REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 319, No. 2
Opinions filed in September – October 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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SUPREME COURT

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ADMINISTRATIVE LAW:

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.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

— 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.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

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.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

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.
Ross v. Nelson 266

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.
Ross v. Nelson 266

— Statutory Presumption Is Rebuttable. K.S.A. 2-3202(a)'s statutory presumption is rebuttable. Even if the requirements for invoking the presumption are met, the presumption does not attach when the activity has a substantial adverse effect on public health and safety.
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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.
FreeState Electric Cooperative, Inc. v. Kansas Dept. of Revenue 377

Claim of Ineffective Assistance of Counsel—Remand to District Court for Evidentiary Hearing. Generally, we do not address the merits of an ineffective assistance of counsel claim for the first time on appeal. Instead, the usual course is a remand to the district court for an evidentiary hearing on the ineffective assistance claim. We will only address the merits of an ineffective assistance claim for the first time on appeal on the rare occasions when the evidentiary record is well-established and the merits of the claim are obvious. If a defendant does not request a remand, this court need not order one sua sponte. *State v. Zongker* 411*

Clerical Mistakes May Be Corrected by Court at Any Time. Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.
State v. Peters 492*

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. *State v. James* 178

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. " *State v. Hinostroza* 129

Six Justices Equally Divided on Issue on Appeal—Judgment of Lower Court Must Stand. When one of the justices of the Supreme Court is disqualified to participate in a decision of the issues raised in an appeal or petition for review, and the remaining six justices are equally divided as to the proper disposition of the appeal, the judgment of the court from which the appeal or petition for review is made must stand. *State v. Frost* 646*

ATTORNEY AND CLIENT:

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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. *State v. Z.M.* 297

Disciplinary Proceeding—Order of Disbarment. Attorney is found to have violated numerous KRPCs, including KRPC 1.3, 1.4(a), 1.15(a), 1.16, 3.3, 3.4(c), 8.1(b), and 8.4(d), as well as Rules 206(o) and 210. By failing to appear at the oral argument before the Supreme Court, she also is found to have violated KRPC 228(i). The hearing panel recommended disbarment, and the Supreme Court concluded the sanction of disbarment is warranted. *In re Crow-Johnson* 192

— Two-year Suspension stayed pending successful completion of Two-year Probation Plan. Attorney practiced law in Kansas and Missouri. A Formal Complaint was filed by the Office of the Disciplinary Administrator alleging violations of 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). A hearing panel found he violated these KRPCs and recommended a one-year suspension stayed with completion of probation plan. The Supreme Court concluded the appropriate discipline is two years suspension, stayed pending successful completion of a two-year probation plan. *In re Fulcher* 105

Order of Discharge from Probation. Attorney previously suspended for 90 days, which was stayed pending completion of 3-year probation plan, now applies for discharge from probation. The Supreme Court grants Lowry's motion, and he is discharged from probation. *In re Lowry* 296

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. *State v. James* 178

Voluntary Surrender of License—Order of Disbarment. Attorney's request to voluntarily surrender his law license was accepted by the Supreme Court. His license had been suspended for failure to pay attorney registration fees. Any pending proceeding or case terminates upon the date of the order of disbarment. *In re Frick* 649*

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.

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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. *American Warrior, Inc. v. Board of Finney County Comm'rs* 78

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. *Benchmark Property Remodeling v. Grandmothers, Inc.* 227

COMMON LAW:

State Law Includes Kansas Common Law. A statutory reference to Kansas law includes the Kansas common law. *Ross v. Nelson* 266

CONFLICT OF LAWS:

Choice-of-Law Analysis under Restatement—Law of Forum State to Determine if Substantive or Procedural Issue. A choice-of-law analysis under the Restatement (First) of Conflict of Laws begins by looking to the law of the forum state to determine whether a given issue is substantive or procedural. All procedural matters are governed by the law of the forum state. If a substantive matter, the category of substantive law will control what law is applied, as different rules apply to different legal categories.
M & I Marshall & Ilsley Bank v. Higdon 572*

Resolution of Conflict-of-Laws Issue—Appellate Review. Resolution of a conflict-of-laws issue involves a question of law over which appellate courts exercise unlimited review.
M & I Marshall & Ilsley Bank v. Higdon 572*

— Restatement Followed by Appellate Courts. When addressing choice of law issues, Kansas appellate courts traditionally follow the Restatement (First) of Conflict of Laws (1934).
M & I Marshall & Ilsley Bank v. Higdon 572*

CONSTITUTIONAL LAW:

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

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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. *State v. Kemmerly* 91

Denial of Sixth Amendment Right to Assistance of Counsel—Appellate Review. Whether a criminal defendant has been denied the Sixth Amendment right to assistance of counsel is a constitutional issue over which appellate courts exercise unlimited review. *State v. Trass* 525*

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. *State v. Huggins* 358

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. *State v. Showalter* 147

— 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.
State v. Showalter 147

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. *State v. Showalter* 147

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. *State v. Showalter* 147

Fifth Amendment Protections Prohibit Coerced or Involuntary Statements to Establish Guilt. The protections of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibit the State from relying on coerced or involuntary statements to establish a defendant's guilt. But these protections do not justify evidentiary suppression of confessions that

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are either unrelated to law enforcement tactics, or are connected to, but not causally related to, law enforcement tactics that constitute misconduct. *State v. Garrett*.....*465

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. *State v. Huggins* 358

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. *State v. Showalter* 147

Sixth Amendment Right of Criminal Defendants to Assistance of Legal Counsel. The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to assistance of legal counsel during all critical stages of a criminal proceeding. *State v. Trass* 525*

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. *State v. Kemmerly* 91

COURTS:

Disciplinary Proceeding—Certificate Revoked. Two separate complaints were filed against court reporter Belcher, which alleged she violated Supreme Court Rule 367, Board Rule 9.F.5, and 9.F.11. Following a hearing to the Board, the Board recommended Belcher's certificate be revoked under Board Rule 9.E.4. The Supreme Court agreed that the appropriate discipline is revocation of Belcher's certificate as a certified court reporter. *In re Belcher* 120

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. *State v. James* 178

CRIMINAL LAW:

Accused Person's Request for Counsel Prevents Further Interrogation—Exception. Once an accused person has expressed a desire to deal with police only through counsel, they may not be subject to further interrogation by the authorities until counsel has been

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made available, unless the accused person initiates further communication, exchanges, or conversations with the police.
State v. Younger 585*

Accused's Request for Counsel—Accused May Change Mind and Talk to Police without Counsel. Even after requesting counsel, an accused may change his or her mind and talk to police without counsel, if the accused initiates the change without interrogation or pressure from the police. *State v. Younger* 585*

Acquiring Controlled Substance Does Not Prove Distribution of Controlled Substance. Simply acquiring a controlled substance in a drug buy is not enough to prove the recipient's guilt for distribution of that controlled substance. *State v. Stuart* 633*

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.
State v. Reynolds 1

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.
State v. Hinostroza 129

Brady Violation Claim—Three Essential Elements. There are three essential elements of a *Brady* violation claim: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *State v. Collins* 439*

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.
State v. Daniels 340

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

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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. *State v. Dotson* 32

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. *State v. Huggins* 358

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.
State v. Hinostroza 129

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. *State v. Showalter* 147

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. .
State v. Reynolds 1

— 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.
State v. Reynolds 1

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.
State v. Hinostroza 129

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

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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. *State v. Hinostroza* 129

Custodial Interrogation—Invocation of Right to Counsel Any Time by Suspect. A suspect may invoke the right to counsel at any time by making, at a minimum, some statement that could be reasonably construed as an expression of a desire for the assistance of an attorney during a custodial interrogation. *State v. Younger* 585*

— Triggers Procedural Safeguards. Procedural safeguards concerning self-incrimination are triggered when an accused is in custody and subject to interrogation. *State v. Younger* 585*

Defendant May Forfeit Right to Counsel. A criminal defendant may forfeit the right to counsel. Unlike waiver, forfeiture results in the loss of a right through some action or inaction. *State v. Trass* 525*

Defendant May Waive Right to Counsel Through Express or Implied Waiver. A criminal defendant may waive the right to counsel through waiver, an intentional and voluntary relinquishment of a known right or privilege. A defendant's waiver of the right to counsel under the Sixth Amendment may be expressly stated or implied by the defendant's conduct. *State v. Trass* 525*

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. *State v. Daniels* 340

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. *State v. Nunez* 351

Determination if Confession Obtained in Violation of Due Process—Review of Totality of Circumstances if Misconduct by Law Enforcement. When determining whether a confession was obtained in violation of due process, a reviewing court must first consider the totality of the circumstances to determine whether any related law enforcement tactics constituted misconduct. If such law enforcement tactics do not constitute misconduct, a resulting confession cannot be rendered inadmissible because of those tactics. *State v. Garrett* 465*

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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. *State v. Showalter* 147

Determination of Defendant's Criminal History under Sentencing Guidelines—Right to Jury Trial under Section 5 Not Implicated. The method of determining a defendant's criminal history under the Kansas Criminal Sentencing Guidelines—which includes consideration of any prior convictions or juvenile adjudications—does not implicate a defendant's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. *State v. Peters* ……..……. 492*

Felony Murder Definition—All Elements of underlying Felony Must Be Established. Felony murder is the killing of a human being committed in the commission of, attempt to commit, or flight from an inherently dangerous felony. The State must establish all elements of the underlying felony to successfully prove felony murder. *State v. Stuart* ……..…… 633*

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. *State v. Showalter* 147

— 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. *State v. Showalter* 147

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.
State v. Showalter 147

If Confession Obtained by Misconduct of Law Enforcement—Totality of Circumstances—Due Process Violation Results in Suppression of Confession. If law enforcement committed misconduct related to a confession, a reviewing court must then assess whether, under the totality of the

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circumstances, the misconduct caused the confession. In other words, the court must consider whether the misconduct caused the defendant's free will to be overborne, such that the resulting confession was not voluntary. If that happened, law enforcement has violated due process and the resulting confession must be suppressed. *State v. Garrett*..... 465*

Invocation of Right to Counsel by Suspect—No Further Questioning unless Knowing and Intelligent Waiver of Right. Once a suspect has invoked the right to counsel, there may be no further questioning unless the suspect both initiates further discussions with the police and knowingly and intelligently waives the previously asserted right. *State v. Younger*..... 585*

Miranda Warnings Required before Custodial Interrogation. The procedural safeguards of *Miranda* are not required when a suspect is simply taken into custody; they only begin to operate when a suspect in custody is subjected to interrogation. *State v. Younger*..... 585*

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. *State v. Jacobson*..... 70

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. *State v. Showalter*..... 147

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. *State v. Union*..... 214

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. *State v. Showalter*..... 147

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. *State v. Wilson*..... 55

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 con-

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scious 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. *State v. Dotson* 32

Recorded Conversations—Knowledge by Defendant Not Necessary. The fact that a defendant is in custody and does not know his or her conversations are being recorded does not render the conversations involuntary or the products of custodial interrogations. *State v. Younger* 585*

Reminder to Accused that Attorney Might Intervene to Stop Interview—No Proof of Coercion. Reminding an accused person that an attorney might intervene to stop them from speaking with investigators is not proof of coercion and does not constitute an impermissible extension of the interview. *State v. Younger* 585*

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. *State v. McMillan* 239

Right to Counsel May Be Forfeited by Egregious Conduct or by Intent to Disrupt Judicial Proceedings. As a matter of first impression, a defendant may be found to have forfeited the right to counsel regardless of whether the defendant knew about or intended to relinquish the right when the defendant engaged in egregious misconduct, or a course of disruption intended to thwart judicial proceedings. Forfeiture is an extreme sanction in response to extreme conduct that jeopardizes the integrity or safety of court proceedings and should be used only under extraordinary circumstances as a last resort in response to the most serious and deliberate misconduct.
State v. Trass 525*

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. *State v. McMillan* 239

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

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jury trial right, admissions by the defendant may be relied upon as facts by a sentencing court. *State v. Nunez* 351

— Motion to Correct Illegal Sentence—Cannot Raise Constitutional Claim. A defendant cannot use a motion to correct an illegal sentence to raise a constitutional claim. *State v. Martis* ……..……. 650*

— Reasons for Denial of Departure Motion and Imposition of Presumptive Sentence on the Record Not Required. K.S.A. 21-6620(c)(2)(A) does not require a district court to state on the record its reasons for denying a departure motion and imposing a presumptive sentence. *State v. Zongker* ……...……. 411*

— 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. *State v. McMillan* 239

— Restitution Amount—Actual Damage or Loss Caused by the Crime. The appropriate amount for restitution is that which compensates a victim for the actual damage or loss caused by the defendant's crime. *State v. Younger* ……..…... 585*

— — Burden on State. The State has the burden of justifying the amount of restitution it seeks. *State v. Younger* …….. 585*

Statements Made in Custodial Interrogation Excluded under Fifth Amendment—Exception if Procedural Safeguards and *Miranda* Warnings. Statements made during a custodial interrogation must be excluded under the Fifth Amendment to the United States Constitution unless the State demonstrates it provided procedural safeguards, including *Miranda* warnings, to secure the defendant's privilege against self-incrimination. *State v. Younger* …...…….. 585*

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. *State v. Wilson* 55

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."
State v. Wilson 55

Summary Denial of Motion to Withdraw Plea—Appellate Review. Appellate courts review de novo a district court's summary denial of a motion

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to withdraw plea because the appellate court has all the same access to the records, files, and motion as the district court. *State v. Espinoza* …….. 653*

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. *State v. Daniels* 340

Valid Consent to Search—Two Conditions. For a consent to search to be valid, two conditions must be met: (1) there must be clear and positive testimony that consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion, express or implied. *State v. Younger* …….. 585*

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. *In re Wrongful Conviction of Doelz* 259

EVIDENCE:

If Law Enforcement Officers Do Not Prompt Spontaneous Statements—No Basis for Finding Subtle Compulsion. When law enforcement officers say nothing to prompt spontaneous statements from a suspect, there is no basis for finding even subtle compulsion. *State v. Younger* …….. 585*

Statements by Defendant in Custody Must Be Voluntary to Be Admissible. To be admissible as evidence, statements by a defendant who is in custody and subject to interrogation must be voluntary and, in general, made with an understanding of the defendant's constitutional rights. *State v. Younger* …… 585*

Statements Freely and Voluntarily Given—Admissible in Evidence. Statements that are freely and voluntarily given without compelling influences are admissible in evidence. *State v. Younger* ……..…… 585*

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. *State v. Kemmerly* 91

HIGHWAYS AND STREETS:

Permanent Occupation of Part of Public Highway Easement for Private Use—Outside Easement's Scope. The permanent occupation of a

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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. *Ross v. Nelson* 266

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. *Ross v. Nelson* 266

HUSBAND AND WIFE:

Joint Ownership of Real or Personal Property by Husband and Wife in Missouri—Presumption of Tenancy by Entirety Created. In Missouri, joint ownership of real or personal property by husband and wife creates a presumption of a tenancy by the entirety. Because the interest in a tenancy by the entirety cannot be divided, a judgment against either the husband or the wife alone may not attach to property held as a tenancy by the entirety. *M & I Marshall & Ilsley Bank v. Higdon* 572*

Tenants in Common or Joint Tenants with Rights of Survivorship of Property in Kansas—Tenancy by Entirety Not Recognized in Kansas. Property in Kansas may be jointly owned as tenants in common or as joint tenants with rights of survivorship. Kansas does not recognize tenancy by the entirety as a form of property ownership. A joint tenant's ownership is severable for meeting the demands of creditors.
M & I Marshall & Ilsley Bank v. Higdon 572*

Under Facts of this Case Issue of Bank Account Ownership Opened in Missouri Is Substantive Issue for Choice of Law Analysis—Property Ownership Issue. Under the facts of this case, the issue of whether a husband and wife owned property in a bank account opened in the state of Missouri, as tenants by the entirety, such that judgment against either the husband or the wife alone may not attach to the property, or as joint tenants with right of survivorship when garnishment occurs in the state of Kansas, which is severable to meet the demands of creditors, was not a procedural issue controlled by laws of the forum state but was a substantive issue for purposes of choice-of-law analysis. This issue related to property ownership, rather than contracts, when resolving a conflict-of-laws question. *M & I Marshall & Ilsley Bank v. Higdon* 572*

JURISDICTION:

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.
Benchmark Property Remodeling v. Grandmothers, Inc. 227

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. *Benchmark Property Remodeling v. Grandmothers, Inc.* 227

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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. *State v. Showalter* 147

PARENT AND CHILD:

Child in Need of Care Adjudication—Termination of Parental Rights When Finding by Clear and Convincing Evidence Parent Is Unfit. When a child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future. *In re D.G.* 446*

Finding of Parental Unfitness—Court Considers if Termination in Best Interests of Child—Primary Considerations. If the court makes a finding of unfitness, the court shall consider whether termination of parental rights as requested in the petition or motion is in the best interests of the child. In making the determination, the court shall give primary consideration to the physical, mental, and emotional health of the child. If the physical, mental, or emotional needs of the child would best be served by termination of parental rights, the court shall so order. *In re D.G.* 446*

Findings of Parental Unfitness—Appellate Review. When reviewing findings of parental unfitness, appellate courts view all the evidence in a light most favorable to the State and decide whether a rational fact-finder could have found it highly probable—i.e., by clear and convincing evidence—that the parent was unfit. In making this decision, the appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. *In re D.G.* 446*

Termination of Parental Rights Hearing—Court's Duty to Ensure Party Has Ability to Be Meaningfully Present. When a party appears for an evidentiary hearing which will address termination of their parental rights, the district court has the duty to ensure that this party has the ability to be meaningfully present in all respects, including the ability to see, hear, speak, and consult with counsel (if they have one) during the proceeding. *In re A.S.* 396*

— Waiver by Appearing Party Must Be Made Voluntarily and on Record. A waiver of an appearing party's right to fully and meaningfully participate in a termination of parental rights hearing must be made knowingly, voluntarily, intelligently, and on the record. *In re A.S.* 396*

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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.
Ross v. Nelson 266

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.
Benchmark Property Remodeling v. Grandmothers, Inc. 227

TRIAL:

An Exception to Right to Face-to-face Confrontation—Individualized Determination by Judges to Meet Constitutional Requirements. In order to meet constitutional requirements, judges must make individualized determinations that an exception to the right to face-to-face confrontation is necessary to fulfill other important policy needs. *State v. Younger* 585*

Appearance by Party in Hearing Presumes Participation by Party. If a party appears for a hearing in their own case, then it is presumed the party wants to fully and meaningfully participate in that hearing.
In re A.S. 396*

Burden on Defendant to Persuade Court That Mental Examination Necessary under Statute. The defendant bears the burden to persuade a sentencing court that a mental examination, evaluation, and report under K.S.A. 22-3429 serves the interests of justice. K.S.A. 22-3429 does not require courts to raise this issue sua sponte; a district court does not abuse its discretion in failing to order an evaluation if a defendant does not request one. *State v. Zongker* 411*

Confrontation Clause Violation—Harmless Error Analysis. A violation of the Sixth Amendment Confrontation Clause is subject to harmless error analysis. *State v. Younger* 585*

Crime of Aggravated Kidnapping—Term of Bodily Harm Requires No Definition in Jury Instruction. To prove aggravated kidnapping under K.S.A. 21-5408(b), the State must demonstrate bodily harm was inflicted upon the person kidnapped. The term "bodily harm" is readily understandable and requires no instructional definition. *State v. Moore* 557*

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Cross-Examination Essential to Fair Trial. The opportunity to conduct cross-examination is essential to a fair trial and helps assure the accuracy of the truth-determination process. *State v. Younger* ……..…… 585*

Cumulative Error Analysis—Unpreserved Instructional Issues May Not Be Aggregated if Not Clearly Erroneous. Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 22-3414(3) limits a party's ability to claim them as error. *State v. Moore* ……..…….. 557*

Cumulative-Error Doctrine—Single Error Cannot Support Reversal. A single error cannot support reversal under the cumulative-error doctrine. *State v. Peters* …… 492*

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 mid-trial 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. *State v. Kemmerly* 91

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. *State v. Kemmerly* 91

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. *State v. Z.M.* 297

Establishing Prosecutorial Error—Misstatement of Facts in Evidence. A defendant meets the first prong of establishing prosecutorial error by showing that the prosecutor misstated the facts in evidence, even if the misstatement was accidental or inadvertent. .*State v. Zongker* ……..…..… 411*

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. *State v. Z.M.* 297

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. *State v. Huggins* 358

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Jury Instructions—Application of Invited Error Doctrine. Application of the invited error doctrine in the context of jury instructions turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal. The ultimate question is whether the record reflects a party's action in fact induced the court to make the claimed instructional error.
State v. Peters 492*

— 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.
State v. Reynolds 1

— 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. *State v. Z.M.* 297

— Definition of Premeditation from PIK Instruction Generally Sufficient –Additional Instruction Definition May Be Appropriate. While the PIK instruction defining premeditation is generally sufficient, in cases involving a temporal question—and where the temporal intricacies embedded in the legal concept of premeditation may confuse the jury—additional instructional language defining premeditation is appropriate so long as it properly and fairly states the law and is not reasonably likely to mislead the jury. *State v. Zongker* 411*

— 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). *State v. Reynolds* 1

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. *State v. James* 178

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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. *State v. Huggins* 358

Proving Peremptory Strikes Were Pretext for Discrimination—Defendant's Burden under Batson. Where no argument or evidence is offered to show the prosecutor's reason for exercising the peremptory strikes were pretext for discrimination, a defendant fails to meet his or her burden under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). *State v. Peters* 492*

Sequestering Witness—Trial Court's Discretion. A trial court's decision whether to sequester a witness lies within that court's discretion. Furthermore, the trial court has discretion to permit certain witnesses to remain in the courtroom even if a sequestration order is in place. *State v. Younger* 585*

Sixth Amendment Right to Counsel Violation is Structural Error—Automatic Reversal of Conviction. Violation of the Sixth Amendment right to counsel is a structural error affecting the trial mechanism; it requires automatic reversal of a defendant's conviction. *State v. Trass* 525*

Structural Errors Affect Fundamental Fairness of Trial—Deprives Defendant of Due Process Protections. Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings. *State v. Trass* 525*

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.
American Warrior, Inc. v. Board of Finney County Comm'rs 78

No. 125,534

In the Interest of A.S., a Minor Child.

(555 P.3d 732)

SYLLABUS BY THE COURT

1. TRIAL—*Appearance by Party in Hearing Presumes Participation by Party*. If a party appears for a hearing in their own case, then it is presumed the party wants to fully and meaningfully participate in that hearing.

2. PARENT AND CHILD—*Termination of Parental Rights Hearing—Court's Duty to Ensure Party Has Ability to Be Meaningfully Present.* When a party appears for an evidentiary hearing which will address termination of their parental rights, the district court has the duty to ensure that this party has the ability to be meaningfully present in all respects, including the ability to see, hear, speak, and consult with counsel (if they have one) during the proceeding.

3. SAME—*Termination of Parental Rights Hearing—Waiver by Appearing Party Must Be Made Voluntarily and on Record.* A waiver of an appearing party's right to fully and meaningfully participate in a termination of parental rights hearing must be made knowingly, voluntarily, intelligently, and on the record.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 9, 2023. Appeal from Leavenworth District Court; JOAN M. LOWDON, judge. Oral argument held May 10, 2024. Opinion filed September 6, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded.

Chadler E. Colgan, of Colgan Law Firm, LLC, of Kansas City, argued the cause and was on the briefs for appellant.

Ashley Hutton, assistant county attorney, argued the cause, and *Todd Thompson*, county attorney, was with her on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: This case involves due process at a hearing for termination of parental rights. H.S. (Father) was in federal custody at the time of the hearing and appeared via Zoom, though the hearing was otherwise in-person. On petition for review, Father argues his limited ability to participate amounted to a due process violation. We agree and reverse the district court and Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Father and R.A. (Mother) are the biological parents of A.S. While pregnant with A.S., Mother tested positive for amphetamines, and both she and A.S. tested positive for amphetamines again after A.S. was born. Despite the initiation of Family Preservation Services in November 2020, Mother tested positive several more times in the following months.

A.S. went into Department for Children and Families custody in March 2021 and was quickly placed in the care of his paternal aunt. The district court held a permanency hearing around a year later. The court concluded reintegration was no longer a viable plan and permanent custodianship or adoption were in A.S.'s best interests. About a month after the permanency hearing, the State moved for a finding of unfitness and termination of parental rights as to both parents. The district court held a termination hearing on the State's motion on May 11, 2022.

