.M. alleges five errors:

(1) The district court erred by denying his request for new counsel.

(2) Trial counsel abandoned him at sentencing, in violation of Z.M.'s constitutional right to be represented by counsel.

(3) During voir dire and closing arguments the prosecutor misstated the law of aiding and abetting liability, premeditation, and first-degree murder.

(4) The jury was provided legally inappropriate jury instructions and verdict forms on first-degree murder, its lesser included offense, and aiding and abetting.

(5) The errors asserted in issues three and four cumulatively denied Z.M. a fair trial.

We agree the jury was not properly instructed on Z.M.'s murder charges, but conclude this was harmless. We affirm his convictions and sentence.

FACTS AND PROCEDURAL HISTORY

On a July afternoon in 2019, Z.M. drove his blue Pontiac G6 east on SE 37th Street in Topeka. He was chasing a white Grand Marquis driven by J.M., who had three passengers in the car with him. Z.M. had two passengers: D.W. and L.J. When the Pontiac caught up to the Marquis, one of Z.M.'s passengers sat on his windowsill and, from the roof of the Pontiac, fired rounds from his rifle toward the Marquis.

The Marquis immediately slowed and ran off the road. J.M.'s passengers ran. The Pontiac drove away. When the dust cleared, J.M. was found by witnesses at the scene, still sitting in the driver's seat of the Marquis. He had a gunshot wound to the head and a handgun in his lap. J.M. was taken to the hospital, where he died.

From the area of the crash, law enforcement found shell casings, including 9-millimeter casings, 7.62 rifle casings, .380 casings, and .45 caliber casings. They also found the Pontiac. Inside it were Z.M.'s driver's license and wallet.

Law enforcement executed a search warrant at D.W.'s home and found a rifle that matched the casings at the crime scene. D.W.'s DNA matched DNA found on the rifle. Officers also found a 9-millimeter magazine at the home where D.W. was arrested, though a 9-millimeter

handgun was never recovered. One witness identified L.J. as the individual shooting the rifle, and L.J. was arrested in Arkansas. Z.M. turned himself in.

The State charged Z.M. in juvenile court. Shortly after, the case was moved to adult court, where Z.M. was charged with one count of first-degree premeditated murder, one count of first-degree felony murder, and one count of criminal discharge of a firearm at an occupied vehicle resulting in great bodily harm. Z.M. pleaded not guilty to all charges.

Before trial, Z.M.'s counsel filed a Motion to Determine Competency to Stand Trial and a Motion to Withdraw. The court granted the former, found Z.M. competent, and denied the latter.

The jury trial began in March 2020. The State presented 34 witnesses. Z.M. did not present any. The State proceeded on a theory of aiding and abetting liability. The jury found Z.M. guilty on all counts.

The court sentenced Z.M. to a hard 50 life sentence for the premeditated first-degree murder conviction and 94 months for criminal discharge of a weapon at an occupied vehicle resulting in great bodily harm. The court ordered the sentences to run concurrent.

Z.M. directly appeals. See K.S.A. 22-3601(b)(3) (direct appeals to Supreme Court allowed for life sentence crimes); K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 22-3601).

ANALYSIS

I. *The district court did not err when it denied Z.M.'s request for new counsel.*

Z.M. argues the district court erred by inadequately investigating Z.M.'s asserted conflict of interest and failing to appoint substitute counsel.

Standard of Review

An appellate court reviews both the adequacy of a district court's inquiry into a potential conflict and its ultimate decision on a motion for new counsel for abuse of discretion. *State v. Pfannenstiel*, 302 Kan. 747, 760-62, 357 P.3d 877 (2015).

"An abuse of discretion can occur if judicial action is (1) arbitrary, fanciful, or unreasonable, i.e., no reasonable person would take the view adopted by the trial court; (2) based on an error of law, i.e., the discretion is guided by an erroneous legal conclusion; or (3) based on an error of fact, i.e., substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *Pfannenstiel*, 302 Kan. at 760.

Additional Facts

Z.M.'s first appointed counsel, Michael Francis, represented him in juvenile court but no longer represented Z.M. after the district court authorized prosecution as an adult. Z.M.'s first appointed counsel in adult court withdrew because of a conflict. The district court then appointed James Chappas to represent Z.M.

Chappas represented Z.M. at a joint preliminary hearing that included two other defendants. Circumstantial evidence suggested Z.M. was the driver of the blue Pontiac, and some testimony also suggested someone fired a handgun from the driver's side. Further, J.P.—one of the passengers in J.M.'s white Grand Marquis—testified there was supposed to be a fight involving Z.M. at Betty Phillips Park on the day of the shooting.

A few months after the preliminary hearing, Chappas filed both a Motion to Determine Competency to Stand Trial and a Motion to Withdraw. In the Motion to Determine Competency, Chappas wrote that Z.M. "cannot sustain a coherent discussion about the facts of the case or any applicable defenses," that his recent discussions with Z.M. "consisted of [Z.M.'s] repeated assertion that God would vindicate him at trial," and that Z.M. exhibited an abnormal comfort with being incarcerated. In the Motion to Withdraw, Chappas wrote only that Z.M. had directed him to file the motion.

At the motions hearing, Z.M. apparently gave the district court a letter, although the letter does not appear in the record and the contents are not discussed specifically. Chappas also presented several concerns:

"[N]umber one, he's a minor. Second . . . I have concerns with . . . [Z.M.'s] cognitive ability to fully understand and appreciate the controlling facts in his particular case. I have a concern with his ability to appreciate the relevance and the application of those facts to the State's theory of prosecution in the case. Specifically . . . concerning [Z.M.'s] appreciation of the relevancy and the significance of those facts related to the theory of prosecution that's been forwarded by the

State and how that all relates to his ability to assist his attorney, his ability to understand and appreciate any formulated defenses, his ability to actually assist his attorney in the defense of his case. And . . . in effect, what I've seen is a lack of ability for him to appreciate all of those things and an inability to make . . . any sound decisions in terms of how to proceed in this particular case, how to interact with his lawyer in the terms of formulation of defenses."

Chappas told the district court that he had not provided Z.M. with "the paper discovery" but had "advis[ed] the client of the State's theory of the case and all of the facts that are alleged." Chappas told the court that he would send the reports to Z.M. after appropriately redacting them.

The district court told the parties that it would take up the Motion to Withdraw after it ruled on Z.M.'s competency. It then ordered a competency evaluation, which was to be performed by Dr. David Blakely. Toward the end of the hearing, Z.M. addressed the court:

"Your Honor, I apologize for taking your time. Your Honor, I have been in custody since July 27th of 2019. I still do not have my discovery. I still have not had a fit. The entire relation, my attorney has only been to see me for—

. . . .

". . . My attorney has only been to see me four times. He represented me. He represented a witness in my cousin's murder trial. I personally believe that is a conflict of interest in my case.

"He has told me he hates jury trials. They scare him, and they are long, and that I need to take a plea, and that included protective custody, out-of-state, when I addressed Mr. Chappas with my defense and as he asked me what he [*sic*] should say on the stand.

"The last time I seen Mr. Chappas, I told him I wanted a new attorney, and he was fired. He respond with 'You're a dumb—sorry for my language—ass, and will spend the rest of your life in prison.'

"Your Honor, please appoint me a new attorney."

Dr. Blakely evaluated Z.M. and produced a report. In it, Dr. Blakely wrote:

"[Z.M.] understands the roles of the various Court officers. He understands that a lawyer is supposed to 'defend me', 'help me through the case', 'prove I'm not guilty', and he adds 'not call me a dumbass'. He says the lawyer called him that as he was leaving. The patient had told the lawyer that he did not want this lawyer anymore; he wants to switch lawyers and that was the occasion of the comment that the patient is claiming. He also adds the lawyer is supposed to 'make a case for me, believe in me'. . . . He does say that they say big words in Court. He does not always understand all of them. He feels that Mr. Chappas 'has not done anything for me'. He has only seen him three times, and he has been here 'seven

months'. He says that he did say 'I hope that God will help me'; 'I hope the judge will help me.'

. . . .

"The first problem is competence, and while this patient does hear some voices and he has some learning disability he also has a serious substance abuse problem. Today he is clearly competent. He clearly understands the charges. He does not like his lawyer; there is a problem going on there it sounds like. It may come out of misinformation or it may come out of not understanding, but it does not come out of psychosis as I see him today. He understands the charges, and if he gets the right lawyer or irons things out with this lawyer, he can help in his own defense.

. . . .

"This is a young man with a serious drug use problem, some antisocial behavior who is falling into with 'the wrong crowd', a history of ADHD, and now he still hears some voices. But, he clearly understands the charges and can help in his own defense and is, therefore, competent to stand trial."

The Blakely report was addressed at the competency hearing. Chappas did not object to Dr. Blakely's finding that Z.M. was competent, but he did object to Dr. Blakely's notation that Chappas called Z.M. a derogatory name. The report was admitted as evidence. No witnesses were called. After hearing statements from counsel, the district court found Z.M. competent to stand trial.

The district court then took up Chappas' Motion to Withdraw in an in-camera hearing with just Z.M. and Chappas present. Z.M. began by telling the court about Chappas' representation of "Mandy," a witness in the trial of his cousin's killer. Z.M. believed "Mandy" was also charged with his cousin's murder, but he was not certain. He also believed this was a conflict of interest because "she was there during the murder which everybody says she set it up."

Z.M. next claimed that:

"[Chappas has] only been up to see me three times, I have not received my discovery, he was begging, and begging, and begging, and begging, telling me to take this plea which I do not want to take. . . . [H]e said he does not like jury trials, which I said, 'Okay, but I want to take it to the jury.' He was like, 'All right,' but then he kept on begging me to take the plea. After that—after that visit he never came up, not once."

Z.M. also told the court that Chappas had not shown him the police reports or discussed the case's facts except "that the—the

DA is trying to accuse me of driving the vehicle. That's all he's told me."

After deducing that Z.M.'s complaints were limited to his belief that Chappas had a "conflict" because he represented "Mandy" and Chappas' lack of communication, the district court turned to Chappas for response. Chappas clarified that he represented Mandy Zechel as a material witness in Z.M.'s cousin's homicide. Zechel had not been charged with Z.M.'s cousin's killing; he was appointed to represent her because she kept evading the State's efforts to serve her with a subpoena. Zechel testified for the State, not the defense. Chappas told the court the only conversation he had with Z.M. on the matter was to say, "'Oh okay, that was your cousin? I didn't know that.'" The district court then said to Chappas: "It seems to me from what you told me and [Z.M.]'s told me on this issue that there is no conflict." Chappas responded: "I can't—I can't see one."

The court then asked Chappas to address Z.M.'s second complaint: failure to provide discovery and generally communicate with him. Chappas explained that Francis originally represented Z.M. in juvenile court before the transfer to adult court. Chappas spoke to Francis about Z.M.'s case and learned Francis had had "extensive discussion with [Z.M.] about the alleged offense conduct." Chappas then said he had "at least three if not four meetings" with Z.M., and had:

"extensive discussion with him about the State's theory of the prosecution of the case, meaning the charges. We have talked extensively about the penalties associated with that. And although I have not sat down and provided him with the actual police reports, but I've had extensive discussion with him about all of the factual allegations that are made by the State, who's making them, and—and how they are alleged to be part of the offense conduct in the case."

Chappas also claimed he had at least three "very extensive" meetings with Z.M.'s parents where they discussed the same things. He explained Z.M. was present at the preliminary hearing, asked Chappas questions during the hearing, and discussed the testimony with Chappas. He then outlined the things he talks about with every client, including "all of the facts that the State alleges that constitutes the offense conduct." He then said:

"We had extensive discussion about the—the car chase that was involved, the fact that AMR was there, that they took a video, that the . . . that all this was bolstered by the testimony that later occurred at the preliminary hearing. The witness statements, [Z.M.] heard witnesses that had him behind the wheel of the car, had him shooting a firearm out the driver's side of the car. There was witness testimony also that during this chase, [Z.M.] was on the phone—at some point in time was on the phone with his brother making comments about chasing them, ang [*sic*] getting them, and things along those lines. *Those facts were discussed with* [*Z.M.*] *in excruciating detail*." (Emphasis added.)

Chappas told the court that he had talked about aiding and abetting liability and claimed that "[Z.M.] understood that when we had that discussion." He also told Z.M. about the jury trial process, his own role as a "facilitator of the information" and as a legal counselor, the possibility of defenses, the nature of plea negotiations, and his own opinion about the likely outcomes of trial. Chappas told Z.M. that "in all likelihood a jury would, at a minimum, come back and convict him of the felony murder" because "they've got a picture of his co-defendant hanging out the driver's side of the window with a rifle shooting at the car in front of him and that resulted in the driver being killed by a bullet from that rifle. They had [Z.M.] driving it." After Chappas suggested that Z.M. take a plea based on those facts, Z.M.—after reflection—told Chappas, "'I thought you were here for me. God's gonna set this right, I'm going to trial, I'm not doing any plea.'" Chappas claimed he never "begged" Z.M. to take a plea.

Finally, Chappas denied calling Z.M. a "dumbass," claiming he does not "berate clients" or "tell them what to do." He then went on:

"[A]nd quite frankly, I find his offense to the term, 'Dumbass,' almost comical in—in—in that, you know, coming from an individual who's almost every other word is, 'F this, F that.' So Judge . . . you layer on top of this the standard, there is no—as an officer of the court, if the Court's question to me is if you have an opinion as to whether there's a basis under the law to justify my removal as counsel and my answer is no. I'm ready to proceed, but that decision is yours."

After Chappas finished, the court turned again to Z.M. for any reply. Z.M. offered nothing more, and the judge asked no more questions. The district court then denied the Motion to Withdraw:

"What I find in this case is the defendant is being represented by competent counsel, that counsel has provided discovery, analysis, suggestions, his take on the

case, has gone over the evidence in this case, besides which the defendant had a full hearing in juvenile court before he was waived upwards as part of the waiver. He had a full preliminary hearing—evidentiary preliminary hearing in this case. I adopt the findings—the statements made by Mr. Chappas of his representation and I find the defendant has not met his burden in this case the [*sic*] show that there is a conflict as—as a valid reason for the appointment of new counsel in this case, that his dissatisfaction with Mr. Chappas is unjustified."

Discussion

The Sixth Amendment to the United States Constitution guarantees Z.M. a right to effective assistance of counsel during all critical stages of the criminal proceeding. *Pfannenstiel*, 302 Kan. at 758. "[A] request for new counsel is largely premised on the principle that the Sixth Amendment does 'not guarantee the defendant the right to choose which attorney will be appointed to represent the defendant.' Because the right to choose counsel is not absolute, it necessarily follows that a defendant does not have an absolute right to substitute counsel." 302 Kan. at 759.

A defendant who seeks the appointment of new counsel must show "justifiable dissatisfaction" with current appointed counsel before substitute counsel is appointed. *Pfannenstiel*, 302 Kan. at 759. They can do this by showing "a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication." *State v. Brown*, 305 Kan. 413, 424, 382 P.3d 852 (2016). By making "an articulated statement of attorney dissatisfaction," a defendant "'trigger[s] the district court's duty to inquire into a potential conflict of interest.'" *Pfannenstiel*, 302 Kan. at 760 (quoting *State v. Brown*, 300 Kan. 565, 575, 331 P.3d 797 [2014]).

When presented with a potential conflict of interest, a district court can err in three ways: (1) by simply failing to conduct an inquiry at all, (2) by failing to conduct an "appropriate inquiry," and (3) by incorrectly deciding whether to substitute counsel. *Pfannenstiel*, 302 Kan. at 760-62. "An appropriate inquiry requires fully investigating (1) the basis for the defendant's dissatisfaction with counsel and (2) the facts necessary for determining if that dissatisfaction warrants appointing new counsel, that is, if the dissatisfaction is 'justifiable.'" 302 Kan. at 761. Still,

"this inquiry does not require 'a detailed examination of every nuance of a defendant's claim of inadequacy of defense and conflict of interest.' Instead, 'A sin-

gle, open-ended question by the trial court may suffice if it provides the defendant with the opportunity to explain a conflict of interest, an irreconcilable disagreement, or an inability to communicate with counsel.' [Citations omitted.]" *State v. Toothman*, 310 Kan. 542, 554, 448 P.3d 1039 (2019).

A "conflict of interest" is defined as:

"1. A real or seeming incompatibility between one's private interests and one's public or fiduciary duties. 2. A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent." Black's Law Dictionary 374 (11th ed. 2019).

"A conflict of interest (or the lack of one) exists independent of the district court's inquiry, and the lack of an inquiry does not, in itself, work a Sixth Amendment violation." *State v. Prado*, 299 Kan. 1251, 1264, 329 P.3d 473 (2014) (Biles, J., dissenting). See *Mickens v. Taylor*, 535 U.S. 162, 173-74, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

Here, the focus of the court's inquiry into whether Chappas had an actual or potential conflict of interest was necessarily directed to Chappas. First, were Chappas' private interests as alleged by Z.M. (Chappas hates jury trials, they scare him, they are long and so Z.M. needs to take a plea) incompatible with his fiduciary duty to Z.M.? Second, was there a real or seeming incompatibility between the interests of Z.M. and someone else represented by Chappas?

Z.M.'s request for new counsel put the district court on notice of a potential conflict of interest, and therefore triggered the court's duty to investigate. The district court did not fail to inquire. But Z.M. claims the district court's inquiry was not appropriate because it was inadequate. He also asserts the district court abused its discretion by refusing to appoint substitute counsel.

The district court's investigation was appropriate.

Z.M. first argues the scope of the court's investigation was too narrow. He criticizes the district court for failing to "ask [Z.M.] about things in Dr. Blakely's report—the one it had used minutes before to find [Z.M.] competent" and for failing to "ask the attorney what he had done to address his own concerns or the ones Dr. Blakely identified during the evaluation the attorney requested

and the court ordered." Z.M.'s complaints partially center on competency issues related to his youth and learning disability—although he does not assert the district court erroneously concluded Z.M. was competent to stand trial. Instead, his core complaint seems to be that the district court overlooked how Z.M.'s cognitive abilities, age, and development impacted his relationship with Chappas.

While Z.M. aptly references some apparent disconnect between Chappas' arguments in support of the competency motion and Chappas' statements about his own representation, we do not find Z.M.'s criticism of the court persuasive. The district court had *just found* Z.M. competent, based on the contents of the competency evaluation report, when it took up Z.M.'s counsel's motion to withdraw. It is unlikely the district court simply forgot about the concerns stated by Z.M. or concluded by Dr. Blakely in that report, including Z.M.'s assertion that Chappas called him a "dumbass."

Z.M. cites references in Blakely's report to Z.M.'s youth and "learning disability," but fails to show how his youth and learning disability, by themselves, presented "a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication." While these factors may increase the *difficulty* of communication or the *risk* of irreconcilable disagreement, their existence is not shown to *create* either automatically. Consequently, the district court did not abuse its discretion by failing to ask specifically about the lack of "special accommodations" Chappas made for Z.M. or, more generally, about the way Z.M.'s cognitive difficulties and age impacted his working relationship with Chappas.

"A court is not required to engage in a detailed examination of every nuance of a defendant's claim of inadequacy of defense and conflict of interest." *State v. Staten*, 304 Kan. 957, 972, 377 P.3d 427 (2016). Instead, by focusing its questions on the issues *Z.M.* presented, the district court reasonably tailored its inquiry to the issues actually before it—not those that *might* have become pertinent under a reopened competency inquiry. Thus, the district court did not err by confining its investigation to the two bases Z.M. advanced at the time of the hearing.

The court also adequately investigated the issues Z.M. presented. Z.M.'s first complaint at the motion hearing lay in Chappas' representation of "Mandy," fearing Chappas was also assisting someone involved in killing his cousin. Most of the district court's specific questions to Z.M. centered on who "Mandy" was and why Z.M. felt the representation posed a conflict. Chappas clarified that "Mandy" was *not* a witness for the defense of his cousin's accused killer, as Z.M. thought, but was a witness for the State and required counsel because she had been jailed for failing to comply with subpoenas to appear for hearings. Thus, the district court's investigation was adequate to obtain the facts necessary to determine whether "Mandy" created a conflict of interest.

Z.M.'s second complaint at the hearing was that Chappas failed to communicate with him about discovery, and in particular had not provided him with written discovery. Although the judge asked Chappas only one open-ended question—"Could you address his second complaint?"—Chappas responded to that general question at length, admitting his failure to provide Z.M. with the written police reports, recounting discussions he had with Z.M. regarding the State's theory, and giving the reasons behind his suggestion that Z.M. should take a plea. The court's investigation was appropriate because it allowed the district court to understand the basis for Z.M.'s claim of dissatisfaction and the facts surrounding his communications with Chappas about the discovery in his case.

Beyond his complaints expressed during the motion hearing, Z.M. further asserts that two of Chappas' statements during the hearing *created* a conflict of interest, thereby requiring the court to inquire into a potential conflict of interest. See *Pfannenstiel*, 302 Kan. at 766; *Prado*, 299 Kan. at 1259. The first statement responded to the district court's observation that Chappas' representation of "Mandy" posed no conflict. Chappas agreed, stating "I can't see one." The second statement was after Chappas' extended remarks about his communications with and representation of Z.M., when he stated, "So, Judge

. . . if the Court's question to me is . . . whether there's a basis under the law to justify my removal as counsel and my answer is no."

As Z.M. reminds us: "[T]he inquiry into whether a defendant has demonstrated justifiable dissatisfaction with his attorney requires both the court and defense counsel to walk a delicate line in making the inquiry." *Pfannenstiel*, 302 Kan. at 766. During this inquiry, the district court "must explore the basis of the alleged conflict of interest 'without improperly requiring disclosure of the confidential communications of the client.' Moreover, other courts draw a meaningful distinction between (1) an attorney truthfully recounting facts and (2) an attorney going beyond factual statements and advocating against the client's position." 302 Kan. at 766. Under *Prado*, Chappas' statements arguably "alerted" the district court to the existence of a conflict, which would have prompted the district court "to inquire as to the nature of the conflict." *Prado*, 299 Kan. at 1259. But the district court was already *doing* that. The focus here is whether these two statements indicated a conflict of interest that "adversely affect[ed] counsel's performance." *Prado*, 299 Kan. at 1266-67 (Biles, J., dissenting).