Although Father was incarcerated in a federal facility at the time of the termination hearing, he attended the hearing remotely by Zoom. Father spoke to his attorney before the hearing. Counsel clarified Father was in the state but was being held in federal custody. The State's attorneys told the district court they had tried to contact the federal facility where Father was being held, but the facility did not respond to them. The facility did allow for digital access, though whether the access allowed for Father to testify is not apparent in the record before us. When counsel asked "how the [c]ourt would like me to—would the [c]ourt like me to be on Zoom with him or…[?]," the court said:

> "Really, quite frankly, [counsel], this is an in-person proceeding. I'd allowed for the Zoom link so he could at least observe what he can from that vantage point. We're not really set up for bifurcated hearings, but it's also not really possible to bring him back from out of state for this proceeding, so at least he can kind of see and hear what's going on."

Noting the State's unsuccessful efforts to have Father transported from the federal facility, the court then stated it would go forward with the hearing. After the district court said, "[W]e'll be hearing evidence today," it asked if defense counsel was "prepared to proceed." Counsel said, "We are, Judge," and then offered the following opening remarks:

"[Father] does anticipate being released, at the very latest, this November. He is comfortable with [A.S.] remaining in his current placement for the time being until his release and until he's able to complete his tasks. He did surrender himself voluntarily to go back into custody and address this issue—address his issues in the federal case specifically for the purpose of getting that cleared up so he could work on being with [A.S.] again."

Although he cross-examined Kristin McGlinn, the Cornerstones of Care case manager assigned to A.S., defense counsel presented no evidence on Father's behalf. McGlinn's uncontested testimony emphasized that Father's participation in his reintegration tasks was "[n]onexistent. Like, he didn't do anything." The court found Father unfit under K.S.A. 38-2269(b)(3), (b)(4), (b)(7), (b)(8), (c)(2), and (c)(3). The court also held that Father's actions "amount[ed] to neglect as defined by K.S.A. 38-2202(t)." Finally, the court found Father's unfitness was unlikely to change in the foreseeable future and termination of Father's parental rights was in the best interests of A.S. Based on these findings, the court terminated Father's parental rights.

On appeal, Father claimed the district court lacked sufficient evidence to terminate his parental rights. The Court of Appeals panel rejected this claim, holding "that clear and convincing evidence shows that Father was unfit under K.S.A. 38-2269(b)(3), (b)(7), (b)(8), (c)(2), and (c)(3)." *In re A.S.*, No. 125,534, 2023 WL 3914196, at *7 (Kan. App. 2023) (unpublished opinion). The panel found it unnecessary to reach the district court's finding that Father was unfit under K.S.A. 38-2269(b)(4). 2023 WL 3914196, at *7. The panel also affirmed the district court's conclusions that Father's unfitness was unlikely to change in the foreseeable future and that termination of Father's rights was in A.S.'s best interests. 2023 WL 3914196, at *8-9.

For the first time on appeal, Father also claimed the district court violated his due process rights by not allowing him to testify via Zoom at the termination hearing. *In re A.S.*, 2023 WL 3914196, at *9. The panel found that Father's explanation for *why* he failed to raise the issue below "does not comply with [Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36),]" and thus declined to reach the issue. 2023 WL 3914196, at *10. But the panel also observed:

"Additionally, Father's failure to raise the claim in district court hampers our ability to review the claim, primarily because there is no indication in the record that Father—as an incarcerated parent—asked or even wanted to testify. Though the district court said it was not set up for bifurcated hearings, this statement falls short of the district court denying any request Father could have made. There is only a brief discussion concerning the efforts the State made to secure Father's physical presence at the hearing, and there is no discussion concerning the State's ability to procure a witness from a federal facility." *In re A.S.*, 2023 WL 3914196, at *10.

The panel thus declined to reach the merits of Father's due process claim. Father petitioned this court for review, and we granted review as to Father's due process claim.

ANALYSIS

Father argues his due process rights at the May 2022 termination hearing were violated because, by only allowing Father to observe the proceedings over Zoom, the district court denied Father the ability to testify or otherwise meaningfully participate in the hearing.

Standard of Review

Appellate courts apply an unlimited standard of review in assessing whether an individual's due process rights were violated under specific circumstances, which poses a question of law. *In re Care and Treatment of Quillen*, 312 Kan. 841, 849, 481 P.3d 791 (2021).

Preservation

Ordinarily, appellate courts do not consider constitutional issues raised for the first time on appeal. See, e.g., *State v. Arnett*, 314 Kan. 183, 185, 496 P.3d 928 (2021); *State v. Parry*, 305 Kan. 1189, 1192, 390 P.3d 879 (2017). But the courts can opt to review newly raised issues where:

"'(1) the newly asserted theory involves only a question of law arising on proved or admitted facts . . . ; (2) consideration of the theory is necessary to serve the ends of justice or to prevent [a] denial of fundamental rights'; or (3) the district court's judgment is correct for the wrong reason." *Arnett*, 314 Kan. at 185.

Because these exceptions are "prudential," an appellate court has discretion over the decision of whether to extend one. *State v.*

Johnson, 310 Kan. 909, 912-13, 453 P.3d 281 (2019); *Parry*, 305 Kan. at 1192. "'Even if an exception would support a decision to review a new claim, [an appellate court has] no obligation to do so.'" *Arnett*, 314 Kan. at 185 (quoting *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 [2020]).

If the initial reviewing court is a panel of the Court of Appeals, we then review the panel's decision to review or not review the issue for an abuse of discretion. *State v. Genson*, 316 Kan. 130, 135-36, 513 P.3d 1192 (2022).

> "'A court abuses its discretion when its action is (1) arbitrary, fanciful, or 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 prerequisite conclusion of law or the exercise of discretion is based. The party arguing an abuse of discretion bears the burden of establishing that abuse.'" *State v. Aguirre*, 313 Kan. 189, 195, 485 P.3d 576 (2021) (quoting *State v. Corbin*, 311 Kan. 385, 390, 461 P.3d 38 [2020]).

Father bears the burden of showing the panel abused its discretion. Cf. *State v. Ochoa-Lara*, 312 Kan. 446, 449, 476 P.3d 791 (2020). We find that burden has been satisfied here, because, under the facts presented, no reasonable judge would agree with the panel's decision to deny discretionary review of Father's due process claim.

The panel correctly observed:

- Father did not object at the termination hearing that he could not testify;
- the record fails to say whether Father wanted to testify; and
- Father's counsel did not object to proceeding with the hearing.

But, as we will further outline below, a reasonable interpretation of the court's comments is that the court *had already ruled* the hearing would proceed despite the limitations on Father's ability to participate, effectively preempting objection or a motion to continue the hearing until Father could participate fully. Thus, we are unpersuaded by the panel's conclusion that it could not review the

claim "because there is no indication in the record that Father—as an incarcerated parent—asked or even wanted to testify." *In re A.S.*, 2023 WL 3914196, at *10.

Although Father does not highlight it, the panel also made a legal error in applying the final sentence of Rule 6.02(a)(5): "If the issue was not raised below, there must be an explanation why the issue is properly before the court." (2024 Kan. S. Ct. R. at 36). As the panel wrote:

> "An appellant is required to explain why an issue that was not raised below should be considered for the first time on appeal. To comply with Rule 6.02(a)(5), Father asserts 'that the issue of his in person appearance was well known and had been raised in the trial [c]ourt as evidenced by the extensive discussion on the record of Father's custody status and appearance.'
>
> . . . .
>
> "At no point did Father file any motions concerning his physical presence at the hearing prior to its occurrence. Father's counsel also never objected to the hearing proceeding without Father's physical presence. Nor did Father's counsel request a continuance so that Father could be released from federal prison before the termination hearing proceeded. As explained above, Father's counsel essentially did the opposite. Given this context, Father's explanation regarding why the issue was not raised in district court does not comply with Rule 6.02(a)(5).
>
> "Our Supreme Court has warned that Rule 6.02(a)(5) would be strictly enforced, and litigants who failed to comply with this rule risked a ruling that the issue is improperly briefed and will be deemed waived or abandoned. As such, we decline to reach the issue because Father has not complied with Rule 6.02(a)(5). [Citations omitted.]" *In re A.S.*, 2023 WL 3914196, at *9-10.

But the panel incorrectly treated the final line of Rule 6.02(a)(5) as if it required Father to show the issue was *preserved*, not merely to show why it was "properly before the court." While "Rule 6.02(a)(5) means what it says," the burden it imposes is not so high. E.g., *Ellie v. State*, 312 Kan. 835, 839-40, 481 P.3d 1208 (2021) (issue unpreserved under Rule 6.02[a][5] when, among other things, "the State fails to argue—either in its briefs to the Court of Appeals or in filings submitted to this court—any reason for an appellate court to consider the issue for the first time on appeal"); *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). Here, Father did not simply lay out the merits of his claim. His brief before the panel argued a prudential exception was met because "'consideration of the theory [was] necessary to serve the ends of justice or to prevent the denial of fundamental rights.'" Father also argued his parental rights were a fundamental liberty

interest. Father therefore met the requirements of Rule 6.02(a)(5) by invoking the fundamental rights exception. The rule does not require an appellant to explain the issue was preserved, but rather why an unpreserved issue should be considered. While the panel noted Father was claiming a fundamental liberty interest, it committed an error of law by failing to consider that claim in the context of Rule 6.02(a)(5). Accordingly, the panel's conclusion that Father violated Rule 6.02(a)(5) was an abuse of discretion.

We turn to the merits of Father's claim.

Analysis

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re J.D.C.*, 284 Kan. 155, 166, 159 P.3d 974 (2007). When considering "a procedural due process claim, we must first determine whether a protected liberty or property interest is involved. If it is, then we must determine the nature and extent of the process due." 284 Kan. at 166.

"'[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.' [Citation omitted.]" *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "Accordingly, resolution of the issue whether the . . . procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." 424 U.S. at 334. We have applied the three factors from *Mathews* when determining whether a procedural due process violation has occurred in cases involving parental rights. See *In re A.A.-F.*, 310 Kan. 125, 145-49, 444 P.3d 938 (2019); *In re K.E.*, 294 Kan. 17, 21-26, 272 P.3d 28 (2012); *In re J.D.C.*, 284 Kan. at 166-70. The *Mathews* factors are:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Our analysis follows this pattern. So we first identify the right asserted and determine whether that asserted right is entitled to due process protections. It is axiomatic that "[a] parent's right to make decisions regarding the care, custody, and control of his or her child is a fundamental liberty interest protected by the Fourteenth Amendment." *In re J.D.C.*, 284 Kan. at 166. Thus we know the asserted right here is a private right entitled to due process protections. But what does that mean in this context?

To answer this question, we turn to the *Mathews* factors to consider the private interest at stake, the risk of depriving that interest against the value of providing additional procedural safeguards, and governmental interests that include practical and fiscal concerns.

Factor 1: The Interest at Stake

Under *Mathews*, we must first consider "the private interest that will be affected by the official action." *Mathews*, 424 U.S. at 335. Why? Because important, consequential, fundamental rights are afforded greater due process protections than less important ones. As we noted above, "[a] parent's right to make decisions regarding the care, custody, and control of his or her child is a *fundamental* liberty interest protected by the Fourteenth Amendment." (Emphasis added.) *In re J.D.C.*, 284 Kan. at 166. The United States Supreme Court has explained "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see also *Santosky v. Kramer*, 455 U.S. 745, 759, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Lassiter v. Dept. of Social Services of Durham County, N.C.,* 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore a commanding one."); *In re Adoption of A.A.T.*, 287 Kan. 590, 600-01, 196 P.3d 1180 (2008). Because of the importance of this right, this factor weighs in Father's favor.

Factor 2: Risk of Deprivation and Value of Additional Procedural Safeguards

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews*, 424 U.S. at 335. Father argues this factor weighs in his favor because he could not testify about his likely release date and prior reunification efforts. Father also claims he was unable to assist counsel with cross-examination.

Recently, the Supreme Court of Iowa explained the importance of a parent's participation at a termination of parental rights hearing:

> "Instead, we adopt the standard that juvenile courts in this state must give incarcerated parents the opportunity to participate from the prison facility in the entire termination hearing by telephone or other similar means of communication that enables the parent to hear the testimony and arguments at the hearing. The interests of the parent, the child, and the state support this opportunity. In particular, it serves the compelling interest of the parent to hear the evidence offered in support of a termination petition and to respond effectively to the evidence. We agree with the observations by other courts that parents normally have unique and exclusive knowledge of evidence concerning the termination. After all, their conduct is at issue. The risk of error is too great if a parent does not have the opportunity to hear this evidence and to formulate a response to it." *In re M.D.*, 921 N.W.2d 229, 236 (Iowa 2018).

The Iowa analysis mirrors our Court of Appeals panel's discussion in *In re Adoption of B.J.M.,* 42 Kan. App. 2d 77, 209 P.3d 200 (2009). In *B.J.M.*, a father argued he was denied procedural due process when the district court prohibited him from being present at the adoption hearing of his child. The father was incarcerated at Hutchinson Correctional Facility, and the adoption was without his consent. The trial court also prohibited the father's counsel from submitting an affidavit in place of the father's testimony. The district court ultimately terminated his parental rights. On appeal, the panel applied the *Mathews* factors and concluded the father was not afforded procedural due process. 42 Kan. App. 2d at 86-87. After noting the interest at stake was the father's fundamental right to parent, the *B.J.M.* panel turned to the second *Mathews* factor:

> "To that end, we find great risk that Father was unlawfully deprived of a fundamental liberty interest when prohibited from personally attending the adoption hearing,

especially given the complete absence of any substitute measures to ensure that Father had an opportunity to be heard at a meaningful time and in a meaningful manner. As a preliminary matter, Father was wholly deprived of the opportunity to testify—whether in person, by deposition, or by affidavit—regarding the efforts he made to assume his parental duties in the 2 years preceding the filing of Stepfather's adoption petition, as well as the actions taken by Mother and Stepfather to obstruct these efforts.

"Moreover, Father was deprived of the opportunity to review, and subsequently challenge, the testimony of and the evidence introduced by Stepfather and Mother at the hearing. This is extraordinarily significant because, although Father's counsel had the procedural ability to cross-examine witnesses and challenge evidence on behalf of Father, Father's inability to assist counsel with regard to these matters greatly diminished the efficacy of his counsel's cross-examination. Given his personal history with Mother, Father was familiar with Mother's traits, propensities, and demeanor, which would assist counsel in cross-examination as to Mother's recollection, veracity, and communication skills. Simply put, we find great risk that Father was unlawfully deprived of a fundamental liberty interest when prohibited from personally attending the adoption hearing. As such, this second factor also weighs in favor of a finding that Father's due process rights were violated in failing to transport him to the adoption hearing." 42 Kan. App. 2d at 85-86.

Here, Father was unable to participate in any meaningful way. Because of the procedures used at the May 2022 hearing, Father could not testify, interact with counsel, or otherwise respond to the State's case. See *In re M.D.*, 921 N.W.2d at 235 ("Parents often have exclusive and particular knowledge of the evidence offered by the [S]tate to support the termination petition and need to hear it to understand the evidence needed to make an effective response."). In essence, Father was a member of the gallery—able to see and hear but unable to influence the outcome of the State's attempt to terminate his parental rights. The risk to Father's parental rights is relatively great under such limitations. Likewise, a short continuance for a later hearing, whether digital, hybrid, or in-person, allowing Father the ability to see, hear, and speak during the hearing, while giving him the ability to consult with counsel, would have been extremely valuable in providing procedural safeguards. This factor weighs in Father's favor.

Factor 3: State Interests

Finally, courts must consider the "Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335. In *Santosky*, the United States Supreme Court explained: "[T]wo state interests are at stake in parental rights

termination proceedings—a parens patriae interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings." *Santosky*, 455 U.S. at 766. Additionally, both A.S. and the State have an interest in promptly resolving the case. *In re M.S.*, 56 Kan. App. 2d 1247, 1253, 447 P.3d 994 (2019).

We conclude that none of these State interests justify Father's inability to meaningfully participate at the May 2022 hearing.

First, promoting the welfare of the child suggests the child should receive the proper placement. Father's testimony and discussion with counsel would have increased the probability of appropriate placement because these procedural safeguards may have allowed additional relevant facts to be considered by the district court. See *Stanley v. Illinois*, 405 U.S. 645, 657-58, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) ("The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father.").

Second, as Father notes, any administrative or fiscal costs and burdens would have been minimal. Often these cases involve the court considering the administrative and fiscal burdens of transporting an incarcerated parent to the hearing. See, e.g., *In re Adoption of B.J.M.*, 42 Kan. App. 2d at 86 ("Regarding the expense to the government of transporting Father and providing for his safekeeping, there is no evidence in the record of cost to the government that compliance with Father's request would have entailed. Nevertheless, common sense suggests that the burden on the State would not have been prohibitive."). But here, Father was already available and virtually present. Presumably, any burdens such as hooking up speakers or a microphone, asking the court reporter to create a transcript of Father's testimony, and providing Father opportunities to consult with his attorney would be substantially less burdensome than a prisoner transport—particularly since the hearing occurred in 2022, two years after the COVID-19 pandemic first necessitated the use of virtual court hearings. Thus the court would have had some familiarity with video conference platforms. Alternatively, if a hybrid virtual and in-person hearing was not practical, then any administrative or fiscal costs and burdens as-

sociated with continuing the hearing and holding it entirely by videoconference were similarly minimal, particularly when weighed against a potentially unjustified termination of parental rights.

Third, the State's interest of a timely resolution would likely not have been impacted here because the court issued its order terminating Father's parental rights around a month after the hearing. The record does not reflect that allowing Father to testify and consult counsel would have significantly delayed the court's order. See *In re S.D.*, No. 116,185, 2017 WL 2001662, at *7 (Kan. App. 2017) (unpublished opinion) ("The only procedural request in this case was simply to allow Mother to testify on the third day of trial. This procedure would not have added a single day to the trial if the court had not closed the evidence. One day is not too large a burden, even if it is considered in 'child time.'"). And even if the court needed to bifurcate the hearing to allow for the setup of any audiovisual equipment needed to facilitate Father's participation, the record reflects nothing to suggest this would have been difficult. By May 2022, entire hearings by videoconference were common. Any resulting delay need not have been long. Besides, such a delay would be warranted to protect Father's right to be meaningfully heard, given the importance of the right at stake. *Stanley,* 405 U.S. at 656 (Due Process Clause was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."); *In re M.D.*, 921 N.W.2d at 236. This factor also weighs in Father's favor.

After considering the facts here and the *Mathews* factors, we conclude due process required Father to be able to testify, communicate with counsel, and otherwise fully participate in the termination of parental rights hearing.

Father was denied due process.

Still, the question remains whether Father was *denied* those due process rights, or if instead he waived them through inaction, failure to object, or acceptance of the process provided him. See *In re A.A.-F.*, 310 Kan. at 145 ("To establish a due process violation, [a parent] must show [they] were both entitled to and denied

a specific procedural protection."). The panel suggested "there is no indication in the record that Father—as an incarcerated parent—asked or even wanted to testify. Though the district court said it was not set up for bifurcated hearings, this statement falls short of the district court denying any request Father could have made." *In re A.S.*, 2023 WL 3914196, at *10.

This characterization overlooks the context of the district court's remarks, however. Before any evidence was admitted, Father's counsel explained to the court that Father was in federal custody. The State observed it had attempted to contact the federal facility with no success. However, there was no discussion of whether other, more formal procedures would have been successful or even if they had been attempted within a reasonable time before the hearing. When Father's counsel asked "how the Court would like me to—would the Court like me to be on Zoom with him or. . . [?]" The court responded:

> "Really, quite frankly, [defense counsel], this is an in-person proceeding. I'd allowed for the Zoom link so he could at least observe what he can from that vantage point. We're not really set up for bifurcated hearings, but it's also not really possible to bring him back from out of state for this proceeding, so at least he can kind of see and hear what's going on."

This statement implies that Father could *only* see and hear the proceeding. In effect, a reasonable interpretation is the court implicitly ruled Father could not meaningfully *participate* in the evidentiary hearing and the hearing would proceed, regardless.

The panel found significant that Father's counsel failed either to object or inform the district court Father *wanted* to testify. But when a party shows up for a hearing, we do not place a muzzle on him just in case he does not object to his inability to speak. If a party appears for a hearing in his own case, we *presume* he wants to fully and meaningfully participate in that hearing *because he is entitled to do so*. When a party appears for an evidentiary hearing that addresses termination of his parental rights, the district court has the duty to ensure the party has the ability to be meaningfully present in all respects, including the ability to see, hear, speak, and consult with counsel (if they have one) during the proceeding. The duty is no less where, as here, an incarcerated party appears virtually. Cf. *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 378, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) ("To safeguard the

due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."). This concept is not new, even though technology has far surpassed what an "appearance" once entailed before virtual hearings became common. Cf. *Fischer v. State*, 296 Kan. 808, Syl. ¶ 7, 295 P.3d 560 (2013) (in the context of a civil habeas proceeding):

> "An important consideration in using any alternative to a prisoner's physical presence in the courtroom for an evidentiary hearing . . . must be whether the court can give fair consideration to the particular claims in dispute, as well as the prisoner's ability to meaningfully participate in the proceedings. This includes the capability to consult privately with counsel."

Here, the issue is whether Father's due process rights were sufficiently accommodated given the manner of appearance the court allowed. And the answer must be "no." At a minimum, there was no discussion or accommodation for Father to testify or communicate with his counsel during this critical hearing.

Of course, a parent who has appeared as a party in a termination hearing may decline to exercise his right to fully participate, or even forfeit some of this right if he is disruptive. See *D. H. Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174, 185, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972) ("The due process rights to notice and hearing prior to a civil judgment are subject to waiver."); *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) ("The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."). But because his very appearance conveys he is there to exercise his right to fully participate, such a waiver is not presumed. We today clarify that a waiver of an *appearing* party's right to fully and meaningfully participate in a termination of parental rights hearing must be made knowingly, voluntarily, intelligently, and *on the record*.

Based on the record before us, we hold Father was denied due process at the May 2022 termination hearing.

This error is not harmless.

The final question is how to evaluate such an error. Father asks us to automatically reverse because this error is structural. But we need

not decide whether this type of error is structural (as some panels of the Court of Appeals have held) because in any event the error was not harmless. Cf. *In re Adoption of B.J.M.,* 42 Kan. App. 2d at 87-88. Under our constitutional harmlessness test:

"'[T]he error may be declared harmless where the party benefitting from the error proves 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.'" *State v. Sherman*, 305 Kan. 88, 100, 378 P.3d 1060 (2016) (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]).

Under this test, the State must show beyond a reasonable doubt the outcome of the termination hearing would be the same had Father been able to testify and otherwise meaningfully participate at the hearing. See *State v. Herbel*, 296 Kan. 1101, 1110, 299 P.3d 292 (2013). But the State cannot satisfy this burden here. The case against Father was almost entirely based on his failure to participate in the reintegration process. Perhaps Father's testimony would not refute that he had failed to satisfy the technical requirements of his reintegration plan, i.e., had failed to communicate with Cornerstones of Care or submit proof of completion of courses, etc. But Father was unable to testify about his relationship with Cornerstones of Care or about any potential barriers that may have affected his ability to complete his reintegration tasks, which might have been germane to the district court's ultimate findings of unfitness. We just do not know what he would have said if he had been able to say it. So we cannot say beyond a reasonable doubt Father's parental rights would have been terminated if he had been given the ability to meaningfully participate at the May 2022 termination hearing.

We therefore reverse the Court of Appeals and district court and remand the case to the district court to complete a new termination of parental rights hearing which satisfies Father's due process right to meaningfully participate.

Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded.

State v. Zongker

No. 125,449

STATE OF KANSAS, *Appellee*, v. ADRIAN N. ZONGKER, *Appellant.*

(555 P.3d 698)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions—Definition of Premeditation from PIK Instruction Generally Sufficient –Additional Instruction Definition May Be Appropriate.* While the PIK instruction defining premeditation is generally sufficient, in cases involving a temporal question—and where the temporal intricacies embedded in the legal concept of premeditation may confuse the jury—additional instructional language defining premeditation is appropriate so long as it properly and fairly states the law and is not reasonably likely to mislead the jury.

2. SAME—*Establishing Prosecutorial Error—Misstatement of Facts in Evidence*. A defendant meets the first prong of establishing prosecutorial error by showing that the prosecutor misstated the facts in evidence, even if the misstatement was accidental or inadvertent.

3. APPEAL AND ERROR—*Claim of Ineffective Assistance of Counsel—Remand to District Court for Evidentiary Hearing.* Generally, we do not address the merits of an ineffective assistance of counsel claim for the first time on appeal. Instead, the usual course is a remand to the district court for an evidentiary hearing on the ineffective assistance claim. We will only address the merits of an ineffective assistance claim for the first time on appeal on the rare occasions when the evidentiary record is well-established and the merits of the claim are obvious. If a defendant does not request a remand, this court need not order one sua sponte.

4. TRIAL—*Burden on Defendant to Persuade Court That Mental Examination Necessary under Statute.* The defendant bears the burden to persuade a sentencing court that a mental examination, evaluation, and report under K.S.A. 22-3429 serves the interests of justice. K.S.A. 22-3429 does not require courts to raise this issue sua sponte; a district court does not abuse its discretion in failing to order an evaluation if a defendant does not request one.

5. CRIMINAL LAW—*Sentencing—Reasons for Denial of Departure Motion and Imposition of Presumptive Sentence on the Record Not Required.* K.S.A. 21-6620(c)(2)(A) does not require a district court to state on the record its reasons for denying a departure motion and imposing a presumptive sentence.

Appeal from Sedgwick District Court; SETH RUNDLE, judge. Oral argument held January 31, 2024. Opinion filed September 13, 2024. Conviction affirmed, sentence vacated in part, and case remanded with directions.

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

Matt J. Maloney, 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

STEGALL, J.: Adrian N. Zongker was a customer at a restaurant owned by Oscar and Amelia Acosta in Wichita. He had with him a diaper bag and a zebra striped clutch. Zongker's appearance and demeanor immediately made Amelia uncomfortable, but she took his order while Oscar observed on their security cameras.

After he finished his food, Zongker placed a second order. When it was ready Amelia brought it out to the booth where Zongker was seated, and Amelia picked up the empty tray in front of Zongker as she sat down the second tray of food. She noticed that there was a Wal-Mart receipt on the tray as she took it to the trash.

At this point a family entered the restaurant and Amelia went to take their order. Zongker finished up his meal, took his second tray to the trash, and exited the restaurant. Amelia felt relieved, but remained apprehensive because she could see Zongker standing outside digging through his diaper bag.

Shortly after, Zongker came back into the restaurant and went to the booth where he had been sitting, where he appeared to frantically search for something. Amelia asked him what he was looking for, but Zongker did not reply. Zongker then went to the trash can, still clearly searching for something. Amelia again asked Zongker what he was looking for and he indicated that he was looking for a receipt. Amelia told him that a Wal-Mart receipt had been on the tray she had emptied into the trash can. She retrieved it from the trash and handed it to him. But Zongker then said he was looking for a little bag containing coins. Zongker continued his search around the trash, eventually returning to the booth and dumping everything out of his diaper bag, only to return to the trash can.

While Zongker was continuing his search between the booth and the trash can, Oscar came out of the kitchen and carried the trash outside to the front of the restaurant so Zongker could continue his search

there. Amelia could see them from the window and said Oscar appeared relaxed and was just standing and watching Zongker dump all the trash on the ground.

Amelia returned her attention to the customers inside, and suddenly she heard a gunshot. She looked up and immediately saw Oscar running into the restaurant and yelling, "[E]verybody to the floor. Get down to the floor." Amelia dropped to the floor, crawled over to Oscar, and saw the gunshot wound on his chest. She called 911 and grabbed the key to lock the restaurant door. Oscar later died at the scene. Immediately after shooting Oscar, Zongker returned to digging through the trash for several moments, before fleeing in the direction of a nearby QuikTrip.

Law enforcement quickly located Zongker a short distance away. When police approached Zongker, he dropped his bag onto the ground, put his hands in the air, and said, unprompted: "I did it. I did it. The gun's in the bag." Officers arrested Zongker, during which he asked the officers: "Is he going to live?" Upon search of Zongker's zebra clutch and diaper bag, police found a gun, ammunition, and some silver collector coins.

The State charged Zongker with premeditated first-degree murder and criminal possession of a weapon. After the charges were filed, Zongker was evaluated and found competent to stand trial. Defense counsel did not object to that finding. Zongker rejected a deal to plead guilty to intentional second-degree murder. Instead, he pled no contest to criminal possession of a weapon and proceeded to trial on the murder charge.

While in jail, Zongker had telephone conversations with his parents, which were recorded by jail officials and played for the jury. During the calls, Zongker explained that he was justified in the killing because he believed the people in the restaurant had stolen several hundred dollars' worth of gold and silver from him.

In one call, Zongker's mom said: "It's a family of five . . . they had four kids and a wife, you took that man away from his family." Zongker responded: "You know what, they took $700 from me . . . I set two gold coins down . . . okay, but that's $700, okay, they did me like that, they took a lot of money from me."

A few days later, on another call, this exchange occurred:

Family member: "A human life isn't worth . . . $600."

Zongker: "If you add it all up, this whole shit cost me $1,500 when you add it all up."

Family member: "I just don't approve of, you know, taking people's life over stuff like that."

Zongker: "$1,500? What if I stole $1,500 . . . from you?"

Family member: "You don't kill somebody over $1,500, okay? You just don't."

Zongker: "If your property is being stolen, that's stand your ground right there."

In another clip, Zongker again emphasized: "Okay, $802 in gold, okay? $802 in gold, okay? They may have paid for their business, but $802 in gold."

And another:

Family member: "Nobody's life is worth a dollar, nobody's life is worth a billion dollars."

Zongker: "How about $800 in gold, . . . and $120 silver, . . . about $900 bucks. How 'bout that? . . . What if I took your wedding ring, your mom's wedding ring and sold it, how would you feel about that?"

Family member: "Well I'd be really pissed off, but I'm not gonna kill you over it."

Zongker: "That's exactly what happened . . . the same ole, the Mexicans, they did that to me. Okay? They been doing it just to piss me off. They think I'm stupid or something. I was drunk!"

And finally:

Zongker: "Let them try to get to me, I'll kill another one of them if they try to get to me—"

Family member: "No, no, no, no. No, no, no! You don't understand—"

Zongker: "I ain't scared of no fuckin [unintelligible] them . . . Okay, we have this man, who lost his life, get over it?"

Family member: "Nobody gets over shit like that, that man had a family! He was supporting, getting your damn check, man—"

Zongker: "Nine hundred dollars—"

Family member: "The man owned the fucking business—"

Zongker: "Well that's my $900, that's my money that he stole from me."

The jury also heard from Dr. Bradley Grinage, a psychiatrist, who interviewed Zongker before trial. Dr. Grinage testified that Zongker has an average IQ and he had seen no evidence of "cognitive disability, learning disability, or intelligence problem." He testified that Zongker has a personality disorder, bipolar disorder, and autism spectrum disorder, but that Zongker did not have schizophrenia. After reviewing all available evidence, Dr. Grinage found with a reasonable degree of medical certainty that though Zongker did suffer from mental disease, at the time of the shooting, his mental disease was not "sufficient to interfere with his ability or capacity to formulate intent," and that there were "no significant cognitive psychotic symptoms that would suggest that he was unable" to form the requisite intent.

During their sessions, Zongker provided Dr. Grinage with "rational, nonpsychotic" reasons for killing Oscar. Much like in the phone calls, Zongker expressed that he knew that someone had taken his coins and so he was acting in self-defense. The justifications he offered to Dr. Grinage for why he shot Oscar were: (1) "he would freeze to death" without his coins; (2) when Oscar was helping him go through the trash he "called him a name" and threatened "to call the police"; (3) "'[i]t was [his] money'"; and (4) "he's been a victim all of his life, and he had to stand his ground."

The jury was given instructions for premeditated first-degree murder as well as a lesser included instruction for second-degree murder. The jury was also instructed:

"You may find the defendant guilty of murder in the first degree, guilty of murder in the second degree, not guilty solely because the defendant, at the time of the alleged crime, was suffering from a mental disease or defect which rendered the defendant incapable of possessing the required culpable mental state, 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."

The jury convicted Zongker of premeditated first-degree murder.

At sentencing, Zongker provided a summary of his lengthy written allocution as follows:

> "[T]his is not the only time me, Adrian Zongker, has been attacked, mugged, bullied, extorted for my money. These group of people exploit and extort me any chance they get. This is one of many times that's been in front of you, . . . that I've been attacked and mugged for my money. These people set me up that day knowing that I got my disability and my back pay; set me up to take my stuff, and . . . they set me up to rob me—mug me—and . . . that's it.
>
> "I want—I want—I want justice against these groups of people who have embezzled me, allegedly, over phone calls. I just found out about this. I was talking to them on the phone after the fact—months after the fact. Got $40,000 out of me. They're stacking my disability when I was locked up. I didn't know this until now. I want justice. I want them brought down too."

Just after Zongker provided this summary, the court, after looking over Zongker's written allocution, asked Zongker: "I just got to the part where you said, 'I probably deserve a life sentence.' . . . Is that a part of your statement?" Zongker responded: "Yeah. I was drunk and I probably lost my own stuff. But, I do have evidence that it's part of a larger conspiracy. So . . . yeah."

Zongker moved for a downward durational departure, offering as mitigating factors the fact that he "suffers from a mental disease and has a long history of mental impairment and was lacking in substantial capacity for judgment at the time of the offense," and that despite the jury's verdict, there was "relatively little evidence to support premeditation and the killing more likely appears to have been done on sudden impulse." The district court denied the motion and imposed a hard 50 life sentence.

Zongker directly appealed.

DISCUSSION

Sufficient evidence supports Zongker's conviction for premeditated murder.

Zongker first claims that the "killing in this case appears to be a textbook example of what a killing without premeditation looks like." He asserts that in contrast to this court's other cases evaluating the sufficiency of premeditation, the record here contains no "evidence of any sort of fight, quarrel, or struggle, or multiple wounds or strangulation over a period of time." Instead, Zongker compares the killing in this case to an "'impulse' decision," one

made "'without a second thought,'" or an "internal, snap decision." *State v. Stanley*, 312 Kan. 557, 572, 478 P.3d 324 (2020). And Zongker states that "[r]eview of the video in this case shows exactly this . . . type of act."

When a defendant challenges the sufficiency of the evidence, 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. We do not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). "[E]ven the gravest offense can be based entirely on circumstantial evidence. Sufficient circumstantial evidence does not need to exclude every other reasonable conclusion to support a conviction. [Citations omitted.]" *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022); see also *State v. Phillips*, 299 Kan. 479, 498, 325 P.3d 1095 (2014) ("[I]t is not necessary that there be direct evidence of either intent or premeditation. Instead, premeditation, deliberation, and intent may be inferred from the established circumstances of a case, provided the inferences are reasonable.").

We have identified nonexclusive factors to consider in determining whether circumstantial evidence gives rise to an inference of premeditation. These factors include the: (1) nature of the weapon used; (2) lack of provocation; (3) defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) dealing of lethal blows after the victim was rendered helpless. The number of factors present does not affect the analysis of what inferences can be reasonably drawn, because in some cases one factor alone may be compelling evidence of premeditation. However, use of a deadly weapon by itself is insufficient to establish premeditation. *State v. Killings*, 301 Kan. 214, Syl. ¶ 3, 340 P.3d 1186 (2015).

This killing was committed with a firearm, a deadly weapon. Oscar did not provoke Zongker; rather, the killing was committed during an encounter where both shooter and victim had been "engaged in a relatively calm confrontation" during which neither party yelled or displayed aggression toward one another. *State v. Schumacher*, 298 Kan. 1059, 1068, 322 P.3d 1016 (2014); see also

State v. Pabst, 268 Kan. 501, 513, 996 P.2d 321 (2000) (finding sufficient evidence of premeditation in part because although defendant and victim were engaged in a "mild, nonviolent argument," defendant was not provoked). Zongker, without warning, shot Oscar at point blank range in the chest. And as soon as he had done so, he resumed looking through the trash without even a glance at Oscar, even though he knew his shot had hit Oscar as evidenced by his asking the police: "Is he going to live?" Zongker did not seek medical aid for Oscar or attempt to call for help after shooting him. See *State v. Carter*, 305 Kan. 139, 153, 380 P.3d 189 (2016) ("[A] defendant's conduct after a killing indicative of earlier premeditation has included failure to seek medical attention for the victim."); *State v. Hill*, 290 Kan. 339, 363, 228 P.3d 1027 (2010) ("[T]he evidence that Hill did not seek medical attention for Yanofsky circumstantially supports premeditation and intent to kill.").

Zongker immediately confessed to the police, and no evidence was presented that he ever expressed remorse. See *Carter*, 305 Kan. at 153 (Statements that "show lack of remorse are in the same category as the defendant's post-killing conduct in our previous cases and could be considered by the jury for whatever weight they would bear. . . . The fact that lack of remorse may not *always* give rise to an inference of premeditation does not mean it *never* can."). Rather, he continuously doubled down on justifying his actions in both the series of phone calls and in his interviews with Dr. Grinage. His insistence that he was entitled to stand his ground because "the Mexicans" had stolen money from him—even asserting that he would "kill another one of them" if they tried it again—all may give rise to a reasonable inference of a premeditated act.

Zongker was "free to argue to the jury that the circumstantial nature of much of the evidence created reasonable doubt, but on appeal we accept the circumstantial evidence in the light most favorable to the State when assessing sufficiency." *State v. Ward*, 292 Kan. 541, 581-82, 256 P.3d 801 (2011). Zongker's jury was given options for either premeditated first-degree or intentional second-degree murder. It was also specifically instructed that if there was 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." To reach the result Zongker requests, we would have to make our own credibility determinations and reweigh the evidence. But these are not tasks an appellate court performs when conducting a sufficiency review. Instead, we consider all evidence—even if there is conflicting evidence or reasons to question its credibility—and do so in the light most favorable to the State. *Phillips*, 299 Kan. at 500-01. In so doing, we conclude the circumstantial evidence establishing premeditation is sufficient.

The district court did not err in declining to give an instruction for voluntary manslaughter.

To analyze Zongker's second claim of error, we begin with our familiar multi-step process for analyzing jury instruction issues, determining (1) whether the issue is preserved for appeal, (2) whether the instruction was legally appropriate, (3) whether the instruction was factually appropriate, and (4) if any identified error was harmless. *State v. Wimbley*, 313 Kan. 1029, 1033, 493 P.3d 951 (2021).

Here, the first and second steps of the analysis are satisfied: Zongker preserved the voluntary manslaughter instruction issue for appellate review by requesting it at trial, and voluntary manslaughter is a lesser included offense of premeditated first-degree murder, meaning the instruction was legally appropriate. *State v. Uk*, 311 Kan. 393, 397, 461 P.3d 32 (2020). In determining whether a lesser included instruction was factually appropriate, we ask whether there was sufficient evidence in the record, viewed in the light most favorable to the requesting party, to have supported a conviction for the lesser included offense. *State v. Couch*, 317 Kan. 566, 591, 533 P.3d 630 (2023).

Here, Zongker's claim fails. K.S.A. 21-5404(a)(2) provides: "Voluntary manslaughter is knowingly killing a human being committed . . . upon an unreasonable but honest belief that circumstances existed that justified use of deadly force under . . . K.S.A. 21-5225." K.S.A. 21-5225 provides:

> "A person who is lawfully in possession of property other than a dwelling, place of work or occupied vehicle is justified in the use of force against another for the purpose of preventing or terminating an unlawful interference with such property. Only such use of force as a reasonable person would deem necessary to prevent or terminate the interference may intentionally be used."

Zongker relies on *State v. Qualls*, 297 Kan. 61, 70, 298 P.3d 311 (2013), to assert that "there is no objective requirement" under the voluntary manslaughter theory of imperfect self-defense. In other words, Zongker argues that if one looks only at the words "unreasonable but honest belief" in K.S.A. 21-5404(a)(2), the evidence when viewed in the light most favorable to him would support a conviction for voluntary manslaughter. And if this is where the analysis both began and ended, we would agree with him.

There is, however, more to it than that. We considered precisely this question when we clarified the meaning of *Qualls* in *State v. Roeder*, 300 Kan. 901, 921-24, 336 P.3d 831 (2014). There we explained that a "purely subjective interpretation does not comport with the statutory language," because had

> "the legislature had intended to allow a defendant to make up his or her own version of the law based upon the defendant's declaration of an honest belief, the statute could have simply defined the crime as an intentional killing of a human being committed upon an unreasonable but honest belief that circumstances existed that justified deadly force. But the statute adds something; it requires that the honest belief has to be 'that circumstances existed that justified deadly force under [K.S.A. 21-5222, 21-5223 or 21-5225], and amendments thereto.'" 300 Kan. at 923.

Here, under K.S.A. 21-5225, the scope of a defendant's "unreasonable but honest belief" that deadly force was justified is limited to only such "force as a reasonable person would deem necessary to prevent or terminate" an unlawful interference with property. Zongker insists he "*honestly* believed that he needed to protect his property." But even assuming Zongker honestly believed he needed to protect against an unlawful interference with his coins, this circumstance would not have justified killing Oscar because no reasonable person in these circumstances could have deemed the killing of Oscar as necessary to prevent or terminate the unlawful interference of Zongker's possession of his coins. This is especially true when considering, as noted above, Zongker did not even claim Oscar was the individual who stole his coins. And in fact, Oscar was not even present when Zongker's coins allegedly went missing. Instead, Zongker maintained that he had "been a victim all of his life" and that he had to "stand his ground." On these facts, a conviction for voluntary manslaughter would not have been supported. It was not error for the district judge to decline to give the instruction.

The district court did not err in giving additional instructions regarding premeditation.

At trial the State requested that additional language defining premeditation from *State v. Bernhardt*, 304 Kan. 460, 472, 372 P.3d 1161 (2016), be included in the jury instructions. The district court gave the instruction over defense counsel's objection. Therefore, the issue is preserved for our review. 304 Kan. at 469.

Jury Instruction No. 4 contained the standard PIK premeditation instruction, followed by four additional paragraphs drawn directly from our decisions in *Stanley*, 312 Kan. at 562-63, *State v. Stafford*, 312 Kan. 577, 580, 477 P.3d 1027 (2020), and *Bernhardt*, 304 Kan. at 464. The instruction as given stated:

"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.

"Premeditation is the process of thinking about a proposed killing before engaging in homicidal conduct.

"Premeditation does not have to be present before a fight, quarrel, or struggle begins. Premeditation is the time of reflection or deliberation. Premeditation does not necessarily mean that an act is planned, contrived or schemed beforehand.

. . . .

"Premeditation can be inferred from other circumstances including: (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, or (5) dealing of lethal blows after the deceased was felled and rendered helpless.

"Premeditation can occur during the middle of a violent episode, struggle or fight."

The State, in requesting the additional paragraphs, explained that it felt "the before and after conduct language is helpful, as is the process of thinking about a proposed killing before engaging in the contact. It doesn't have to be present before." The district court agreed, explaining:

"I'm going to give the State's requested premeditation definition, and the reason why is, even the last sentence, it says premeditation can occur during the middle of a violent episode, struggle, or fight. That—they might think there was some sort of fight of some degree going on. I think the evidence of that is pretty

thin. But I think what the State's definition does is, it provides some more parameters. So, even if the jury does not believe that there was a violent episode, struggle, or fight going on, this definition lets them know that that's where one of the, you know—that even if there is a serious violent episode going on, that that does not exclude premeditation from occurring during the middle of that. And I think that is helpful for them to understand what—what premeditation means, and that it can occur even in the middle of something that they may believe didn't rise to the level of a violent episode, but if it had premeditation, they could still find that it occurred."

Zongker contends that though this additional instruction was legally appropriate—as it is a correct statement of the law—it was not factually appropriate because in his case there was no fight, quarrel, or struggle. The State asserts that evidence of a fight, quarrel, or struggle is not necessary in order to use the additional language. Rather, the instruction can be used whenever a temporal question exists. And the State asserts there was a temporal question in Zongker's case, because several minutes had elapsed from the time Zongker reentered the restaurant to the moment that he fired the gunshot.

We agree. While we maintain that generally, the PIK alone is sufficient, see *State v. Hilyard*, 316 Kan. 326, 336, 515 P.3d 267 (2022), the additional language is appropriate in any case where jurors could be confused "over the temporal intricacies embedded in the legal concept of premeditation." *Stanley*, 312 Kan. at 565. In Zongker's case, he could have formed premeditation after he had begun searching through the trash, but before he went outside and killed Oscar. In that sense, the temporal clarification in the instruction was helpful. And despite the instruction's reference to a fight, quarrel, or struggle, we do not find that that reference would mislead the jury. See *Hilyard*, 316 Kan. at 334 (When the given instructions "were sufficient, meaning that they properly and fairly stated the law and *were not reasonably likely to mislead the jury*, there is no error for an appellate court to correct." [Emphasis added.]).

The State did not commit reversible prosecutorial error.

Zongker next alleges that several instances of prosecutorial error during closing arguments require reversal of his conviction. He points to three instances where the prosecutor misstated the

facts, and one instance where he alleges the prosecutor misstated the law.

We employ a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sieg*, 315 Kan. 526, 535, 509 P.3d 535 (2022).

"To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of 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, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. 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.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

A defendant meets the first prong by establishing the prosecutor misstated the law or argued a fact or factual inferences outside of what the evidence showed. *State v. Wilson*, 309 Kan. 67, 78, 431 P.3d 841 (2018) ("When a prosecutor argues facts outside the evidence, the first prong of the prosecutorial error test is met."). In determining whether a particular statement falls outside of the wide latitude given to prosecutors, we consider the context in which the statement was made, rather than analyzing the statement in isolation. *State v. Becker*, 311 Kan. 176, 182, 459 P.3d 173 (2020).

During closing arguments, the prosecutor claimed Zongker murdered Oscar "by shooting him in the head [sic] just because he didn't get what he wanted." Zongker admits this was just an "unintentional oversight," though our caselaw suggests it is error nonetheless. See *State v. Sturgis*, 307 Kan. 565, 570, 412 P.3d 997 (2018) ("[A] prosecutor commits error by misstating the evidence, even when the misstatement is accidental or inadvertent."); *State v. Blansett*, 309 Kan. 401, 416-17, 435 P.3d 1136 (2019) (prosecutor stated "I recall that in [defendant's] testimony," even though defendant had not testified; prosecutor quickly corrected himself that he was referring to testimony of others who repeated what defendant said; though the "misstatement was repaired quickly,"

it was still prosecutorial error); *State v. Bodine*, 313 Kan. 378, 411, 486 P.3d 551 (2021) (assumed error when prosecutor claimed victim's body had no eyes when evidence only had shown victim had no "eye fluid").

But even considering this misstatement as error, we easily conclude it was harmless, as there is no reasonable probability it contributed to the verdict. There was no dispute that Oscar was shot in the chest. The error was clearly a result of a slip of the tongue and had no effect on the outcome of the trial.

Next, Zongker claims the prosecutor erred by mischaracterizing Dr. Grinage's testimony. As noted above, Dr. Grinage was careful not to opine on whether Zongker possessed the intent to kill; rather, he precisely articulated that his conclusion was only that Zongker's mental disease was not "sufficient to interfere with his ability or capacity to formulate intent," and that there were "no significant cognitive psychotic symptoms that would suggest that he was unable" to form the requisite intent. But in closing, the prosecutor stated:

"**[Dr. Grinage] told you in no uncertain terms: In spite of that, the defendant still possessed the necessary intent to kill.** That evidence can only be determined whether or not he has the culpable mental state. You'll see a definition for that later in the instructions, that culpable mental state. That's one of the elements that the State has to prove as it pertains to the offenses of premeditated first-degree murder and second-degree murder. *Dr. Grinage told you that he's capable of forming that intent*.

"At the time of the murder, he was bipolar. He did not suffer from a mental disease or defect sufficient to render the defendant incapable of possessing the intent required to commit first-degree murder. Is he odd? Did he have odd behavior? Sure. Eccentric? Yes. Motivations that we cannot relate to or perhaps we don't understand? Yes. *He can still form intent*." (Emphases added.)

Zongker alleges the bolded statement is error, despite the italicized portions that came soon after which correctly described Dr. Grinage's testimony. The State agrees the first statement was incorrect, but asserts that because the prosecutor immediately followed up with correct statements the jurors would not have been misled.

Again, our precedent indicates that the first step in a prosecutorial error analysis is satisfied when the prosecutor misstates facts, even if they are quickly corrected. See *Sturgis*, 307 Kan. at

570; *Blansett*, 309 Kan. at 417. Thus the prosecutor's statement that "[Dr. Grinage] told you . . . the defendant still possessed the necessary intent to kill" was error.

Turning to the second step of our analysis, prosecutorial error is harmless if the State can show that there is no reasonable possibility that the error contributed to the verdict. *Sherman*, 305 Kan. at 109. Zongker asserts the error cannot be harmless given the very strong language that prefaced the misstatement—"[h]e told you in no uncertain terms"—and that the corrections that followed could not mitigate the strength of the initial misstatement.

We disagree. We find the error was harmless because (1) the State corrected itself immediately after making the misstatement; (2) Dr. Grinage was very careful to speak precisely during his testimony and repeatedly corrected the attorneys if they started to ask questions that blurred the line of what he could testify to; (3) the misstatement went to whether Zongker formed the requisite intent to kill (as opposed to premeditation) which was not a contested element at trial; and (4) the jury was instructed that it should disregard any statement not supported by the evidence. See *State v. Thomas*, 307 Kan. 733, 744-45, 415 P.3d 430 (2018).