We conclude these statements did not indicate a conflict of interest between Z.M. and his counsel affecting counsel's advocacy for Z.M. The first comment merely agreed with the court's previously articulated conclusion that Chappas' representation of "Mandy" created no conflict of interest. Chappas' second comment addressed Z.M.'s complaint—and the court's inquiry—about the nature and extent of Chappas' allegedly inadequate communication with Z.M. The court's inquiry on this issue, and the testimony of both Z.M. and Chappas, addressed the facts underlying that complaint. While Z.M. thought the communication was insufficient and Chappas' second comment indicates Chappas thought the communication was sufficient, their *opinions* on the sufficiency of their communications did not create a conflict of interest because their opinions did not change the facts that pre-existed the hearing, or the strength of Chappas' loyalty to Z.M., or the ability of Chappas to advocate for Z.M. See *Pfannenstiel*, 302 Kan. at 770 (Biles, J., concurring in part) ("Prado's counsel's statement that he "'didn't see a conflict"' also merely expressed an independent professional judgment about whether he had perceived prior to the hearing any duty to withdraw based on his relationship with his client."). Thus, when considered in context, Chappas' second

comment did not cross the line into advocating against Z.M. Accordingly, the court discharged its duty to inquire into a potential conflict.

The district court did not abuse its discretion in refusing to appoint substitute counsel.

Next, Z.M. also challenges the district court's decision not to permit Chappas to withdraw and to appoint new counsel. We conclude the district court did not abuse its discretion by finding Z.M.'s two claims did not require appointment of substitute counsel. The record supports the district court's implicit conclusions that there was no conflict of interest stemming from Chappas' representation of "Mandy" and no irreconcilable disagreement or complete breakdown in Chappas' relationship with Z.M. More specifically, we agree that Chappas' representation of "Mandy" was not incompatible with his representation of Z.M. And we agree Z.M.'s suggestion that Chappas failed to communicate does not rise to the level of justifiable dissatisfaction. Chappas recounted his preparation with Z.M., which included discussions about the evidence, the State's theory, and possible defenses. Chappas and Z.M. disagreed about how to proceed based on their assessment of the evidence—which, Chappas claimed, he fully explained to Z.M.—but Chappas took the matter to trial anyway, as Z.M. requested.

Still, one potential error warrants attention. The district court concluded that Chappas provided Z.M. with "discovery," but Chappas himself admitted he had not yet given Z.M. any written reports. Z.M. highlights this discrepancy as an error of fact by the district court. But Chappas also represented that he had discussed the facts with Z.M. extensively. And in the earlier pretrial hearing, Chappas told the district court that "what I define as discovery is advising the client of the State's theory of the case and all of the facts that are alleged." The district court agreed that "discovery can be actually providing your client with written reports or passing that information on" and that "some counsel are . . . hesitant about sending over paper reports, because other individuals in jail can get hold of that."

Given Chappas' repeated representation that he had discussed the police reports and other discovery extensively with Z.M.—and Z.M.'s presence at both the hearing on the motion to authorize adult prosecution and the "close to a day"-long preliminary hearing—we conclude the district court did not err in finding that Chappas had presented Z.M. with "discovery."

Finally, Z.M. urges us to find the competency report is evidence of irreconcilable differences between himself and counsel which the court unreasonably ignored. Dr. Blakely noted that Z.M. "does not like his lawyer; there is a problem going on there it sounds like" and that Z.M. "understands the charges, and if he gets the right lawyer or irons things out with this lawyer, he can help in his own defense."

But "'[t]he focus of the justifiable dissatisfaction inquiry is the adequacy of counsel in the adversarial process, not the accused's relationship with his attorney.'" *Staten*, 304 Kan. at 972 (quoting *United States v. Baisden*, 713 F.3d 450, 454 [8th Cir. 2013]). While it is true Dr. Blakely's report suggests problems in Z.M.'s *relationship* with Chappas, it does not show a conflict of interest, irreconcilable differences, or a complete breakdown in communications. Dr. Blakely reported Z.M.'s complaints that Chappas had "'not done anything for me'" and had "only seen him three times," but those complaints were not explored or endorsed by Dr. Blakely. They were explored during the motions hearing, when Chappas admitted he had only met with Z.M. three or four times. Chappas also spoke at length about his communications with Z.M. during those meetings, and the district court had the discretion to gauge Chappas' credibility.

Ultimately, we conclude the district court did not abuse its discretion by finding Z.M.'s claims did not require appointment of substitute counsel. The record supports the district court's implicit findings of fact and legal conclusions that there was no conflict of interest stemming from Chappas' representation of "Mandy" and no irreconcilable disagreement or complete breakdown in Chappas' communication with Z.M. The court's holding was reasonable.

II. *Counsel did not fail to function as Z.M.'s advocate at sentencing.*

Z.M. next argues trial counsel failed so completely to function as his advocate at sentencing that prejudice should be presumed under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Standard of Review

Should we reach the merits of this claimed error, Z.M.'s argument implicates his constitutional right to counsel, which we review de novo. *State v. Robinson*, 303 Kan. 11, 85, 363 P.3d 875 (2015), *disapproved of on other grounds by State v. Cheever*, 306 Kan. 760, 402 P.3d 1126 (2017).

Preservation

The State argues this issue is not preserved for review because Z.M. did not raise the issue before the district court. Though the State is correct, we have previously exercised our discretion to review an unpreserved constitutional argument in three circumstances:

"(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; or (3) the district court is right for the wrong reason." *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015) (quoting *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 [2010]).

Here, we choose to reach Z.M.'s argument because it implicates Z.M.'s fundamental right to counsel and is a case-dispositive question of law based on undisputed facts. See *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000) (reaching a *Cronic* claim because the record on appeal could enable meaningful review of the claim).

Additional Facts

At sentencing, the State presented testimony from J.M.'s mother. Z.M. did not present any witnesses. In closing, the State asked the court to sentence Z.M. to a life sentence for both the premeditated first-degree murder conviction and the first-degree felony murder conviction. The court then interrupted and asked the parties whether doing so was appropriate. Since there were two first-degree murder convictions for a single killing, the court suggested sentencing Z.M. for both convictions would be multiplicitous. When asked his position, Chappas

agreed doing so would violate our caselaw. (The court did not impose a sentence for the felony murder conviction.)

Resuming its closing arguments, the State asked the court to run the sentences for Z.M.'s remaining convictions consecutive. When it was Z.M.'s turn, counsel explained Z.M. was young, knew the victim, observed the preliminary hearing and trial, and received legal advice from counsel. Counsel asked the court to run Z.M.'s sentences concurrent, given Z.M.'s youth and that he was not the shooter. Counsel reminded the court that a 50-year sentence carries no good time and concurrent sentences would give Z.M. some opportunity to realize what he needs to do with the rest of his life.

But counsel also said:

"Notwithstanding all of that, Judge, I'm at a loss to in good faith present to the Court something positive that I can say about my client. Throughout the course of this proceeding, he's exhibited no remorse, no repentance, no acceptance of his criminal action, no acknowledgement of the life that in fact was taken. Although, Judge, he was not the shooter, the criminal action that he was involved with was overwhelming. The jury did not take much time to come back with a verdict in this particular case. And as I've related to the Court, usually in these cases, we have something positive we can say about our clients, and I'm at a loss for anything to say positive about [Z.M]. In fact, and I'll relay it to the Court, and the Court knows this, he wrote a song while he's been in custody about the taking of this young man's life."

The court ordered concurrent sentences.

Discussion

The Sixth Amendment to the United States Constitution does not simply guarantee a criminal defendant the right to assistance of counsel during critical stages. It guarantees the right to *effective* assistance of counsel. *State v. Cheatham*, 296 Kan. 417, 429-30, 292 P.3d 318 (2013). In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Court announced the well-known two-part test for a claim of ineffective assistance of counsel: deficient performance and prejudice. *Strickland*, 466 U.S. at 687. The party claiming ineffective assistance of counsel under *Strickland* has the burden to prove both parts of the test. *Cheatham*, 296 Kan. at 431-32.

Released the same day as *Strickland*, *Cronic* explained that in limited circumstances the deficient performance of counsel is so egregious a showing of prejudice is presumed. *Cronic*, 466 U.S. at 658-60; see also *State v. Edgar*, 294 Kan. 828, 837-40, 283 P.3d 152 (2012) (explaining the interrelationship between *Strickland* and *Cronic*). In *State v. McDaniel*¸ 306 Kan. 595, 607-08, 395 P.3d 429 (2017), we outlined three categories of ineffective assistance of counsel claims. A defendant may (1) argue their attorney performed deficiently under *Strickland*; (2) invoke the *Cronic* exception; or (3) argue their attorney represented conflicting interests. 306 Kan. at 607-08. On appeal, Z.M. relies exclusively on the second category. He explains: "To be clear, at this stage, [Z.M.] is deliberately raising a *Cronic* issue only as to his counsel's performance at sentencing." He does not assert a *Strickland* claim.

Cronic was charged with committing mail fraud. The Government's investigation took four and a half years, and the defendant's appointed counsel, who was a real estate lawyer, had only 25 days to prepare. The 10th Circuit found the defendant's counsel was ineffective, but on review, the United States Supreme Court reversed, finding the circuit court's analysis insufficient. The high Court began by "recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Cronic*, 466 U.S. at 658. However, the Supreme Court found there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658. It explained prejudice could be presumed in three circumstances: (1) when there is a "complete denial of counsel" at a critical stage; (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) if it would not be possible for a competent lawyer to provide effective assistance. *Cronic*, 466 U.S. at 659-60. The Court concluded Cronic did *not* establish any of these circumstances and that to prevail Cronic needed to identify specific errors

made by counsel and demonstrate the effect such errors had on the reliability of the trial process, which could be done on remand.

So our inquiry must focus on whether Z.M.'s counsel's performance falls within one of the circumstances articulated in *Cronic*. Because Z.M. limits his argument to counsel's performance at sentencing, we characterize his claim as falling within the first *Cronic* circumstance: the complete denial of counsel at a critical stage. See *Lafler v. Cooper*, 556 U.S. 156, 165, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (sentencing is a critical stage); *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 19 L. Ed. 2d 336 (1967) (same); *Pfannenstiel*, 302 Kan. at 758 (same); *Phillips v. White*, 851 F.3d 567, 580 (6th Cir. 2017) ("For *Cronic* prejudice to apply, petitioner must be deprived of counsel during a critical stage of trial, such as sentencing.").

Z.M. asserts he was completely denied counsel at sentencing for the following reasons: (1) counsel did not file a departure motion; (2) counsel did not make mitigation arguments; (3) counsel referenced incriminating rap lyrics Z.M. authored; and (4) counsel stated he had nothing positive to say about Z.M.

The State argues counsel advocated for Z.M. in two ways at sentencing. First, counsel objected to the State's recommendation to sentence Z.M. on both the premeditated murder and felony murder convictions. See, e.g., *State v. Thach*, 305 Kan. 72, 86-87, 378 P.3d 522 (2016) (explaining "the jury may receive instructions on both theories although a defendant may not be sentenced to both premeditated murder and felony murder for a single killing"). But this objection came only after the court had rejected as multiplicitous the State's suggestion. Z.M.'s counsel merely agreed and did not raise the concern on his own.

The State asserts Chappas also opposed the State's recommendation to run Z.M.'s sentences consecutive, urging the court to consider Z.M.'s youth and order concurrent sentences. (Apparently persuaded, the court ordered concurrent sentences, which reduced the overall sentence by 94 months—or nearly 8 years—from what it could have been.) Thus, Chappas did do something to focus the court's attention on both a reason to justify leniency and a way in which that leniency could be granted. While his effort was brief, caselaw shows its importance to a *Cronic* analysis.

"Errors evaluated under *Cronic* are rare, and most alleged deficiencies are properly evaluated under *Strickland* rather than *Cronic*." *State v. Adams*, 297 Kan. 665, 670-71, 304 P.3d 311 (2013); see also *Florida v. Nixon*, 543 U.S. 175, 190, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004) ("We illustrated just how infrequently the 'surrounding circumstances [will] justify a presumption of ineffectiveness' in *Cronic* itself.").

For example, in *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002), Bell asserted a sentencing-based *Cronic* argument. He argued trial counsel was ineffective at sentencing in a capital case because counsel did not present mitigating evidence and waived final argument. In rejecting Bell's position, the Court reiterated that "when we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete." *Cone*, 535 U.S. at 696-97. The Court differentiated between failing to oppose the prosecution "as a whole," which would implicate *Cronic*, and failing to oppose the prosecution "at specific points," which would implicate *Strickland*. 535 U.S. at 697. The Court characterized this difference as "not of degree but of kind." 535 U.S. at 697. It ultimately held that *Strickland* should govern Bell's asserted errors. 535 U.S. at 698.

Similarly, we conclude Z.M.'s asserted errors within the context of sentencing are specific, rather than a complete abandonment. See *Miller v. Martin*, 481 F.3d 468, 473 (7th Cir. 2007) ("In the wake of *Bell*, courts have rarely applied *Cronic*, emphasizing that only non-representation, not poor representation, triggers a presumption of prejudice."). Z.M. was not *completely* denied counsel at a critical stage because Chappas argued for concurrent sentences. Z.M. has not shown a *Cronic* violation. To be clear, we take no position on whether there is either deficient performance or prejudice under the *Strickland* test.

III. *The prosecutor did not misstate the law on aiding and abetting, premeditation, or first-degree murder.*

Z.M. next argues the prosecutor committed reversible error during voir dire and closing arguments by misstating the law of aiding and abetting, premeditation, and first-degree murder.

Preservation and Standard of Review

Though Z.M. did not object during trial to the statements he now asserts are error, this issue is properly preserved for review. "[W]e will review a prosecutor's comments made during voir dire, opening statement, or closing argument on the basis of prosecutorial error even without a timely objection, 'although the presence or absence of an objection may figure into our analysis of the alleged misconduct.'" *State v. Sean*, 306 Kan. 963, 974, 399 P.3d 168 (2017).

"To determine whether prosecutorial error has occurred, we consider whether the challenged prosecutorial acts 'fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.' If error is found, we then determine whether the error prejudiced the defendant's right to a fair trial by considering whether the State can prove that no reasonable possibility exists that the error contributed to the verdict. [Citations omitted.]" *Slusser*, 317 Kan. at 185.

It is error for a prosecutor to misstate the law. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021). When "determining whether a particular statement falls outside of the wide latitude given to prosecutors, the court considers the context in which the statement was made, rather than analyzing the statement in isolation." *Hillard*, 313 Kan. at 843. A defendant is denied a fair trial "when 'the facts are such that the jury could have been confused or misled by the statement.'" *State v. Davis*, 306 Kan. 400, 413, 394 P.3d 817 (2017) (quoting *State v. Hall*, 292 Kan. 841, 849, 257 P.3d 272 [2011]).

If error occurs, the second step when reviewing claims of prosecutorial error is to "determine whether the error prejudiced the defendant's due process rights to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Since *Sherman*, we have applied "the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]." 305 Kan. at 109. "In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" 305 Kan. at 109. The prejudice analysis is not amenable to a rigid test. 305 Kan. at 110-11.

First Asserted Error—Aiding and Abetting

Z.M. first argues the State misstated the law on aiding and abetting liability in voir dire and closing argument. In *State v. Bodine*, 313 Kan. 378, 396, 486 P.3d 551 (2021) (quoting *State v. Robinson*, 293 Kan. 1002, 1037-38, 270 P.3d 1183 [2012]), we explained aiding and abetting is not a distinct crime, but instead "'extends criminal liability to a person other than the principal actor.'" All persons who "aid and abet a crime are equally guilty without regard to the extent of each's participation." 313 Kan. at 397.

The current version of the aiding and abetting statute, K.S.A. 21-5210(a), became law in 2010. *Bodine*, 313 Kan. at 400. It provides:

"A person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime." K.S.A. 21-5210(a).

Based on this language, which applies to Z.M.'s 2019 crime, "the aider must intentionally assist the principal. In doing so, the aider must possess the mental culpability required for the commission of the crime for which the aider is assisting." *Bodine*, 313 Kan. at 401.

More specific to this case, in *State v. Overstreet*, 288 Kan. 1, 7-15, 200 P.3d 427 (2009), we explained that if a person is charged with aiding and abetting a premeditated murder, then the State must prove that the aider and abettor acted with the same specific intent as the principal. Put differently, "the State [is] required to prove that the defendant shared in the specific intent of premeditation and thus promoted or assisted in the commission of the specific crime of premeditated first-degree murder." 288 Kan. at 11; see also *State v. Gonzalez*, 311 Kan. 281, 291, 460 P.3d 348 (2020) ("To convict a defendant of a specific intent crime on an aiding and abetting theory, that defendant must have the same specific intent to commit the crime as the principal.").

Z.M. argues the prosecutor's statements in voir dire and closing argument failed to explain the State's burden of showing Z.M. acted with premeditation. Because of this, the argument goes, the

jury could have found Z.M. guilty of premeditated murder as an aider and abettor if the jury believed his intent was simply to scare the occupants of the other car or cause the other car to wreck. The State disagrees and urges the court to consider the overall context of the prosecutor's comments, and not just each statement in isolation.

We agree with the State's position. When read in context, the prosecutor's explanation of aiding and abetting appropriately alluded to the fact that everyone in the car, including Z.M., understood they were chasing the Grand Marquis with the specific intent of committing a premeditated murder. The prosecutor discussed aiding and abetting four times during voir dire. The first and second discussions were as follows:

"[STATE]: Okay. There is one concept, a principal of criminal responsibility that I want to talk to you about . . . . A principal of criminal responsibility, aiding and abetting . . . And if someone is aiding and abetting someone else to commit a crime, is it your personal believe [*sic*] that they should be held responsible just as the person that committed the crime?

"PROSPECTIVE JUROR [B.]: Yes.

"[STATE]: . . . The classic case that we often talk about, one that people either see on TV or have heard about is the bank robbery case, right?—where you'll see three guys jump in the car. They drive to the bank. Someone is driving. Two guys jump out. One has the gun, holds the bank teller up while the other guy stuffs the bag full of money. They all go, run out of the bank, get in the car and drive away. Now, there's only one person that took the money, but that person doesn't take the money if the other person doesn't hold a gun to the teller's head. And neither one of them do that if they don't get there by the driver to get away with the gun. So there may be one person that committed the aggravated robbery, but there's two that aided and abetted him, under the principle of criminal responsibility, aiding and abetting, in for a penny, in for a pound. If you aided and abetted, you are as responsible as the person that stuffed that bag full of money. . . .

"Ms. [H.], if you are driving someone to the Kwik Shop, and you think they're going inside to get some pop, and they come out and jump in the car, and you drive away, and all-of-a-sudden, you have cops following you. It turns out the person you took to the Kwik Shop robbed the Kwik shop, but you had no knowledge, right? You were just driving. Would you—should you be held as responsible just because you are merely present?

"PROSPECTIVE JUROR [H.]: Not in that situation, no.

"[STATE]: So there are situations where on its face, it could look like you aided and abetted, right?

"Mr. [I.], is that right?

"PROSPECTIVE JUROR [I.]: Right.

"[STATE]: So we have to look at what was your level of involvement. Did you aid and abet? Did you encourage and assist and aid that person in any meaningful way, or were you just there?—literally just there, unknowingly. That's the difference."

And:

"[STATE]: Did you understand the conversation regarding aiding and abetting, specifically the example that I used about the bank robbery?

"PROSPECTIVE JUROR [T.]: Yeah.

"[STATE]: And do you agree that that is a principle of criminal liability that a person could be found guilty based on their participation in a criminal act.

"PROSPECTIVE JUROR [T.]: Yes."

In both discussions, the prosecutor illustrated aiding and abetting liability by giving the example of the driver in an armed robbery. The prosecutor explained that all participants in the armed robbery were "in for a penny, in for a pound," meaning that even a participant with a minor, offsite role in collectively effectuating an armed robbery nonetheless has full legal responsibility for committing that crime. The prosecutor also clarified an individual would not be aiding and abetting if the individual drove someone to a gas station thinking the passenger would buy a beverage, but the passenger instead robbed the store.

The third voir dire discussion again referenced the armed robbery hypothetical, and included an explanation that aiding and abetting liability required an aider and abettor to share the intent of the principal:

"Is everyone comfortable with the fact that under our principles of law in Kansas and aiding and abetting, that *if the getaway driver was in on it, he knew the plan? He wanted them to rob the bank*, that he is just as guilty of bank robbery as the two folks that went into the bank." (Emphasis added.)

The fourth voir dire discussion reiterated this point. It went as follows:

"[STATE]: Okay. There is one concept I didn't share with this entire panel, but I will talk to you about it . . . [a]nd that is the concept of aiding and abetting. Do you know what—have you heard of that before?

"PROSPECTIVE JUROR [D.]: I've heard it.

. . . .

"[STATE]: . . . Oh, aiding and abetting; right? You said you heard of that concept before. Do you have an example that comes to mind at all, what would be aiding and abetting?

"PROSPECTIVE JUROR [D.]: Not really.

"[STATE]: Yeah, I—well, you know. I do this all the time, so I have a few examples for you. . . . But the one I used this morning was the bank robbery. So if you have a person—three people get in [a] car and gonna go rob Cap Fed. I think that is the bank right over here—and they get in the car. One person drives. The other two jump out, go into the bank. One has the gun on the teller, and then the other one stuffs a bag full of money, but only one of them really robbed the bank; right?

"PROSPECTIVE JUROR [D.]: Right.

"[STATE]: Are the other two good for it too?

"PROSPECTIVE JUROR [D.]: They guilty.

"[STATE]: Yeah, because that's aiding abetting; right?

"PROSPECTIVE JUROR [D.]: Right, yeah.

"[STATE]: Because they assisted either before or during the commission of the crime; right? One was even—never even got out the car. Never even went in the bank, but he's the driver. He got them there. That's aiding and abetting.

"PROSPECTIVE JUROR [D.]: Aiding and abetting.

"[STATE]: Right. So is that something that you're okay with as a legal principle of criminal responsibility? That's a mouth full there, but basically they're held as responsible as the person that robbed the bank. Are you okay with that?

"PROSPECTIVE JUROR [D.]: I don't know about the driver. He probably didn't know what they was doing.

"[STATE]: Okay. Now, that's a good point. We even talked about that this morning. What if the driver thought, hey, I'm gonna take my two buddies to the bank. They want to go in there and do a deposit—

"PROSPECTIVE JUROR [D.]: Right.

"[STATE]: Right? And then they come out and say, 'hey, Joe, let's go,' and they drive off. Well, maybe he didn't know that those two robbed the bank. You're right. But what if he did know? What if he drove them there to do that?

"PROSPECTIVE JUROR [D.]: Then that's helping about—

"[STATE]: He's aiding and abetting.

"PROSPECTIVE JUROR [D.]: Aiding and abetting, yes.