Dr. Grinage was careful in how he presented his findings. For example:

> "Q. Was he able to form the intent to kill?
> "A. My—my request, how I address those who would have asked the question is: My expertise is not specifically on intent, but on mental disease or defect.
> . . . .
> ". . . I drew an opinion that he did not have mental disease or defect sufficient to interfere with his ability or capacity to formulate intent as to the charges that were presented that I saw, which was first-degree murder."

And later:

> "I don't—you know, at this particular point, I don't know if it's been stipulated that he did kill him. *My job is to evaluate and look at mental disease or defect*. And so, you know, what I can say is that he understood when he—when the police were interviewing him—someone did die—and he had an awareness that a person had died. And so, *I didn't specifically ask him, you know, did you do this specifically? That's not my job*." (Emphases added.)

Throughout his testimony Dr. Grinage remained consistent in how he characterized his findings and was careful to speak precisely. Considering how cautious Dr. Grinage was to be clear about what exactly he was testifying to, the prosecutor's error—that again, was quickly corrected—did not affect the outcome of the trial in light of the entire record. This is particularly true considering that the error did not relate to premeditation, but rather, went to whether Zongker had the intent to kill. Indeed, the simple "intent to kill" was conceded by Zongker's counsel both at trial and on appeal. In closing argument counsel stated:

"I'm not suggesting that you find Adrian Zongker not guilty of everything. I'm not for a minute suggesting that. I'm not suggesting that you not find that he had the inability to form intent. I'm not suggesting that either. . . . The big thing here, ladies and gentlemen, is not the culpable mental state. They've proven that. That's not what this is about. This is about the other element about premeditation."

Appellant's brief stated that "[b]ased on the evidence presented and appointed counsel's admissions, the jury could have reasonably found that Mr. Zongker intentionally killed Oscar."

Zongker next claims the prosecutor misstated the location of the gun at key moments during the events in question. The prosecutor claimed that when Zongker entered the restaurant,

"*the gun is in the clutch, and the clutch is in the bag.* If you watch the video carefully, you're going to see that *he's retrieved the gun. He's got the clutch in his hand*. And so, as he searches and becomes more and more frustrated, he begins to look for: Who can I blame for this frustration?" . . . [H]e's getting more frustrated. . . . *The gun is now out of the bigger bag, and it's in his hand*. By the time he gets outside, he wields and uses the gun." (Emphases added.)

Zongker's counsel moved for a new trial because of these misstatements. He correctly argued that contrary to the State's assertions, the undisputed video evidence showed the clutch was initially outside of the diaper bag, and that Zongker only put the clutch into the bag as he was getting ready to go outside with Oscar. Thus, according to Zongker, the State's misstatements misled the jury into thinking Zongker "had removed the clutch from the bag so that he could shoot the guy, and that was his premeditation." But in reality, it was "the opposite. It's that the clutch is always outside of the bag. It goes into the bag for the first time right before he exits" the restaurant. Zongker's counsel also criticized

the timing of the State's statements, because it was brought up in the second half of the State's closing argument, so defense counsel was left with no "opportunity to try to clean up that mistake."

The district court denied the motion, stating: "I'm not aware of the prohibition on counsel arguing facts in evidence at any particular point during their closing argument," and also noting that the jurors had the video available to them during their deliberations.

The State now admits in its brief that the prosecutor "misspoke" when discussing the location of the zebra clutch. But the State contends that "the broader point that the prosecutor was making was valid," because the video did show that Zongker retrieved and held the clutch before the shooting. In fact, Zongker had initially left both his bags at the booth while he searched the trash, but went back and retrieved only the clutch when Oscar first came to help him. The State asserts that it is reasonable to infer that Zongker viewed Oscar as a threat to his property and decided to retrieve the clutch at the time Oscar got involved, because Zongker was preparing to use the gun against him. As such, the "prosecutor did not err in making this observation and arguing that it was evidence that defendant was planning to use the weapon."

But even if this was fair commentary on the evidence broadly speaking, it is not what the prosecutor said when specifically discussing the evidence. The prosecutor told the jury that the gun was in the clutch and that *the clutch was in the diaper bag* the whole time and that Zongker *only* took it out as he was getting agitated during his search. The video shows that this simply is not true. As such, the prosecutor erred in making these statements. *Sturgis*, 307 Kan. at 570.

Again, once an error is established, the court turns to determining whether the State has demonstrated beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the entire record. *Sherman*, 305 Kan. at 109. As noted above, the district court instructed the jury that "[s]tatements, arguments, and remarks of counsel are intended to help you in understanding the evidence and in applying the law, but they are not evidence. If any statements are made that are not supported by evidence, they

should be disregarded." See *Thomas*, 307 Kan. at 744-45 (this instruction can mitigate a prosecutor's misstatement of fact and can support a finding of harmlessness). Though the prosecutor's statement that the "gun is in the clutch, and the clutch is in the bag" was not correct at the time Zongker entered the restaurant, the overall point that the prosecutor was making—that Zongker kept his clutch close at hand during his search for his coins and while his frustration was building, including when Oscar first approaches him, and that he eventually removes the clutch and then removes, wields, and uses the gun—is supported by the video evidence. And the jury was instructed to disregard any statement not supported by the evidence. For these reasons we do not find that the prosecutor's error in misstating the location of the gun when Zongker entered the restaurant affected the outcome of the trial.

Finally, Zongker argues the prosecutor committed an error of law by stating: "He decides to carry a gun. He decides to pull the gun. He decides to aim. And he decides to pull the trigger." Zongker claims this argument is error because it suggests premeditation is always present when a person intentionally kills another person with a gun. We do not analyze statements in isolation. *Becker*, 311 Kan. at 182. Rather, we must also consider the surrounding context, which is as follows in this instance:

> "Premeditation means to have thought it over beforehand. The defendant is in the restaurant. He eats. He leaves. And then, he comes back. As he's coming back, he's digging through the trash. He's getting frustrated. He's getting angry. He believes either something has been lost or taken from him. He believes that he's been wronged. He believes that he's the victim. He follows the—he follows Mr. Acosta outside, and as he's helping him, the defendant kills him.
>
> "No specific time period required, but it requires more than that instantaneous, intentional act. It does require you to think about it beforehand. And, again, we have examples of the defendant returning to the restaurant, digging through the trash. *He decides to carry a gun. He decides to pull the gun. He decides to aim. And he decides to pull the trigger.* Those are intentional decisions that he's making over and over and over again. Does not have to be present before the interaction began. It can form at any time. It doesn't mean that an act is planned, contrived, or schemed beforehand.
>
> "Okay. Back to these inferences. The nature of the weapon used. It was a gun. Can you think of a more lethal weapon than a gun? What are guns used for? Guns are used to kill. Semiautomatic handgun: He carried it on his person. He shot center mass at close range. There's only one reason you shoot someone center mass at close range, and that's to kill him. It penetrated his heart and his lungs;

went through a ventricle and his aorta, two lobes of his lungs. Ladies and gentlemen, it was a kill shot.

"The lack of provocation: The defendant left the restaurant and came back. He comes back. You can decide for yourselves, but I would submit perhaps agitated because, at this point in time, he thinks that someone has stolen from him or he's lost something. He's digging through the trash and he's digging through the trash, and they ask him to stop. But, he continues to dig through the trash because he wants his own way.

"The victim helps him. The victim facilitates him in this attempt to find these coins. He takes the trash can outside. You can see it on the video. He's standing there much like this: Trash can, defendant, and the defendant continues to dig. And in response to that, the defendant shoots him center mass—aims to kill.

"Use your common sense, ladies and gentlemen. What inferences can you draw from that behavior? Defendant's conduct before the killing: He walks away. He comes back. He carries this handgun. It's with him all the time. He pulled it out, he aims, lifts the gun, aims, and fires.

"After the killing, he does continue to look for his coins, but then he leaves the area. You heard from Officer, I believe it was Seachris, that they had received information from a civilian that they saw the defendant digging around in some leaves looking like he was trying to hide the murder weapon.

"'I did it. I did it. The gun's in the bag.' His conduct afterwards—you saw Officer Jensen. You saw how big he was. He told you, six-six, 240. He was with-it enough to know not to tangle with a cop that big, and so the minute he saw Jensen draw down, 'I did it. The gun's in the bag.'

"'Is he going to live?' He asked, I believe it was Officer Howard: 'Is he going to live?' He knows, ladies and gentlemen. He knows he's killed a man. He chose to kill that man. He thought about it beforehand. He premeditated it. The State has proven this to you beyond a reasonable doubt.

"And this is one of those unique cases where we get to know. We have insight into what he was thinking at the time, because he later tells his parents on a jail phone call. He later tells them what he was thinking in that moment; why he did what he did. We don't often get to do that. We don't get to take pictures of the insides of peoples' heads. Sometimes, individuals tell us why they did what they did. But in this case, you have that information. He killed Oscar Acosta because he thought he was wronged, period. This defendant killed him with premeditation, because he believed, erroneously so, but he still believed that he was the victim. He's not a victim. He's not a victim.

"Again, as he's discussing this, his parents are telling him that what he did was wrong. His focus is on why he killed the victim, the fact that he believed that the victim stole from him. 'They took $900 from me. They took 120 in silver. That's 900 bucks. How about that? What if I took Mom's wedding ring and stole it? How would you feel about that?' 'Well, I would be really pissed off, but I wouldn't kill someone.' That's not what the defendant chose to do. The defendant chose to make himself—the defendant believed that he was the victim of a crime, and he chose to make himself judge, jury, and executioner of Oscar Acosta." (Emphasis added.)

When viewing the statement in context, it is apparent the prosecutor was giving the jury a list of all the evidence the prosecutor felt could

contribute to a finding of premeditation. As this court has said in response to similar challenges: "The prosecutor here did not say that premeditation could be instantaneous. Rather, he pointed to the nature of the weapon used—a gun—and how it was used." *State v. Moore*, 311 Kan. 1019, 1041, 469 P.3d 648 (2020). "[T]he prosecutor's comments were within the bounds of the law because they described the totality of the evidence regarding premeditation . . . . After properly stating the definition of premeditation, the prosecutor pointed out key factual intervals supported by the evidence that established premeditation." *State v. Brownlee*, 302 Kan. 491, 516-18, 354 P.3d 525 (2015).

The same is true here—the challenged statement was made in the midst of the prosecutor discussing each of the other factors supporting premeditation: the lack of provocation, as demonstrated by Oscar merely helping Zongker in his search; Zongker's conduct in retrieving the gun when Oscar got involved; and his conduct immediately after the killing in his interactions with the police, as well as the later phone calls where he explicitly and repeatedly asserts that he killed Oscar because he believed someone stole money from him. As in *Brownlee*, the prosecutor prefaced his comments with a correct definition of premeditation, telling the jury there is "[n]o specific time period required, but it requires more than that instantaneous, intentional act. It does require you to think about it beforehand." See also *State v. Jones*, 298 Kan. 324, 336-37, 311 P.3d 1125 (2013) (prosecutor's reference to defendant's "'five-pound pressure on [the] trigger'" was not error when considered in context, because it was part of the prosecutor's identification of key factual intervals at which the defendant had an opportunity to premeditate the killings well before firing the gun).

Considering the full statement in light of our precedent, we find the prosecutor's comments were not outside the wide latitude allowed in discussing the law governing the jury's evaluation of the evidence of premeditation. There was no error.

Zongker's ineffective assistance of counsel argument is not preserved for review.

Zongker next argues that because trial counsel pursued a guilt-based defense at trial, his Sixth Amendment right to counsel and his right to a jury trial were violated. He argues the proper remedy is for us to reverse his conviction and remand for a new trial.

We do not ordinarily address the merits of an ineffective assistance of counsel claim for the first time on appeal. "The usual course is a request by appellate counsel for remand to the district court for an evidentiary hearing on the ineffective assistance claim, commonly called a '*Van Cleave* hearing.'" *Hilyard*, 316 Kan. at 338 (citing *State v. Van Cleave*, 239 Kan. 117, 120, 716 P.2d 580 [1986]). "Although 'there are circumstances when no evidentiary record need be established, when the merit or lack of merit of an ineffectiveness claim about trial counsel is obvious,' and an ineffectiveness claim can therefore be resolved when raised for the first time on appeal, these circumstances are 'extremely rare.'" *State v. Dull*, 298 Kan. 832, 839, 317 P.3d 104 (2014).

Here, Zongker did not request a remand for a *Van Cleave* hearing on his ineffectiveness claim. When no *Van Cleave* hearing is requested, we need not order one sua sponte. *Hilyard*, 316 Kan. at 338.

Zongker asserts that because he rejected an offer to plead guilty to the charge of second-degree intentional murder, a clear record is established that defense counsel overrode his wishes by pursuing a guilt-based defense. Zongker contends a new trial is the proper remedy, appearing to believe that his case is one of the "extremely rare" times that an ineffectiveness claim can be resolved essentially as a matter of law when raised for the first time on appeal.

Zongker contrasts his case with *Hilyard*. Hilyard asked for a new trial on appeal based on ineffective assistance of counsel simply because the record lacked any evidence that she explicitly consented to the guilt-based defense. This court held that though a defendant must consent to the use of a guilt-based defense, "that consent need not be on the record." 316 Kan. 326, Syl. ¶ 3. Zongker asserts that *Hilyard* is distinguishable because Hilyard actively participated in the guilt-based defense by testifying that she
killed the victim. Zongker, on the other hand, did not testify at his trial, and had rejected an offer to plead guilty to second-degree murder before trial. This fact, he now argues, is proof that he did not consent to the guilt-based defense.

The State counters that there may be other reasons Zongker rejected the plea deal, and the factual record is insufficient for the court to review the issue on Zongker's direct appeal. Under the proposed deal, Zongker would have pled guilty to intentional second-degree murder and the parties would agree to an "upward durational departure,

essentially to twice the aggravated number in the appropriate grid box, for the maximum penalty allowed by law"; Zongker would also "agree to waive notice for the upward durational departure and his right to a jury trial," and the parties would agree on the aggravating circumstances for the departure. The State therefore asserts that the record is not sufficient for this court, on direct appeal, to conclude that trial counsel went against Zongker's wishes in pursuing the guilt-based defense, because the plea offer would have required Zongker to agree to an upward departure to twice the aggravated number in the grid box for a severity level 1 offense, and, according to the State, would have been agreeing to a sentence of nearly 38 years in prison. Notably, after Zongker was convicted for first-degree murder, defense counsel sought a downward departure to a hard 25 sentence, which the State points to as indicating that Zongker's rejection of the plea offer could have been based on the length of the sentence he would have been forced to accept as a part of the plea deal.

The State's argument is supported by the record. When counsel was discussing the rejected plea deal with the court, the court asked: "Was—that was an agreed State and defense upward durational to twice the high number, not defense free to argue?" The State confirmed that "[d]efense would not have been free to argue, yes. It would have been an agreed upward durational departure." The court followed up by asking if the issue was "with just the free to argue, or was it something else?" The State said that it "didn't ask," but did note that Zongker "came back and he countered with a separate number," which the State rejected.

Given these facts, we conclude the mere rejection of the plea deal is not sufficient by itself for this court to bypass a *Van Cleave* remand because the record is not "obvious" about the "merit or lack of merit" of Zongker's ineffectiveness claim. *Dull*, 298 Kan. at 839. We decline review because the issue is unpreserved. See *Hilyard*, 316 Kan. at 339 ("Quite simply, a claim of ineffective assistance of counsel for failure to obtain consent for a guilt-based defense must be proved below. It has not been.").

Cumulative error did not deprive Zongker of a fair trial.

Cumulative trial errors, when considered together, may require the defendant's conviction to be reversed when the totality of the circumstances establishes that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of errors during the trial, appellate courts examine the errors in context and consider how the trial judge dealt with the errors as they arose; the nature and number of errors and whether they are interrelated; and the overall strength of the evidence. If any of the errors being aggregated are constitutional in nature, the party benefitting from the error must establish beyond a reasonable doubt that the cumulative effect did not affect the outcome. *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022).

We have identified three errors where the prosecutor misstated facts: the misstatement of the location of the kill shot, the mischaracterization of Dr. Grinage's testimony, and the erroneous description of the location of the gun. We already concluded that individually, these errors were harmless. We now find that even
considering these errors together, the cumulative effect did not affect the outcome of the trial. The errors were brief and the State presented strong evidence of Zongker's guilt. Cumulative error did not deprive Zongker of a fair trial.

The district court did not abuse its discretion in declining to impose a departure sentence.

In Kansas, a sentencing court must order a defendant convicted of first-degree premeditated murder to a hard 50 life sentence unless the judge finds substantial and compelling reasons that support departing to a hard 25. K.S.A. 21-6620(c)(1)(A); K.S.A. 21-6623. We have interpreted the term "substantial" as used in this context to mean "'"something that is real, not imagined, and of substance, not ephemeral."' And a compelling reason "'is one that forces a court—by the case's facts—to abandon the status quo and venture beyond the presumptive sentence."' [Citations omitted.]" *State v. Galloway*, 316 Kan. 471, 476, 518 P.3d 399 (2022).

K.S.A. 21-6625(a) establishes a nonexclusive list of mitigating circumstances the court may consider. A defendant's psychological state can be a mitigating factor under subsections (a)(2) ("The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.") and (a)(6) ("The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.").

We review a district court's denial of a departure motion for an abuse of discretion. A district court abuses its discretion when its decision turns on an error of law or fact, its decision is not supported by substantial competent evidence, or its decision is one with which no reasonable person would agree. *Galloway*, 316 Kan. at 476-77.

Zongker argues the district court abused its discretion in failing to impose a downward departure because of his mental illness. He did not present any expert testimony at trial or sentencing to address his mental health issues; rather he simply refers to the pretrial competency evaluation and Dr. Grinage's trial testimony. But as discussed above, Zongker was found competent to stand trial, and Dr. Grinage testified that despite Zongker's mental illness, he was capable of forming an intent to kill.

Zongker also complains that the sentencing court did not make specific findings about why it denied the motion to depart, instead only "perfunctorily not[ing] that 'the motion for departure is denied.'" Zongker seems to suggest that because we do not know why the district court denied the motion, we have to assume the court abused its discretion because the denial was either based on an error of fact (i.e., did not believe Zongker had a mental illness), or an error of law (i.e., did not believe mental illness could be a mitigating factor). And Zongker claims that since he clearly suffers from significant mental illness and because mental illness "can and should be a basis for a mitigated sentence," the district court abused its discretion.

Zongker ignores a third, and much more likely, reason for the court's denial; that it simply did not find substantial and compelling reasons to depart after a review of the mitigating circumstances Zongker offered. The statute does not require the district

court to state its reasons for denial; it only requires the district court to state its reasons on the record if it does *not* impose the hard 50. K.S.A. 21-6620(c)(2)(A) ("If the sentencing judge does *not* impose the mandatory minimum term of imprisonment required by K.S.A. 21-6623 . . . the judge *shall state on the record* at the time of sentencing the substantial and compelling reasons therefor . . . ." [Emphases added.]).

And in any event, a review of the district court's full statement reveals that the court did preface its denial with the following:

> "Having regard for the nature and the circumstances of the crime, the history, character, and condition of the defendant, the lowest minimum term, which in the opinion of the Court, is consistent with the public safety, the needs of the defendant, and the seriousness of the crimes, the Court makes the following orders: . . . "

We have generally upheld denial of departure motions in similar cases. See *State v. Boswell*, 314 Kan. 408, 417, 499 P.3d 1122 (2021); *State v. Grable*, 314 Kan. 337, 342-46, 498 P.3d 737 (2021); *State v. McLinn*, 307 Kan. 307, 347-49, 409 P.3d 1 (2018). We conclude Zongker has failed to establish that the district court abused its discretion by committing a factual or legal error or by making an objectively unreasonable decision, and therefore affirm his hard 50 sentence.

The district court did not abuse its discretion in failing to sua sponte order a mental evaluation before sentencing.

K.S.A. 22-3429 provides that "the trial judge may order the defendant committed to the state security hospital for mental examination, evaluation and report." Then, if the report of the examination authorized by K.S.A. 22-3429 shows

> "the defendant is in need of psychiatric care and treatment, that such treatment may materially aid in the defendant's rehabilitation and that the defendant and society are not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment, in lieu of confinement or imprisonment, the trial judge shall have power to commit such defendant to: (1) The state security hospital or any county institution provided for the reception, care, treatment and maintenance of mentally ill persons, if the defendant is convicted of a felony." K.S.A. 22-3430.

Zongker did not request an evaluation under K.S.A. 22-3429. Nevertheless, Zongker now asserts that because he moved for a departure based on his mental illness, the district court was "on notice" and thus abused its discretion by failing to sua sponte order an evaluation. Zongker argues we can reach this issue for the first time on appeal to prevent the denial of his right to due process. See *Hilyard*, 316 Kan. at 343. We review a district court's decision whether to order an evaluation under K.S.A. 22-3429 for abuse of discretion. *State v. Evans*, 313 Kan. 972, 992, 492 P.3d 418 (2021).

Evans and *Hilyard* foreclose Zongker's arguments. In *Evans*, the sentencing court denied Evans' requested mental evaluation under K.S.A. 22-3429 without explanation. Evans asserted the court abused its discretion in doing so, but we disagreed, explaining that:

> "The statutory evaluation scheme is clearly permissive, and it is the defendant's burden to persuade a sentencing court that a mental examination serves the interests of justice. When a party presents no facts and makes no argument to support its request for relief, an issue may be deemed abandoned. . . .
>
> "Simply asserting that the trial court denied a request does not elevate an issue to the status of preserved for appeal." 313 Kan. at 993.

In other words, though Evans did move for a mental evaluation, because she did not create any further factual record in support of her motion, her motion was not preserved for appeal.

We built on this in *Hilyard*; Hilyard did not request a mental examination, so we concluded she certainly did not "meet her burden to persuade the sentencing court to order [one]. The statute imposes no affirmative duty for courts to raise this issue sua sponte and whether to do so is clearly discretionary. There is no indication the sentencing judge was unaware of this discretion. There is no error." 316 Kan. at 345.

Zongker did not meet his burden of persuading the sentencing court that a mental examination "serves the interests of justice." *Evans*, 313 Kan. at 993. The district court did not abuse its discretion by failing to sua sponte order a discretionary evaluation.

Zongker received an illegal sentence on Count 2.

A sentence is illegal when it is imposed by a court without jurisdiction, fails to "conform to the applicable statutory provision, either in character or punishment," or "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). Whether a sentence is illegal is a question of law subject to unlimited review. *State v. Johnson*, 309 Kan. 992, 997, 441 P.3d 1036 (2019). An illegal sentence may be corrected at any time, and we have the authority to correct an illegal sentence sua sponte. K.S.A. 22-3504(a); 309 Kan. at 997.

At the sentencing hearing, the parties verbally agreed Zongker had a criminal history score of E. Accordingly, the court sentenced Zongker as follows:

"I find the primary crime that controls the base sentence to be Count 2, criminal possession of a weapon. It is a severity level 8 nonperson felony, *placing the defendant in grid box 8-E. Upon those findings, I sentence the defendant to a term of 15 months* in the custody of the Secretary of Corrections. The defendant is entitled to earn up to a maximum of 20 percent good-time credit, and is subject to 12 months of post-release supervision.

. . . .

"On Count 1, murder in the first degree, I'll impose the sentence of life imprisonment with no parole eligibility until 50 years. Counts 1 and 2 are consecutive to each other. Parole supervision in the event of release, is lifetime, and the motion for departure is denied." (Emphasis added.)

The State points out that the journal entry of judgment says that Zongker's criminal history classification is an F. And the presentence investigation report prepared likewise indicates Zongker's criminal history is an F. The criminal history worksheet appears to support this calculation, as it lists two adult nonperson felonies. See K.S.A. 2022 Supp. 21-6804. Accordingly, the journal entry reflects the legal sentence that should have been given; the 15 months orally pronounced at sentencing does not conform to the applicable statutory provision. K.S.A. 2022 Supp. 21-6804. It is well established that "a journal entry is not the controlling pronouncement of a sentence," but rather that a "'criminal sentence is effective upon pronouncement from the bench.'" *State v. Redick*, 317 Kan. 146, 147, 526 P.3d 672 (2023); see also *State v. Juiliano*, 315 Kan. 76, Syl. ¶ 4, 504 P.3d 399 (2022) ("Where the sentence announced from the bench differs from the sentence described in the journal entry, the orally pronounced sentence controls.").

Because the oral pronouncement for 15 months on Count 2 is the controlling sentence—Zongker should have been sentenced in

accordance with grid box 8-F, which would have permitted a maximum sentence of 13 months—Zongker received an illegal sentence. Accordingly, we remand for resentencing on Count 2 only. See *State v. Jamerson*, 309 Kan. 211, 216, 433 P.3d 698 (2019).

Conviction affirmed, sentence vacated in part, and case remanded with directions.

Nos. 125,681
126,069

STATE OF KANSAS, *Appellee,* v. MIA MARIE COLLINS, *Appellant.*

(555 P.3d 693)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Brady Violation Claim—Three Essential Elements*. There are three essential elements of a *Brady* violation claim: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice. See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Submitted without oral argument December 15, 2023. Opinion filed September 13, 2024. Affirmed in part and dismissed in part.

Sam S. Kepfield, of Hutchinson, 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

STEGALL, J.: In May 2019, Mia Marie Collins attempted to flee from police while driving a stolen vehicle through downtown Wichita. As a result of the chase, Collins struck another vehicle, killing two people and injuring three others. She was initially charged with two counts of felony murder, two alternative counts of fleeing or attempting to elude an officer, three counts of aggravated battery, and single counts of possession of methamphetamine and driving while suspended. Collins ultimately agreed to plead guilty to two counts of felony murder, one count of fleeing or attempting to elude an officer, and three counts of aggravated battery. The remaining charges were dismissed per the plea agreement.

In the plea agreement, the State recommended hard 25 life sentences for the two felony-murder counts, and the low grid sentence for the remaining four counts. The State recommended that all sentences run concurrent, except for Count 5—the aggravated battery of victim J.W., who suffered a traumatic brain injury. The

State, relying in part on J.W.'s lawyer's statements, recommended that Collins serve this 38-month sentence consecutively. The plea agreement explicitly informed Collins that she retained the right to argue for any other legal sentence before the district court. The agreement also stated that the district court had discretion to reject the plea agreement's sentencing recommendations and impose its own lawful sentence.

The day after Collins signed the plea agreement, the State sent defense counsel a news article stating that J.W. had settled a civil lawsuit against the Wichita Police Department (WPD). The article described how J.W. had been awarded an undisclosed settlement and reported J.W.'s statements blaming her injuries on the WPD—not on Collins.

Collins then filed a motion to withdraw her plea. Essentially, she claimed that had she known the information contained in the article—which she contends the State had a duty to share with her before the plea agreement—she would not have agreed to the terms of the plea agreement concerning Count 5 and therefore her plea was not knowingly and voluntarily made. Even though the record is clear that the State did not have the information concerning the settlement when Collins signed the plea agreement, she argued the State had a duty to know. She added that had the parties had the information, the State would have recommended that the 38-month sentence for Count 5 run concurrent as well. She alleged that the State's failure to disclose this settlement information amounted to a violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) (requiring that prosecutors disclose evidence favorable to the accused if that evidence is material to either guilt or punishment, regardless of whether the prosecution acted in good faith).

The district court held a hearing on Collins' motion. At that hearing, the defense stipulated to the specific facts presented in the State's response to Collins' motion to dismiss—including the fact that J.W.'s attorney had spoken with the State's attorney and informed him that a settlement in the J.W. civil suit against WPD was "imminent." No further details concerning the settlement were provided. The stipulation further agreed that the State had shared this information with the defense prior to Collins' entry of

her plea. Additionally, the State provided a text message thread between the prosecution and the defense in which the lawyers discussed the possibility of running Count 5 concurrent, and the State explained that it intended to hold firm to running Count 5 consecutive.

The district court held that whether a *Brady* violation occurred and whether good cause existed for a withdrawal of plea was not a "close call" in this case. The court held that because the State was not a party to the civil suit against WPD it could not be charged with knowledge of the settlement agreement. The district court followed the State's recommendation in the plea agreement, acknowledging that it had the flexibility to choose any legal sentence it deemed appropriate and included its own independent reasons for ordering Collins to serve Count 5's sentence consecutively.

Collins now appeals, reprising the arguments she made below. Jurisdiction is proper under K.S.A. 22-3601(b)(3)-(4) for the first-degree murder charge, both as a crime where the maximum sentence of life imprisonment has been imposed and as an off-grid crime.

Standard of Review

We generally review the denial of a motion to withdraw a plea for abuse of discretion. *State v. Fritz*, 299 Kan. 153, 154, 321 P.3d 763 (2014). 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. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). An abuse of discretion indicates that no reasonable person could agree with the decision of the trial court. See *State v. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

"A plea of guilty or nolo contendere, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged." K.S.A. 22-3210(d)(1). When determining whether a defendant has demonstrated good cause to

withdraw their plea, a district court generally looks to the following three factors from *Edgar*: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made. *State v. Frazier*, 311 Kan. 378, 381, 461 P.3d 43 (2020) (citing *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 [2006]).

These factors are not applied mechanically to the exclusion of other factors. *Fritz*, 299 Kan. at 154. These factors establish "'viable benchmarks'" for the district court when exercising its discretion, but the court "should not ignore other factors that might exist in a particular case." *State v. Schaefer*, 305 Kan. 581, 588, 385 P.3d 918 (2016); see *Frazier*, 311 Kan. at 382 (applying contract principles to good cause showing).

In her initial motion to withdraw plea, Collins argued that her situation fell under the second *Edgar* factor—that she was misled by the State during plea negotiations. In her appellate brief, counsel suggests that Collins' situation is not a perfect fit for any single *Edgar* factor, but rather fits somewhere between the second and third factor. Under either factor, the core argument is the same: had Collins been aware of J.W.'s sentiments and the WPD settlement before signing a plea agreement, she believes that she would have been able to use those facts as leverage to convince the State to recommend Count 5 run concurrent. She argues that the State's failure to disclose this information, intentionally or unintentionally, constituted a *Brady* violation which as a matter of law qualifies as good cause under the *Edgar* factors.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that pleas must be knowingly and voluntarily made. *Brady v. United States*, 397 U.S. 742, 745, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). *Brady v. Maryland* requires that prosecutors disclose evidence favorable to the accused if that evidence is material to "'guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *State v. Warrior*, 294 Kan. 484, 506, 277 P.3d 1111 (2012) (quoting *Brady*, 373 U.S. at 87).

"There are three components or essential elements of a *Brady* violation claim: (1) The evidence at issue must be favorable to the accused, either because

it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material so as to establish prejudice.

"Under the test for materiality governing all categories of *Brady* violations, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Warrior*, 294 Kan. 484, Syl. ¶¶ 10, 11.

We review a trial court's determination as to the existence of a *Brady* violation under a split standard of review. First, a trial court's ultimate decision concerning whether a *Brady* violation occurred is a legal question which we review de novo. When answering that question, however, we must give deference to a trial court's findings of fact. *United States v. Turner,* 674 F.3d 420, 428 (5th Cir. 2012) ("[Courts] consider alleged *Brady* violations de novo. This de novo review 'must proceed with deference to the factual findings underlying the district court's decision.'").

We need not consider all three of *Brady*'s essential elements because the second is determinative and, as the district court noted, it does not present a "close call." There is no evidence in the record showing the State willfully or inadvertently suppressed evidence. Both parties agree that the State did not intentionally suppress or withhold any evidence. And both acknowledge that the prosecutor did not actually know about the settlement prior to Collins' plea entry.

The State had communicated with J.W.'s attorney about all matters related to Collins' plea agreement. That attorney acknowledged he did not share J.W.'s feelings with the State. All parties acknowledge that the State freely shared with the defense what information it had. Communications between the State's attorney and defense counsel indicated that the State communicated that a settlement may be imminent, but that the State was committed to running Count 5 consecutive.

The district court found that there were many legitimate reasons why J.W.'s attorney would decline to share information about J.W. with the State during the pending civil suit against the Wichita police. The district court found that to "impute [the] lack of information to the State, . . . is not fair"; that the State cannot be expected to "read between the lines or know what is coming out

or even expect that they get that information"; and that even if the State had forcibly tried to get that information, it would have been unable to. In sum, the district court found that "with regard to the *Brady* issue," the State's lack of knowledge regarding the civil suit made this "a nonissue." We agree.

Without a *Brady* violation, Collins' motion to withdraw failed and it cannot be resuscitated on appeal. To drive the point home, we note that on the point of contention, the district court judge stated his own independent reasons for ordering Count 5 to run consecutive:

"In fact, I think there's rationale to run all of the counts consecutively. This—despite what other people may have done, focusing on Ms. Collins' behavior, which is the focus of a criminal sentencing hearing, Ms. Collins, after having a history of being given the opportunity to rehabilitate herself on probation, found herself in a stolen vehicle, and when confronted by the police, from all accounts, immediately took off and drove extremely fast through downtown Wichita. That put everybody's life in danger. Unfortunately, those risks came to fruition.

"But there is a difference between people who, for whatever reason, choose to use drugs or alcohol and people who choose to use drugs or alcohol and then involve the rest of the community in their own risky behavior. And that is the offensive part that only Ms. Collins is responsible for.

"Unfortunately, it resulted in this terrible tragedy. But while two people died and a number of others were injured, we're only running two of the counts consecutively—I'm only running two of the counts consecutively. And that represents the credit for Ms. Collins taking responsibility for her actions, that represents the, in my opinion, good-faith negotiation between the prosecution and the defense. And while that may have been or not have been the sentence that I would have suggested had I been involved in the negotiations, I do find that the sentence agreed upon in the plea agreement is a fair sentence and takes into account mitigation factors cited by the defense, as well as the factors from the prosecution about why they believe that more than one count should be punished in this case. So for those reasons, that is the Court's sentence."

Given all this, the district court did not abuse its discretion in denying Collins' motion to withdraw her plea for a lack of good cause.

Arguments Relating to Jail Time Credit Are Moot

On a final note, this case is before the court as two consolidated cases. One being the appeal related to Collins' motion to withdraw her plea (No. 125,681), the other involving a motion for jail time credit (No. 126,069).

Following her conviction, Collins filed a motion to correct an illegal sentence, arguing that the sentence in this case should run concurrent with a previous traffic case, 19 TR 1743. Collins argued that the judge in the traffic case had ordered that sentence to run concurrent with the present case, and that the failure to acknowledge this deprived her of six months' jail time credit. Though the district court initially denied her motion to correct an illegal sentence, she later filed a motion to correct/adjust jail time and was awarded the six months' credit on August 22, 2022. Therefore, arguments regarding appeal No. 126,069 are moot. *State v. Roat*, 311 Kan. 581, 584, 466 P.3d 439 (2020).

Affirmed in part and dismissed in part.

In re D.G.

No. 125,724

In the Interests of D.G. JR., U.G., C.A., and DI.G., Minor Children.

(555 P.3d 719)

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Child in Need of Care Adjudication—Termination of Parental Rights When Finding byf Clear and Convincing Evidence Parent Is Unfit.* When a child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.

2. SAME—*Review of Findings of Parental Unfitness—Appellate Review.* When reviewing findings of parental unfitness, appellate courts view all the evidence in a light most favorable to the State and decide whether a rational fact-finder could have found it highly probable—i.e., by clear and convincing evidence—that the parent was unfit. In making this decision, the appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact.

3. SAME—*Finding of Parental Unfitness—Court Considers if Termination in Best Interests of Child—Primary Considerations*. If the court makes a finding of unfitness, the court shall consider whether termination of parental rights as requested in the petition or motion is in the best interests of the child. In making the determination, the court shall give primary consideration to the physical, mental, and emotional health of the child. If the physical, mental, or emotional needs of the child would best be served by termination of parental rights, the court shall so order.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 21, 2023. Appeal from Johnson District Court; ERICA K. SCHOENIG, judge. Oral argument held March 29, 2024. Opinion filed September 13, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Richard P. Klein, of Lenexa, argued the cause and was on the briefs for appellant Father.

Kendall S. Kaut, assistant district attorney, argued the cause, and *Shawn E. Minihan*, assistant district attorney, and *Stephen M. Howe*, district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: This appeal involves the termination of Father's parental rights to his four minor children. The children were adjudicated as children in need of care (CINC) and placed together in foster care due to Mother's suspected illegal drug use, the family's unstable living situation, and the parents' noncompliance with a medical safety plan to address one of their children's special needs after birth. In the three years following adjudication, Father relied on Mother as the exclusive point of contact with the agencies and organizations and maintained throughout the case that Mother would be the primary caretaker of the children upon reintegration because he worked long hours. Yet Mother was repeatedly incarcerated and failed multiple drug tests while the case was pending. And Mother submitted falsified documentation of some reintegration tasks, including forged drug test results and parenting class completion certificates for both her and Father. Although Father was appropriate with the children during scheduled visits, he was not otherwise engaged in the reintegration process in Kansas and failed to meet the goals necessary for reintegration as provided in his own separate, court-ordered reintegration plan.

After three extensions to the parents' reintegration plans without sufficient progress and two failed attempts to have the children placed in Missouri where the parents recently bought a home, the district court terminated parental rights. The Court of Appeals panel affirmed the termination decision as to both parents. *In re D.G.*, No. 125,724, 2023 WL 4675379, at *12 (Kan. App. 2023) (unpublished opinion). We granted Father's petition for review to determine whether the district court properly considered his factors of unfitness separate from Mother's, and whether the court's decision to terminate Father's parental rights was an abuse of its discretion. Finding no error, we affirm.

FACTS

In March 2019, Kansas Department for Children and Families (DCF) received a report that Mother tested positive at the hospital for amphetamines while 32 weeks pregnant. U.G. was born over a month later, several weeks premature, and was diagnosed with transient tachypnea: a lung condition that can cause breathing problems and requires monitoring. U.G. was initially placed in the

Neonatal Intensive Care Unit (NICU) to be monitored, where he received oxygen and was on a feeding tube for the first two days of his life.

Before being released from the hospital, Mother and Father met with a hospital social worker and collectively agreed to a verbal safety plan to address U.G.'s health needs which included the following directives: notify the hospital of U.G.'s pediatrician or seek help in setting up that appointment, take U.G. to the doctor and send the hospital those records, follow instructions from nurses and doctors in regards to U.G.'s health needs, ensure a safe home environment for U.G. and the other children, recognize signs of hypoxia and malnutrition and how to provide emergency care if U.G. stops breathing, cooperate with Children's Mercy home healthcare, and Father will serve as the children's primary caregiver. The home healthcare services were intended to help parents learn infant CPR and safe sleep practices, set up a SIDS monitor, measure U.G.'s weight and nutritional status, and provide an extra set of eyes on U.G. in the early weeks of his life. DCF also did a walk-through of the family's living quarters at the time, an Extended Stay motel room.

Several days after Mother and U.G. were released from the hospital, DCF received a report that U.G. had missed a scheduled well-baby check-up and that Father had cancelled the first home healthcare appointment with Children's Mercy and told staff not to call again. DCF repeatedly contacted the parents' cell phones and hotel room phone and also visited the hotel where the family was staying but was unable to reach the parents. Hotel staff reported to DCF the family was in and out of the room during this time. Apparently on the same day that DCF was attempting to make contact, Mother was arrested and went to jail.

In response, the State initiated CINC proceedings on behalf of three-year-old C.A., one-year-old D.G. Jr., and two-week-old U.G., citing lack of parental care necessary for the physical, mental, or emotional health of the children and a corresponding risk of abuse or neglect under K.S.A. 38-2202(d)(1)-(3), (d)(11). As for U.G., the State characterized the situation as an "emergency" necessitating immediate out-of-home placement due to his health concerns and the parents' noncompliance with the medical safety

plan. Based on the information presented in the State's petition, the Johnson County District Court granted the State temporary custody of C.A., D.G. Jr., and U.G., noting specific concerns about Mother's use of illegal substances and the parents' lack of cooperation with a safety plan to care for a medically fragile infant.

In August 2019, the district court adjudicated C.A., D.G. Jr., and U.G. as CINC. In a September 2019 journal entry filed to document the adjudication, the district court ordered Mother and Father be offered separate, six-month reintegration plans, prepared by KVC as the case management provider. Although Father failed to include the parents' reintegration plans in the record on appeal, it appears from testimonial evidence presented throughout the termination hearing that the parents were to complete the following reintegration tasks: housing, employment, transportation, visitation, and parenting classes. Mother also needed to abstain from using illegal drugs. The court would ultimately extend the parents' reintegration plans three times to give them additional opportunities to meet these requirements.

About a year after the CINC case began, Mother gave birth to Di.G. who was in the NICU for a short stay after birth, then taken into state custody by DCF. Di.G. was eventually placed into foster care with her siblings. The State amended its CINC petition to include Di.G., and the district court found her to be a CINC in its termination ruling issued in September 2022.

In January 2021, the State filed a Motion for Finding of Unfitness and Termination of Parental Rights. At this point, C.A., D.G. Jr., and U.G. had been in an out-of-home placement for over 20 months. Yet the termination hearing was postponed for almost another year to permit parents more time to work towards reintegration. During this time, the parents bought a home in Raytown, Missouri, even though the children were involved in the consolidated CINC case in Kansas. This required the parents to initiate the interstate placement process under the Interstate Compact on the Placement of Children (ICPC) to have the Missouri home considered as an appropriate out-of-state placement for the children. But the process ultimately failed, apparently because the parents

failed to submit the required paperwork and because of other setbacks in the case. These setbacks included concerns about Mother's continued substance abuse and her dishonesty with KVC by submitting multiple falsified drug test results and forging completion certificates for parenting classes on behalf of both parents.

In August 2022, over three years after the CINC case was filed, the parties appeared for a two-day hearing to resolve the State's motion to terminate Mother's and Father's parental rights to the four children. At the time of the hearing, C.A. was 6 years old, D.G. Jr. was 4 years old, U.G. was 3 years old, and Di.G. was 1 1/2 years old. All the children had spent the majority of their lives in state custody and in the same foster placement. The court heard from nearly a dozen witnesses, including case managers, social workers, family therapists, Mother, the foster parent, and an employee from one of the labs that evaluated Mother's drug test results.

The State and the guardian ad litem both argued for termination. Represented by separately appointed attorneys, both parents argued against termination and requested another extension of their reintegration plans. Mother testified, but Father did not. Through counsel, Father conceded Mother's substance use problem and dishonesty had hindered reintegration efforts but also pointed to the lack of trust between parents and KVC and DCF as complicating factors. Father claimed he completed many steps towards reintegration, including stable employment, housing, transportation, and visitation. He also argued he displayed the ability to care for the children, as demonstrated when the children were still living at home and during visits, including while Mother was in jail. But Father also agreed with the State's summation that he and Mother "are a team," that his "situation is tied to [hers]," and that his "success depends on [her] success."

In September 2022, the district court issued its termination decision. The court found both parents were unfit to properly care for C.A., D.G. Jr., U.G., and Di.G., and that parental unfitness is unlikely to change in the foreseeable future. See K.S.A. 38-2269(a) (The court may terminate parental rights when there is clear and convincing evidence of parental unfitness that is unlikely

to change in the foreseeable future.). In making its unfitness determination about Father, the court expressly considered the statutory factors set forth in K.S.A. 38-2269(b)(4) (physical, mental, or emotional abuse of a child), K.S.A. 38-2269(b)(7) (failure of reasonable efforts by public or private agencies to rehabilitate the family), K.S.A. 38-2269(b)(8) (lack of effort by parent to adjust circumstances to meet needs of child), and K.S.A. 38-2269(c)(3) (failure to complete reasonable, court-ordered reintegration plan).

Based on these factors and after making numerous findings of fact, the district court found the State had proved by clear and convincing evidence that Father is unfit to care for the four children and that his unfitness is unlikely to change in the foreseeable future. The court also concluded termination of parental rights was in the children's best interests.

On appeal, the panel affirmed the district court's termination decision, holding (1) the court's unfitness determination was supported by clear and convincing evidence and (2) its termination decision was a "sound exercise of the court's discretion and consistent with the children's best interests." *In re D.G.*, 2023 WL 4675379, at *12.

ANALYSIS

K.S.A. 38-2269 sets forth the facts and circumstances a court must consider when deciding whether to terminate parental rights. Two subsections of this statute are relevant here:

> "(a) When the child has been adjudicated to be a child in need of care, the court may terminate parental rights or appoint a permanent custodian when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.
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> "(g)(1) If the court makes a finding of unfitness, the court shall consider whether termination of parental rights as requested in the petition or motion is in the best interests of the child. In making the determination, the court shall give primary consideration to the physical, mental and emotional health of the child. If the physical, mental or emotional needs of the child would best be served by termination of parental rights, the court shall so order." K.S.A. 38-2269(a), (g)(1).

I. *K.S.A. 38-2269(a): unfit and unfitness unlikely to change in the foreseeable future*

Standard of Review

When reviewing findings of parental unfitness, appellate courts view all the evidence in a light most favorable to the State and decide whether a rational fact-finder could have found it highly probable—i.e., by clear and convincing evidence—that the parent was unfit. See *In re B.D.-Y.*, 286 Kan. 686, 705-06, 187 P.3d 594 (2008). In making this decision, the appellate court does not weigh conflicting evidence, pass on the credibility of witnesses, or redetermine questions of fact. 286 Kan. at 705.

Father argues the panel erred in affirming the district court's order terminating his parental rights because the district court's unfitness findings were not supported by clear and convincing evidence.

A. *Unfit by conduct or condition*

To determine whether a parent is unfit, the district court must consider a nonexclusive list of statutory factors, any one of which may, but does not necessarily, establish grounds for termination of parental rights. K.S.A. 38-2269(b), (c), (f). Here, the district court found Father unfit based on four statutory factors:

1. K.S.A. 38-2269(b)(4) (U.G. only) (physical, mental, or emotional abuse or neglect);
2. K.S.A. 38-2269(b)(7) (failure to rehabilitate family despite agency's reasonable efforts);
3. K.S.A. 38-2269(b)(8) (lack of effort by parent to adjust circumstances, conduct, or conditions to meet needs of child); and
4. K.S.A. 38-2269(c)(3) (failure to carry out a reasonable plan approved by the court directed toward integration of child into parental home).

Father argues there is insufficient evidence to support the district court's findings of unfitness under each of these statutory factors. We address each of Father's arguments in turn.

1. *Physical, mental, or emotional abuse or neglect or sexual abuse of a child (U.G. only), K.S.A. 38-2269(b)(4)*

Father concedes "there was evidence of concerns presented involving U.G." based on how he handled U.G.'s special medical needs after birth but argues these facts on their own do not rise to the level of physical, mental, or emotional abuse or neglect. He asserts "[m]issing a medical appointment and not cooperating with service providers" may be grounds for removing a child from the home and a CINC adjudication but are insufficient to establish clear and convincing evidence of abuse or neglect warranting a finding of unfitness for termination of parental rights. Based on the statutory definitions in the Kansas Code for Care of Children and the factual record here, we disagree.

K.S.A. 38-2202 provides the statutory definitions of "neglect" and "physical, mental or emotional abuse" of a child, as those terms are used in K.S.A. 38-2269(b)(4).

> "(t) 'Neglect' means acts or omissions by a parent, guardian or person responsible for the care of a child resulting in harm to a child, or presenting a likelihood of harm, and the acts or omissions are not due solely to the lack of financial means of the child's parents or other custodian.
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> . . . .
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> "(y) 'Physical, mental or emotional abuse' means the infliction of physical, mental or emotional harm or the causing of a deterioration of a child and may include, but shall not be limited to, maltreatment or exploiting a child to the extent that the child's health or emotional well-being is endangered." K.S.A. 38-2202.

The record and evidence presented at the hearing support the district court's findings on this factor, consistent with the applicable statutory definitions. At the time U.G. was discharged from the hospital, he had documented medical needs requiring a special feeding protocol initially and then therapeutic interventions for the first year of life. Both parents agreed to and signed a medical safety plan before leaving the hospital to address these needs, a condition of U.G.'s release. Yet the parents still missed U.G.'s follow up doctor appointment less than a week after discharge and failed to otherwise adhere to the DCF medical safety plan. Father affirmatively rejected home healthcare services necessary for U.G. and personally told medical staff not to contact the family again. In doing so, Father ignored his obligation under the agreed-

upon medical safety plan to cooperate with Children's Mercy home healthcare and to serve as the primary care provider for U.G. The court found the poor decisions of both parents put U.G.'s physical health at significant risk.

Considering the evidence in the light most favorable to the State, we conclude a rational fact-finder could have found it highly probable Father was unfit under K.S.A. 38-2269(b)(4) because he engaged in an act or omission presenting a likelihood of harm to U.G. (neglect) or because he mistreated U.G. to the extent the child's health was endangered (physical, mental, or emotional abuse of a child).

2. *Failure of reasonable efforts made by appropriate public or private agencies to rehabilitate the family, K.S.A. 38-2269(b)(7)*

As to the district court's findings under K.S.A. 38-2269(b)(7) that reasonable efforts of appropriate public or private agencies failed to rehabilitate the family, Father argues KVC did not address Mother's substance use problem and dishonesty, which he concedes hindered family reintegration.

The phrase "reasonable efforts" is not susceptible to precise definition, and its meaning depends largely upon the facts and circumstances of the particular case. It is reasonable to expect family service agencies to work with families to create a case plan outlining specific goals, tasks, and timelines for reintegration. And it is similarly reasonable to expect agencies to monitor compliance with the case plan and progress toward completing tasks and attaining goals.