"[STATE]: Okay. And there is absolutely a difference, but you have to pay attention to that to see if that applies."

There, a prospective juror suggested a driver in a bank robbery may not be guilty as an aider and abettor if the driver did not know they were driving to a bank robbery. The prosecutor agreed and explained the driver would be aiding and abetting *if* the driver was aware of the plan and drove the others to the bank to commit the robbery. In fact, the prosecutor explained "there is absolutely a difference" between the two scenarios.

The prosecutor returned to the bank robbery hypothetical in closing argument. The relevant portion reads as follows:

"We are not required to nor are we attempting to prove that [Z.M.] fired the 9-millimeter, . . . had the 9-millimeter. It doesn't matter. That is just part of what happened. What matters is [J.M.] was murdered on 37th Street on that day, that he shot from behind with a 7.62 from a car that was trailing them from an individual who had seated himself on the window ledge, propped up that 7.62 up over the roof and left off 20 shots—pow, pow, pow, pow, pow, pow, pow—killing him. That's what matters.

"So why [Z.M.]? [Prosecutor], you're saying that he may not even have shot that 9-[millimeter]. We know he didn't shoot the 7.62, because he was driving. So why is he here for murder? We talked about that on Monday, aiding and abetting. We talked about the example of the bank robber. Three guys jump in the car. They both rob Cap Fed. You've got your driver driving there. Two guys jump out. One goes in, holds the guard at gunpoint, while the third person stuffs the bag full of money. In for a penny in for a pound. They're all good for it. That's what the law says, and that makes sense to us. You all are equally responsible, unless it's mere presence or a mere association. As an example, Mr. Wolfley was nearby. Mr. Stokes was nearby. Mr. Eisenberger and the AMR was nearby. They were merely present. The[y] weren't participants. They couldn't be charged with this crime. But what about [Z.M.]? He didn't shoot anyone. We don't know that, but let's assume that. Does this happen without him? Does he aid and abet them? Absolutely. In fact, he may be the most critical person in the commission of this crime. And I'm not just saying that, because but for him, this doesn't happen this way; right? If [D.W.] or [L.J.] are on foot with their guns and wanting to shoot at the Grand Marquis after it leaves the neighborhood, good luck. You need a way to get there. And that's where [Z.M.] came in. He was the driver. He knew exactly from the time they pulled out when they have guns—a long gun getting in there, and they yell, 'Let's get em.' And he peels out. And you heard Mr. Keeler say that the front seat passenger said, 'Go, go, go, go,' with a gun. And what does [Z.M] do? He goes. He is the driver, the classic example of an aider and abettor. He even tells it to his brother. 'Yo, Bro, they slid on us. I'm fixing to slide on them back.' And then you hear the shots. 'Where you at? Where you at?' 'I'm going to [D.W.]'s.' He even said [D.W.]'s. 'We just made 'em wreck.' There's a reason there. He's part of it. He knows that. This took all of their efforts to commit this crime, not just [L.J.] or [D.W.]. It took a driver, and [Z.M.] is that guy.

"Ladies and gentleman, the evidence is overwhelming that [Z.M.] is criminally responsible for the murder of [J.M.] Just like [L.J.] will have his day in court as will [D.W.]. They will have their day. But today is [Z.M.]'s day."

During closing argument, the prosecutor reminded the jury of the bank robbery discussion and suggested the principles outlined in it applied to Z.M.'s liability as an aider and abettor. For example, the prosecutor again used the phrase "in for a penny, in for a pound." And he explained Z.M. was "the driver, the classic example of an aider and abettor," thereby hearkening back to the example described in voir dire. And finally, the prosecutor outlined the

requirements of premeditation immediately after the aiding and abetting discussion, allowing the jurors to connect aiding and abetting and the mens rea requirement of the charged crime.

There is no requirement that each discussion of aiding and abetting must include every aspect of the doctrine. It is not legal error to discuss the doctrine's various aspects separately so long as the jury is not confused or misled. Here, the prosecutor accurately described aiding and abetting. The prosecutor neither stated nor implied that *only* association was sufficient or that a specific intent to commit premeditated murder was not required. When understood collectively, we conclude these statements of aiding and abetting liability did not misstate the law and would not mislead or confuse jurors. We see no error here.

Second Asserted Error—Premeditation

Z.M. next alleges the prosecutor misstated the law on premeditation. In closing argument, the prosecutor explained:

"I want to talk to you a little bit about some of the instructions, because there's quite a few of them, and sometimes it can get a bit overwhelming when you look at the charges. As an example, the defendant is charged in Count 1 with first-degree premeditated murder. Those are the—then you see the elements in there, right, that the killing was done by the defendant, or another as the aiding and abetting element here. You know the evidence to support that, that it was done intentionally, meaning not by accident. It wasn't done recklessly. They set out to do exactly what they did, and they did it. They accomplished it.

"There was known premeditation. Well, what does that mean? Does it have to be drawn out in a contract? Does it have to be agreed to weeks earlier? Does it have to be planned out? No. It just has to be something more than instantaneous. In this particular case, we know it took time, because they had to leave the neighborhood, drive down to 37th, chase them down as someone is sitting up over the roof of the car firing off rounds. That's thought about beforehand. That's not just incidental. Oh, there they go. Bam. That's different. That's not what happened. This is premeditated murder, ladies and gentlemen."

We recently explained that "what distinguishes premeditation from intent is both a temporal element (time) and a cognitive element (consideration). It is 'thought' that happens 'beforehand.'" *State v. Stanley*, 312 Kan. 557, 573, 478 P.3d 324 (2020). More specifically:

"**Premed**itation, then, adheres in the conditions present when intent was formed. If intent is the mental condition of purpose, aim, and objective, then premeditation exists when that mental condition arises before the act takes place and is accompanied by reflection, some form of cognitive review (i.e., 'thinking over'), deliberation, conscious pondering. That is, premeditation is a cognitive process which occurs at a moment temporally distinct from the subsequent act." *Stanley*, 312 Kan. at 572.

Z.M. cites *Stanley* for the proposition "that what distinguishe[s] premeditation from intent was *more* than mere timing." *Stanley*, 312 Kan. at 570. From this, we understand his argument to be the prosecutor misstated the law because the prosecutor did not also inform the jury that premeditation requires "a period, however brief, of thoughtful, conscious reflection and pondering" before the killing allowing the actor to change their mind. 312 Kan. at 574.

But the prosecutor's comments, again read in context, appropriately explain both the temporal and cognitive elements of premeditation. First, regarding the temporal element, the prosecutor suggested that Z.M., D.W., and L.J. had time to drive and chase down the vehicle driven by J.M., meaning the shooting was not "just incidental" or instantaneous. This is an accurate statement of the law. In fact, we have found error many times when a prosecutor suggested "that premeditation can be instantaneous with the homicidal act." *State v. Kettler*, 299 Kan. 448, 476, 325 P.3d 1075 (2014); *State v. Williams*, 299 Kan. 509, 544-45, 324 P.3d 1078 (2014) (collecting cases).

Next, the prosecutor referenced the cognitive element by stating the shooting was "thought about beforehand." And the prosecutor, when discussing the killing, observed "[t]hey set out to do exactly what they did, and they did it. They accomplished it." The "set out to do what they did" language suggests a design to kill J.M. These are proper statements of the law and demonstrate the prosecutor's comments referenced the "thoughtful conscious reflection and pondering" requirement of premeditation as outlined in *Stanley*. See also *State v. Brownlee*, 302 Kan. 491, 515, 354 P.3d 525 (2015) ("'Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act.'") (quoting *State v. Jones*, 298 Kan. 324, 336, 311 P.3d 1125 [2013]).

We conclude the prosecutor's statements led the jury to accurately understand premeditation occurs more than instantaneously and involves some type of "cognitive review" or "'thinking over'" before the killing. *Stanley*, 312 Kan. at 572. Again, we see no error.

Third Asserted Error—First-degree Murder

Z.M. also asserts the prosecutor misstated the law on first-degree murder. In closing argument, the prosecutor explained:

> "A second count of first-degree murder is also charged. We call it felony murder. So you think, well, how can anyone be charged with two murders for one murder, one homicide? There are two alternative charges. So you look at the first-degree premeditated. I'm already seeing I'm getting looks on your faces of confusion. I understand. The first one, you go through the elements. If you believe, based on the evidence that was presented, that the State has met its burden on each of those elements, you find him guilty of first-degree premeditated murder.
>
> "Then you turn the page, and you get to felony murder. Those have their own elements again, and you go through those elements. And in that particular case, it requires the intentional death. Let me just look at that real quick—that the defendant, or another killed [J.M.], that the killing was done while the defendant, or another was committing the crime of criminal discharge of a firearm. Well, that evidence is not even in dispute, right? Either [D.W.] or [L.J.] was firing off rounds on the 7.62 into that occupied vehicle. And as a result of that, [J.M.] was killed. And again, under aiding and abetting, [Z.M.] is criminally responsible as the other two are. So as you go through those elements, you would find the defendant guilty of murder in the first-degree under felony murder as well. So two murders for one homicide. Well, what happens at that point is by operation of law. That doesn't involve you. It will involve the Judge. The Court will only be able to accept or sentence the defendant as to one of the two. You decide whether they were both there. If they were, you find him guilty. But I want to assure you, you don't get sentenced for two murders for one homicide."

Z.M. argues these comments erroneously characterized felony murder as a lesser included offense of premeditated murder. He is correct that felony murder and premeditated murder are alternative ways to commit first-degree murder, and thus it would be erroneous to describe felony murder as a lesser included offense. See *State v. Stewart*, 306 Kan. 237, 247, 393 P.3d 1031 (2017); K.S.A. 21-5402(d).

But the prosecutor did not describe felony murder and premeditated murder as separate crimes, nor did the prosecutor use

the term "lesser included" during this discussion. We do not discern any comments that would mislead the jury about the hierarchy of the charged crimes. Again, the prosecutor did not err. We do not consider whether the alleged errors were harmless because we do not find any misstatements of the law.

IV. *Z.M. did not receive the correct jury instructions, but this did not rise to the level of clear error.*

Z.M. argues the court failed to provide the appropriate jury instructions on aiding and abetting liability, first-degree murder, and its lesser included offense.

Standard of Review and Preservation

"The multi-step process for reviewing instructional errors is well-known: First, the court decides whether the issue was properly preserved below. Second, the court considers whether the instruction was legally and factually appropriate. Third, upon a finding of error, the court determines whether that error is reversible. Whether the instructional error was preserved will affect the reversibility inquiry in the third step of this analysis. [Citations omitted.]" *State v. Couch*, 317 Kan. 566, 589, 533 P.3d 630 (2023).

Because Z.M. did not object to the jury instructions at trial, the issue is not preserved and therefore our reversibility inquiry evaluates whether the instructions constitute clear error. *Couch*, 317 Kan. at 590. We do not conclude there was clear error unless we are "firmly convinced that the jury would have reached a different verdict had any instructional error not occurred." 317 Kan. at 590.

We have unlimited review over the legal appropriateness of a jury instruction. *State v. Wimbley*, 313 Kan. 1029, 1034, 493 P.3d 951 (2021). "To be legally appropriate, the instruction must fairly and accurately state the applicable law." 313 Kan. at 1034. A jury instruction is factually appropriate when "sufficient evidence, viewed in the light most favorable to the requesting party, supports the instruction." 313 Kan. at 1033. We review "jury instructions as a whole and do not isolate any one instruction." *State v. Craig*, 311 Kan. 456, 461, 462 P.3d 173 (2020). "If the jury instructions properly and fairly stated the law and were not reasonably likely to mislead the jury, then no error exists for this court to correct." *State v. Coleman*, 318 Kan. 296, 313, 543 P.3d 61 (2024). See

State v. Hilyard, 316 Kan. 326, 334, 515 P.3d 267 (2022). In other words, "it is immaterial if another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been *more* clear or *more* thorough than the one given." 316 Kan. at 334.

The aiding and abetting instruction was appropriate.

Z.M. argues the court should have provided a shared-intent instruction for aiding and abetting. He asserts the court should have instructed the jury that he could only be found guilty of premeditated murder under an aiding and abetting theory if the jury found that he shared the principal's specific intent of premeditation. He contends the phrase "mental culpability," which is found in his aiding and abetting instruction, insufficiently explains the shared intent requirement. Accordingly, he argues the aiding and abetting instruction provided was not legally appropriate. Both parties agree the instruction was factually appropriate.

As noted above, our current aiding and abetting statute provides: "A person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime." K.S.A. 21-5210(a).

Z.M.'s aiding and abetting instruction provided:

"A person is criminally responsible for a crime if the person, either before or during its commission, and with the mental culpability required to commit the crime intentionally aids another to commit the crime, or advises, counsels, procures, the other person to commit the crime.

"All participants in a crime are equally responsible without regard to the extent of their participation. However, mere association with another person who actually commits the crime or mere presence in the vicinity of the crime is insufficient to make a person criminally responsible for the crime."

Z.M. contends the phrase "mental culpability" in his jury instruction is unclear and would mislead the jurors about whether the State had to prove Z.M. had premeditation to kill J.M. He characterizes "mental culpability" as a term of art and suggests a nonattorney would not have understood its meaning. Because of this,

he asserts a juror would not have understood the aiding and abetting instruction was referencing the premeditation requirement found in the premeditated first-degree murder instruction. And he correctly points out that the term "mental culpability" is not defined or explained in any of the other jury instructions.

It is an issue of first impression as to whether the phrase "mental culpability" in K.S.A. 21-5210(a) is unclear and should be defined or otherwise explained in jury instructions. In *State v. Robinson*, 261 Kan. 865, 877, 934 P.2d 38 (1997), we observed "[a] jury is expected to decipher many difficult phrases without receiving specific definitions, such as the term 'reasonable doubt.'" We later explained:

"In assessing whether definition of instructional terms is legally appropriate, we have held that 'a trial court "need not define every word or phrase in the instructions. It is only when the instructions as a whole would mislead the jury, or cause them to speculate, that additional terms should be defined." We further stated that "[a] term which is widely used and which is readily comprehensible need not have a defining instruction." [Citations omitted.]'" *State v. Robinson*, 303 Kan. 11, 275-76, 363 P.3d 875 (2015).

Here, we conclude Z.M.'s aiding and abetting instruction was legally appropriate for several reasons. First, the aiding and abetting jury instruction echoed the aiding and abetting statute. See *Hillard*, 315 Kan. at 776 ("Generally, jury instructions patterned after statutes are legally proper.").

Second, the meaning of the phrase "mental culpability" is readily comprehensible. Merriam-Webster's dictionary defines "mental" as "of or relating to the mind." Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/mental. It also defines "culpability" as "responsibility for wrongdoing or failure: the quality or state of being culpable." Merriam-Webster Online Dictionary, *available at* https://www.merriam-webster.com/dictionary/culpability. Taken together, the common dictionary understanding of "mental culpability" may be broadly defined as "responsibility for wrongdoing that occurs in the mind," and this common understanding tracks the use of the phrase in our aiding and abetting statute. See *State v. Bartlett*, 308 Kan. 78, 88, 418 P.3d 1253 (2018) (the district court did not err by failing to give a definition of "intentionally" because the term's legal definition was "essentially the same as the common meaning of the

word"). We simply do not believe the phrase "mental culpability" is too inscrutable or too arcane for a person "of common intelligence and understanding" to comprehend. *State v. Norris*, 226 Kan. 90, 95, 595 P.2d 1110 (1979); see also *State v. Bolze-Sann*, 302 Kan. 198, 210-11, 352 P.3d 511 (2015) ("imminence" did not need to be defined in jury instruction because the term is "widely used and readily comprehensible"). Moreover, Z.M. does not direct us to any authority suggesting the phrase requires a definition.

Third, Z.M.'s instructions included three defined mental states. Instruction 10, the premeditated murder instruction, defined "premeditation" as follows:

"'Premeditation' means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life."

Instruction 10 also included the following definition of "intentionally": "A defendant acts intentionally when it is the defendant's desire or conscious objective to do the act complained about by the State, or cause the result complained about by the State."

Instruction 13, the instruction outlining the elements of felony murder, defined "recklessly" as follows:

"A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that certain circumstances exist or a result of the defendant's actions will follow. This act by the defendant disregarding the risk must be a gross deviation from the standard of care a reasonable person would use in the same situation."

Since the jurors were instructed on several types of mental states, each with their own definitions, we believe that a juror, when reading the instructions as whole, would understand that the phrase "mental culpability" in the aiding and abetting instruction referred to those defined mental states. Because of this, the aiding and abetting instruction's phrase "with the mental culpability required to commit the crime" would direct jurors to consider whether Z.M. shared the mental state as outlined in the elements of premeditated murder. That is, jurors would understand that to convict Z.M. of aiding and abetting a premeditated murder, the

jury must find Z.M. shared the principal's specific intent of premeditation, which was defined in the premeditated murder jury instruction.

The aiding and abetting instruction's phrase "with the mental culpability required to commit the crime" contained what Z.M. characterizes as the concept of shared intent. The jury instructions were legally appropriate.

First-degree murder and second-degree murder instructions were not clearly erroneous.

Z.M. next argues the court failed to provide the appropriate jury instructions regarding first-degree murder and its lesser included offense. The jury was provided 16 instructions. Instruction 9 is described above and outlined aiding and abetting liability. Instruction 10 was the premeditated murder instruction. Instruction 11 explained that second-degree murder is a lesser included offense of premeditated murder in the first-degree. Instruction 12 outlined the elements of second-degree murder. Instruction 13 was the felony murder instruction. Instruction 14 provided the elements for criminal discharge of a firearm at an occupied vehicle. Instruction 15 provided:

"Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding juror."

Among other things, Instruction 16 explained the jurors' agreement upon a verdict must be unanimous.

On appeal, Z.M. argues that he should have received instructions and verdict forms modeled after the following pattern jury instructions: PIK Crim. 4th 54.130, 68.190, and 68.200. Z.M.'s Instruction 10, which was modeled on PIK Crim. 4th 54.110, outlined the **premeditated** murder elements as well as the definitions of premeditation and "intentionally." Instruction 13, modeled on PIK Crim. 4th 54.120, set out the elements of felony murder and defined "recklessly."

Z.M. argues that, along with Instructions 10 and 13, the court should have provided the jury with an instruction based on PIK

Crim. 4th 54.130, which informs the jury that when a defendant is charged with one first-degree murder offense, and the State has presented evidence on theories of both premeditated murder and felony murder, the jury "must consider both theories in arriving at" the verdict. PIK Crim. 4th 54.130.

The Notes on Use for PIK Crim. 4th 54.130 provide: "Where the information and evidence include both felony murder and premeditated murder, this instruction must be given in addition to PIK 4th 54.110, Murder in the First-degree, and PIK 4th 54.120, Murder in the First-degree—Felony Murder." The court suggested the inclusion of this instruction at the jury instruction conference, but the State did not want to do so.

Z.M. also asserts several other errors, all which flow from the court's failure to provide the "alternative theories" instruction. He first challenges his multiple count verdict instruction. Z.M.'s Instruction 15 followed the multiple counts verdict instruction from PIK Crim. 4th 68.060, which provided:

"Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror."

Z.M.'s jury received three verdict forms. Z.M.'s premeditated first-degree murder verdict form provided the jury three options: Z.M. was guilty of first-degree premeditated murder, Z.M. was guilty of the lesser included offense of second-degree murder, or Z.M. was not guilty. His felony murder and criminal discharge of a firearm at an occupied vehicle resulting in great bodily harm verdict forms each provided two options: guilty or not guilty.

Z.M. asserts that instead the jury should have been instructed using the verdict instruction and verdict form found in PIK Crim. 4th 68.190 (Murder in the First-degree, Premeditated Murder, and Felony Murder in the Alternative Verdict Instruction) and 68.200 (Murder in the First-degree, Premeditated Murder, and Felony Murder in the Alternative Verdict Form), respectively.

The verdict instruction in PIK Crim. 4th 68.190 walks a jury through its deliberations when there are alternative theories for one first-degree murder. The instruction explains the jury "may

find the defendant guilty of murder in the first-degree; or murder in the second degree; or voluntary manslaughter; or involuntary manslaughter; or not guilty." Further, the instruction directs the jury to *first* consider whether the defendant is guilty of first-degree murder. Next, if the jury does not find the defendant guilty of first-degree murder, then the jury should consider the lesser included offense of second-degree murder. The instructions continue this pattern as the jury works through the various homicide crimes in descending order of severity. See *State v. Bernhardt*, 304 Kan. 460, 473, 372 P.3d 1161 (2016) ("We have recognized five degrees of homicide, in descending order: capital murder, first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter.").

And PIK Crim. 4th 68.200, Z.M.'s preferred verdict form, provides three options for the first-degree murder determination in a single jury form. It requires the jurors to first note whether the jury unanimously found the defendant guilty of first-degree murder. If so, the verdict form then asks the jury to identify whether (1) the jury was unanimous as to the defendant's guilt on the theory of premeditated murder; (2) the jury was unanimous as to the defendant's guilt on the theory of felony murder; or (3) the jury was unanimous as to the defendant's guilt "on the combined theories of premeditated murder and felony murder." PIK Crim. 4th 68.200. The verdict form then includes options to find the defendant guilty of other homicide crimes in descending order, as well as an option to find the defendant not guilty.

The Notes on Use of PIK Crim. 4th 68.190 explain it should be given when, as here, the defendant is charged with alternative theories of first-degree murder. And the Notes on Use of PIK Crim. 4th 68.200 explain it should be given along with PIK Crim. 4th 68.190. The Notes on Use of PIK Crim. 4th 68.190 explain that it should not be used simultaneously with PIK Crim. 4th 68.060, which was the template for Z.M.'s multiple counts verdict instruction.

Finally, Z.M. asserts the court erred in its instruction on the lesser included offense of second-degree murder. Z.M.'s instruction, Instruction 11, was modeled on PIK Crim. 4th 68.080. It provided:

"The offense of premeditated murder in the first-degree as charged in Count 1 with which the defendant is charged includes the lesser offense of murder in the second degree.

"You may find the defendant guilty of murder in the first-degree, murder in the second degree, or not guilty.

"When there is a reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only, provided the lesser offense has been proven beyond a reasonable doubt.

"Your Presiding Juror should mark the appropriate verdict."

But PIK Crim. 4th 68.080's Notes on Use explain: "This instruction should not be used when the crime is first-degree murder under the alternative theories of premeditated murder and felony murder. Instead, use PIK 4[th] 68.190 and 68.200[]."