Here, the court-ordered case plan KVC developed required Mother to: obtain a mental health assessment, complete recommended therapy, abstain from illegal drugs and undergo regular UAs, obtain necessary drug treatment, and resolve her ongoing legal issues, including to successfully complete probation. The record reflects KVC supported Mother's requirement of abstaining from illegal drugs by requesting documentation of drug test results and completion of a drug and alcohol assessment. KVC also provided Mother with counseling services to support her mental health needs.

Despite KVC's efforts, Mother went to great lengths to avoid being monitored for illegal drug use, including hiding two pregnancies and giving birth out of state, repeatedly missing scheduled UAs, and falsifying toenail and hair follicle drug test results. She also forged certificates of completion for substance abuse treatment and parenting classes (for her and Father), rather than complete those reintegration tasks. Yet Father contends KVC should have discovered Mother's dishonesty sooner and addressed her substance use problem more aggressively. His argument stretches the bounds of reason. Reasonable efforts help and support families in achieving specific goals for reintegration. It is simply not reasonable or practical for an agency to devote time, energy, and resources to detect false representations and fabrication of evidence by parents who subvert the very process meant to protect the safety and welfare of children.

Considering the evidence in the light most favorable to the State, we conclude a rational fact-finder could have found it highly probable that Father was unfit under K.S.A. 38-2269(b)(7) after the family failed to reunify despite reasonable efforts made by appropriate public or private agencies.

3. *Lack of effort by the parent to adjust the parent's circumstances, conduct, or conditions to meet the needs of the child, K.S.A. 38-2269(b)(8)*

Father next argues he changed his circumstances to meet his children's needs, and the district court ignored the progress he has made in finding him unfit under K.S.A. 38-2269(b)(8). He points to two circumstances that have changed since the start of the CINC case: the parents moving from an Extended Stay motel to a home in Missouri and the parents beginning to address Mother's substance use problem in therapy. On direct appeal, Father also referenced his stable, long-term employment with the United States Postal Service and reliable transportation as positive factors that *did not need to change* to meet the needs of his children.

The district court noted the biggest change in circumstance was the parents moving from a motel in Kansas to a home in Raytown, Missouri. But the court found the decision to move to Missouri created complications and added another obstacle to family

reintegration because "now the parents must have an approved ICPC for the children to return to their home. After the first ICPC was denied, due to the parents failing to complete the required paperwork, the parents made no adjustment to their circumstances and remained in Missouri." The court then pointed to evidence showing "that the second ICPC was denied because the parents are involved in the Missouri equivalent of a [CINC] case for [B.G.]" who has been removed and is in DCF custody. Ultimately, the court concluded "the children cannot return to their parents' Missouri home at this time, and it is unknown when that circumstance will change." Thus, the district court duly considered the parents' housing circumstances but found the cited "change" had not altered the relevant issue of allowing the children to live with the parents.

Father's other claim that "the family was beginning to work on the mother's drug use" in effort to adjust circumstances to meet the needs of the children is unsupported by the record. At the time of the termination proceeding, Father was taking part in counseling individually and with Mother. Their purported "breakthrough" in therapy related to her substance use was Mother agreeing to tell Father when she has an upcoming drug test. While this may constitute an improvement in the parents' communication, we do not see a connection between this improved communication and the requirement Mother abstain from using illegal drugs, particularly in light of the evidence presented. Mother testified any positive drug tests for methamphetamine and amphetamine were the result of taking valid, unprescribed medications but provided no admissible evidence to support this assertion. The parents' therapist testified Mother did not acknowledge using illegal drugs and Father supported her excuses for the positive drug test results. As a result of "Mother's startling patterns of deception and [dis]honesty," the district court found Mother had "little to no credibility" on the issue of her substance abuse. As stated above, we do not reweigh the evidence presented or assess the credibility of witnesses at the hearing.

Considering the evidence in the light most favorable to the State, we conclude a rational fact-finder could have found it highly probable Father was unfit under K.S.A. 38-2269(b)(8) based on

Father's lack of effort to adjust his circumstances, conduct, or conditions to meet the needs of his children.

4. *Failure to carry out a reasonable plan approved by the court directed toward the integration of the child into a parental home, K.S.A. 38-2269(c)(3)*

Finally, Father asserts that, contrary to the district court's finding otherwise, he successfully completed his reintegration plan. He listed owning a home in Missouri, having a driver's license, car insurance and registration, and consistently participating in visits as tasks he completed successfully. Father's actual progress on the reintegration plan is difficult to assess because he failed to include in the appellate record a copy of his case plan outlining specific goals, tasks, and timelines for reintegration or any documentation verifying his compliance with plan tasks. From the record, however, we can infer Father's case plan required stable employment, reliable transportation, consistent visitation, suitable housing, and completion of a parenting class to achieve reintegration.

There was evidence Father completed some reintegration tasks, which the district court considered. It was undisputed he maintained stable employment and faithfully participated in visitation. But with respect to suitable housing for the children, the parents failed to complete the ICPC process, and once state agencies discovered Mother had falsified drug tests, parenting classes, and substance abuse treatment, it was not clear when or if the process would be restarted. There is no reliable evidence Father completed the required parenting class because the proof of completion submitted to KVC was falsified. The record shows parents had ample time—indeed a generous amount of extra time—to accomplish these important tasks but due to their own actions or omissions, they failed to do so.

It was also undisputed, including by Mother's testimony, that over the entire case, Father only minimally communicated with KVC and was not engaged with the reintegration tasks other than participating in visitation. Instead, he relied on Mother to be the sole point of contact with the assisting agencies, and the parents treated her reintegration plan as the "de facto" plan for both parents. As a result, the court concluded Father "has chosen to let

mother handle everything with KVC, including providing proof that these plan tasks are completed." Father's lack of engagement in the reintegration process is especially troubling given Mother's repeated incarcerations during the pendency of this case and her documented history of illegal drug use and dishonesty with family service agencies.

This brings us to an observation that an implicit, critical requirement for reintegration is that the parents show a sustainable childcare plan. Here, the only option the parents provided to the court was Mother would be the children's primary caregiver while Father worked very long hours. But the parents failed to show Mother would be *a reliable and safe* primary caregiver capable of meeting the four children's physical, mental, and emotional needs. Quite the opposite.

Mother was repeatedly incarcerated during the pendency of this case; in fact, she was arrested in the same week as the termination proceeding and charged with two felony crimes. The district court found Mother continues to be "involved in criminal activity" which "puts her at risk of being incarcerated and unable to care for the children." She also missed mandatory UAs and tested positive for methamphetamines and amphetamines multiple times during the case, then submitted falsified drug test results. At the termination hearing, Mother insisted her positive drug tests resulted from taking valid medications but did not provide any documentation of valid prescriptions or other admissible evidence to support this claim. Consequently, the district court found "Mother continues to have issues related to her substance abuse and has taken no steps to begin treatment and recovery after all of this time and despite a pattern and years of drug use dating back to 2013." For his part, Father denies knowing throughout this case that Mother was using illegal drugs. But his claimed ignorance about Mother's substance use problem does not relieve him of the requirement to show a sustainable childcare plan for reintegration, which he failed to do.

Ultimately, the district court found the parents "had 40 months to complete their reintegration plan" but failed to do so—instead, they submitted "falsified documents and false information . . . meant to mislead and deceive the public and private agencies in

this case." As to Father specifically, the court reasonably concluded he was either "aware of [M]other's actions and behaviors and has done nothing to correct the false statements and information" or is "so unengaged that he makes no effort to ensure that documentation and information submitted by mother on his behalf to KVC is accurate and truthful."

Considering the evidence in the light most favorable to the State, we conclude a rational fact-finder could have found it highly probable that Father was unfit under K.S.A. 38-2269(c)(3) based on Father's failure to carry out a reasonable plan approved by the court directed toward integration of his children into his home.

B. *Conduct or condition of unfitness unlikely to change in foreseeable future*

After finding a parent is unfit to properly care for a child, the court must then determine whether there is clear and convincing evidence that the parent's conduct or condition of unfitness is unlikely to change in the foreseeable future. K.S.A. 38-2269(a). "The foreseeable future is examined from the perspective of a child because children and adults have different perceptions of time and children have a right to permanency within a time frame reasonable to them." *In re M.H.*, 50 Kan. App. 2d 1162, 1170, 337 P.3d 711 (2014). "A district court may look to a parent's past conduct as an indicator of future behavior" and give weight to actions over intentions. *In re K.L.B.*, 56 Kan. App. 2d 429, 447, 431 P.3d 883 (2018); *In re A.A.*, 38 Kan. App. 2d 1100, 1105, 176 P.3d 237 (2008).

There is no set amount of time in which a parent's failed completion of the reintegration plan proves the parent's conduct or condition of unfitness is unlikely to change in the foreseeable future. But Kansas caselaw suggests such a finding is warranted when the time for completion has been extended, the parent makes little progress towards reintegration during that added time, and reintegration is still not possible or expected in the near future. See, e.g., *In re R.S.*, 50 Kan. App. 2d 1105, 1116-17, 336 P.3d 903 (2014) (mother's unfitness unlikely to change in the foreseeable future after 10 months had passed and she had made only minimal efforts to regain custody); *In re C.C.*, 29 Kan. App. 2d 950, 954,

34 P.3d 462 (2001) (possibility that children would remain in out-of-home-placement for at least 30 months before mother would be released from jail and reintegration could proceed supported a finding that the circumstances of unfitness were unlikely to change in the foreseeable future). That is exactly what happened here.

The district court found Father's unfitness was unlikely to change in the foreseeable future on the basis of the following:

- "The children have been out of [F]ather's care for the past 40 months."
- "There have been significant efforts by both public and private agencies in both Kansas and Missouri over the past 40 months to rehabilitate [F]ather and this family."
- "Father is essentially in the same place he was when the cases were filed in 2019."
- "Father made the intentional choice to move to Missouri while his children are in Kansas DCF custody, and no information has been submitted that this is going to change."
- "[T]he children cannot reside in [Father's] Missouri home" due to rejected ICPCs.
- Child (B.G.) in Missouri has been removed twice from Father's care.
- There is no indication Father "is likely to comp[l]ete the reintegration plan in the foreseeable future."

In his Petition for Review, Father repeats his argument that the district court "ignores the clear progress the father . . . made in the case," as outlined in his challenge of the court's unfitness finding. On direct appeal, Father argued the court improperly drew inferences or made "inappropriate, hypothetical leaps" to find his unfitness was unlikely to change in the foreseeable future. He asserted any current unfitness "was changing and was likely to continue to change very quickly" based on evidence at the hearing.

He cited having a house and a job, participating in visitation that reportedly went well, and the parents' recent "breakthrough" in therapy. He also pointed to the parents' therapist's testimony that reintegration remained a goal in the Missouri case involving B.G.

As discussed, the district court considered this evidence in the context of the unfitness factors, and we do not reweigh evidence on appeal. The district court properly considered the foreseeable future element from the perspective of the children and looked to Father's past conduct as a reliable indicator of how he would behave in the future. The court noted C.A., D.G. Jr., and U.G. were out of Father's care for 40 months, and Di.G. for 22 months, which constituted most of the children's lives up to that point. This long time span was attributable to the multiple extensions parents received to continue working towards reintegration. Yet by the time of the termination proceeding, the family was no closer to reintegration due to: Mother's substance abuse, incarcerations, and dishonesty with assisting agencies; Father's lack of engagement in the reintegration plan and unwillingness to communicate with those agencies; the parents' failure to complete an appropriate parenting class; and the housing situation that the parents created by moving to Missouri and the subsequent failed ICPC process. Given this evidence, the court concluded reintegration was not a reasonable possibility and there was no indication it would be in the foreseeable future, stating "after 40 months, the parents are still having supervised visitation with the children, and there is no information before the Court to support a finding that unsupervised parenting time will resume in the near future."

Considering the evidence in the light most favorable to the State, we conclude a rational fact-finder could have found it highly probable that Father's conduct or condition of unfitness was unlikely to change in the foreseeable future under K.S.A. 38-2269(a).

II. *K.S.A. 38-2269(g)(1): best interests of the child*

In addition to findings of unfitness, the court must consider whether it is in the best interests of the child to terminate parental rights. K.S.A. 38-2269(g)(1) expressly identifies the physical, mental, and emotional health of the child as the primary factors a

district court should consider in making its best-interests determination. See K.S.A. 38-2269(g)(1) ("If the physical, mental or emotional needs of the child would best be served by termination of parental rights, the court shall so order."). In assessing the child's physical, mental, and emotional health, the court may make a series of factual determinations. These factual findings may include, but are not limited to, personal features of the child's relationship with the parent and the harm that would come from losing the relationship and attachment, how a prospective adoptive placement for the particular child may work to counterbalance those harms, whether guardianship would better meet the physical, mental, or emotional needs of the child, and how the prospects for achieving permanency for the child will impact the child in terms of placement stability, placement disruptions, and aging out of the system.

Unlike subsection (a)—which expressly requires a "clear and convincing evidence" standard of proof for parental unfitness findings—subsection (g)(1) does not provide a standard of proof for factual findings regarding the child's physical, mental, and emotional health, which are the primary statutory factors the district court should consider in deciding whether the child would be best served by termination of parental rights. In *In re R.S.*, a panel of the Court of Appeals resolved an inconsistency within that court "about whether we should review the best-interests determination under an abuse-of-discretion standard or under the clear-and-convincing-evidence standard." 50 Kan. App. 2d at 1113. The panel ultimately held Kansas appellate courts should review the best-interests determination for abuse of discretion, which occurs when no reasonable person would agree with the district court or the court's decision is based on a legal or factual error. In determining whether the district court made a factual error, the panel held any factual findings about the child's physical, mental, and emotional health that were made in the best-interests determination should be reviewed to see that substantial evidence supports them, specifically recognizing that the preponderance-of-the-evidence standard of proof applies to best-interests findings in the district court. 50 Kan. App. 2d at 1116.

The Court of Appeals has cited to the *In re R.S.* standard of review in hundreds of cases since 2014. And consistent with these

cases, Father argued both on appeal and in his petition for review that the district court abused its discretion under this standard of review in deciding termination of his parental rights was in the best interests of his children. Even so, this court has yet to decide whether the lower preponderance-of-the-evidence or the higher clear-and-convincing standard of proof applies to factual findings made under subsection (g)(1) and, depending on the answer, the impact this might have on our standard of review. But we need not decide at this time whether the higher standard of proof should apply under subsection (g)(1) because the district court here found under the higher standard—clear and convincing evidence—that the best interests of the children will be served by termination of both parents' rights.

"The Court has given primary consideration to the physical, mental and emotional health of these children. Permanency for [C.A., D.G. Jr., and U.G.] has not been achieved in the more than three years that these cases have been impending. Permanency for [Di.G.] has not been achieved in the 22 months since her birth.

"As stated by the children['s] Guardian Ad Litem, this Court finds that the children deserve permanency. And right now, they are all waiting on a shelf for their parents to bring them home.

"The Court has considered that the current placement where all four children reside together is a willing, adoptive resource for the children.

"This is a heartbreaking case. And without question, both parents love the children. The Court has considered the testimony of Ms. Johnson, the therapist for [C.A.] and [D.G. Jr.], and that these children need a structured and consistent routine and a permanent and consistent home. Ms. Johnson testified that in working with Placement, that she believes Placement can provide to the children what they need for their physical, mental and emotional health.

"The evidence presented raises considerable concern by the Court that mother is unable to address her own substance abuse and behavioral issues, so how will she also provide the children what they need for their physical, mental and emotional health.

"And that father will be unable to provide the structure and consistency the children need, and will leave the parenting to mother, as evidenced by the past history of the parties and mother's testimony that she is the parent to primarily care for the children in their household.

"The evidence also reveals that the children are bonded with Placement. And after 40 months, [U.G.] and [Di.G.] have lived with and been cared for by Placement for the entirety of their lives.

"When considering all evidence presented during this trial, the Court finds that the best interest of these children are served by the termination of both parents' rights."

Father asserts in his Petition for Review that there was no credible evidence presented at the hearing that it was in the children's best interests to terminate his parental rights. He points to evidence he cared for the children when they were younger, before the CINC proceedings began, and he attended all visitations, including when Mother was incarcerated for months at a time. At visits, he was engaged with his children and they enjoyed being around him. Based on this evidence, Father argues the children's best interests would not be served by terminating his parental rights. Instead, he asserts, "the best course of action considering the physical, mental, or emotional needs of the children was to give the father more time to reintegrate with his children."

Regardless of the standard of proof required, we do not reweigh conflicting evidence in a sufficiency review. Yet we agree with the district court that there was clear and convincing evidence presented here that the children's physical, mental, and emotional needs could best be served by termination. Thus, we conclude a rational fact-finder could have found it highly probable—i.e., by clear and convincing evidence—that termination of Father's parental rights was in the children's best interest. As such, we find no factual error within the district court's best-interests determination.

Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

State v. Garrett

No. 124,329

STATE OF KANSAS, *Appellant*, v. PHILLIP JASON GARRETT, *Appellee*.

(555 P.3d 1116)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fifth Amendment Protections Prohibit Coerced or Involuntary Statements to Establish Guilt.* The protections of the Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, prohibit the State from relying on coerced or involuntary statements to establish a defendant's guilt. But these protections do not justify evidentiary suppression of confessions that are either unrelated to law enforcement tactics, or are connected to, but not causally related to, law enforcement tactics that constitute misconduct.

2. CRIMINAL LAW—*Determination if Confession Obtained in Violation of Due Process—Review of Totality of Circumstances if Misconduct by Law Enforcement.* When determining whether a confession was obtained in violation of due process, a reviewing court must first consider the totality of the circumstances to determine whether any related law enforcement tactics constituted misconduct. If such law enforcement tactics do not constitute misconduct, a resulting confession cannot be rendered inadmissible because of those tactics.

3. SAME—*If Confession Obtained by Misconduct of Law Enforcement—Totality of Circumstances—Due Process Violation Results in Suppression of Confession.* If law enforcement committed misconduct related to a confession, a reviewing court must then assess whether, under the totality of the circumstances, the misconduct caused the confession. In other words, the court must consider whether the misconduct caused the defendant's free will to be overborne, such that the resulting confession was not voluntary. If that happened, law enforcement has violated due process and the resulting confession must be suppressed.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 21, 2022. Appeal from Saline District Court; JARED B. JOHNSON, judge. Oral argument held May 15, 2023. Opinion filed September 20, 2024. Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed and remanded.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with him on the briefs for appellant.

D. Justin Bravi, of Salina Regional Public Defender Office, argued the cause, and *Mark J. Dinkel*, of the same office, was with him on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: Police interviewed Phillip Jason Garrett after he was accused of inappropriately touching a minor, L.A. Garrett confessed to some of the allegations during the interview. The district court suppressed his statements after concluding they were involuntary. A panel of the Court of Appeals reversed, holding the district court placed undue weight on the deceptive police practices while excluding "nearly all other relevant components of the inquiry." *State v. Garrett*, No. 124,329, 2022 WL 12129643, at *6 (Kan. App. 2022) (unpublished opinion). Garrett petitioned for review. We affirm the Court of Appeals' reversal of the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2018, L.A.'s biological father reported to Salina police that he found text messages on L.A.'s phone showing Phillip Garrett inappropriately touched her. L.A. was under 14 years-of-age at the time. Police interviewed L.A., and she confirmed Garrett had touched and penetrated her vagina and anus multiple times and rubbed her chest. Officers contacted Garrett and requested he come to the police station, and Garrett agreed.

Detective Tim Brown and Detective Gregory Jones interviewed Garrett in a locked room inside the police headquarters. The interview began with Detective Jones telling Garrett that Jones needed to "jump through some hoops" because the interview was taking place behind locked doors and Jones was a "cop and I ask questions." Jones then read Garrett his *Miranda* rights. The officers asked Garrett about the allegations, and Garrett denied them.

The officers then asked Garrett if he would submit to a computerized voice stress analysis (CVSA) to verify the truth of his statements. Garrett was hesitant, telling the officers he was very nervous and stressed and worried the stress would negatively impact the results of the test. The detectives offered to bring in Sergeant Sarah Cox, who administers the tests, to better explain the

test and allay his fears. While they waited for Sergeant Cox, Detective Brown told Garrett the CVSA is more accurate than a polygraph.

Sergeant Cox entered the interview room and described the test to Garrett. She told him, "They're just a series of yes or no questions. If you're telling us the truth, then you should have no problem, okay? But if you're lying about these specific questions, the stress is going to pop up on those charts like nobody's business and we're gonna know. It is 100% effective." When Detective Brown let Sergeant Cox know Garrett was worried his general stress was going to alter the results of the test, Cox told him "this test is 100% effective and what I mean by that [is] it doesn't matter if someone is drunk or high or sober, it's still going to measure that frequency and that stress in your vocal cords." Detective Brown told Garrett they appreciated his cooperation so far and thought he would want to continue to cooperate. Garrett eventually agreed to submit to the test.

Sergeant Cox led Garrett into a separate room to complete the CVSA. Before they began, Sergeant Cox handed Garrett a form to read and sign titled "Truth Verification Release Form." The form stated that Garrett was submitting to the test without any "threat, coercion, promise, reward or immunity," and that Garrett released all involved parties from any liability associated with the exam. The form also stated that Garrett understood all materials and recordings from the exam could be released for the purposes of testimony. The bottom of the form included Garrett's *Miranda* rights. Sergeant Cox read each right aloud to Garrett and had him initial beside each one.

After Garrett signed the form, Sergeant Cox offered more details about the exam:

"[T]he CVSA is actually a tool that's used all over the United States, even the military uses it, to verify whether someone is telling the truth. Okay? Instead of being called a lie detector test, the CVSA is considered a truth verification exam, and it is 100% effective. Okay? The CVSA works by analyzing the stress of one's voice when asked specific questions to determine whether the person being asked those questions is telling the truth or a lie. The test activates off of voice frequency alone so again it doesn't matter how high, drunk, sober a person is, it's going to be 100% accurate."

Sergeant Cox said, "by the time we're done in here, we're going to know what happened and what the truth is." She then administered the test and returned Garrett to the interview room.

After that, Sergeant Cox analyzed the results and concluded "there was stress present, and stress is an indication of deception." She then contacted another CVSA examiner to analyze the results, which is standard protocol. The two examiners then discussed the results and their separate analyses. Their discussion did not cause Cox to change her opinion about the test results.

The officers told Garrett the test had registered stress when Sergeant Cox asked if Garrett had touched L.A.'s anus. Garrett still denied the allegations. Detective Brown said he could tell Garrett loved L.A., and that his love had caused him to make a bad decision. The officers said they wanted to tell the prosecutor Garrett had been cooperative. Garrett eventually confessed to rubbing L.A.'s vagina four or five times.

The State charged Garrett with 11 counts of rape, 8 counts of aggravated indecent liberties with a child, 1 count of aggravated indecent solicitation of a child, and 2 counts of aggravated criminal sodomy.

Garrett moved to suppress the statements he made during the interrogation, arguing they had been coerced. The district court held a hearing on the motion, during which Detectives Jones and Brown and Sergeant Cox testified. The court admitted the recordings of the interview and the CVSA results. Gary Davis, a defense expert, testified about the CVSA and its accuracy. He stated that while he was not familiar with how the test is administered, the CVSA is a real test that has been used in official settings. But Davis also testified the test was "[n]o better than flipping a coin" to detect truthfulness. And he agreed literature shows it to be only 15 to 50 percent accurate in detecting truthfulness and that the CVSA cannot discriminate general stress from "case-specific" stress.

The district court initially concluded that Garrett's statement had been voluntary and denied the motion to suppress. We will discuss the district court's findings in more detail below.

Eighteen months later, before trial, the district court reversed its own judgment sua sponte. The court reconsidered the totality of the circumstances and—based largely on the officers' deceptive

description of the accuracy of the CVSA and the postexam interview tactics—concluded Garrett's statements were involuntary. The court then suppressed Garrett's statements.

The State filed an interlocutory appeal, and the Court of Appeals reversed. *Garrett*, 2022 WL 12129643, at *6. The panel majority concluded the district court focused "almost entirely" on "its discontent with the CVSA and its attendant discussions, rather than adhering to its obligation to conduct a full and fair assessment based on the totality of the circumstances." 2022 WL 12129643, at *6. Judge Hurst concurred but wrote separately. 2022 WL 12129643, at *6-11 (Hurst, J., concurring). We granted Garrett's petition for review.

ANALYSIS

Garrett argues the Court of Appeals erroneously reversed the district court's suppression by reweighing evidence and considering the officers' deceptive tactics in isolation rather than together with other coercive factors. He contends that, without these errors, the totality of the circumstances shows his statements were involuntary.