Accordingly, Z.M.'s overall contention is the court committed clear error by failing to provide the alternative theories instruction, and this failure cascaded into other associated failures in his jury instructions and verdict forms.

Z.M. directs us to *State v. Dominguez*, 299 Kan. 567, 328 P.3d 1094 (2014). The State charged Dominguez with premeditated first-degree murder or, in the alternative, felony murder; attempted first-degree murder; and discharge of a firearm at an occupied building. The jury convicted Dominguez of premeditated first-degree murder, aggravated battery (a lesser included offense of attempted first-degree murder), and discharge of a firearm at an occupied building.

On appeal, Dominguez argued the trial court failed to give an instruction and verdict form "designed for trials in which the State presents alternative theories of first-degree murder to the jury." *Dominguez*, 299 Kan. at 575. We explained we needed to determine "whether the trial court's instructions adequately covered the essential information contained in those alternative theory pattern instructions—that is, whether the instructions that were given were legally appropriate." 299 Kan. at 576.

Our task is identical here. We conclude Z.M.'s actual instructions were not legally appropriate because the instructions given provided an incomplete and inaccurate picture of the law. See *Dominguez*, 299 Kan. at 576 (quoting *State v. Tully*, 293 Kan. 176, 197, 262 P.3d 314 [2011]) ("This court has explained the wisdom

of using the PIK instructions, stating: 'When a district court ventures from the standard language of a pattern instruction, the court runs the risk of . . . omitting words that are essential to a clear statement of law.'").

First, by failing to provide PIK Crim. 4th 54.130 along with the elements instructions of premeditated and felony murder, the jury was not informed that premeditated murder and felony murder were *alternative theories* for the single crime of first-degree murder. See *Dominguez*, 299 Kan. at 578 ("The jury instructions that were given to the jury did not explain that first-degree murder has two alternative theories or that felony murder must be considered in reaching a verdict on the charge of first-degree murder."); *State v. Sullivan*, 224 Kan. 110, 112, 578 P.2d 1108 (1978) ("When an information charges the defendant with premeditated murder and felony murder for the commission of a single homicide the state may introduce evidence on both theories at the trial, but the trial court should instruct the jury on both theories in the alternative in order to avoid double convictions or sentences."), *disapproved of on other grounds by State v. Berry*, 292 Kan. 493, 254 P.3d 1276 (2011).

And since PIK Crim. 4th 68.190 should have been given to direct the jury on how to properly sequence its consideration of the various homicide charges, Instruction 11 was legally inappropriate because Instruction 11 omits jury consideration of first-degree felony murder after rejecting first-degree premeditated murder but before considering the lesser crime of second-degree murder. Mitigating the situation found in the *Dominguez* instructions, however, Z.M.'s Instruction 13 does identify felony murder as first-degree murder, lessening the risk that Z.M.'s jury wrongly inferred felony murder was a crime lesser than first-degree premeditated murder.

Second, and relatedly, by failing to provide the verdict instruction in PIK Crim. 4th 68.190 and the verdict form in PIK Crim. 4th 68.200, the jury was not instructed that Z.M. could be convicted of first-degree murder if some jurors believed he was guilty of premeditated murder and the other jurors believed he was guilty of felony murder. See PIK Crim. 4th 68.200 ("Theory 1[c]

We, the jury, unable to agree under Theory 1[a] or 1[b], do unanimously find the defendant guilty of murder in the first-degree on the combined theories of premeditated murder and felony murder."). This "combined theory" possibility was excluded from Z.M.'s jury instructions and verdict forms, and Instruction 15 compounded this problem by telling jurors that "[e]ach crime charged against the defendant is a separate and distinct offense." See *Dominguez*, 299 Kan. at 584 (explaining language identical to Instruction 15 was "a misstatement of the law"). This language, combined with Instruction 16's directive that a verdict must be unanimous, suggested the jury had to be unanimous on each first-degree murder theory.

Because we find the district court failed to properly instruct the jury, our next inquiry is whether this failure rises to the level of clear error. In *Dominguez*, we noted his instructions did not make it clear the jury needed to consider *both* premeditated murder and felony murder before making a first-degree murder conclusion. Nor was felony murder described as a theory of first-degree murder. *Dominguez*, 299 Kan. at 580. The jury convicted Dominguez of premeditated murder but did not convict Dominguez of felony murder. This was concerning because "there was substantial evidence of the underlying felony, criminal discharge of a firearm at an occupied building." 299 Kan. at 584. We concluded the jury instructions, when considered along with the evidence and the verdict forms, suggested felony murder was a lesser included offense of premeditated murder, thereby directing the jury to only consider premeditated murder when evaluating first-degree murder. See 299 Kan. at 568 ("Consequently, we have no confidence the jury appropriately considered the alternative of felony murder, and we are firmly convinced the jury would have reached a different verdict if the instructional errors had not occurred.").

Here we do not have a concern like the one we had in *Dominguez*. The completed verdict forms reveal the jury unanimously found Z.M. guilty of first-degree murder under *both* theories: premeditated murder and felony murder. Even if Z.M. had received the jury instructions he requests on appeal, we are not firmly convinced the jury would have

reached a different verdict. The failure to provide these instructions does not warrant reversal.

Cumulative error did not deny Z.M. a fair trial.

Z.M.'s final argument is that cumulative error denied him a fair trial. "The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances." *Couch*, 317 Kan. at 597 (quoting *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 [2020]). As we explained in *State v. Waldschmidt*, 318 Kan. 633, Syl. ¶ 9, 546 P.3d 716 (2024), unpreserved instructional issues that are not clearly erroneous cannot be considered as a component of cumulative error. As we have found no other errors, we reject Z.M.'s argument that his convictions must be reversed for cumulative error.

CONCLUSION

We conclude:

(1) The district court did not abuse its discretion in denying Z.M.'s request for new counsel;

(2) trial counsel's performance at sentencing did not rise to the level of a *Cronic* violation;

(3) the prosecutor accurately stated the law;

(4a) the aiding and abetting jury instruction was not erroneous;

(4b) the jury instructions related to Z.M.'s murder convictions were not clear error; and

(5) cumulative error does not apply.

Affirmed.

* * *

ROSEN, J., concurring in part and dissenting in part: I concur in most of the majority's opinion. I write separately because I believe defense counsel abandoned Z.M. at a critical stage in his trial and would thus vacate Z.M.'s sentence and remand for resentencing.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant effective assistance of counsel throughout trial and sentencing. *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); see *Bell v.*

Cone, 535 U.S. 685, 697, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (evaluating whether counsel was ineffective during sentencing). To show counsel was ineffective in violation of the Sixth Amendment, a defendant usually must prove counsel was deficient and that the deficiency prejudiced their defense. *Bell*, 535 U.S. at 695. But in *Cronic*, the Supreme Court held a court should presume prejudice (1) when there is a "'complete denial of counsel' . . . at 'a critical stage'"; (2) when "'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'"; and (3) when "counsel is called upon to render assistance under circumstances where competent counsel very likely could not." *Bell*, 535 U.S. at 695-96 (quoting *Cronic*, 466 U.S. at 659-62). In these situations, the Court has explained, "counsel has entirely failed to function as the client's advocate," *Florida v. Nixon*, 543 U.S. 175, 177, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), and the performance is "so likely to prejudice the accused that the cost of litigating their effect . . . is unjustified." *Cronic*, 466 U.S. at 658.

Z.M. has argued that his counsel ceased to function as his advocate during sentencing and we should thus apply the *Cronic* presumption of prejudice, reverse his sentence, and remand for resentencing. I agree.

Z.M. was convicted of first-degree murder on a theory of aiding and abetting after he drove a car from which his juvenile passenger shot and killed a teenager riding in another vehicle. As a result, 17-year-old Z.M. was facing a mandatory sentence of life in prison with no possibility of parole for 50 years. K.S.A. 21-6620(c)(1)(A); K.S.A. 21-6623. There was only one course of action that allowed Z.M. a chance at life outside of prison before he was nearly 70 years old: filing a motion for a downward departure to the hard 25. See K.S.A. 21-6620(c)(2); *State v. Hopkins*, 317 Kan. 652, 660, 537 P.3d 845 (2023) ("defendant preserves denial of a departure sentence for our review by moving for a departure at the district court and offering evidence in support, giving the district court a fair opportunity to rule on the merits"). But defense counsel offered no motion for departure and proceeded directly to sentencing, where he spoke as an adversary to his client's interests. In doing so, defense counsel forfeited any chance for a lesser sentence, effectively abandoning his teenage client at a critical stage

of his trial. See *Hamilton v. State of Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (arraignment is a critical stage of trial because "what happens there may affect the whole trial" and, "available defenses may be as irretrievably lost, if not then and there asserted"); *State v. Hopkins*, 317 Kan. 652, 660, 537 P.3d 845 (2023) ("defendant preserves denial of a departure sentence for our review by moving for a departure at the district court and offering evidence in support"). I believe, under these circumstances, the *Cronic* error was complete upon this failure. See *Hamilton*, 368 U.S. at 55 (presuming prejudice when counsel denied at arraignment because this was only time defendant could have asserted certain defenses).

The majority rejects Z.M.'s challenge. It points out that defense counsel requested the court impose Z.M.'s 94-month sentence concurrent to the hard 50, so any failure in his representation cannot be a *Cronic*-style error. The majority cites the United States Supreme Court decision *Bell v. Cone* in support. In *Bell*, the defendant argued the Court should presume prejudice when counsel failed to produce mitigating evidence and waived a closing argument during sentencing. The Court disagreed. It held that counsel had not "failed to oppose the prosecution throughout the sentencing proceeding as a whole," but "at specific points." *Bell*, 535 U.S. at 697. The majority concludes that, like in *Bell*, the challenge here is to specific errors, so it cannot presume prejudice.

I do not consider this case to be like *Bell*. During sentencing in *Bell*, counsel drew the jury's attention to mitigating evidence and urged the jury to have mercy on his client. Defense counsel then cross-examined the prosecution's witnesses and successfully opposed the admission of prejudicial evidence. After the prosecution offered a "low-key" closing argument, defense counsel waived final argument, which prevented the prosecution's "extremely effective advocate from arguing in rebuttal." *Bell*, 535 U.S. at 692.

The circumstances in this case were very different. Counsel in *Bell* made some strategic choices that the defendant alleged were ineffective. In contrast, defense counsel here completely abandoned Z.M. at a singularly critical stage of his trial. This case might be similar to *Bell* if counsel had filed a downward departure

motion and offered no or little support in that motion. But counsel offered *nothing*. And I believe his colloquy at the sentencing hearing indicates that the decision to forgo that motion had nothing to do with strategy and was instead a product of defense counsel's apparent contempt for his own client. Before Z.M. was to be sentenced to life in prison, defense counsel told the court he "was "at a loss to in good faith present to the Court something positive that I can say about my client." He described Z.M. as being without "remorse, . . . repentance, . . . [and,] acceptance of his criminal action" or "acknowledgement of the life that in fact was taken" before reminding the court that Z.M. had written incriminating song lyrics about taking the victim's life. This astonishing statement, so blatantly adversarial to Z.M.'s interests, demonstrates just how completely Z.M. was denied effective assistance of counsel. His constitutionally guaranteed advocate did not simply abandon him; he turned on him.

Cronic advises that a court should presume prejudice when there is a "'complete denial of counsel' . . . 'at a critical stage.'" *Bell*, 535 U.S. at 695-96 (quoting *Cronic*, 466 U.S. at 659, 662). I believe that happened here when counsel ensured his client would not be outside of prison walls until he was nearing the age of 70. I would remand for resentencing.

No. 124,626

STATE OF KANSAS, *Appellee*, v. BRYAN CURTIS DANIELS JR., *Appellant*.

(554 P.3d 629)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Defendant's Admission to Criminal History in PSI Report—Supports Criminal History for Sentencing Purposes.* A defendant's admission to their criminal history as set forth in the presentence investigation report relieves the State from having to produce additional evidence to support criminal history for sentencing purposes, and the admission includes a prior crime's person/nonperson classification as set forth in the presentence investigation report.

2. SAME—*Two Stages of Criminal Case under K.S.A. 21-6814.* K.S.A. 21-6814 contemplates procedures at two stages of a criminal case: (1) the time before the sentencing judge establishes the defendant's criminal history for purposes of sentencing; and (2) any time after.

3. SAME—*Challenge to Previously Established Criminal History—Statute Requires Proof by Preponderance of the Evidence.* K.S.A. 21-6814(c) requires an offender seeking to challenge their previously established criminal history to prove their criminal history by a preponderance of the evidence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 6, 2023. Appeal from Sedgwick District Court; CHRISTOPHER M. MAGANA, judge. Oral argument held December 14, 2023. Opinion filed August 30, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Hope Faflick Reynolds, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Lance J. Gillett, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: In this criminal case, we consider whether a criminal defendant's previous conviction was misclassified for sentencing purposes. Bryan Curtis Daniels Jr. claims a Georgia conviction for burglary was misclassified by the district court as a person felony. A Court of Appeals panel affirmed the district court. We affirm.

FACTS AND PROCEDURAL BACKGROUND

District Court Proceedings

In March 2021, Bryan Curtis Daniels Jr. pled guilty to two counts of aggravated assault with a deadly weapon and one count of domestic battery. The court accepted the plea and ordered a presentence investigation (PSI) report. The PSI report indicated Daniels had a criminal history of "C." It listed his 11 previous convictions, including 2 felonies—one classified as person and one as nonperson. The person felony was a 2003 burglary conviction in Georgia under Ga. Code Ann. § 16-7-1. The PSI report did not include any information concerning the Georgia burglary conviction beyond the applicable Georgia statute and the conviction's classification as an adult person felony.

At sentencing, Daniels did not notify the court or the State of any errors on his criminal history worksheet. Further, he admitted his criminal history was correct. The court then sentenced Daniels accordingly. The sentencing hearing did not include information on the details of Daniels' 2003 Georgia burglary conviction.

Appellate Proceedings

On appeal, Daniels argued for the first time that he received an illegal sentence because the 2003 Georgia conviction should not have been scored as a person felony. *State v. Daniels*, No. 124,626, 2023 WL 119910, at *1 (Kan. App. 2023) (unpublished opinion). Since Daniels agreed to his criminal history at sentencing, the panel initially concluded he had the burden to prove on appeal the criminal history was incorrect. However, accepting without deciding Daniels' assertion that the criminal history may have been illegal based solely on an error of law, the panel looked further. Interpreting K.S.A. 21-6811(e)(3)(B), the panel held the district court had not committed an error of law and affirmed the court's conclusion that Daniels' Georgia felony conviction was properly classified in Kansas as a person felony.

The panel's opinion was issued on January 6, 2023. On May 5, 2023, we published *State v. Busch*, 317 Kan. 308, 528 P.3d 560 (2023). In *Busch*, this court interpreted K.S.A. 21-6811(e)(3)(B),

as it applied to other out-of-state convictions. After granting Daniels' petition for review, we ordered the parties to brief how *Busch* applied to his claims. Both parties filed supplemental briefs.

Jurisdiction is proper. See K.S.A 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (The Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review.).

ANALYSIS

Daniels argues that the Georgia burglary statute under which he was previously convicted contemplates the possibility that the building burgled is not a residence; thus, because the building may have been a nonresidence, his conviction must be classified as a nonperson crime as a matter of law for sentencing. Since the district court scored his burglary conviction as a person felony, Daniels claims he received an illegal sentence.

Daniels cannot show as a matter of law that his Georgia crime of conviction was a nonperson crime.

Daniels asserts his Georgia burglary conviction was misclassified as a person offense as a matter of law. (He does not contest the offense's classification as a felony, so the "felony" classification is not at issue.) Daniels recognizes that he admitted to the accuracy of the criminal history set forth in the PSI report, but argues the facts are irrelevant, and he cannot stipulate to or agree upon an illegal sentence. *State v. Lehman*, 308 Kan. 1089, 1093, 427 P.3d 840 (2018). Daniels asserts he "only challenges the legal significance of his Georgia burglary conviction—not its existence."

Whether a sentence is illegal presents a question of law, which allows this court unlimited review. *State v. Hayes*, 312 Kan. 865, 867, 481 P.3d 1205 (2021). The classification of a conviction for sentencing purposes as person or nonperson necessarily "involves interpretation of the revised Kansas Sentencing Guidelines Act (KSGA)." Like the legality of a sentence, statutory interpretation is a question of law over which we have unlimited review. *State v. Bryant*, 310 Kan. 920, 921, 453 P.3d 279 (2019).

Daniels asserts the Georgia statute must be interpreted *as a matter of law* to require a Kansas sentencing court to score his

Georgia conviction as nonperson, pursuant to K.S.A. 21-6811(e)(3)(B).

In pertinent part, K.S.A. 21-6811(e)(3) governs the classification of felonies as person or nonperson for criminal history purposes:

"(e)(3) The state of Kansas shall classify the crime as person or nonperson.

. . . .

(B) In designating a felony crime as person or nonperson, the felony crime shall be classified as follows:

(i) An out-of-state conviction or adjudication for the commission of a felony offense, . . . *shall be classified as a person felony if one or more of the following circumstances is present* as defined by the convicting jurisdiction in the *elements* of the out-of-state offense:

. . . .

(h) *entering or remaining within any residence, dwelling or habitation*.

. . . .

(iii) An out-of-state conviction or adjudication for the commission of a felony offense, . . . shall be classified as a nonperson felony if the *elements* of the offense do not require proof of any of the circumstances in subparagraph (B)(i) or (ii)." (Emphases added.)

We must first determine whether Daniels' Georgia conviction *must* be scored as a nonperson crime as a matter of law. K.S.A. 21-6811 initially requires the court to review the elements of the out-of-state crime to determine whether certain circumstances are present, and required to be proved, to obtain a conviction. We thus begin with the Georgia burglary statute's plain language. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022) (quoting *Johnson v. U.S. Food Service*, 312 Kan. 597, 600-01, 478 P.3d 776 [2021]). It provides, in relevant part:

"(a) A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof. . . ." Ga. Code Ann. § 16-7-1(a) (1980).

Under this statute, a person commits burglary in Georgia when, "without authority and with the intent to commit a felony or theft" they enter or remain: (1) within the dwelling house of another; *or* (2) within any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of

another; *or* (3) within any other building, railroad car, aircraft, or any room or any part thereof.

We must next consider whether these separate possibilities constitute three potential versions of the crime, or one version of the crime. As the State concedes,

> "[i]f the Georgia statute were indivisible, i.e. contained one set of elements defining burglary indivisibly, then [Daniels] might have a point because the Georgia burglary statute clearly listed locations that are not a 'dwelling' as required to be scored as a person felony under K.S.A. 2020 Supp. 21-6811(d)(1) and K.S.A. 2020 Supp. 21-5111(k)."

However, if the Georgia statute is divisible into *three* versions of the crime, and at least one contains a distinct element requiring a residence to be burgled, then Daniels' conviction could be scored as a person felony *if* it arose under that version of the crime. See K.S.A. 21-6811(e)(3)(B)(i)(h); *State v. Dickey*, 301 Kan. 1018, 1037-38, 350 P.3d 1054 (2015) (a "divisible statute . . . includes multiple, alternative versions of the crime and at least one of the versions matches the elements of the generic offense"; under the "modified categorical approach," a sentencing court can consider "a limited class of documents to determine 'which of a statute's alternative elements formed the basis of the defendant's prior conviction'"). So we look further to determine whether the Georgia statute contemplates one or more versions of the crime.

The Eleventh Circuit Court of Appeals has held that Ga. Code Ann. § 16-7-1 (2011)—which was identical in relevant part to the version governing Daniels' conviction—is divisible because it contains "multiple locational elements effectively creating several different crimes." *United States v. Gundy*, 842 F.3d 1156, 1166-68 (11th Cir. 2016). Without belaboring the point, we agree. Cf. *State v. Reynolds*, 319 Kan. 1, Syl. ¶ 2, 552 P.3d 1 (2024) (a nondwelling building and a dwelling describe alternative means for committing aggravated burglary in Kansas' statutory context); *State v. Daws*, 303 Kan. 785, 789, 368 P.3d 1074 (2016) (Kansas aggravated burglary statute creates alternative means of committing the crime with distinct elements.).

Daniels asserts that the Georgia crime of conviction must be nonperson because it does not require that the building burgled be a dwelling. But at least two of the three divisible crimes under the

applicable Georgia statute clearly *do* require the building burgled to be a dwelling. So Daniels' argument that his Georgia crime must be scored as a nonperson felony is *only* correct if the crime of conviction was the third distinct set of elements. Cf. *Smith v. State*, 281 Ga. App. 91, 93, 635 S.E.2d 385 (2006) ("As we have held, a burglary can be committed by entry into a building that is not a dwelling.").

Thus, Daniels' argument fails. He is incorrect that—as a matter of law—his Georgia conviction *must* be a nonperson felony. Because the statute is divisible, his Georgia conviction *might* be a nonperson felony, but it *might not* be a nonperson felony.

Given the existence of this dichotomy, we must consider who has the burden of proving which version of the Georgia statute Daniels violated—and whether they carried that burden. Daniels concedes the burden is his but claims the burden does not matter. Au contraire.

Daniels does not carry his burden to show the district court erred.

Before Daniels was sentenced for his current crimes of conviction, the district court ordered a PSI report from court services, as required by K.S.A. 21-6703. Among other things, this report contains the defendant's criminal record. K.S.A. 21-6703(b)(3). The PSI report plays an important role in the procedure used by a district court to determine a defendant's criminal history score and classification for purposes of sentencing. That procedure is described in K.S.A. 21-6814, which states:

> "(a) The offender's criminal history shall be admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing judge.
>
> "(b) Except to the extent disputed in accordance with subsection (c), the summary of the offender's criminal history prepared for the court by the state shall satisfy the state's burden of proof regarding an offender's criminal history.
>
> "(c) Upon receipt of the criminal history worksheet prepared for the court, the offender shall immediately notify the district attorney and the court with written notice of *any error* in the proposed criminal history worksheet. Such notice shall specify the exact nature of the alleged error. The state shall have the burden of proving the disputed portion of the offender's criminal history. The sentencing judge shall allow the state reasonable time to produce evidence to establish its burden of proof. If the offender later challenges such offender's criminal history,

which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of the evidence.

"(d) If an offender raises a challenge to the offender's criminal history for the first time on appeal, the offender shall have the burden of designating a record that shows prejudicial error. If the offender fails to provide such record, the appellate court shall dismiss the claim. In designating a record that shows prejudicial error, the offender may provide the appellate court with journal entries of the challenged criminal history that were not originally attached to the criminal history worksheet, and the state may provide the appellate court with journal entries establishing a lack of prejudicial error. The court may take judicial notice of such journal entries, complaints, plea agreements, jury instructions and verdict forms for Kansas convictions when determining whether prejudicial error exists. The court may remand the case if there is a reasonable question as to whether prejudicial error exists." (Emphasis added.)