Standard of Review

When reviewing a district court's suppression order, an appellate court reviews the district court's "findings about historical facts regarding the circumstances of the confession as issues of fact"; thus, such findings "about these factors must be supported by substantial competent evidence or, in other words, evidence that a reasonable person could accept as adequate to support a conclusion." *State v. G.O.*, 318 Kan. 386, 407, 543 P.3d 1096 (2024). In making this determination, an appellate court "does not reweigh the evidence, assess witness credibility, or resolve evidentiary conflicts" and disregards "any conflicting evidence or other inferences that might be drawn from the evidence." *G.O.*, 318 Kan. at 407. After assessing the evidentiary sufficiency of the district court's findings, an appellate court then reviews the district court's ultimate legal conclusion de novo. *State v. Palacio*, 309 Kan. 1075, 1081, 442 P.3d 466 (2019). As we recently explained, this involves our consideration of

"whether the state actor overreached, the determination of how the accused reacted to the external facts, and the legal significance of the reaction as issues of law. We examine the totality of circumstances and assess de novo the trial judge's legal conclusion based on those facts. This means we give no deference to the trial judge's legal conclusion that [the accused] did not voluntarily confess." *G.O.*, 318 Kan. at 407.

Garrett argues the Court of Appeals erroneously reweighed the evidence and incorrectly assessed the legal effect of some of the district court's factual findings. Both arguments present legal questions subject to unlimited review. See *State v. Neighbors*, 299 Kan. 234, 240, 328 P.3d 1081 (2014); *Palacio*, 309 Kan. at 1081.

Discussion

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment Due Process Clause, prohibits the State from compelling anyone "in any criminal case to be a witness against himself." This protection bars the State from relying on coerced or involuntary statements to establish a defendant's guilt. *Palacio*, 309 Kan. at 1087. A statement can be involuntary even if officers read a defendant their *Miranda* rights and the defendant waived a right to counsel. 309 Kan. at 1087.

Due process protects against involuntary confessions caused by coercive police tactics. These tactics fall into two broad categories: "(1) Those that are inherently coercive and a per se violation of the Due Process Clause and (2) those where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive." *G.O.*, 318 Kan. at 397. The former group includes "interrogation techniques that in isolation are inherently offensive to a civilized system of justice" and usually involve "coercive techniques that included extreme psychological pressure or brutal beatings and other physical harm." 318 Kan. at 397-98. While Garrett claims the police's tactics were coercive, he does not argue they were of the sort that is "inherently offensive to a civilized system of justice."

When confronted, as here, with a confession alleged to have been caused by law enforcement tactics that were coercive (and thus misconduct) "because of the unique circumstances of the sus-

pect," we consider the totality of the circumstances, including circumstances relevant to both law enforcement and the accused, to determine first whether the law enforcement tactics used *in this instance* constituted overreaching misconduct. In the absence of the State abusing its power, a confession does not violate due process. If such misconduct is found, appellate courts then must undertake a causal analysis to determine whether the misconduct resulted in the challenged confession. *G.O.*, 318 Kan. at 398. That causal analysis is necessary if misconduct is found because the mere presence of police misconduct *connected* to a confession is not enough to require suppression. The misconduct must *cause* the defendant's free will to be overborne, such that the resulting confession is not voluntary. When that happens, law enforcement has violated due process and it is appropriate to suppress the confession for that violation. See *G.O.*, 318 Kan. at 400. The State bears the burden of proving the voluntariness of a defendant's confession by a preponderance of the evidence. 318 Kan. 403-04 (citing *State v. Brown*, 286 Kan. 170, 172, 182 P.3d 1205 [2008]).

So what are the characteristics of law enforcement tactics and the accused to be considered here? Because we have described these characteristics, or factors, as nonexclusive, "any relevant factor may—and should—be considered." *G.O.*, 318 Kan. at 402. Still, we have previously identified several such factors:

> "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." *G.O.*, 318 Kan. at 403.

When evaluating misconduct, we consider the district court's findings about the interview itself and those findings about the defendant that would have been known to (or ascertainable by) law enforcement; only when evaluating voluntariness overall do we consider the factors which law enforcement would have had no way of knowing, such as a defendant's experience or subjective feelings.

Our task on review is thus akin to solving a jigsaw puzzle: first sorting out the district court's relevant findings of fact supported by sufficient evidence and then fitting those facts together to assess, as a matter of law, whether the final picture produced by those findings reveals police misconduct. If the answer is yes, we then proceed to determining whether the facts demonstrate, as a matter of law, that the misconduct caused an accused person's will to be overborne, rendering the confession involuntary and inadmissible for violating due process.

Substantial competent evidence supports the district court's findings of fact.

On January 27, 2020, the district court held an evidentiary hearing on the motion to suppress. At the conclusion of the hearing, the court made the following findings:

- Garrett was brought in for questioning at the Salina Police Department, behind one set of locked doors. The interrogation began at around 1:20 p.m.
- Detective Brown, Detective Jones, and other law enforcement were present throughout the interview.
- Garrett was provided with his *Miranda* warning at the outset. There was some minimization of that process by the detective, who referred to the warning as "hoops that he needed to jump through" because Garrett was arguably in custody.
- Soon it became apparent to Garrett that the interview was about his inappropriate touching and behavior toward L.A.

- The officers were very fair as far as their tone and demeanor, and were not in any way coercive in an outright confrontational sense.
- Garrett's mental condition was stressed; however, he was oriented to time, place, and circumstance.
- Garrett was able to communicate with the outside world.
- The duration of the interrogation was short.
- Garrett is fluent in English.
- Garrett is articulate, and of average or above average intellect.
- At the time of the interview, Garrett's age was close to 40.
- The officer "oversold" the voice stress test. It was presented as 100 percent effective repeatedly, in the context of Garrett denying any inappropriate touching. The test was presented as a foolproof truth confirmation test. Nothing in the literature would indicate that it is 100 percent effective. To assert as much was a deceptive practice.
- Sergeant Cox indicated the CVSA was 100 percent effective for truth confirmation and that the test could differentiate between the stress of the event and the stress of deception. The literature before the court indicated that was not accurate.
- After being confronted with the result of the CVSA, Garrett changed his answers and started disclosing statements that incriminated him.
- Garrett was not threatened.
- No promises were made to Garrett concerning action that would be taken by a public official in reference to a deal or some favorable treatment.

On July 30, 2021, the district court held a hearing on its own motion to reconsider the motion to suppress. No additional evidence was presented. The court stated it did not intend to repeat every finding previously made, and incorporated its findings from January 27, 2020, but also supplemented those with additional findings. The additional findings were to replace any contrary findings from the earlier hearing. The supplemental findings were as follows:

- Garrett's interview was several hours in length, including a significant period the defendant spent alone or isolated.
- The interview was conducted by three different officers at varying points.
- Garrett was in his early 30s at the time and informed officers that he had not eaten or slept and that he was upset. At the time, Garrett worked at Dillons as a backup meat cutter and manager.
- The questioning before the CVSA was nonconfrontational and less direct.
- Detectives told Garrett that nervousness was not part of the equation, that they thought it was "'a fantastic tool, an excellent tool[,]'" or words to that effect.
- Sergeant Cox then arrived and explained the CVSA, and stated the CVSA is 100 percent effective, despite Garrett's stress.
- Detectives asked Garrett if he would agree to take the test, and Garrett acquiesced.
- The CVSA exam occurred in a separate room with Garrett and Cox present. Cox informed Garrett the exam would be recorded and he could stop it at any time.
- Garrett was trying to read a form Cox gave him and he could not make out the word "coercion." Cox pronounced it for him and then he understood it.
- Cox again administered the *Miranda* warnings to Garrett. Garrett was again told he could stop the exam at any time.
- Cox explained they formerly used a polygraph exam but now use the CVSA. Cox said the CVSA is used throughout the United States, and even the military uses it. She explained it is a truth verification exam and it is 100 percent effective. Cox said by the time they were done they would know what happened and what the truth was.
- Cox told Garrett she wanted him to pass the test and remember to be completely honest. Before administering the CVSA, she reviewed with Garrett the specific allegations of how the defendant touched L.A. Garrett denied the allegations.

- Cox then administered the CVSA.
- After the CVSA, law enforcement was not persuaded by Garrett's continued denials and told him they believed he touched L.A. as alleged.
- Garrett was twice given *Miranda* warnings before testing and did not assert he wanted counsel or wished to remain silent.
- Law enforcement's use of the "Reid Technique" to minimize and obstruct claims of innocence were egregious.

We conclude the district court's findings of fact are supported by substantial competent evidence. (While there is some discrepancy in whether Garrett was "in his early thirties" or "closer to forty[,]" both findings describe Garrett as a mature adult.)

The detectives did not overreach.

Having found that the district court's findings were supported by substantial competent evidence, we next turn to its legal conclusions: that under the totality of the circumstances there was overreaching law enforcement misconduct that caused Garrett's will to be overborne, such that his confession was involuntary. We review these aspects of the district court's decision de novo. In doing so, we note the district court, the Court of Appeals, and the parties did not have the benefit of our decision in *G.O.* clarifying several of the legal principles relevant to the proper legal analysis in this case.

Before the district court, Garrett focused on the officers' fairness in conducting the interrogation. He argued the officers unfairly coerced him into confessing by downplaying the significance of the interrogation and the *Miranda* warnings, misrepresenting the accuracy and admissibility of the CVSA exam, encouraging him to confess so the prosecutor would look favorably upon him, and utilizing an interrogation tactic called the Reid Technique by minimizing the serious nature of the crime and offering innocent explanations after asserting that the CVSA proved guilt.

After discussing the officers' unfairness in more detail at the second hearing, the district court explained its new ruling:

"The Court has reconsidered the totality of the circumstances. Clearly, the defendant was under stress. He reported not sleeping or eating. He had difficulty reading the word 'coercion,' had to be explained to him. Law enforcement minimized the need for *Miranda*. Delayed telling him the specific nature of the allegations. And what troubles the Court most significantly is law enforcement deliberately misled the defendant regarding the effectiveness of the CVSA. As I mentioned previously, they oversold it as 100% effective and a way for the defendant to move past this.

"The Court understands that law enforcement are allowed to use misleading tactics at times during an investigation; however, the overselling and application of the CVSA process and the post CVSA interview tactics are a bridge too far in these circumstances.

. . . .

"Considering the totality of all the circumstances, including the pre-CVSA tactics and approach, the process used during the CVSA and the post-CVSA tactics and approach, the Court finds the defendant's statements after the CVSA were not voluntary, they were not the product of his free and voluntary will, and the Court is suppressing those statements."

The Court of Appeals rejected what it perceived as the district court's "hard stop against deceptive interview techniques in general." *Garrett*, 2022 WL 12129643, at *5. It then appeared to disagree with the district court's finding that Garrett was stressed and tired and had not eaten: "As the testing period neared, Garrett repeatedly made his current level of anxiety known, explaining that he was 'hyped up' and felt nervous and stressed arguably in a thinly veiled attempt to offer an innocent explanation for any stress registered by the test." 2022 WL 12129643, at *5. The majority described Garrett's mental condition as "stable." 2022 WL 12129643, at *6.

The panel concluded:

"In our view, the district court entered its second ruling almost entirely as a product of its discontent with the CVSA and its attendant discussions, rather than adhering to its obligation to conduct a full and fair assessment based on the totality of the circumstances. Shining a light on those factors reveals that Garrett's mental condition was stable and he was not subject to undue duress. While he admitted to experiencing stress, the evidence reflects that anxiety started to simmer the night before his interview after reviewing a text on his wife's phone from L.A.'s father about this matter. The manner and duration of Garrett's interview was also nonremarkable. The evidence reflects it started at roughly 1:30 in the afternoon and lasted only about 2 hours, which we find to be a reasonable length of time. While the record is absent any facts addressing whether Garrett sought to communicate with the outside world at the time, there is no evidence suggest-

ing such a request was made and denied. Finally, turning to Garrett's age, intellect, and background. The evidence adduced demonstrated that Garrett was about 40 years old, married with a family, and worked in two capacities at a local store with one of those roles carrying managerial responsibilities. Accordingly, there is no evidence tending to show Garrett lacked the intellectual capabilities to appreciate his circumstances or what was being asked of him.

"The undue weight the district court afforded the deceptive techniques, to the exclusion of nearly all other relevant components of the inquiry, gave rise to a finding of involuntariness that is neither grounded in substantial competent evidence nor consistent with the longstanding law in this area. Accordingly, that decision cannot be permitted to stand. The district court's conclusion that Garrett's statements were involuntary and its suppression of the same is reversed." *Garrett*, 2022 WL 12129643, at *6.

Garrett argues the panel erred by reweighing the evidence and considering the legal effect of the relevant factors in isolation, rather than assessing the cumulative effect of all the relevant factors. As to the evidence considered by this court, we look to the findings as made by the district court. And we consider those findings both specifically and then as part of the overall circumstances to determine whether the law enforcement tactics constituted overreaching misconduct.

We believe the dissents' criticism that this review constitutes a "divide and conquer" approach is misplaced. 319 Kan. at 490. Consideration of the cumulative effect of the totality of the circumstances does not require that we neglect to examine each circumstance. Rather, a close examination of the circumstances provides greater understanding of their total effect.

When considering all the circumstances related to both (a) law enforcement tactics and (b) what law enforcement knew about Garrett, we conclude that, as a matter of law, the police did not overreach. True, they exaggerated the CVSA's ability to detect truthfulness, which the district court found deceptive. And the district court found it "egregious" that law enforcement minimized and suggested justifications for Garrett's actions, using the Reid Technique.

Even so, law enforcement also understood Garrett was a grown man of apparently average intelligence who was fluent in English. The duration of the interrogation was not prolonged; there was no evidence Garrett was denied any request to communicate with the outside world. Garrett highlights his stress and

tiredness, but he cites no caselaw indicating that either *necessarily* results in involuntary confessions. Appropriate law enforcement interrogation has never required a stress-free environment. Difficult allegations require difficult questions that cause stress. As we have previously explained, "A statement is not involuntary simply because a defendant was tired . . . the condition must have made the defendant seem confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent." *State v. Galloway*, 311 Kan. 238, 246, 459 P.3d 195 (2020). The district court made no such findings here, regardless of its observation that Garrett reported not eating or sleeping and was, understandably, under "stress."

Further, Garrett argues Detective Brown's statement that he wanted to tell the prosecutor that Garrett had cooperated also amplified the coercive nature of the interrogation. Admittedly, a *promise* of leniency can render a confession involuntary if it "concern[s] action to be taken by a public official[,] . . . would likely cause the accused to make a false statement to obtain the benefit of the promise[,]" and was made "by a person whom the accused reasonably believed had the power or authority to execute it." *State v. Garcia*, 297 Kan. 182, 196, 301 P.3d 658 (2013). But an officer's statement that they would like to tell a prosecutor that a defendant cooperated is not a promise of leniency. *State v. Johnson*, 253 Kan. 75, 82, 84, 853 P.2d 34 (1993). Nor have we held such a statement to be coercive. See *State v. Harris*, 284 Kan. 560, 581, 162 P.3d 28 (2007) (resulting confession voluntary even though officer told defendant full cooperation would be viewed favorably); *State v. Tillery*, 227 Kan. 342, 344, 606 P.2d 1031 (1980) (confession voluntary when officers told defendant things would "go better" if they told the truth); *State v. Harwick*, 220 Kan. 572, 575, 552 P.2d 987 (1976) (confession voluntary even though officer told defendant that district attorney might be lenient). The officers' statements here were no different than those previously considered to be noncoercive. They did not promise leniency and thus were not improper.

Next, Garrett argues that the minimization of his *Miranda* rights at the outset of the interview contributed to the coercive environment. We agree that, at least in some circumstances, an officer's attempt at minimizing a defendant's rights *can* contribute to a coercive atmosphere that may lead to an involuntary statement. See, e.g., *G.O.*, 318 Kan. at 407-09; *Doody v. Ryan*, 649 F.3d 986, 1002-06 (9th Cir. 2011); *Ross v. State*, 45 So. 3d 403, 434-35 (Fla. 2010), *as revised on denial of reh'g* (2010). But that did not happen here. Garrett was advised of his constitutional rights not once, but twice, before he made incriminating statements. While the reasons and importance of the first *Miranda* advisory were minimized, the second advisory repeated the ones already given and Garrett acknowledged each one. These rights included his right to stop the interview at any time (remain silent) and demand the assistance of counsel. This clearer and more forceful recitation of Garrett's rights alleviated any coercive effect that the initial reading caused.

Garrett also asserts the officers' deceptive exaggeration of the reliability of the CVSA to identify the "truth" was coercive. He insists this case is like *State v. Stone*, 291 Kan. 13, 29, 237 P.3d 1229 (2010). Despite certain similarities, *Stone* is distinguishable. In *Stone*, the detectives falsely told the defendant they had found semen on the victim's pajama top and were sure it would match the defendant's DNA. They were also aggressive in their interrogation and implied the only thing that would keep the defendant out of jail or affect the length of the sentence was a confession. In addition, the defendant had a sore throat, an ankle injury, was suffering from exhaustion, and became confused to the point of offering garbled and disorganized responses throughout the interview and merely adopted the interrogator's suggested version of events. 291 Kan. at 22-23. In contrast, here the district court made no finding that officers were aggressive or indicated Garrett's confession would keep him out of jail or affect the length of his sentence, or that Garrett's mental state prohibited him from thinking clearly.

Sometimes deceptive practices by law enforcement constitute misconduct, but not always. The difference is a matter of degree, gauged by what the officers knew or could have ascertained about

the defendant; a lie told to a child, after all, will have a far greater impact than a falsehood given to an adult. Here, nothing about Garrett himself or the other surrounding circumstances of the interrogation could have exacerbated the effect of the deception. While our threshold assessment of misconduct differs from the ultimate question of voluntariness, we note that many cases have found a voluntary confession even when presented with law enforcement's deceptive tactics. See *Frazier v. Cupp*, 394 U.S. 731, 737, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (statements voluntary even though officer falsely told defendant codefendant had confessed to his and the defendant's guilt); *State v. Harris*, 279 Kan. 163, 170, 105 P.3d 1258 (2005) (deceptive interrogation techniques alone do not establish coercion); *State v. Swanigan*, 279 Kan. 18, 32, 106 P.3d 39 (2005) (police free to lie about evidence that fingerprints were found and confirmed to be Swanigan's, but false information must be viewed as a circumstance in conjunction with others, e.g., additional police interrogation tactics); *State v. Wakefield*, 267 Kan. 116, 127-28, 977 P.2d 941 (1999) (questioning officer's false statement to defendant, when viewed as part of the totality of the circumstances, was insufficient to make the otherwise voluntary confession inadmissible).

The alleged deception here stems from the disparity between what officers represented the CVSA's accuracy to be—100 percent—and what a witness reported the scientific literature said: 15-50 percent accuracy. But we disagree with Justice Wall's dissent's claim that "[a]ll the while, police knew the testing was junk science, the results could not be used in court." 319 Kan. at 491. We simply do not know they knew that. No evidence supports the conclusion that the police in this case *knew* the CVSA test—a real test used by other law enforcement agencies—to be "junk science." 319 Kan. at 491. Nor do we know from the evidence that CVSA results could never be admissible in court for any reason. To the extent the discrepancy in the CVSA's real versus represented accuracy *was* deceptive, as the district court found it to be, we cannot conclude that it constituted misconduct as a matter of law. As Judge Hurst aptly summarized:

"[T]he deception here was not pervasive—while the interviewers extolled the accuracy of the CVSA exam, they did not heavily or repeatedly rely on its results.

While the interviewers led Garrett to believe that some of his answers demonstrated stress, they did not say that the exam proved he lied or proved his guilt, and they did not belabor the exam results. They asked Garrett about the results just once or twice before changing tactics. Additionally, the interviewers did not lie about the existence of physical evidence, witnesses, or surveillance footage." 2022 WL 12129643 at *10 (Hurst, J., concurring).

The district court also criticized law enforcement's use of the Reid Technique as "egregious," so some explanation of the Reid Technique is needed. While the district court's use of the word "egregious" creates a negative connotation of these techniques, that conclusive connotation is not universally held. One secondary source more favorable to this law enforcement tactic describes it as follows:

"By virtue of its name, the Reid Technique of Interview and Interrogation may lend itself to the generalization that it teaches interrogators how to become better at eliciting confessions from suspects but no more than that. Moreover, critics . . . broadly assert that the technique is so powerful that interrogators use it to coerce suspects to confess to crimes they haven't committed, yet so flawed that interrogators are unable to tell the difference between someone who is telling the truth and someone who is not. Reid's 'three-part process for solving crime,' however, is much more comprehensive than such generalizations would suggest.

"While behavior analysis and interrogation skills are the primary benefits derived from the textbook and seminars, the technique's overall structure has a system of checks and balances. To review, first there is 'factual analysis.' Prior to interviewing a suspect, interrogators are instructed to gather as much independent evidence as possible from the most reliable sources. Second is the 'behavior analysis' interview, in which investigators look for symptoms of deception, but under the admonition not to put too much weight in any one indicator. Finally, there is the 'nine-step interrogation method,' which is set up in a manner so that innocent people are likely to forcefully deny guilt as early as steps one, two, and three.

"By the time the interrogator reaches what is likely the most suggestive part of the interrogation, innocent suspects will have given many indications of truthfulness, thereby eliminating the need to move into this area. In such cases, Reid advises the interrogator to consider the process of 'stepping down.' Stepping down involves softening the intensity of the interview or terminating it completely. Which way to proceed here depends on whether the interrogator believes the person has some knowledge of the crime (as an accomplice, witness, etc.), or is completely uninvolved.

"Whether or not a confession is voluntary depends on an overall inquiry into the suspect's susceptibility to coercion as well as whether or not the police acted in a manner likely to overbear the suspects' desire not to speak." Goodman, *Getting to the Truth: Analysis and Argument in Support of the Reid Technique of Interview and Interrogation*, 21 Me. B.J. 20, 24-25 (2006).

Garrett submitted no evidence criticizing law enforcement's use of the Reid Technique as used here and cites no law prohibiting these techniques. Indeed, this court noted in *Khalil-Alsalaami v. State*, 313 Kan. 472, 507, 486 P.3d 1216 (2021), that "no Kansas appellate decision had found" "'minimization'" techniques in interrogation "alone sufficient to render a defendant's confession involuntary."

But we pause to caution that the point is not whether a confession is truthful or false. The point is the process due the accused, *regardless* of the truth of the confession. As one federal district judge recently opined:

> "While [Defendant] Monroe [criticizes] the Reid Technique . . ., there is nothing impermissible as a matter of law with this interrogation approach; it falls within the range of acceptable interrogation tactics sanctioned by the First Circuit. Monroe offers no authority, and the Court could not find any, for the contention that an agent's minimization of crimes, under these facts, renders a suspect's statements involuntary. Thus, Monroe's argument that the Reid Technique violated his Due Process rights must fail.
>
> "The problem with this result, of course, is that it implicitly condones police interrogation tactics, such as lie detector tricks and the minimization and maximization of crimes, which, again, can lead to—or are at least present in—false confessions. Thus, the use of the Reid Technique on most competent adults is lawful until and unless it fails, and proving its failure is a herculean task to be sure. Generally, it would require overcoming a finding of guilt on a post-conviction claim of actual innocence. The solution to this problem is not to ban the Reid Technique by holding, as Defendant would have it, that its use constitutes a per se Fifth Amendment violation. But, at the same time, law enforcement agents need to consider carefully whether their tactics are appropriate in any given situation, and they should be fully trained, using real science (not company promotional propaganda), on the efficacy and frailties of various interrogation techniques.
>
> "Indeed, all agents in the criminal justice system—prosecutors, defense attorneys, and judges—want a system that does not wrongfully convict innocent people. If law enforcement agents are led to believe incorrectly that the Reid Technique possesses a kind of special power to root out the truth—as the company's marketing material implies—they will be misled in certain cases, resulting in false confessions and wrongful convictions. It is also particularly important to recognize the risk of false confessions in vulnerable populations." *United States v. Monroe*, 264 F. Supp. 3d 376, 392-94 (D.R.I. 2017), *aff'd* No. 19-1869, 2021 WL 8567708 (1st Cir. 2021) (unpublished opinion).

Here, law enforcement used both the Reid Technique and deception. We have previously held that neither is prohibited standing alone. Here, they did not stand alone, and our precedent requires that we consider their cumulative effect. *Stone*, 291 Kan. at 25. Even so, considering these and other tactics used by law enforcement, along with the factors relevant to Garrett as known by law enforcement, under the totality of the circumstances we conclude that law enforcement's actions did not go so far as to constitute misconduct in violation of due process. Since the tactics here were not misconduct, Garrett's resulting confession is not rendered inadmissible because of those tactics.

We affirm the Court of Appeals' reversal of the district court's suppression of Garrett's confession, albeit on different grounds. We remand the matter to the district court for further proceedings.

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

* * *

ROSEN, J., dissenting: Today the majority sanctions law enforcement interrogation tactics that the district court described as "akin to a psychological rubber hose." While the majority may be unbothered, I believe that the deceptive tactics here went too far and functioned to defeat Garrett's free will. I would affirm the district court's suppression of Garrett's statements for the reasons I set out below. And I also join Justice Wall's dissent.