This procedure governs our review of this case. Under this statute, the State has the burden to prove a defendant's criminal history at sentencing. *State v. Roberts*, 314 Kan. 316, 322, 498 P.3d 725 (2021). As part of this burden, the State must prove all facts necessary for the district court to make an accurate classification for all scoreable crimes. *Roberts*, 314 Kan. at 322.

K.S.A. 21-6814 contemplates procedures at two stages of a criminal case: (1) the time before the sentencing judge establishes the defendant's criminal history for purposes of sentencing; and (2) any time after. Subsection (a) sets forth *how* an offender's criminal history is determined for purposes of the defendant's sentence. In *State v. Corby*, 314 Kan. 794, 797, 502 P.3d 111 (2022), we explained that subsection (a) "describes two possible scenarios. In one, a defendant admits to criminal history. In the other, the court determines criminal history by the preponderance of the evidence."

And in *Corby* we clarified that an admission to criminal history includes both an admission to a conviction's existence *and* its classification for sentencing purposes. 314 Kan. at 798. Although in *Corby* that classification was to a felony classification, as opposed to a misdemeanor, the logic applies equally to a person classification, as opposed to a nonperson one.

In *Corby*, we reasoned that an admission to criminal history includes an admission to the crime's classification as felony or

misdemeanor because the Legislature has defined "criminal history" to include a former conviction's status as felony or misdemeanor. While the definition of criminal history does not similarly include the person or nonperson classification of a crime, the Legislature has elsewhere referred to "criminal history" as a conviction and its person or nonperson classification. See, e.g., K.S.A. 21-6810(d)(7) ("Unless otherwise provided by law, unclassified felonies and misdemeanors, shall be considered and scored as nonperson crimes for the purpose of determining criminal history."); K.S.A. 21-6811(d) (describing whether prior burglary convictions should be scored as person or nonperson "for criminal history purposes").

Furthermore, if "criminal history" did not include the person or nonperson classification of a former conviction, then it would be unclear who bears the burden of proving that classification. Kansas statutes provide only that the State must prove criminal history; it outlines no separate procedures for proving person or nonperson classification. See K.S.A. 21-6814. We will not interpret the statutes to create such silence. Their reference throughout the sentencing guidelines to "criminal history" as a conviction and *all* of its classifications tells us that when K.S.A. 21-6814(a) provides a defendant can admit to criminal history, it means a defendant can admit to prior convictions and their classification as a felony or misdemeanor and as a person or nonperson crime.

Next, subsection (b) informs the second scenario in subsection (a). Subsection (b) provides that a PSI report prepared by the State for the court is sufficient to satisfy the State's burden of proving the offender's criminal history to the sentencing judge by a preponderance of evidence, absent a dispute as outlined in subsection (c). When there is such dispute, subsection (c) provides the defendant with an opportunity to challenge the State's PSI report prior to the sentencing hearing, thereby negating the report's sufficiency to satisfy the State's burden of proof. However, the opportunity to challenge is procedurally specific and time sensitive. The defendant must "immediately" notify the court and the State "with written notice of any error" and must "specify the exact nature of the alleged error." Once these things occur, the evidentiary value of the PSI report disappears as to the specific error alleged,

and the State must otherwise satisfy its burden at sentencing to prove a defendant's criminal history by a preponderance of the evidence. See, e.g., *State v. Dickey*, 301 Kan. at 1038 (discussing the "limited class of documents" a court may consider in determining which version of a divisible statute applies). Finally, the court "establishes" the defendant's criminal history, either by admission or proof, and uses that established criminal history as a factor in sentencing the defendant.

Accordingly, the sentencing court's initial finding that Daniels' Georgia burglary conviction was a person crime was supported by substantial competent evidence because Daniels' admission satisfied the first scenario outlined in *Corby.* And Daniels made no effort to avail himself of the opportunity outlined in subsection (c) to challenge the PSI report itself.

This brings us to the second stage of a criminal proceeding discussed in K.S.A. 21-6814. The final sentence of subsection (c) provides that "[i]f the offender later challenges such offender's criminal history, which has been previously established, the burden of proof shall shift to the offender to prove such offender's criminal history by a preponderance of the evidence." Subsection (d), which was added by the Legislature in 2022, further outlines the procedures when a defendant challenges their criminal history for the first time on direct appeal.

Here, the State argues the appropriate burden of proof is found in subsection (c). We agree. Subsection (c) explains the offender bears the burden of proving their criminal history by a preponderance of the evidence when their criminal history has previously been established at a sentencing hearing, and Daniels' history was previously established by his admission to the criminal history set forth in the PSI report presented to the court for sentencing purposes. Cf. *State v. Obregon*, 309 Kan. 1267, 1275, 444 P.3d 331 (2019) (finding criminal history score erroneous as a matter of law when the criminal history score included an out-of-state divisible statute, the defendant *did not* admit to his criminal history score, and the PSI report did not identify which version of the statute the defendant was convicted under; however, the court also did not consider the burden of proof after defendant's criminal history had been established).

Daniels correctly points out that the State did not specifically designate the version of the crime for which he was convicted under the Georgia statute. But, at this postsentencing point in Daniels' case, the burden has shifted, and Daniels fails to meet it because he did not provide the district court, the Court of Appeals panel, or this court with any evidence, such as his Georgia journal entry, outlining the elements of his Georgia burglary conviction to prove his previously established criminal history was incorrect. As in *Corby*, the district court's classification for the pertinent conviction may have been wrong. But we also know it may have been right. Daniels fails to meet the burden outlined in K.S.A. 21-6814(c).

We pause to note that Daniels' case may also implicate K.S.A. 21-6814(d), but neither party briefed its applicability (although the State suggested it did not apply), and it was only briefly discussed at oral argument. We therefore take no position on subsection (d) because this case can be resolved under subsection (c).

In its brief, the State criticizes *Busch*, for giving the burden of proof analysis short shrift. But in *Busch* the State did not brief the burden of proof and we did not raise it sua sponte. Even if we had, the outcome would have been the same. Busch would have met his burden under subsection (c) by showing his out-of-state burglary convictions, which were not based on a statute with alternative means, were nonperson crimes as a matter of law pursuant to K.S.A. 21-6811(e)(3)(B)(i), (iii). Further, Busch would have failed to meet his burden of showing his criminal trespass conviction, under a statute with alternative means, was error because Busch did not object to the person classification prior to the court establishing his criminal history.

Regardless, although we did not need to take this step in *Busch*, today we clarify that a defendant's admission to their criminal history score includes the admission that the PSI correctly classified the individual crimes included in that criminal history—and that, in the case of divisible out-of-state statutes, the statutory definitions of any prior convictions classified as person felonies contained at least some of the elements required by K.S.A. 21-6811(e)(3)(B)(i) or (ii). And because Daniels so admitted at sen-

tencing—and then failed to provide the necessary evidence to refute that admission when he challenged his already established criminal history, as required by K.S.A. 21-6814(c)—his claim fails.

CONCLUSION

Here, at most Daniels has shown that the district court might have misclassified his Georgia conviction as a person crime. But the Legislature has stated clearly that Daniels has the burden to show error on appeal. Daniels has not shown that the district court erroneously classified his Georgia conviction; at most, he showed it *might* have. As this is insufficient to carry his burden, Daniels' claim fails.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

No. 125,141

STATE OF KANSAS, *Appellee*, v. WILLIAMS NUNEZ, *Appellant.*

(554 P.3d 656)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Application of* Apprendi v. New Jersey. Under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), a defendant's constitutional jury trial rights guaranteed by the Sixth Amendment to the United States Constitution are violated by judicial fact-finding (that is, facts found by a judge rather than a jury) which increases the penalty for a crime beyond what is authorized by the facts reflected in the jury's verdict. When a defendant has made a knowing and voluntary waiver of the jury trial right, admissions by the defendant may be relied upon as facts by a sentencing court.

2. SAME—*Defendant's Appeal Based on* Apprendi *Error—Appellate Review*. In evaluating whether an *Apprendi* error is harmless, a court reviews the evidence to determine whether a judicially found fact is supported beyond a reasonable doubt and was uncontested, such that the jury would have found the fact had it been asked to do so.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 22, 2023. Appeal from Lyon District Court; JEFFRY J. LARSON, judge. Oral argument held May 8, 2024. Opinion filed August 30, 2024. Judgment of the Court of Appeals affirming the district court is reversed on the issue subject to review. Judgment of the district court is vacated on the issue subject to review, and the case is remanded with directions.

Jacob Nowak, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Amy L. Aranda, assistant county attorney, argued the cause, and *Marc Goodman*, county attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Williams Nunez was charged with rape under K.S.A. 2020 Supp. 21-5503(a)(2) for knowingly engaging in sexual intercourse with a person who is unable to consent due to intoxication. Rape under this subsection is a severity level 1 person felony and a sexually violent crime. K.S.A. 21-5503(b)(1)(A); K.S.A. 22-3717(d)(5)(A). At trial, Nunez admitted to having sex with the victim, but claimed the victim was not so intoxicated that

she was unable to consent. *State v. Nunez*, No. 125,141, 2023 WL 6172190, at *1 (Kan. App. 2023) (unpublished opinion).

A jury convicted Nunez after a two-day trial. The district court sentenced Nunez to 155 months in prison with lifetime postrelease supervision under K.S.A. 22-3717(d)(1)(G)(i) (mandating lifetime postrelease supervision for sexually violent crimes when the offender was 18 years or older). Nunez appealed on multiple grounds, including a claim that when the district court sentenced him to lifetime postrelease supervision, his jury trial rights under *Apprendi* were violated because his age was not a fact found by the jury. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (facts which "increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

After considering all his appellate claims—including his *Apprendi* argument—the panel affirmed Nunez' conviction and sentence. 2023 WL 6172190, at *16. Nunez then petitioned this court for review. We granted Nunez' petition in part, granting review solely to determine whether Nunez' rights under *Apprendi* were violated when the district court failed to submit the question of his age to the jury before sentencing Nunez to lifetime postrelease supervision. The jury instructions do not include a finding of age, and Nunez never testified to or contested his age before the district court. Nunez alleges that the use of his age to enhance his sentence amounts to judicial fact-finding, and therefore violates the guarantee of *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Facts "admitted" by a defendant, however, may be relied upon by a sentencing court to increase the sentence. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*").

Thus, the question on appeal is whether Nunez' age was ever properly "admitted" such that the sentencing court could have re-

lied on that fact during sentencing without running afoul of *Apprendi*. The lower court found that Nunez had sufficiently "admitted" his age, reasoning that he had listed his age as 32 and his date of birth as 1988 on a financial affidavit for court-appointed counsel. The court also relied on the fact that Nunez filed a presentencing departure motion indicating that he was born in 1988 and that he did not object to the State's presentence investigation report stating Nunez was 32. Additionally, the State pointed out that Nunez clearly stated his age during his sentencing hearing. *Nunez*, 2023 WL 6172190, at *16. Based on this record, the panel concluded Nunez' jury trial rights as set forth in *Apprendi* had not been violated, and alternatively, that any *Apprendi* violation was harmless.

DISCUSSION

"'Whether a defendant's constitutional rights as described under *Apprendi* were violated by a district court at sentencing raises a question of law subject to unlimited review.'" *State v. Huey*, 306 Kan. 1005, 1009, 399 P.3d 211 (2017). To the extent that the resolution of Nunez' claims involves statutory interpretation, those questions present a question of law over which appellate courts likewise have unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022).

As mentioned above, *Apprendi* provides that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490; see also *State v. Gould*, 271 Kan. 394, 405-06, 23 P.3d 801 (2001) (same). And "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303; see also *State v. Bello*, 289 Kan. 191, 199, 211 P.3d 139 (2009) (same). Therefore, a defendant's constitutional jury trial rights guaranteed by the Sixth Amendment to the United States Constitution are violated by judicial fact-finding (that is, facts found by a judge rather than a jury) which increases the penalty for a crime beyond what is authorized by the facts reflected in the jury's verdict.

But what about facts admitted to by the defendant? Here we hold that before a sentencing court may rely on a defense admission to increase the defendant's sentence, that admission must have been preceded by a knowing and voluntary waiver of the defendant's jury trial right. This must be so given that *Apprendi* is all about preserving and protecting a defendant's jury trial right under the Sixth Amendment. If the jury trial right was not properly waived with respect to any defense admission, that admission may not be considered by a sentencing court without running afoul of *Apprendi*.

Many cases within our own state explicitly or implicitly follow this rule by relying on admissions following jury trial waivers, such as those found in guilty pleas. See *State v. Walker*, 275 Kan. 46, 51, 60 P.3d 937 (2003) ("A plea of guilty to a statutorily defined sexually violent crime provides the basis for an extended postrelease supervision period."); *State v. Case*, 289 Kan. 457, 467-68, 213 P.3d 429 (2009) (stipulation to a factual basis within an *Alford* plea did not constitute an admission under *Apprendi*); *State v. Allen*, 283 Kan. 372, 377, 153 P.3d 488 (2007) (a no contest plea in a prior case did not function as an admission and could not be used to increase the defendant's sentence); *State v. Entsminger*, No. 124,800, 2023 WL 2467058, at *6-8 (Kan. App. 2023) (unpublished opinion) (guilty plea included defendant's age); *State v. Walker*, No. 125,554, 2023 WL 7983816, at *3-5 (Kan. App. 2023) (unpublished opinion) (guilty plea included age); *State v. Cook*, No. 119,715, 2019 WL 3756188, at *2 (Kan. App. 2019) (unpublished opinion) (guilty plea included defendant's age). Other jurisdictions have come to similar conclusions. See *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1192 (9th Cir. 2014) ("We treat defendant admissions as analogous to jury findings beyond a reasonable doubt for *Apprendi* purposes only when those admissions are made with knowledge of the penal consequences that attend those admissions."); *State v. Dettman*, 719 N.W.2d 644, 652 (Minn. 2006) ("[A] defendant's admission of a fact supporting an upward sentencing departure [must] be accompanied by a knowing waiver of his right to a jury finding on that fact before the admission may be used to enhance his sentence.").

Here, there is no question that the jury found facts sufficient to convict Nunez of rape, resulting in his prison sentence of 155 months. But in this case, the defendant's age was not a necessary element of the charged crime and so the jury never considered or found Nunez' age. Postrelease supervision is undeniably a part of the defendant's sentence and is considered punitive. *State v. Mossman*, 294 Kan. 901, 907-08, 281 P.3d 153 (2012). Because postrelease supervision is considered part of the defendant's sentence, judicial fact-finding which increases a term of postrelease supervision beyond the "statutory maximum" implicates *Apprendi*. *State v. Anthony*, 273 Kan. 726, 728-29, 45 P.3d 852 (2002); *Case*, 289 Kan. at 458. We have stated that it is immaterial for *Apprendi* purposes whether the sentence elevating provision is contained within the sentencing statutes or within the elements of the crime itself. *Bello*, 289 Kan. at 199 ("[M]erely because a state legislature places a sentence enhancing factor within the sentencing provisions of the criminal code does not mean that the factor is not an essential element of the offense.").

Nunez received, as part of his sentence, lifetime postrelease supervision under K.S.A. 22-3717(d)(1)(G)(i). But for that subsection to apply, there must be a factual determination made that the defendant was 18 years or older at the time of the crime. No evidence of Nunez' age was presented during trial, and the jury did not make a finding regarding Nunez' age. *Nunez*, 2023 WL 6172190, at *14. So, the three questions on appeal are: (1) did Nunez admit his age after a knowing and voluntary jury trial waiver; (2) if not, was the *Apprendi* error harmless; and (3) if the error was not harmless, what is the appropriate remedy.

On this record, there is no plausible argument that Nunez waived his jury trial rights with respect to the question of his age. Nunez did not enter any plea agreement, he did not waive his jury trial rights, and he did not stipulate or state his age in open court. Nowhere in the transcripts from his jury trial does any person state or dispute Nunez' age, it is simply never mentioned. As such, it was error for the sentencing court to rely on Nunez' admissions to sentence him to lifetime postrelease supervision under K.S.A. 22-3717(d)(1)(G)(i).

We next must ask whether this error was harmless. An *Apprendi* error is harmless if the reviewing court is convinced beyond a reasonable doubt the jury verdict would have been the same absent the error with regard to the omitted element, and that the omitted element was also uncontested and supported by overwhelming evidence. *State v. Brown*, 298 Kan. 1040, 1049, 318 P.3d 1005 (2014) (errors are harmless if the record contains no evidence which "'could rationally lead to a contrary finding with respect to the element that the defendant was over the age of 18 at the time of the crime'" [quoting *State v. Reyna*, 290 Kan. 666, 682, 234 P.3d 761 (2010)]); see *State v. Carr*, 314 Kan. 615, Syl. ¶ 25, 502 P.3d 546 (2022).

During Nunez' trial, the jury was given no direct evidence of Nunez' age. Juries are permitted to make reasonable inferences from the evidence presented at trial. "'If an inference is a reasonable one, the jury has the right to make the inference.'" *State v. McBroom*, 299 Kan. 731, 754, 325 P.3d 1174 (2014). The trial record contains no evidence from which a jury could reasonably have drawn an inference that Nunez was 18 years of age or older at the time of the crime. Moreover, the State did not adequately brief the issue of harmlessness. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021) (issues not adequately briefed are deemed waived or abandoned). And so, after a review of the entire record, we are not convinced that the *Apprendi* error was harmless.

Given this, we must remand for resentencing. But one final question remains on remand. Nunez argues that he should be sentenced to 36 months' postrelease supervision under K.S.A. 22-3717(d)(1)(A), as that is the section which applies to severity level 1, person felonies. But by its plain language, K.S.A. 22-3717(d)(1)(A) is unavailable to set Nunez' postrelease supervision term because it excludes defendants convicted of "sexually violent crimes." Nunez was convicted of a "sexually violent crime" and such defendants receive their term of postrelease supervision under subsection (G). Subsection (G) further divides defendants convicted of sexually violent crimes into those who were 18 years of age or older at the time of the crime and those who were younger than 18 at the time of the crime.

We know Nunez cannot receive a lifetime postrelease supervision term under K.S.A. 22-3717(d)(1)(G)(i) because a jury did not determine that he was 18 years of age or older at the time of the crime. Which, by a process of elimination, leaves K.S.A. 22-3717(d)(1)(G)(ii)—mandating a 60-month term for defendants who were under the age of 18 at the time they committed a sexually violent crime—as the only available subsection in our statutes to set the term of Nunez' postrelease supervision.

Nunez, of course, suggests he also cannot be sentenced under K.S.A. 22-3717(d)(1)(G)(ii) because a jury has not found that he was younger than 18 at the time of the crime. But this ignores the fact that K.S.A. 22-3717(d)(1)(G)(ii) sets the prescribed statutory maximum term of postrelease supervision for anyone convicted of the crime Nunez was charged with. That is, a sexually violent crime governed by subsection (G) but one for which no age determination is required as an element of the crime. Because such a defendant must have had *some* age at the time of the crime, the statutory scheme fixes the term of postrelease supervision at 60 months absent a special jury finding (or a valid admission after a jury trial waiver) of the defendant's age. There is no *Apprendi* violation for such a sentence because there is no judicial fact-finding required.

We therefore reverse the Court of Appeals, vacate Nunez' term of postrelease supervision, and remand the case for resentencing under K.S.A. 22-3717(d)(1)(G)(ii).

Judgment of the Court of Appeals affirming the district court is reversed on the issue subject to review. Judgment of the district court is vacated on the issue subject to review, and the case is remanded with directions.

No. 125,573

STATE OF KANSAS, *Appellee*, v. LARRY D. HUGGINS III, *Appellant*.

(554 P.3d 661)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instruction Legally Inappropriate if Alternate Statutory Elements Not in Complaint.* A jury instruction is legally inappropriate if it adds alternate statutory elements not included in a charging document.

2. CRIMINAL LAW—*Charging Document—All Facts Alleged Not Required to Be Proved to Support Conviction.* There is no requirement that the State prove all facts alleged in a charging document to support a conviction for the charged crime.

3. CONSTITUTIONAL LAW—*Determination of Involuntary Statement—Requires Overreach by Government Actor*. Overreach by a government actor is a necessary predicate to a determination that a statement is not voluntary under the Fifth and Fourteenth Amendments.

4. SAME—*Involuntary Statements by Defendant—Link Required between Government Overreach and Resulting Statements.* There must be a link between government overreach and the resulting statements that a defendant makes to law enforcement to render such statements involuntary under the Fifth and Fourteenth Amendments.

5. TRIAL—*Objection at Trial—Required to Be Sufficiently Specific.* An objection made at trial must be sufficiently specific to give the trial court a reasonable understanding of the basis of the objection.

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Oral argument held May 8, 2024. Opinion filed August 30, 2024. Affirmed in part, vacated in part, and remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Kris W. Kobach* attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Larry D. Huggins III appeals from his convictions of felony murder, attempted aggravated robbery, aggravated burglary, and conspiracy to commit aggravated robbery. Finding no

errors in his trial, we affirm the convictions, but we vacate the imposition of fees and remand the case for reconsideration of the fees.

FACTUAL AND PROCEDURAL BACKGROUND

A series of unfortunate events beginning on November 11, 2019, resulted in the deaths of two young men the following day. At that time, 15-year-old O.H. lived in a house on Southeast Maryland Avenue in Topeka. O.H. sometimes sold marijuana, and his friend Z.M. occasionally helped him with that enterprise. O.H. generally carried a 9-millimeter semiautomatic gun in a holster on his waist.

Fourteen-year-old J.B. was an acquaintance of O.H. Beginning on November 11, J.B. initiated a series of electronic messages with Larry Huggins, responding to a video J.B. saw posted on Huggins' Facebook account. In the course of these messages, J.B. suggested that O.H. would be a good target for a robbery. These messages initially took place through Facebook, and then the two began texting each other.

J.B. told Huggins that O.H. had firearms, marijuana, and money. J.B. also sent a picture of Z.M. holding a handgun and an assault rifle. The two agreed that J.B. could pretend to buy marijuana and Huggins would then steal any drugs, money, or guns he could find. J.B. would pretend to be a victim as well and later meet up with Huggins to divide up the stolen property. They contemplated committing the robbery that evening, but the plan did not materialize because they could not procure a car.

The two resumed their electronic dialogue the next morning. When J.B. told Huggins to let him know what was going on, Huggins replied: "Let's do that." They continued discussing their strategy for carrying out the robbery. J.B. was to meet Huggins outside when Huggins showed up with a car.

Early that afternoon, Reginald McKinney drove to pick up a longtime friend at the bus station. When McKinney arrived, two other youths were in the car with him: D.P. and Huggins. The friend noticed that Huggins was holding a semiautomatic handgun on his lap. McKinney dropped the friend off, and McKinney, D.P.,

and Huggins proceeded to pick up J.B. The four then drove to O.H.'s house.

That afternoon, O.H. picked Z.M. up from school, and the two eventually arrived at O.H.'s house, where they played video games in his bedroom. A while later, J.B. showed up and asked for a ride home. O.H. repeatedly told J.B. no. J.B. remained in O.H.'s house, and he told O.H. there were people in the front yard. J.B. said he knew the people and would go out to talk with them. As he started to leave the house, he was holding O.H.'s handgun, but O.H. told him to give it back before he went outside.

After talking with the people outside, J.B. returned to the house and said they wanted to use a phone. Both O.H. and Z.M. said no, and J.B. went back outside and spoke briefly again with the people gathered there.

Shortly after J.B. came back in the house, the three people came up to the door and knocked. O.H. opened the door slightly, and the people pushed in the door and rushed in the house. At least one of the intruders was holding a firearm.

J.B. and D.P. went into O.H.'s bedroom, where Z.M. was standing. D.P. asked Z.M. where "the big gun" was, and Z.M. told him it was behind the door. As D.P. went to take the gun, Z.M. heard O.H. yelling, "No, please, please." Then O.H., who was in the living room, began to fire shots.

Huggins turned and ran from the house, sustaining a bullet wound to his leg as he ran. McKinney also ran from the house, but he fell down outside the door. As he lay on the porch, he fired up towards O.H., who was shooting down at him. A mortally wounded McKinney made his way across the yard before collapsing on the ground.

When the shooting began, D.P. and J.B. hid in a closet in the bedroom. After the shooting stopped, D.P. ran out of the house, and J.B. walked out behind him, taking one of the guns with him. He walked over to where McKinney was lying in the yard and stayed with him until the police arrived and determined McKinney was deceased.

When the shooting stopped, Z.M. came out of the bedroom. O.H. walked toward him, leaned against a wall, and asked if he was okay. O.H. then slid down to the floor and did not move again.

He died from two gunshot wounds, one to the chest and one to the groin area. Z.M. called the police.

Meanwhile, Huggins sent a text to a woman with whom he was involved, telling her he was "hit." He later asked her to pick him up. She drove him to the home of his stepmother, who gave him some pain medication she had on hand from a recent surgery, and the three then drove to a hospital. Police officers arrived at the hospital, and the woman consented to a search of her car. Police found and confiscated Huggins' cell phone.

When Huggins was released from the hospital that evening in a wheelchair, the police took him into custody. After about a four-hour wait at the police headquarters, they interviewed him. He denied any involvement in the shooting at O.H.'s house, claiming that he had received his bullet wound in a driveby shooting somewhere else in town. The police released him, but they conducted a second interview with him two days later, and he continued to contend he had nothing to do with events leading to McKinney's and O.H.'s deaths.

Police later obtained a search warrant for Huggins' Facebook account, and Facebook supplied information that included messages sent and received on that account. Police also obtained text messages recovered from Huggins' phone.

At trial, Huggins testified on his own behalf. He told the jury much the same sequence of events that other witnesses recounted, but, in his version, by the time the youths picked up J.B. on the day of the shootings, Huggins had decided not to rob O.H. and instead intended to simply buy some marijuana from him.

Huggins dissociated himself from any criminal intent at the time of the shootings. He said he did not tell D.P. or McKinney about the robbery plan he had formulated with J.B. He testified he never went into O.H.'s house because he got shot when he reached the threshold. He did not remember going to the hospital, and he told the jury he made up a story at his interview because an inmate had once told him he should always provide an alibi defense. He denied owning a gun, but he admitted on cross-examination that he tried to sell a gun for $260 on Facebook after the shootings.

The jury found Huggins guilty on all four counts: first-degree felony murder; attempted aggravated robbery; aggravated burglary; and conspiracy to commit aggravated robbery. He was sentenced to a hard 25 life sentence for the murder conviction. He received a consecutive sentence of 32 months for attempted aggravated robbery, another consecutive sentence of 71 months for aggravated burglary, and a concurrent sentence of 32 months for conspiracy to commit aggravated robbery, for a controlling term of a minimum 25 years plus 103 months. He was also ordered to pay $2500 as BIDS attorney fees.

On appeal, Huggins asserts errors in both the conduct of his trial and the imposition of fees.

ANALYSIS

Section 5: Right to Jury Trial

The State charged Huggins with attempted aggravated robbery of "O.M.H. . . . and Z.M." The corresponding jury instruction differed because it omitted Z.M. as a victim. On appeal, Huggins argues the instruction's failure to include both victims alleged in the charging document deprived him of his right to jury trial as guaranteed by section 5 of the Kansas Constitution Bill of Rights. He urges this court to hold that a violation of the jury trial right under section 5 is a structural error and reverse his convictions.

Huggins presents this argument for the first time on appeal. He argues this court may review it because it involves only a question of law arising on admitted facts and is finally determinative of the case; and consideration of the theory is necessary to prevent the denial of a fundamental right.

We decline to utilize either preservation exception, even if they are applicable. Because Huggins presents a novel and consequential issue, argument to and analysis from the district court would have been helpful. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (declining to apply exception because failure to present issue below "deprived the trial judge of the opportunity to address the issue in the context of this case and such an analysis would have benefitted our review"). Like in *Gray*, we decline to review Huggins' unpreserved issue.

Alleged Instructional Error

Huggins next argues that regardless of whether the mismatch between the charging document and the attempted aggravated robbery instruction violated section 5 of the Kansas Constitution, the mismatch rendered the jury instructions for all four charges clearly erroneous.

This court reviews alleged instructional errors in multiple steps. It first considers "jurisdiction and whether the issue is preserved." *State v. Martinez*, 317 Kan. 151, 162, 527 P.3d 531 (2023). It then analyzes whether the instruction was "both legally and factually appropriate." 317 Kan. at 162. In the last step, it "review[s] any error for harmlessness, using different standards depending on whether the claim has been preserved. If a defendant failed to object to the instruction at trial, [it] reverse[s] only for clear error." 317 Kan. at 162. In that case, "the defendant has the burden to firmly convince [the court] that the jury would have reached a different verdict if the instructional error had not occurred." 317 Kan. at 162. Because Huggins did not object to the jury instructions below, review is for clear error.

Huggins argues the jury instruction for attempted aggravated robbery was legally erroneous because it did not include Z.M. as a victim. He argues the instructions for felony murder, aggravated burglary, and conspiracy to commit aggravated robbery were legally erroneous because they referred to the erroneous attempted aggravated robbery instruction in describing the elements of aggravated robbery. He argues that "all the instructions are missing, either in the instruction itself or by incorporation, the essential element of Huggins or his friends intending (and agreeing for conspiracy) to rob O.H. *and* Z.M., not just O.H."

A jury instruction that totally "omits an essential element of the crime charged" is legally erroneous. *State v. Jones*, 313 Kan. 917, Syl. ¶ 3, 492 P.3d 433 (2021). We therefore consider whether the jury instruction for attempted aggravated robbery omitted an essential element of that crime.

The elements of aggravated robbery are "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person . . . [while] armed with a dan-

gerous weapon." K.S.A. 21-5420. The statutory elements of attempt are "any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 21-5301(a).

The court instructed the jury that the elements of the crime of aggravated robbery are:

> "1. The defendant knowingly took property from the person or presence of [O.H.].
> "2. The taking was by threat of bodily harm or force.
> "3. The defendant was armed with a dangerous weapon or inflicted bodily harm on any person in the course of such conduct."
> It instructed the jury that, to find Huggins guilty of attempted aggravated robbery, it had to find:
> "1. The defendant performed an overt act toward the commission of aggravated robbery.
> "2. The defendant did so with the intent to commit aggravated robbery.
> "3. The defendant failed to complete the commission of aggravated robbery."
> It is clear the attempted aggravated robbery instruction included every statutory element of the charged crime.

Huggins does not contest that conclusion, but he argues that the jury instruction had to include more than just the statutory elements of the charged crime. He insists that the State expanded the elements of attempted aggravated robbery through its complaint. He asserts that through the charging document, the State made robbing Z.M. and O.H., specifically, part of the "total element" of taking property from the person or presence of another within the crime of aggravated robbery or any crime that relied on aggravated robbery as an underlying felony. He cites *State v. McClelland*, 301 Kan. 815, 828, 347 P.3d 211 (2015), and *State v. Trautloff*, 289 Kan. 793, 802, 217 P.3d 15 (2009), in support.

Neither *McClelland* nor *Trautloff* support Huggins' claim. In these cases, we held jury instructions "were overly broad and erroneous because they added alternate *statutory* elements of a crime that were not included in the complaint or information." (Emphasis added.) *State v. Crosby*, 312 Kan. 630, 640, 479 P.3d 167 (2021). Neither stands for the notion that the State can expand the elements of a crime through factual allegations in a charging

document. In fact, in *Crosby*, we held a jury instruction was legally appropriate under similar circumstances to Huggins'. There, the State charged the defendant with attempted aggravated robbery and alleged two distinct and specific overt acts against two distinct victims, while the jury instruction required the jury find only that the defendant commit a single, nonspecified overt act. This court held there was no error because the factual omissions in the jury instructions had not altered the elements of the crime. 312 Kan. at 641.

Because the jury instruction for attempted aggravated robbery included the statutory elements of the charged crime, it was legally appropriate and was not erroneous. This defeats Huggins' claim that any instructions that referred to the attempted aggravated robbery instruction were also erroneous.

Sufficiency of the Evidence

Huggins argues the State failed to offer sufficient evidence to support the attempted aggravated robbery, aggravated burglary, and felony murder convictions. He again turns to the charging document, claiming the State had to prove Z.M. was a victim of these crimes because he was alleged to be a victim of attempted aggravated robbery therein. He contends there was no evidence he attempted to rob Z.M.

When a defendant claims there was insufficient evidence to support a conviction, this court considers "whether, viewing the evidence in the light most favorable to the State, a rational factfinder could have found the defendant guilty beyond a reasonable doubt." *State v. Larsen*, 317 Kan. 552, 560, 533 P.3d 302 (2023). It does not "reweigh evidence, resolve evidentiary conflicts, or assess witness credibility." *Larsen*, 317 Kan. at 560.

Huggins again cites *Trautloff*, 289 Kan. 793, and *McClelland*, 301 Kan. 815, to support his claim that the State had to prove he attempted to rob Z.M. to support the attempted aggravated robbery, aggravated burglary, and felony murder convictions. Quoting these cases, he claims, the State is "bound by the wording of its charging document." *McClelland*, 301 Kan. at 828.

We effectively rejected the notion that the State must prove all the facts alleged in the charging document when we held the instructions were legally appropriate even though they did not include Z.M. as a victim. The State is indeed required to prove the *statutory elements* charged, regardless of what instructions are offered to the jury. See *State v. Fitzgerald*, 308 Kan. 659, 666, 423 P.3d 497 (2018) (when jury was instructed on different elements than the State charged, court reviewed whether there was sufficient evidence to support elements in charging document). But robbing or attempting to rob Z.M. was not an element of any of the crimes; it was a factual allegation in support of the attempted aggravated robbery charge. See *Crosby*, 312 Kan. at 641 (naming of two victims in charging document was factual assertion, not description of elements).

As we discussed above, the cases to which Huggins cites stand for the notion that the State is bound by the statutory elements included in the complaint or information—not the facts. *Crosby*, 312 Kan. at 641. The State did not need to prove that Huggins intended to rob Z.M. to sufficiently support the convictions. This defeats Huggins' sufficiency claim.

Voluntariness of Huggins' Statements

After he was released from the hospital and was in a wheelchair because of his bullet wound, Huggins was taken to the downtown Topeka police headquarters. He waited there for around four hours and then, after receiving and orally agreeing to waive his *Miranda* rights, he took part in an interview that lasted a little over half an hour. He denied any participation in or knowledge of the events at O.H.'s house. Two days later, the police conducted a second interview. Huggins' statement remained essentially the same as it was during the first interview.

Huggins later sought to suppress the statements that he made to police during the first interview, arguing that the interview violated his Fifth Amendment privilege against self-incrimination. He argued to the trial court that he was under the influence of various medications that rendered him intoxicated and incapable of making voluntary statements, and he contended that his behavior

prior to and during the interview supported that conclusion. Following a *Jackson v. Denno* hearing, the district court found his statements were voluntary and allowed the State to play a recording of the interview to the jury. Huggins did not contest the voluntariness of the second interview.

On appeal, Huggins argues the district court erred in denying his motion to suppress. He repeats his allegation that his participation in the first interview was involuntary because of a diminished mental state resulting from medication, fatigue, and trauma. We disagree and conclude the district court did not err when it concluded Huggins made his statements voluntarily and denied the motion to suppress.

After a trial court decides whether a statement is voluntary under the Fifth and Fourteenth Amendments and a party appeals that decision, this court applies a standard of review that divides the voluntariness determination into questions of fact and questions of law. The trial court's findings of the "crude historical facts"—the events and occurrences surrounding the statement—receives deferential review on appeal, and the question is whether those findings are supported by substantial competent evidence. *State v. G.O.*, 318 Kan. 386, 404-07, 543 P.3d 1096 (2024). This court does not reweigh the evidence, assess witness credibility, or resolve evidentiary conflict, and it disregards any conflicting evidence or other inferences that might be drawn from the evidence. *G.O.*, 318 Kan. at 407. The court examines the totality of the circumstances and assesses de novo the district court's legal conclusion on whether the statement was voluntary. 318 Kan. at 407.

The Fifth Amendment protection against self-incrimination and the Fourteenth Amendment Due Process Clause require that statements made to government officials are given voluntarily. Overreach by police or other state actors—that is, intimidation, coercion, deception, or other misconduct—is a necessary predicate to finding a confession is not voluntary, and there must be a link between the overreach and a defendant's resulting confession to establish the constitutional violation. *G.O.*, 318 Kan. at 404.

In *G.O.*, we referred to examples of techniques that constitute per se coercive conduct, such as extreme psychological pressure or physical harm. *G.O.*, 318 Kan. at 398. But we also recognized

that less onerous police conduct may also overcome an individual's ability to decide freely whether to make statements if the individual has particular vulnerabilities, either situational or ongoing. 318 Kan. at 399-400. We set out a lengthy, nonexhaustive list of factors for consideration in this analysis:

> "Potential details of the interrogation that may be relevant include: the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statement took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises of benefit, inducements, threats, methods, or strategies used to coerce or compel a response; whether an officer informed the accused of the right to counsel and right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights.
>
> "Potential characteristics of the accused that may be relevant when determining whether the officer's conduct resulted in an involuntary waiver of constitutional rights include the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement.
>
> "These—and other factors arising from facts of a case—may be relevant no matter whether the accused is a juvenile or an adult, making separate lists unnecessary. But in cases involving a juvenile, we continue to urge judges to exercise great care in weighing these factors to decide whether the juvenile's inculpatory statement to law enforcement was voluntary." *G.O.*, 318 Kan. at 403.

In this case, the district court made extensive findings relating to Huggins' mental state at the time of the interview. The court found that Huggins was taken to an interview room approximately an hour and 40 minutes after he arrived at the hospital with a gunshot wound. He was "clearly tired" and "slept in a wheelchair for a good number of hours." The court found that when Huggins first arrived, he was clearly agitated. He repeatedly knocked on the door and inquired why he was there, threw water on the table, banged on the table, and appeared to be chewing something. The court noted "it makes sense that he would have been given some pain medication at the hospital" and found Huggins "was under the influence of some medication or something at the beginning of the period of time when he was in the room alone." But the court further found that by the time the interview began, around four hours after Huggins' arrival, the effects of any medication had

worn off. By then, Huggins was calm, coherent, and aware of what was going on around him. As the court noted, if the interview had taken place earlier, considerations such as medicinal intoxication and fatigue might have been significant, but the passage of time mitigated those considerations: Huggins was able to take a nap, and he showed no signs of intoxication when the interview began.

The court also compared the second interview, which Huggins did not challenge before trial and does not challenge on appeal, with the first. The district court noted that Huggins' demeanor and statements at the two interviews were essentially the same. The district court concluded these factors showed Huggins' statements were voluntary.

Huggins does not contest the district court's factual findings. He argues only that the court made a legal error in concluding those findings show his statement was voluntary. He asserts that his injury, the medication, fatigue, and a lengthy wait before his interview began all were factors that so diminished his capacity to make voluntary statements that this court must conclude his statements were involuntary.

We disagree with Huggins. While these factors *could* have come into play in terms of law enforcement overreaching, there is no evidence or findings from the district court suggesting that they actually did come into play. The district court found Huggins was calm and coherent and that any effects of medication had worn off by the time the interview began. Under those circumstances, the police did not overreach when they went forward with their brief interview of Huggins. And Huggins makes no allegation that the officers offered threats or promises or attempted to mislead Huggins about the purpose of the interview.

Our conclusion is in accord with that of the district court: Huggins made his statements unaffected by factors that would inhibit his ability to act voluntarily. We conclude the district court did not err when it admitted the recording of Huggins' first interview.

Admissibility of Facebook Records

Law enforcement officers served a warrant on Facebook to obtain Huggins' account records, which provided the State with

the messages he exchanged with J.B. In two pretrial motions, Huggins sought to suppress admission of those messages, arguing different theories: the warrant was defective because it lacked particularity, and the State had failed to establish a foundation for the records. The district court overruled both pretrial motions. At trial, Huggins again objected to admission of the messages, and again the court overruled him.

Now, on appeal, he argues the district court erred when it admitted the messages because the warrant on which the search of his Facebook account was based lacked particularity and was therefore an unreasonable search under the Fourth Amendment to the United States Constitution. The State contends he failed to preserve the issue for appeal because of the way he asserted his challenge during the trial.

A close examination of how the issue of the constitutionality of the search warrant was presented to the district court supports the State's preservation claim.

On November 21, 2019, the State served on Facebook a warrant to search Huggins' account. Facebook provided extensive records of his posts and messages, a redacted portion of which the State eventually presented to the jury. Of special significance to the prosecution, the records showed communications between Huggins and J.B. before and after the shootings, and these communications suggested the two were planning to steal things from O.H. and Z.M.

On July 13, 2020, Huggins' attorney at the time, Gary Conwell, filed a Motion to Suppress, urging suppression of the fruits of the search because the warrant failed to describe with particularity the information the State was seeking as it related to the prosecution for the shootings. This is the claim that Huggins seeks to assert on appeal.

On October 27, 2020, the district court conducted an evidentiary hearing on the motion to suppress. At the hearing, Conwell emphasized his allegation that the warrant for Facebook records was a general warrant and was unlawful. The district court disagreed and denied the motion to suppress. The court briefly noted that the investigating officers used the data from the search for the

limited purpose of connecting Facebook messages to the events of November 12, 2019.

Then, on October 1, 2021, Huggins' new attorney, Kevin Shepherd, filed a motion in limine to preclude the State from presenting evidence of cellphone data, text messages, and Facebook communications without establishing authenticity and reliability. In this motion, Shepherd argued the State had failed to establish a proper foundation for the Facebook evidence. He asserted the State had the burden of authenticating the origin of the Facebook messages.

The district court granted the motion in part: it held that the State would have to establish the authenticity and reliability of the Facebook communications before the evidence would be admitted.

At trial, when the State began to offer evidence of the Facebook communications, Huggins objected through his trial attorney, James Spies. Spies objected to the Facebook messages based on hearsay and because the law enforcement witness was "not a records custodian for Facebook" and was "not in the position to testify as to the accuracy of the information," resurrecting Shepherd's foundational objection. Spies informed the court that "there was pretrial litigation on this matter. I would, you know, raise the same arguments raised in those motions previously filed. I think they were actually filed by Mr. Shepherd, but nonetheless, I adopted *them* as my own and I would reassert those arguments." (Emphasis added.)

The court rejected the hearsay argument, which is not at issue here. Then the district court addressed the objection in terms of foundation and made no mention of the particularity issue.

On appeal, Huggins challenges the admissibility of the Facebook messages based on the warrant through which they were obtained. He asserts neither foundational nor hearsay concerns. Those were the concerns that he specifically argued to the district court at trial and which the district court specifically addressed. He also obliquely referred to pretrial motions, specifying motions filed by Kevin Shepherd. But Shepherd did not challenge the legality of the warrant.

Huggins asks this court to review an issue that he did not preserve below by failing to renew at trial his initial particularity objection.

Because a court may change its pretrial ruling as the case unfolds, a party must contemporaneously renew its pretrial objections during trial. See *State v. Showalter*, 318 Kan. 338, 363, 543 P.3d 508 (2024). When the district court grants or denies a motion in limine and the evidence is introduced at trial, the moving party must follow K.S.A. 60-404 and make a timely and specific objection to the admission of the evidence to preserve the issue for appeal. See *State v. Miller*, 308 Kan. 1119, 1166, 427 P.3d 907 (2018). There is no question that Spies' objection was timely, but it was hardly specific if it was somehow intended to include Conwell's motion. Spies made no mention of problems with the warrant, and he did not direct the court's attention to Conwell's motion. At best, he may have been hoping the court would remember the much earlier motion and the ruling on it.

As the contemporaneous objection was presented, the court would have had no reason to reaffirm its ruling on the warrant. In denying Spies' objection at trial, the court made no mention of the legality of the warrant. Furthermore, Spies did not specify or even suggest some other grounds for suppression or ask the court to expand on its ruling to include Conwell's grounds for suppression. Cf. *State v. Robinson*, 303 Kan. 11, 63, 363 P.3d 875 (2015) (when defendant considers findings insufficient for appellate review, defendant has obligation to seek more complete explanation of rulings); *McIntyre v. State*, 305 Kan. 616, 618, 385 P.3d 930 (2016) (litigants bear responsibility for objecting to inadequate findings and conclusions so the trial court may correct such inadequacies; failure to object to the adequacy of the rulings precludes appellate review).

Huggins argued one reason for suppression at trial and hopes the language of his objection was sufficiently vague to preserve a different basis for appeal. This defeats the statutory requirement for specificity, and it leaves trial courts guessing what the grounds for an objection may be. We are disinclined to retreat from our long-held position that a party must state to the trial court the basis

for an objection. And Huggins does not contend that any exceptions to the contemporaneous objection rule apply to his situation.

Because the issue of the particularity of the search warrant was not set out to the court at trial, we will not address it on appeal. See, e.g., *State v. Hillard*, 313 Kan. 830, 839, 491 P.3d 1223 (2021).

Prosecutorial Error Based on Comment on Witness Credibility

Huggins contends for the first time on appeal that the prosecutor improperly commented on and bolstered the veracity of a witness for the State during closing argument. He argues this commentary is grounds for reversing his convictions. We disagree.

Claims of prosecutorial error are reviewable on appeal even if they were not preserved below. *State v. Haygood*, 308 Kan. 1387, 1397, 430 P.3d 11 (2018). In determining whether a prosecutor engaged in erroneous conduct, this court considers whether the challenged acts "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

On the day of the shootings, Shane Kendall was working on remodeling a house next door to where O.H. lived. He testified at trial that he was outside preparing to use a saw when he observed the youths show up at O.H.'s house, go to the door, push their way in, and a short time later, engage in gunfire.

In closing argument, the prosecutor made the following comments about Kendall's testimony:

> "The other evidence, including the testimony from Shane Kendall. Shane Kendall testified that he saw these people on the porch push their way into the house. *Shane Kendall's got no dog in this fight. Why would he come in here and testify to you that he saw that if he didn't see it?*" (Emphasis added.)

Huggins contends the prosecutor improperly commented on the truthfulness of Kendall's testimony. Caselaw suggests otherwise, however.

Prosecutors have broad latitude in crafting their arguments and drawing reasonable inferences from the evidence, but telling

the jury that a witness told the truth falls outside that broad latitude. *State v. Jordan*, 317 Kan. 628, 648, 537 P.3d 443 (2023). This is because such comments constitute improper testimony, not commentary on the evidence of the case. State v. *Gulley*, 315 Kan. 86, 95, 505 P.3d 354 (2022). See, e.g., *State v. Elnicki*, 279 Kan. 47, 64, 105 P.3d 1222 (2005) (improper to call defendant a liar and comment "'the truth shows you beyond a reasonable doubt the defendant is guilty'"); *State v. Pabst*, 268 Kan. 501, 507, 996 P.2d 321 (2000) (improper to repeatedly tell jury defendant and defendant's counsel had lied without connecting it to evidence); *State v. Akins*, 298 Kan. 592, 607, 315 P.3d 868 (2014) (improper to say witnesses or their statements were not credible).

Kansas cases distinguish between arguments expressing an opinion about a witness' credibility and arguments discussing legitimate factors a jury may consider in assessing credibility. The former falls outside the bounds of proper argument while the latter does not. *Jordan*, 317 Kan. at 648.

One factor a jury may consider in assessing witness credibility is a witness' motive to be dishonest. *Jordan*, 317 Kan. at 649. This court has approved of a prosecutor's use of rhetorical questions to encourage a jury to consider whether a witness had a motive to be untruthful. *State v. Ortega*, 300 Kan. 761, 777, 335 P.3d 93 (2014). And "[p]rosecutors may comment on a witness' lack of motivation to be untruthful but must base these comments on the evidence and reasonable inferences from the evidence without stating their own personal opinion concerning the witness' credibility." *State v. Hachmeister*, 311 Kan. 504, 519, 464 P.3d 947 (2020).

In *Hachmeister*, we considered a prosecutor's comments in closing argument that several witnesses "ha[d] no skin in the game. They've got no agenda." 311 Kan. at 519. We concluded the comments were valid considerations for the jury to consider, holding:

> "The prosecutor made these comments so the jury could examine whether the witnesses here had a motive to lie—a valid consideration in weighing credibility. Further, the prosecutor did not inject any personal opinion into these statements. Rather, the prosecutor made a reasonable inference that these witnesses lacked a motive to lie given their peripheral connection to Hachmeister. Accordingly, the prosecutor's statements were within the wide latitude allowed the State when discussing evidence." *Hachmeister*, 311 Kan. at 520.

In *Hachmeister*, we cited to *Ortega*, where this court considered the comments of a prosecutor who reminded the jury it would have to judge the credibility of witnesses and then argued to the jury:

"What reason do they have to lie to you? Perhaps somebody who might think, well, police officers do this all the time. I don't necessarily know why you would think that, but that's the most cynical possible thing I can think of. Well, set that aside. Do middle school secretaries come into court and lie all the time? Did Ms. Perez or Ms. Delarosa, the principal, have a reason to come in here and tell you that the defendant did something or said something that she didn't really do?" *Ortega*, 300 Kan. at 775.

We found that "the prosecutor's statements were based on reasonable inferences drawn from the evidence, and the prosecutor was merely explaining what the jury should look for in assessing the credibility of the school officials." *Ortega*, 300 Kan. at 775.

Similarly, in *Jordan*, the prosecutor told the jury: "'Ask yourself, what motivation does Ms. Cunningham have to not be truthful about that particular fact? I submit to you that there's absolutely no reason. What did she have to gain from that?'" *Jordan*, 317 Kan. at 648. The court considered the broad context of the prosecutor's argument and found "the prosecutor's statement suggesting Cunningham had no motive to lie was made within a larger discussion about legitimate factors bearing on witness credibility and how those factors related to the trial evidence." 317 Kan. at 650. We concluded that "by tying her comment to the evidence and to legitimate factors bearing on witness credibility, her argument fell just within the wide latitude afforded prosecutors in closing argument, even if by only the slightest margin." 317 Kan. at 650-51.

Here, the prosecutor stated: "Shane Kendall's got no dog in this fight. Why would he come in here and testify to you that he saw that if he didn't see it?" This argument that the witness was a neutral bystander lacking motivation to manipulate the truth is akin to the comments at issue in *Hachmeister*, *Jordan*, and *Ortega*. We found no error in those comments, and we also find no error in the prosecutor's statement here.

Cumulative Error

Huggins urges us to apply cumulative error analysis, but we find no errors to aggregate. The cumulative error rule does not apply if there are no errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021).

BIDS Fees

At sentencing, the court ordered Huggins to make various payments for costs associated with his trial and other fees:

> "The [c]ourt would direct that you pay court costs in the amount of $171 and a $22 surcharge fee. There would be a $200 DNA database fee. The [c]ourt would waive the BIDS application fee. The [c]ourt would impose a significantly reduced attorney fee in the amount of $2,500. That would be for indigency found. The [c]ourt would direct that you begin paying this in the amount of $15 per month, beginning on December 1, 2022. You will be getting some income once you're in prison if you're able to work."

When a district court imposes liability for expenditures for counsel and other defense services, K.S.A. 22-4513(b) requires the court to consider both the financial resources of the defendant and the nature of the burden that payment of such sum will impose. The sentencing court must state on the record how those factors weigh in the court's decision. *State v. Robinson*, 281 Kan. 538, 546, 132 P.3d 934 (2006).

Here, the court failed to consider on the record Huggins' financial resources or his ability to pay the fees. We therefore vacate the imposition of defense fees and remand the case to the district court to reassess Huggins' attorney fees.

CONCLUSION

We find no trial errors and affirm the convictions. We vacate the imposition of fees and remand for reconsideration of those fees.

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

No. 126,642

FREESTATE ELECTRIC COOPERATIVE, INC. et al., *Appellees*, v. KANSAS DEPARTMENT OF REVENUE, DIVISION OF PROPERTY VALUATION, *Appellant*.

(555 P.3d 220)

SYLLABUS BY THE COURT

1. ADMINISTRATIVE LAW—*Kansas Judicial Review Act—Court's Consideration of New Issues in Proceedings Is Limited.* K.S.A. 77-617 limits a court's consideration of new issues in proceedings under the Kansas Judicial Review Act. The trial de novo provision in K.S.A. 2023 Supp. 74-2426(c)(4)(B) applicable to the Board of Tax Appeals, which specifies "an evidentiary hearing at which issues of law and fact shall be determined anew," does not expand that limitation.

2. SAME—*Board of Tax Appeals—Agency Record Controls Issues Raised in Appeals.* For trial de novo proceedings under K.S.A. 2023 Supp. 74-2426(c)(4)(B), the agency record controls in resolving any dispute about what issues were raised before the Board of Tax Appeals. Unless an exception applies, a district court may only review those issues litigated at the administrative level.

3. SAME—*Board of Tax Appeals—Burden on Party to Show Judicial Review Is Proper*. For trial de novo proceedings under K.S.A. 2023 Supp. 74-2426(c)(4)(B), the party asserting an issue was raised before the Board of Tax Appeals bears the burden to show judicial review is proper.

4. APPEAL AND ERROR—*Appeal from District Court Proceedings Involving BOTA Orders—Appellate Review.* In an appeal from district court proceedings conducted under K.S.A. 2023 Supp. 74-2426(c)(4)(B), an appellate court considers the agency record de novo when deciding whether the district court exceeded its scope of judicial review.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Oral argument held May 10, 2024. Opinion filed August 30, 2024. Reversed.

Ted E. Smith, chief counsel, Legal Services Bureau, Kansas Department of Revenue, argued the cause and was on the brief for appellant.

Greg L. Musil, of Rouse Frets White Goss Gentile Rhodes, P.C., of Leawood, argued the cause, and *Chris M. Mattix* and *James T. Schmidt*, of the same firm, were with him on the brief for appellees.

The opinion of the court was delivered by

BILES, J.: Eight rural electric cooperatives sought judicial review after the Board of Tax Appeals administratively denied their property valuation challenges for the 2019 and 2020 tax years. They elected to go to district court for a trial de novo under K.S.A. 2023 Supp. 74-2426(c)(4)(B) (review specifies "an evidentiary hearing at which issues of law and fact shall be determined anew"). The court agreed with the cooperatives, concluding the valuation methodology used by the Department of Revenue's Property Valuation Division violated K.S.A. 79-5a04 (requiring "generally accepted appraisal procedures" when valuing public utilities). On appeal, PVD argues the district court exceeded its scope of review because the statutory compliance question was not litigated first with BOTA. See K.S.A. 77-617 (limiting judicial review of issues arising from administrative agency action). We agree with PVD and reverse the district court judgment.

A trial de novo under K.S.A. 2023 Supp. 74-2426(c)(4)(B) does not enlarge a district court's scope of judicial review beyond what is permitted by K.S.A. 77-617. This means the issue must have been raised with BOTA unless an exception applies. *In re Tax Appeal of Panhandle Eastern Pipe Line Co.*, 272 Kan. 1211, 1235, 39 P.3d 21 (2002) ("In an appeal from an administrative agency decision, one is limited to the issues raised at the administrative hearing."). And if there is disagreement about the issues raised, the agency record controls. See *Sierra Club v. Mosier*, 305 Kan. 1090, 1123-24, 391 P.3d 667 (2017) ("The entire concept of judicial review contemplates that an agency must have had an adequate opportunity to consider the merits of an issue."); *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 411-42, 204 P.3d 562 (2009) ("[A] district court may only review those issues litigated at the administrative level.").

Here, the record confirms BOTA explicitly and correctly identified the only issue before it was whether "PVD's income approach valuation methodology *violates Article 11, § 1 of the Kansas Constitution* as it results in non-uniform and unequal valuations of RECs statewide." (Emphasis added.) We hold

the district court exceeded its scope of review by deciding PVD's methodology violated K.S.A. 79-5a04.

FACTUAL AND PROCEDURAL BACKGROUND

Rural electric cooperatives ("RECs") are nonprofit cooperative corporations that distribute electricity within their respective service areas to retail consumers, who are their member-owners. They procure electricity from Kansas Electric Power Cooperative, Inc. ("KEPCo"), also a nonprofit cooperative corporation. KEPCo comprises 18 Kansas RECs, including the eight bringing this litigation: The Ark Valley Electric Cooperative Association, Inc., The Butler Rural Electric Cooperative Association, Inc., Heartland Rural Electric Cooperative, Inc., Sumner-Cowley Electric Cooperative, Inc., The Victory

Electric Cooperative Association, Inc., The Sedgwick County Electric Cooperative Association, Inc., Twin Valley Electric Cooperative, Inc., and FreeState Electric Cooperative, Inc.

Since RECs are nonprofit entities, they do not generate profits; instead, they operate on margins (the amount of income exceeding operational expenses). KEPCo invoices each REC monthly. The REC, in turn, charges its members a rate to cover its expense for acquiring electricity and providing capital for future operations.

KEPCo's monthly invoice to each REC includes an item called the margin stabilization adjustment ("MSA"), which lies at the heart of this property tax controversy. MSA serves as a budgeting tool allowing KEPCo to increase (through an invoice surcharge) or decrease (through an invoice credit) the amount KEPCo collects monthly from each REC based on the difference between actual and estimated power costs. Since MSA began in 2011, KEPCo has issued an MSA credit on all but one monthly invoice.

When KEPCo provides an MSA credit, each REC decides if and how to pass the credit along to its members, the retail consumers. There are three options: (1) issue a credit to a

member's monthly bill, (2) issue a single lump-sum credit annually, or (3) retain the credit by allocating it to each member's equity account, a/k/a "'patronage capital' or 'member capital.'" The first and second options reduce an REC's income, but the third does not. The eight RECs here elected the third option during the 2019 and 2020 tax years—triggering this fight over the effect on their property tax bills.

During the 2019 and 2020 tax years, PVD calculated fair market value using an income approach, which translates projected future operating income for each REC into a present value estimate. See K.S.A. 79-5a04 (requiring PVD determine public utility property's fair market value by "us[ing] generally accepted appraisal procedures"). Future operating income is projected from the RECs' current net operating income ("NOI")—"the actual or anticipated income that remains after all operating expenses are deducted from effective gross income." In other words, the RECs' election on MSA credits impacts its NOI, which affects valuation and therefore taxes. A higher NOI results in a higher property valuation and higher taxes. This means PVD's chosen methodology treats our eight RECs electing the third option differently because only the first and second options reduce the RECs' income.

Proceedings before BOTA

The eight RECs individually appealed their property valuations to BOTA, complaining PVD treated the third option differently from the others. See K.S.A. 74-2438 (authorizing administrative appeals). Each filed a "Division of Property Valuation Appeal" with BOTA using a similar format as the one by Ark Valley, which identified as the "basis" for the appeal:

"*All cooperatives should be valued on a uniform and equal basis.* Depending on the treatment of the MSA, the NOIs of two hypothetically identical cooperatives are different depending on whether they pass through the MSA in their [equity capital account/patronage capital account] or retain it. Therefore, PVD's income approach to value results in differing values for these identical co-ops. *We believe this violates the uniform and equal standard and an adjustment should be made to the NOI to reflect the retained MSA.*" (Emphases added.)

BOTA conducted a two-day evidentiary hearing. In its decision favoring PVD, BOTA described the RECs' claim:

"*The RECs assert PVD's income approach valuation methodology violates Article 11, § 1 of the Kansas Constitution as it results in non-uniform and unequal valuations of RECs statewide*. PVD responds that it has used a uniform and equal basis of valuation for all Kansas RECs and, therefore, its assigned valuations should be sustained.

. . . .

"The RECs accepted PVD's valuation methodology, except for their claim that PVD should change its treatment of the MSA credits. The RECs contend that their independent accounting decisions to retain or not retain the MSA credits, when combined with PVD's valuation methodology, *result in non-uniform and unequal valuation determinations among RECs and arbitrarily inflates the purported value of the subject RECs for property tax purposes*. The RECs request the Board *remedy this inequity* by ordering PVD to decrease the NOI of the subject RECs by subtracting the amount of MSA credits." (Emphases added.)

BOTA then analyzed in detail whether PVD's valuation methodology violated article 11, section 1 of the Kansas Constitution's mandate that "the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation." BOTA noted the "RECs failed to identify any other similarly situated Kansas RECs that received different valuation treatment from PVD on essentially equivalent property" and concluded the RECs failed to satisfy their burden to demonstrate "PVD deliberately adopted a valuation system for public utilities resulting in intentional systemic unequal treatment of Kansas RECs." It eventually determined:

"Nothing in the evidence presented to the Board indicates that the subject RECs were appraised in a manner that violates the uniform and equal provisions of the Kansas Constitution. *Further, the Taxpayers presented no evidence persuading the Board that the instant RECs were not appraised at their respective fair market value*." (Emphasis added.)

That single italicized sentence now becomes our focus in deciding what was litigated before BOTA. And we note neither party requested BOTA's reconsideration of its order to better specify the issues, despite their right to do so under K.S.A. 2023 Supp. 74-2426(b).

Judicial review before the district court

The RECs petitioned for judicial review in the district court where each was located: Butler, Ford, Kingman, Neosho, and Shawnee Counties. See K.S.A. 2023 Supp. 74-2426(c)(4)(B)

("District court review of [BOTA] orders shall . . . be conducted by the court of the county in which the property is located."). They then jointly filed a motion to merge the litigation under K.S.A. 2023 Supp. 60-242(c) (The Supreme Court may order the consolidation of civil actions from different judicial districts upon a party's request.). We granted that motion and transferred the consolidated cases to Shawnee County District Court.

The RECs' petition for judicial review elected a trial de novo in the district court, rather than review by the Court of Appeals. See K.S.A. 2023 Supp. 74-2426(c)(4). Their review petition alleged PVD's valuation methodology violated not only the state Constitution but also K.S.A. 79-5a04. It claimed:

> "14. The valuations stated in BOTA's Opinion do not represent the fair market value of the property for [RECs], as is required by the Kansas Constitution *and Kansas statu*[*t*]*es, specifically K.S.A. 79-5a01, et seq*. BOTA was in error when it issued its Opinion which found in favor of [PVD]'s valuations. BOTA's decision was, among other things, based on determinations of fact not supported by substantial evidence on the record as a whole as well as improper conclusions of law. When viewed by the totality of the evidence which will be received by this Court in a trial de novo, the BOTA decision will be found to be otherwise unreasonable, arbitrary and/or capricious as to [RECs].
>
> "15. [PVD]'s methodology for valuing rural cooperative utilities, as implemented and sanctioned by the BOTA decision, creates a non-uniform and unequal system of taxation in violation of the Kansas Constitution *and statutes*." (Emphases added.)

PVD objected to this framing of the dispute. It argued the RECs were asking the district court to decide something not raised with BOTA—a statutory claim under K.S.A. 79-5a04 that PVD failed to determine a fair market value of the RECs' property. The district court overruled PVD's objection, relying on that single sentence in BOTA's order, which it said demonstrated BOTA considered the statutory issue and decided against granting relief. It held the RECs "will not be limited to the constitutional question raised based on Article 11, Section 1 of the Kansas Constitution."

The district court then said it would address the RECs' contentions "according to the grounds for relief they cite in K.S.A. 77-621(c)." Specifically, the RECs had asked to invalidate PVD's methodology under subsections (c)(1) (agency action is unconstitutional), (c)(4) (agency action is error of law), (c)(7) (agency action is based on error of fact), and (c)(8) (agency action is unreasonable). They did not explain how

those subsections might apply in a trial de novo under K.S.A. 2023 Supp. 74-2426(c)(4)(B), in which "issues of law and fact shall be determined anew."

On the merits, the district court agreed with BOTA's denial of the RECs' constitutional claim but still reversed PVD's valuations, reasoning its "flawed and incomplete" valuation method "overstates NOI for RECs." It concluded the RECs showed "by a preponderance of the evidence" that the PVD methodology resulted in unit valuations that were unsupported by evidence and were otherwise unreasonable. It ordered PVD to give "appropriate consideration" to adjusting its methodology as proposed by the RECs "regarding treatment of MSAs in the determination of utility operating income and adjust the 2019 and 2020 unit valuations accordingly."

PVD appealed, arguing the district court erred by improperly (1) expanding its scope of judicial review, (2) shifting the burden of proof to PVD, and (3) invalidating PVD's valuation methodology. The RECs did not cross-appeal the district court's constitutional holding against them, so that much is settled. See K.S.A. 2023 Supp. 60-2103(h) (appellate procedure for cross-appeal); *Cooke v. Gillespie*, 285 Kan. 748, Syl. ¶ 2, 176 P.3d 144 (2008) ("Before an appellee may present adverse rulings to the appellate court it must file a cross-appeal. If the appellee does not, the rulings are not properly before the appellate court and may not be considered.").

PVD then moved to transfer the case from the Court of Appeals, which we granted. See K.S.A. 2023 Supp. 20-3017; Supreme Court Rule 8.02 (2024 Kan. S. Ct. R. at 54). Our jurisdiction is proper. See *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981, 453 P.3d 304 (2019) (The Supreme Court "exercises concurrent jurisdiction with the Court of Appeals over all appeals over which the Court of Appeals has jurisdiction . . . . See K.S.A. 60-2101[b] ['The supreme court shall have jurisdiction to correct, modify, vacate or reverse *any* act, order or judgment of a district court . . . .' (Emphasis added.)]").

THE DISTRICT COURT EXCEEDED ITS SCOPE OF JUDICIAL REVIEW

The Kansas Judicial Review Act, K.S.A. 77-601 et seq., provides the exclusive means to obtain judicial review of state agency action, including BOTA. See K.S.A. 77-603(a) (KJRA "applies to all agencies and all proceedings for judicial review and civil enforcement of agency

actions not specifically exempted by statute."); K.S.A. 77-606 ("[T]his act establishes the exclusive means of judicial review of agency action."); K.S.A. 2023 Supp. 74-2426(c) (application to BOTA); *In re Equalization Appeal of Walmart Stores, Inc.*, 316 Kan. 32, 46, 513 P.3d 457 (2022) (KJRA controls BOTA decision review). But in authorizing judicial review of agency actions, the KJRA has traditionally confined the court's ability to consider new issues not asserted first with the agency. See K.S.A. 77-617 (limiting judicial review of issues "not raised before the agency").

This constraint is premised on a petitioner's obligation to exhaust administrative remedies before going to court. See K.S.A. 77-612 (permitting petitioning for judicial review "only after exhausting all administrative remedies"); *Jarvis v. Department of Revenue*, 312 Kan. 156, 164, 473 P.3d 869 (2020) ("Courts conducting judicial review of an agency action cannot usually consider issues not raised before the agency, including constitutional issues."); *Sierra Club v. Mosier*, 305 Kan. 1090, 1122, 391 P.3d 667 (2017) (stating K.S.A. 77-617 bars new issues for judicial review); *Rebel v. Kansas Department of Revenue*, 288 Kan. 419, 427, 204 P.3d 551 (2009) ("[I]f a person does not exhaust all available and adequate administrative remedies . . . , the district court lacks subject matter jurisdiction to consider the contents of the petition."). That said, K.S.A. 77-617 enumerates limited situations in which a "person may obtain judicial review" of new issues. Here, the RECs acknowledge none apply, so we direct our attention to K.S.A. 2023 Supp. 74-2426(c)(4)(B).

Since 2014, state law has included a trial de novo in the district court from BOTA orders at a taxpayer's election. See L. 2014, ch. 141, § 1. That process was amended in 2016, which applies here. L. 2016, ch. 112, § 3. The relevant statute, K.S.A. 2023 Supp. 74-2426(c)(4)(B), provides "the trial de novo shall include an evidentiary hearing *at which issues of law and fact shall be determined anew*." (Emphasis added.) We have considered an appeal from BOTA under this de novo procedure only once before, but it did not involve controversy about the district court's enlarging its scope of review. See *Bicknell v. Kansas Department of Revenue*, 315 Kan. 451, 509 P.3d 1211 (2022).

Together with the procedural mechanism allowing a trial de novo, it is important to appreciate BOTA's role and responsibility

in a taxpayer's valuation appeal when, as here, the property is state assessed. K.S.A. 2023 Supp. 74-2438(a) provides generally that "[a]n appeal may be taken to [BOTA] from any finding, ruling, order, decision, final determination or other final action, including action relating to abatement or reduction of penalty and interest, on any case of the secretary of revenue or the secretary's designee by any person aggrieved thereby." Subsection (b) sets out what happens: "[BOTA] shall conduct . . . a de novo hearing unless the parties agree to submit the case on the record made before the secretary of revenue or the secretary's designee." K.S.A. 2023 Supp. 74-2438(b).

We explained the agency functions in the public utility context in *Northern Natural Gas Co. v. Dwyer*, 208 Kan. 337, 365, 492 P.2d 147 (1971):

"The Director [of Property Valuation] exercises independent judgment in approving the valuation of property by personnel in his department, *and the Board* [*of Tax Appeals*] *exercises its judgment anew and independent of the Director in approving the valuation and assessment of property*. . . . [BOTA] functions independently of the Director in matters of administrative judgment and decision." (Emphasis added.)

The similarity between what BOTA does in this context and what a district court must do when a taxpayer elects for a trial de novo seems obvious—the court steps into the role BOTA occupies under K.S.A. 2023 Supp. 74-2438, essentially repeating that process before a trial judge. See *In re Tax Appeal of Colorado Interstate Gas*, 270 Kan. 303, 318-19, 14 P.3d 1099 (2000) (*CIG I*) ("It is the duty of BOTA, in reviewing a valuation by the PVD, to exercise its judgment anew based on the evidence presented to it at the hearing and without giving deference to the PVD's valuation."); *Bicknell*, 315 Kan. at 484-505 (outlining district court's application of trial evidence to the same domicile factors set out in K.A.R. 92-12-4a used by BOTA in its administrative proceeding).

In effect, K.S.A. 2023 Supp. 74-2426(c)(4)(B) stands apart from customary KJRA proceedings first adopted in 1984. See L. 1984, ch. 338, § 1. And this suggests the statutorily stated grounds for relief in K.S.A. 77-621(c) on the merits do not align with the district court's trial de novo role under K.S.A. 2023 Supp. 74-

2426(c)(4)(B). But that puzzle does not need to be solved today because our decision here rests entirely on the scope of judicial review.

Standard of review

To determine whether the district court exceeded its scope of review requires us to consider two questions. First, whether K.S.A. 2023 Supp. 74-2426(c)(4)(B) allows a district court to decide an issue not presented to BOTA. Second, if we conclude the statute does not allow new issues, we must decide whether the disputed issue here was in fact raised with BOTA. Specifically, we examine whether the RECs litigated whether PVD violated K.S.A. 79-5a04 before BOTA.

The first question is straightforward statutory interpretation, so our review is unlimited. See *In re Walmart Stores, Inc.*, 316 Kan. at 46. The second can be resolved only by examining the administrative hearing record to see what issues were before BOTA, which we can do as well as the district court, so again our review is unlimited. See *State v. Daniel*, 307 Kan. 428, 429-30, 410 P.3d 877 (2018) (exercising plenary review over whether an issue is properly presented below). To the extent either question requires addressing whether the district court had subject matter jurisdiction over the statutory claim, our review is unlimited as well. See *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009).

The party advocating for the district court to consider an issue bears the burden to show it was raised before BOTA. See K.S.A. 2023 Supp. 74-2426(c) (any action of BOTA is subject to judicial review under KJRA); K.S.A. 77-621(a)(1) (KJRA; imposing the burden of proving agency action's invalidity on the party asserting it); *In re Tax Appeal of Colorado Interstate Gas Co*., 276 Kan. 672, 680, 79 P.3d 770 (2003) (*CIG II*).

First question: interpreting K.S.A. 2023 Supp. 74-2426(c)(4)(B)

A court acting under the KJRA lacks jurisdiction over a new issue and cannot review it, unless an exception exists. K.S.A. 77-617 (listing exceptions); see also *Kingsley*, 288 Kan. at 410 (failure to raise an issue at the administrative hearing bars district court

from reviewing that particular issue). K.S.A. 2023 Supp. 74-2426(c)(4)(B), however, presents a unique procedural approach for review, so we must consider whether it allows a district court to add new issues beyond what was raised with BOTA. We hold it does not.

Our analysis starts with the statutory language. See *City of Shawnee v. Adem*, 314 Kan. 12, 15, 494 P.3d 134 (2021) ("When interpreting a statute, we begin with its plain language, giving common words their ordinary meaning."). K.S.A. 2023 Supp. 74-2426(c) provides the KJRA governs review of any action by BOTA. And the Court of Appeals performs this review, unless a taxpayer asks for a district court trial de novo. Compare K.S.A. 2023 Supp. 74-2426(c)(4) ("Appeal of an order of [BOTA] shall be to the court of appeals as provided in subsection [c][4][A], unless a taxpayer who is a party to the order requests review in district court pursuant to subsection [c][4][B]."), with K.S.A. 77-609 (providing the district court generally reviews agency action under the KJRA). Here, the RECs chose the district court path, so our focus remains fixed on its text:

> "At the election of a taxpayer, any summary decision or full and complete opinion of the board of tax appeals issued after June 30, 2014, *may be appealed* by filing a petition for review in the district court. *Any appeal* to the district court shall be a trial de novo. . . . [T]he trial de novo shall include an evidentiary hearing *at which issues of law and fact shall be determined anew*. . . ." (Emphases added.) K.S.A. 2023 Supp. 74-2426(c)(4)(B).

The district court must follow the KJRA to assess BOTA's determination of a taxpayer's challenge in a trial de novo, since nothing in subsection (c)(4)(B) states otherwise. See K.S.A. 2023 Supp. 74-2426(c) (BOTA's action is subject to review in accordance with KJRA unless its subsections provide differently). This means the district court reviews issues decided by BOTA or issues raised but not decided by BOTA. In either case, K.S.A. 2023 Supp. 74-2426(c)(4)(B) requires a party to first raise an issue with BOTA, so it can either act or fail to act. Otherwise, nothing exists for a district court to review. See K.S.A. 77-602(b) ("'Agency action' is '[t]he whole or a part of . . . an order,'" "the failure to issue . . . an order," or "an agency's performance of, or failure to perform, any other duty, function or activity, discretionary or otherwise."); K.S.A. 77-602(e) (defining an order as "an agency action of

particular applicability that determines the legal rights, duties, privileges, immunities or other legal interests of one or more specific persons"); K.S.A. 2023 Supp. 74-2438(a) (providing the process for a party to appeal a PVD determination to BOTA); K.S.A. 2023 Supp. 74-2437(b), (c) (providing BOTA with the power to hear appeals); K.A.R. 94-5-1(c) ("The regulations, policies, procedures, and directives of [BOTA] shall be construed to secure expeditious determinations of all issues presented to [BOTA].").

This view is supported by the core notion that an "appeal" seeks a higher authority to *re*consider the issue. See Black's Law Dictionary 121 (11th ed. 2019) (defining appeal as a "proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal"). And it is reinforced by K.S.A. 2023 Supp. 74-2426(c)(4)(B)'s reference to the district court's role as determining issues of law and fact "anew," which has a common understanding of "once more." See Black's Law Dictionary 109 (11th ed. 2019) (defining anew as "[o]ver again; once more; afresh").

We hold the trial de novo provision does not authorize a district court to expand its scope of judicial review barring an exception specified by law. See K.S.A. 77-612 (requiring exhaustion of administrative remedies prior to petitioning for judicial review); K.S.A. 77-617 (limitations on new issues). This means BOTA must have had an adequate opportunity to address the RECs' claim under K.S.A. 79-5a04 first since the RECs invoke no exception.

Second question: reviewing BOTA's record

The RECs described their statutory claim to the district court as: "[T]he valuations stated in BOTA's Opinion do not represent the fair market value of the property for [RECs], as is required by [K.S.A. 79-5a04]." And the court justified considering this issue based on that single sentence mentioned earlier from BOTA's order that the RECs "presented no evidence persuading the Board that [they] were not appraised at their respective fair market value." It concluded, "BOTA believed the respective valuations of the Petitioner RECs were at issue, and further, that BOTA decided against granting relief based on error in PVD's valuation of each utility."

But there is more said in BOTA's decision that the district court did not account for. To begin with, the court failed to mention, let alone reconcile, BOTA's clearly expressed issue statement:

"*The RECs assert PVD's income approach valuation methodology violates Article 11, § 1 of the Kansas Constitution as it results in non-uniform and unequal valuations of RECs statewide*. PVD responds that it has used a uniform and equal basis of valuation for all Kansas RECs and, therefore, its assigned valuations should be sustained." (Emphasis added.)

The obvious question is why would BOTA so precisely describe the RECs' allegation only as constitutional, if statutory compliance with K.S.A. 79-5a04 was also in play? After all, K.S.A. 79-5a04 is a complicated matter. See *Mobil Pipeline Co. v. Rohmiller*, 214 Kan. 905, 921, 522 P.2d 923 (1974) ("In determining the validity of an assessment of state assessed public utility property for ad valorem tax purposes, the essential question is whether the standards prescribed by K.S.A. 79-5a04, in determining the fair market value of the public utility's property, have been determined and considered by taxing officials, or intentionally and grossly disregarded."). This conspicuous clash with the district court's stated justification for taking up the statutory methodology argument is too glaring to be ignored.

Similarly, the district court overlooks that the whole BOTA decision describes and applies article 11, section 1, while supposedly taking just a single sentence to dismiss a statutory issue involving PVD's complex methodology for arriving at fair market value. See *In re Walmart Stores, Inc.*, 316 Kan. 32, Syl. ¶ 2 ("A property's fair market value determination is generally a question of fact with the fact-finder free to decide whether one appraisal or methodology is more credible than another."). This dearth of fact-finding from BOTA would be odd, at best, since fair market value disputes typically generate substantial factual and legal battles. See, e.g., *In re Tax Appeal of ANR Pipeline Co.*, 276 Kan. 702, 711-31, 79 P.3d 702 (2003) (public utility); *CIG II*, 276 Kan. at 674-82 (public utility); *CIG I*, 270 Kan. at 305-15 (public utility); *Mobil Pipeline*, 214 Kan. at 908-27 (public utility); cf. *In re Tax Appeal of River Rock Energy Co.*, 313 Kan. 936, 492 P.3d 1157 (2021) (gas well working interests and equipment). Yet the district

court disregards this lack of factual findings about K.S.A. 79-5a04's requirements.

The district court also avoids the RECs' own description of their administrative appeal to BOTA that did not mention K.S.A. 79-5a04 or even generally claim a statutory compliance problem. Instead, they stated the "basis" of their agency appeal in terms of a violation of "the uniform and equal standard," which is decidedly a constitutional framing. Again, such statements cry out for reconciliation before embarking on the district court's desired analytical path.

Even worse, the district court gives no indication it considered the entire agency record before extending its judicial authority over the statutory claim. And Kansas caselaw shows how probative and persuasive references to that record are when disputes arise about what issues were raised with the agency. See, e.g., *Sierra Club*, 305 Kan. at 1122-24 (noting "vague references without any supporting authority" to the administrative record before concluding an issue was unpreserved).

Fortunately, our appellate record includes the transcript of BOTA's two-day evidentiary hearing, so we can perform that review ourselves. And it shows the witnesses discussed a single question—Did PVD's treatment of MSA credits violate the state Constitution under article 11, section 1? To explain, we begin with the RECs' counsel's opening statement to BOTA:

"*So the issue in this case is how do you treat that MSA? . . .*

"What PVD does is include all of that MSA in the net operating income. So it creates a larger net operating income than when you capitalize a higher value. What the Taxpayers will present to you is both evidence on valuation through our expert and through his testimony and that of our other witnesses indications that by doing that *wecreate a non-uniform/non-equal situation.* Because if Rural Electric Cooperative A keeps its MSA in the Coop, then its net operating income according to PVD is going to be higher and its value is going to be higher.

"If that same REC credited that MSA amount out to its own retail members, the farmers and ranchers and industry, then its net operating income according to PVD will be less and its retail or its property value would be less.

"So under the PVD model how you account for and distribute or retain that MSA amount has a dramatic impact on your real property value. *Now we don't think that's accurate and we think it violates the requirement of uniform and equal taxation.* And ultimately real property values should not be based upon an operating budget decision of an RECs Board of Directors, it should be based on real property valuation. *And so our expert will explain a way that not only gets*

to a fair real estate value but one that is uniform and equal among all RECs regardless of how they account for a particular MSA in a particular year and a particular month." (Emphases added.)

The italicized statements delineate the asserted constitutional theory, while the underlined remark vaguely mentions what counsel called "a fair real estate value." But this does not signal that the RECs separately litigated an attack on PVD's valuation methodology for noncompliance with K.S.A. 79-5a04. In fact, the BOTA transcript shows fair market value comes up only twice in witness questioning (and "fair real estate value" was never mentioned again).

One occurred during direct examination of the RECs' expert, Matt Barberich, in this exchange:

"Q Mr. Barberich, in your opinion is there a difference among these three options in terms of who ultimately receives the benefit of margin or dividend or a refund?

"A Who ultimately receives it, no. As we heard testimony this morning the timing of that receipt could be affected potentially by an extended period of time but ultimately who receives the benefit of the—of those funds is the same regardless of the Coop.

"Q So from a valuation perspective does that—what does that mean from a valuation perspective?

"A *From a valuation perspective under fair market value it should have no effect. It should have equal effect amongst similar situated properties.*" (Emphasis added.)

Barberich seemingly suggested that no matter which MSA option an REC chose, it ultimately benefits the same recipient, i.e., the member-customer. He continued to explain that these options should be treated equivalently because they equally affect similarly situated properties. But that is all he said. He did not give an opinion about whether PVD's methodology still achieved fair market value regardless of this difference or state that PVD's valuation methodology was contrary to generally accepted appraisal procedures or violated K.S.A. 79-5a04. And what he said was consistent with the constitutional "uniform and equal" standard at play throughout the proceedings.

Likewise, Barberich's written report to the district court, which we were told at oral argument is the same as that provided to BOTA, misses these same points. It identified the issue as "how

disparate operating and accounting treatments for Margin Stabilization Adjustments ('MSA') *result in non-uniform and unequal determinations* of Director's Unit Values for the [eight RECs]." (Emphasis added.) And it concludes: "[I]n our opinion, *there are non-uniform and unequal determinations* of Director's Unit Values between Kansas RECs as a result of how each respective Kansas REC elects to refund the available MSA to its members." (Emphasis added.) The report makes no reference to K.S.A. 79-5a04, PVD's statutory compliance with that statute, or any factual basis to dispute the assessed values under that statute.

Contrast that with Barberich's district court testimony, which the RECs tout now in their brief as related to "generally accepted appraisal procedures, which PVD is mandated by statute to use" and demonstrating "capital contributions should not be included in operating income when utilizing the income approach to value." They reference this exchange about the MSA:

"[REC counsel]: How about under K.S.A. 79-5a04 when it uses the phrase 'generally accepted appraisal procedures.' Would generally accepted appraisal procedures address those issues that you're describing?

"[Barberich]: Yes. Because they would be considered normalization adjustments in the various valuation approaches.

"[REC counsel]: And under generally accepted appraisal procedures, is it appropriate to try to strip out capital contributions if you're doing an income approach?

"[Barberich]: Yes."

To be sure, one can dispute whether this would be enough to substantively condemn PVD's income approach as statutorily invalid if that question were contested. But the point remains there is nothing in the agency record remotely comparable to this district court testimony. And without even that much discussion at the agency level, one cannot reasonably conclude BOTA had an adequate opportunity to consider the statutory claim's merits. See *Sierra Club*, 305 Kan. at 1123-24.

The second "fair market value" reference occurred during the cross-examination of PVD's expert, Dustin Barnes, in this exchange:

"Q Does the cost approach arrive at a just and reasonable value for public utility property?

"A In some cases it can. In these cases our cost approach is quite a bit higher than the income approach.

"Q So then as you testified, the primary method PVD used to value these Rural Electric Cooperatives for 2019 and 2020 involved the income approach?

"A Correct.

"Q Let's see. *Does this approach enable PVD to accurately determine the fair market value of these Coops real and personal tangible and intangible property*?

"A *I believe so*.

"Q Okay. What is the starting point of analysis under the income approach?" (Emphases added.)

Barnes presented his opinion to BOTA that the income approach accurately determines fair market value. And the parties largely agreed throughout these proceedings that the income approach was a generally accepted appraisal procedure under K.S.A. 79-5a04, so the question remains, how does this show the RECs litigated their statutory claim with BOTA? We fail to see that it does. See *Kingsley*, 288 Kan. at 411. Such a challenge requires much more than what is documented here. See *In re Walmart Stores, Inc.*, 316 Kan. 32, Syl. ¶ 2 ("A property's fair market value determination is generally a question of fact with the fact-finder free to decide whether one appraisal or methodology is more credible than another.").

Undaunted, the RECs' appellate brief refers us to other statements by counsel in the BOTA hearing as further proof that the fair-market-value issue was litigated there. But even if we were to consider counsel's statements for this purpose, the signals are faint—if they exist at all. For example, the RECs' counsel described the parties' dispute in closing as: "PVD applies the same methodology to every Kansas Rural Electric Cooperative. They took the same formula that they've used for years and applied it. *But that formula results in a non-uniform and an unequal result*." (Emphasis added.) Again, this is the language of the Kansas Constitution's article 11, section 1, not fair market value or generally accepted appraisal procedures required under K.S.A. 79-5a04.

Elsewhere, counsel mentioned "statutory requirements" to BOTA, but without any substantial connection to generally accepted appraisal practices, fair market value, or even K.S.A. 79-5a04. Counsel seemingly refers only to the RECs' independent decision to elect the third option. The referenced passage states:

"We're not saying there are any hypothetically equal RECs in Kansas. But the same REC will be forced by PVD's methodology to make a different judgment for its members than it would otherwise if the current formula stays in place.

"And even though I think it might be better . . . as a Board member for my REC to retain this, if I do the property tax impact is going to be a difference in valuation of millions of dollars. So I am now being forced; manipulated; compelled by PVD to change what I want to do as a Board member for my REC.

"That's what we are concerned about. *That's what we think doesn't reach the statutory requirements* and that's what we'll show you more of in our briefing." (Emphasis added.)

Regardless of what may have been intended, passing comments by counsel cannot adequately raise an issue with the agency without substantial evidence or legal argument backed with authority to link back to the issue. See *Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 335, 291 P.3d 1056 (2013) (noting that without any substance behind an allegation, a reviewing court deems the argument abandoned). Otherwise, a party could undermine the tax appeal process by merely mentioning something to BOTA and then wait for a de novo proceeding with a district court to unleash the substance behind it. Such slipshod practice would effectively strip away the judicial review character of K.S.A. 2023 Supp. 74-2426(c)(4)(B) and KJRA's requirement that a party exhaust all administrative remedies.

Finally, in their appellate brief appendix, the RECs list snippets scattered throughout the BOTA transcript, claiming these demonstrate a substantive attack on PVD's statutory compliance. But none even remotely grapple with the essence of K.S.A. 79-5a04, either individually or collectively.

One is by Don Hellwig, who testified for the RECs. He simply explained "flowing" MSA credits through a monthly bill does not "impact the actual value of physical property." The remaining ones are from Barberich: (1) explaining he calculated the eight RECs' values in the 2019 and 2020 tax years with an income approach using a capitalization method and showing his figures; (2) confirming his valuations "match" the financial information in Taxpayers Exhibits A and B; (3) summarizing the appraisal issues in his report, discussing how different treatments of the MSA "result[] in non-uniform and unequal determinations of a value," and agreeing with the income approach to value the RECs' property; (4) noting the RECs' NOI results in a higher "real

property" valuation although it should not affect "fair market value"—which we already discussed above; (5) using two hypothetical cooperatives to show PVD's model results in unequal treatment; (6) describing how the final valuation is determined from applying PVD's cap rate to the adjusted NOI; (7) confirming he valued each REC for 2019 and 2020; and (8) clarifying PVD's model may differently value the same properties.

In these excerpts, both witnesses discuss how PVD's treatment of the RECs' business judgment allegedly failed to reflect the actual property value by inflating their NOI. But a public utility's "property" includes "both real and personal, tangible and intangible" under K.S.A. 79-5a04, so it is hard to decipher what is meant by these passing comments. Besides, "actual value" and "fair market value" are not equivalent. See K.S.A. 79-5a04 (defining "fair market value" as "the amount in terms of money that a well informed buyer is justified in paying and a well informed seller is justified in accepting for property in an open and competitive market").

Based on the record, BOTA's isolated statement that the district court found so decisive—"the Taxpayers presented no evidence persuading the Board that the instant RECs were not appraised at their respective fair market value"—merely says neither party contested the income approach's validity. Accordingly, we conclude the RECs advanced a single constitutional claim of "uniform and equal" treatment before BOTA. See Kan. Const. art. 11, § 1; *State ex rel. Stephan v. Martin*, 227 Kan. 456, 468, 608 P.2d 880 (1980) (holding article 11, section 1 "prohibits favoritism, and requires uniformity in valuing property for assessment purposes so that the burden of taxation will be equal"). BOTA was correct when it identified the only issue before it was whether "PVD's income approach valuation methodology violates Article 11, § 1 of the Kansas Constitution as it results in non-uniform and unequal valuations of RECs statewide."

We hold the district court exceeded its scope of judicial review under the KJRA by deciding PVD's methodology violated K.S.A. 79-5a04.

Judgment of the district court is reversed.