True to the majority's observation, the United States Supreme Court and this court have held that deceptive interrogation practices do not constitute a per se constitutional violation. But in each of those cases, the officers misrepresented existing physical evidence or witness' version of events. *Frazier v. Cupp*, 394 U.S. 731, 737, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (officer falsely told defendant codefendant implicated him in crime); *State v. Harris*, 279 Kan. 163, 170, 105 P.3d 1258 (2005) (officers lied about physical evidence and eyewitnesses); *State v. Wakefield*, 267 Kan. 116, 126, 977 P.2d 941 (1999) (officers lied about existence of incriminating fingerprints and witnesses).

In contrast, the officers in this case did not misrepresent the existence of physical evidence or witness observations or their cooperation with law enforcement. Their coercion was multi-leveled consisting of numerous acts of deception. The officers began the interrogation by minimizing the importance of the *Miranda* advisement, explaining they merely had to "jump through some hoops" before they began the interrogation—those "hoops" being Garrett's constitutional right to remain silent.

Before the officers relied on the results of the CVSA to wrench a confession out of Garrett, they had to coerce him into taking the exam. To do this, they told Garrett that the CVSA was a reliable tool used by the military that was 100% accurate and would verify that he was telling the truth when he denied the allegations against him. The implication is clear: if Garrett refused to take the CVSA and verify the truth of his statements, he was obviously lying about his innocence. In constitutional terms, Garrett's exercise of his right to remain silent would establish his guilt. This directly contradicts Fifth Amendment jurisprudence, which has long provided that a defendant's custodial silence is "insolubly ambiguous" and shall "carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The officers also implied that his agreement to take the test would be communicated to the prosecutor as "cooperation." Garrett thus faced a reality in which his silence proved guilt—regardless of whether he was guilty—and an agreement to take the CVSA might earn him better treatment from the prosecutor. Standing alone, this is highly coercive.

But the officers' coercion continued. After the exam's conclusion, the officers revealed to Garrett that he had failed the test. From Garrett's point of view, a scientific test he (and nearly everyone) has never heard of that law enforcement insists is 100% accurate had absolutely proved his guilt. Guilty or not, his only realistic option was to take the officers up on their offer to tell the prosecutor Garrett had been cooperative. Again, I agree with the district court's assessment of this situation as akin to a "psychological rubber hose."

Other courts have viewed deception regarding the results of lie detector tests to be highly coercive. In *State v. Matsumoto*, 145

Haw. 313, 327, 452 P.3d 310 (2019), results from the defendant's polygraph were inconclusive, but officers told the defendant he failed. The defendant confessed and the Supreme Court of Hawaii suppressed the confession. In doing so, the court explained why falsely telling a defendant that a scientific test had absolutely shown their guilt was so psychologically impactful:

> "The polygraph is a scientific instrument that purports to accurately determine whether the subject of the test is telling the truth. . . . An examinee who has not lied does not expect to be given falsified polygraph test results from the police. It is thus not surprising that the presentation of falsified results may have serious and substantial effects on a suspect. '[E]xperiments have shown that . . . counterfeit test results . . . can substantially alter subjects' . . . beliefs, perceptions of other people, behaviors toward other people, emotional states, . . . self-assessments, [and] memories for observed and experienced events.' Saul M. Kassin et. al, Police-Induced Confessions: Risk Factors and Recommendations, 34 L. & Hum. Behav. 3, 17 (2010) (citing studies that have tracked the effects of counterfeit test results, along with other deceptive tactics) (internal citations omitted).
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> "Falsified polygraph results may pressure a suspect into changing the suspect's pre-test narrative. This pressure is intensified when an officer expresses confidence that the suspect is lying and is aggressive in pushing the suspect to confess on the basis of the officer's pre-formed belief of the suspect's guilt. Richard A. Leo & Richard J. Ofshe, The Truth About False Confessions and Advocacy Scholarship, 37 Crim. L. Bull. 293, 293-370 (2001). Falsified polygraph results are geared towards making the suspect believe in one's own guilt or believing that the officer will not stop the interrogation until the suspect confesses guilt. See Klara Stephens, Misconduct and Bad Practices in False Confessions: Interrogations in the Context of Exonerations, 11 Ne. U. L. Rev. 593, 596 (2019) (finding that false polygraph results are 'bad practices' that produce both true and false confessions).
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> "Once a suspect believes that a confession of guilt is inevitable, the individual is cognitively geared to accept, comply with, and even approve of that outcome. Kassin et. al., supra, at 17, (citing Elliot Aronson, The Social Animal (1999)) (exploring how human beings cognitively respond once they view an outcome as inevitable). That is, false polygraph results may psychologically prime an innocent suspect to make a confession.
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> . . . .
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> "Extensive scientific literature and numerous documented cases have demonstrated the coercive nature of falsified polygraph test results; they can change a suspect's beliefs, pressure a suspect to confess, and even cause the suspect to believe they committed the crime when they did not." *Matsumoto*, 145 Haw. at 326-27.

There is no allegation that Garrett was given falsified results from the CVSA. But, like the defendant in *Matsumoto*, he was falsely told that a lie detector test absolutely proved his guilt. In

reality, the exam Garrett took was at best no more reliable than a coin flip.

This coercive effect of the CVSA was amplified by the highly dubious indication from the officers that the results could be used against Garrett in court. Before Garrett began his test, he was given a document that informed him the exam would be recorded and could be released for purposes of testimony. I question this representation. Because polygraph results have proven to be scientifically unreliable, they are generally inadmissible in Kansas unless the parties agree to their admission. *Wakefield*, 267 Kan. at 133. I suspect CVSA results would fair similarly. Nonetheless, the form Garrett signed indicated his results could be used as testimony. This would have cemented Garrett's belief that he had no recourse but to give the officers the confession they wanted. At least one other court has held it was coercive for an officer to falsely tell a defendant his polygraph results would be admissible in court. See *State v. Valero*, 153 Idaho 910, 914, 916, 285 P.3d 1014 (2012) (confession involuntary in part because officers told defendant polygraph results were admissible in court, which is legally incorrect). And this court has hinted that it would agree. See *State v. Sanders*, 223 Kan. 273, 277-78, 574 P.2d 559 (1977) (use of polygraph did not render confession involuntary in part because officers did not discuss admissibility of polygraph results with defendant); see also *State v. Morton*, 286 Kan. 632, 652, 186 P.3d 785 (2008) ("While telling a suspect false information about the evidence against the suspect, standing alone, does not render a confession involuntary, giving the suspect false or misleading information about the law is more problematic.").

When the officers did not obtain a confession after convincing Garrett to sit for the CVSA and revealing the supposed 100% reliable results, they deployed another deceptive tactic. The officers began minimizing the nature of the alleged crimes and offering justification for their commission. Standing alone, I agree that this was not enough to render a confession involuntary, but it certainly piled on to the already highly coercive nature of the interrogation. Our Court of Appeals has described how this tactic can influence a person's free will:

"Although innocent, an individual may attribute the purported evidence against him or her to a horrible and likely uncorrectable mistake rather than to the interrogator's deception. And the interrogator's categorical dismissal of each protest of innocence can cement that fear. The individual then considers the minimalized admission of guilt the interrogator has offered to be the best way out of an exceptionally bad predicament. See Kassin, 34 Law & Hum. Behav. at 14, 16-19; Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques,* 33 Fordham Urb. L.J. 791, 817-19 (2006); Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action,* 74 Denv. U. L. Rev. 979, 985-86 (1997)." *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 1087, 337 P.3d 691 (2014).

Aggravating all this deception was Garrett's emotional state. The district court found Garrett had emotional turmoil, intense stress, and had not slept or eaten. It was noticeable because it interfered with his understanding of the CVSA consent form—he did not know the meaning of at least one term, and he attributed his confusion to his emotional and physical state.

The district court here thoroughly considered the interrogation and carefully analyzed the voluntariness of Garrett's statements. This is evident in the detailed description of the court's findings and legal conclusions and in the court's commendable decision to correct its earlier order after giving it more thought. The district court made findings supported by substantial competent evidence that: (1) Garrett was emotionally confused and volatile, to the extent it interfered with his comprehension of the CVSA consent form; (2) officers minimized the importance of his *Miranda* advisement to induce him into the interrogation; (3) multiple officers repeatedly misstated the reliability of CVSA testing; (4) the CVSA consent form indicated the test results could be used as evidence against Garrett; and (5) post-testing, the officers minimized the nature of the alleged crimes, offered justification for their commission, and suggested the prosecutor would view Garrett's confession favorably as a form of cooperation. Based on these findings and in light of the totality of the circumstances, like the district court, I conclude the officers' collective deceptive and coercive practices here fell too far over the line.

The majority acknowledges that the officers' misrepresentation of the accuracy of the CVSA was deceptive but concludes it was unproblematic because the officers' reliance on the CVSA results was not "'pervasive.'" 319 Kan. 465, 480-81, 555 P.3d 1116

(2024) (quoting *State v. Garrett*, No. 124,329, 2022 WL 12129643, at *10 [unpublished opinion] [Hurst, J., concurring]). I do not understand this characterization or the reasoning. The officers began discussing the CVSA 30 minutes into the interview and did not abandon the topic until they had convinced Garrett to sit through the exam, administered the exam, and revealed the results over an hour later. After telling Garrett the exam showed he was being dishonest when he denied the allegations, the officers wrested a confession out of him in under 10 minutes. So, the officers may have mentioned the exam results only a few times after the exam was complete, but that was all it took for officers to get him to involuntarily waive his constitutional rights. I cannot see how this means use of the results was not pervasive or did not function to overpower Garrett's will.

I believe that the majority's rubber-stamp of the deception in this case paves the way for an onslaught of even more coercive trickery during police interrogations. Hyper-realistic digital impersonation that can be nearly impossible to debunk, or "deep fakes," as they have come to be known, are ever present. Chesney & Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 Cal. L. Rev. 1753, 1758 (2019). Advances in technology will continue to make these digital impersonations increasingly convincing. 107 Cal. L. Rev. at 1758. I fear it will not be long before law enforcement tests the limits of creating fabricated images of a detainee at the scene of the crime or artificially create other evidence in order to convince a suspect to forego their right to remain silent or cooperate with an investigation. The majority's blanket endorsement of deceptive police tactics, even in the face of a new and unfamiliar technology like the CVSA, signals this kind of highly concerning deceit is fair game.

This court has historically permitted the use of deceptive interrogation tactics. But I believe we should have drawn a line today and affirmed the district court's judgment to suppress Garrett's statements. As Justice Wall adeptly points out in his separate dissent, when the circumstances are analyzed in their totality, they show Garrett's confession was involuntary. Also worth mention, it appears the Court of Appeals believed that Garrett's confession

was truthful, and this may have influenced their voluntariness analysis. *Garrett*, 2022 WL 12129643, at *5 (opining "given the fact Garrett was able to independently provide details of the incidents, he knew participation in the test would require him to be dishonest"). To the extent this had any role, it was misguided. While coercive interview tactics have certainly resulted in false confessions—which demonstrates the psychological power of those tactics—false confessions are not the animating concern behind suppressing involuntary statements. Courts guard against coercive interrogative pressure to protect the individual's constitutional right to remain silent and to due process of law. Guilty or not, our Constitution guarantees every person these rights. The United States Supreme Court has emphasized this truth:

> "Our decisions under [the Due Process Clause] have made clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540-41, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961).

I would remember this today, and for the reasons stated hold that Garrett's confession was involuntary. I would affirm the district court's judgment to suppress his statements.

WALL, J., joins the foregoing dissenting opinion.

* * *

WALL, J., dissenting: I join Justice Rosen's dissent in its entirety. I write separately to critique the majority's application of the controlling legal standard for voluntariness.

Under that legal standard, Garrett's custodial statements must be suppressed unless the State proves by a preponderance of evidence that they were voluntary under *the totality of the circumstances*. *State v. Spencer*, 317 Kan. 295, 297, 527 P.3d 921 (2023). The majority opinion fails to analyze voluntariness under this standard.

Instead, the majority uses a clever analytical device—divide and conquer. It isolates each circumstance that contributed to the environment of coercion. Then, it points to caselaw suggesting each circumstance falls short of coercion on its own. *State v. Garrett*, 319 Kan. 465, 475-83, 555 P.3d 1116 (2024). The problem with this approach is that the Constitution requires us to consider the forest, not each tree. And when we do, the State's overreaching is apparent.

This critique is not groundbreaking. We recognized the illegitimacy of the divide-and-conquer approach in *State v. Stone*, 291 Kan. 13, 237 P.3d 1229 (2010)—cited by the majority. There, the district court reviewed each of the three alleged deceptive practices in isolation. It then cited caselaw to support its conclusion that each factor, alone, did not render the defendant's statements involuntary. 291 Kan. at 23. *Stone* held the district court erred by "failing to look at the circumstances of the interrogation in totality." 291 Kan. at 29. Even if each circumstance fell short on its own, the coercive environment became evident upon "a review of . . . all of these circumstances, as the law requires." 291 Kan. at 32-33.

Since *Stone*, Kansas appellate courts have "specifically rejected a divide-and-conquer approach to assessing the involuntariness of a confession." *State v. Fernandez-Torres*, 50 Kan. App. 2d 1069, 1092, 337 P.3d 691 (2014). Instead, the circumstances must be analyzed collectively. 50 Kan. App. 2d at 1092.

And when the court applies the legal standard correctly, it is often outcome determinative. Take *State v. Swanigan*, 279 Kan. 18, 106 P.3d 39 (2005), for instance. There, the defendant argued the totality of the circumstances rendered his statements involuntary. Those circumstances included detectives lying about the evidence and threatening to tell the prosecutor about the defendant's lack of cooperation. *Swanigan* held that "[a]lthough any one of these factors . . . may not be sufficient to show coercion, the combination of all of them" does. 279 Kan. at 39; see also *Stone*, 291 Kan. at 32-33. The same holds true here.

Garrett was sleep-deprived when he was summoned to police headquarters for custodial interrogation. From the start, he ex-

pressed confusion with the written advisement. But police diminished the importance of his constitutional right to silence and leaned on him to submit to their truth-verification technology. They repeatedly told Garrett this technology discerns truth from falsehood with 100% accuracy. And that the reliability of testing is not affected by other variables like intoxication or anxiety. The consent form for testing also suggested that the results could be used against him in court. All the while, police knew the testing was junk science, the results could not be used in court, and that Garrett's Fifth Amendment rights were not "hoops" to jump through. In fact, the district court was particularly troubled that "law enforcement deliberately misled the defendant regarding the effectiveness of the CVSA."

This conduct put Garrett in an untenable situation. He could assert his constitutional rights or roll the dice and submit to testing. If he chose the former, this would have been viewed as an admission of guilt by silence given law enforcement's misrepresentations about the test's accuracy. So Garrett chose his only path to exoneration and submitted to testing.

Police later told Garrett he had "failed." And based on the misrepresentations in the consent form, he had reason to believe that evidence would come in at trial. Even so, the police overbore Garrett's will only after they continued to minimize the seriousness of the alleged conduct and imply that "cooperation" might encourage the prosecutor to be lenient.

This story is not conveyed through the majority's divide-and-conquer analysis. By focusing on parts of the story in isolation, the true nature of overreaching is skewed and diminished. And that is problematic here because the totality of the circumstances yields coercion greater than the sum of its parts. But the device serves the majority well. How else could the story of Garrett's interrogation be characterized as a proper exercise of State power in a civilized system of justice?

ROSEN, J., joins the foregoing dissenting opinion.

State v. Peters

No. 126,016

STATE OF KANSAS, *Appellee*, v. DEIZMOND C. PETERS, *Appellant*.

(555 P.3d 1134)

SYLLABUS BY THE COURT

1. TRIAL—*Proving Peremptory Strikes Were Pretext for Discrimination—Defendant's Burden under* Batson. Where no argument or evidence is offered to show the prosecutor's reason for exercising the peremptory strikes were pretext for discrimination, a defendant fails to meet his or her burden under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

2. SAME—*Jury Instructions—Application of Invited Error Doctrine.* Application of the invited error doctrine in the context of jury instructions turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal. The ultimate question is whether the record reflects a party's action in fact induced the court to make the claimed instructional error.

3. SAME—*Cumulative-Error Doctrine—Single Error Cannot Support Reversal.* A single error cannot support reversal under the cumulative-error doctrine.

4. CRIMINAL LAW—*Determination of Defendant's Criminal History under Sentencing Guidelines—Right to Jury Trial under Section 5 Not Implicated.* The method of determining a defendant's criminal history under the Kansas Criminal Sentencing Guidelines—which includes consideration of any prior convictions or juvenile adjudications—does not implicate a defendant's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights.

5. APPEAL AND ERROR—*Clerical Mistakes May Be Corrected by Court at Any Time.* Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Oral argument held February 2, 2024. Opinion filed September 20, 2024. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Samuel Schirer, 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, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: This is Deizmond C. Peters' direct appeal following his convictions for first-degree felony murder, aggravated robbery, aggravated burglary, criminal possession of a weapon, and four counts of aggravated assault. Peters raises several claims of trial and sentencing error, including (1) ineffective assistance of counsel, (2) violation of his constitutional rights during the jury selection process, (3) prosecutorial error during closing argument, (4) jury instruction error, (5) sufficiency of the evidence, (6) cumulative error, (7) constitutional sentencing error, and (8) an error in the sentencing journal entry of judgment.

For the reasons stated below, we find only two of Peters' arguments have merit—the evidence does not support his conviction for possession of a weapon and the sentencing journal entry of judgment improperly omitted Peters' jail credit award. Because we find no error resulted from Peters' remaining six arguments, we affirm in part, reverse in part, and remand with directions to vacate Peters' sentence for the reversed conviction, and to issue a nunc pro tunc order correcting the sentencing journal entry of judgment.

FACTS

On the evening of February 11, 2018, teenage brothers A.B. and D.R. hung out and played video games at their Wichita home with Donte Devore and Rashidi Johnson. Devore brought a backpack with him that contained marijuana. When Devore told D.R. he planned to sell some marijuana that evening, D.R. told him not to do it inside the house.

Later that night, the group heard a knock on the window in the brothers' bedroom followed by knocking at the front door. Devore answered the door and went outside. While Devore was outside, D.R. heard a loud noise by the front door. Shortly thereafter, Devore returned to the bedroom, bleeding from the forehead. He arrived with four males who wore hoods and were armed with handguns. D.R. recognized two of the intruders as V.M. and J.S. V.M. and Devore began fighting. During the altercation, Devore was

shot twice by two different guns and later died from a gunshot wound to the chest. After the shooting, the intruders fled. A.B. and D.R. implicated V.M. as the person who fired one of the shots.

When law enforcement arrested V.M. that same night, he was in possession of a fully loaded gun. Law enforcement quickly identified J.S., Peters, and Lascottric Yarbrough as additional suspects.

Law enforcement eventually located Peters and arrested him about a year after the murder. The State charged him with first-degree felony murder, aggravated robbery, aggravated burglary, criminal possession of a weapon, and four counts of aggravated assault.

The case proceeded to a jury trial, where V.M. testified for the State pursuant to a plea agreement. The State initially charged V.M. with first-degree murder, aggravated robbery, and criminal possession of a weapon. Under the plea agreement, V.M. pled guilty to the aggravated robbery charge, and the State dismissed the remaining charges. V.M. was not charged as an adult, and he was committed to a juvenile detention facility until his 22nd birthday. At the time of Peters' trial, V.M. was out on bond because he had completed his entire sentence.

V.M. testified he, Peters, J.S., and Yarbrough participated in the February 11, 2018, aggravated robbery resulting in Devore's death. V.M. grew up and went to school with Yarbrough and J.S. V.M. identified Peters as his brother Nakari's best friend; Nakari died in 2017. V.M. said he was friendly with Peters and called him a family friend.

V.M. provided the following testimony detailing the night of the murder. V.M. received a Facebook Messenger call from J.S. asking for help robbing "somebody you don't mess with." V.M., who had committed at least five previous drug-related armed robberies, agreed to help. Later that evening, J.S. and Peters picked up V.M. and Yarbrough from the house where V.M. lived with his grandmother and other family members. They left the house wearing hoodies and were each armed with handguns of varying calibers.

V.M. did not know where they were going. Once inside the car, J.S. said he was planning to rob Devore, who V.M. was acquainted with. After a 10-to-15-minute drive, they arrived at a house where J.S. tapped on a window. When Devore stepped onto the front porch, the men pointed their guns at him, and J.S. hit Devore in the face with his gun, causing him to bleed. V.M. reached into Devore's pockets and took a small amount of marijuana and about $100 in cash.

Wanting more drugs and money, J.S. walked Devore back into the house at gunpoint while V.M., Peters, and Yarbrough followed behind. After the intruders failed to locate more money and marijuana in the bedroom, J.S. again hit Devore in the face with his gun. V.M. pointed his gun at Devore and threatened to shoot if he did not give up his marijuana. Devore tried to tackle V.M. and take his gun. V.M. said that during the struggle, he tried to shoot Devore, but his gun did not fire. According to V.M., J.S. and Peters both shot Devore. After the shooting, the intruders fled. V.M. claimed he gave the marijuana and money he took from Devore's pockets to J.S.

V.M.'s grandmother (Grandmother) testified that on February 11, 2018, Peters and Yarbrough came to her house around 8:30 or 8:45 p.m., and V.M. left with them a few minutes later. Grandmother said Yarbrough, who she considered to be an extended family member, came inside to get V.M. while Peters waited on the porch. Grandmother knew Peters as a good friend to her grandson, Nakari, and said Peters "was always at the house." Grandmother did not see J.S.

The State also presented testimony from Taylor Kinsey, Peters' former girlfriend. At the time of Peters' trial, Kinsey was serving time for a federal conviction. Kinsey testified that after Devore's murder, she agreed to be an alibi witness for Peters and falsely told law enforcement she and Peters had been out of the state from January through March 2018, and they were in Atlanta at the time of the murder. Kinsey said she lied for Peters because she loved him and believed he was innocent. Also during that time, Peters' mother was taking care of Kinsey's son because Kinsey was in federal custody. Kinsey later reached out to law enforcement and said she had not been with Peters when the murder

occurred. Kinsey denied her story changed because her son was no longer living with Peters' mother or that she was receiving any benefit in exchange for her testimony. Kinsey claimed she had grown up and did not "want to be in that lifestyle anymore" or "have anything to do with [Peters] ever again." She admitted she had been upset with Peters and his family but said she was no longer angry with them. Kinsey said Peters was not with her when Devore was murdered. After the murder, however, she returned to Wichita to pick up Peters and they left town together.

Peters testified in his defense. Peters denied any involvement in the murder or robbery, claiming he was not in Wichita at the time because he was traveling and visiting friends while trying to build his music career and obtain a record deal. Peters admitted that other than his word, no evidence supported his alibi defense. He suggested Kinsey had changed her story because his mother no longer had custody of Kinsey's son.

Peters admitted he had created music videos featuring guns, money, and marijuana. V.M.'s deceased brother, Nakari, was in one of the videos. Peters said he had been friends with Nakari but denied he was friendly or hung out with V.M. J.S., who Peters called a family friend, was also in one of the music videos. Peters denied knowing Yarbrough.

The jury convicted Peters as charged. Peters filed a pro se motion for new trial raising various arguments, including claims his trial counsel was ineffective. Peters obtained new counsel, and the district court held an evidentiary hearing on Peters' motion. After considering the evidence and arguments from both parties, the court denied the motion, including his ineffective assistance of counsel claims.

At sentencing, the district court imposed a controlling life sentence without the possibility of parole for 618 months plus 332 months. The court awarded Peters 1,437 days of jail credit.

Peters directly appealed his convictions to this court. Jurisdiction is proper. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A.
22-3601); K.S.A. 22-3601(b)(3)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court); K.S.A. 21-5402(b) (first-degree murder is off-grid person felony).

ANALYSIS

Peters raises eight issues on appeal. He argues: (1) his trial counsel was ineffective, primarily during cross-examination of V.M. and Grandmother; (2) the jury selection process violated his rights under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); (3) the prosecutor committed error by misstating evidence during closing argument; (4) the district court failed to instruct the jury on the lesser-included offense of attempted aggravated robbery; (5) the evidence does not support his conviction for criminal possession of a weapon; (6) cumulative error deprived Peters of a fair trial; (7) the district court violated his common-law right to a jury trial under section 5 of the Kansas Constitution Bill of Rights by making judicial findings of his criminal history to establish his sentence; and (8) the sentencing journal entry of judgment omits the jail credit awarded at sentencing. We address each of Peters' arguments in turn.

1. *Ineffective assistance of trial counsel*

Peters argues the district court erred in denying his motion for new trial based on ineffective assistance of his trial counsel, Patrick Mitchell. Specifically, Peters claims he was prejudiced by Mitchell's failure to adequately impeach the testimony of V.M. and Grandmother during cross-examination and Mitchell's failure to request the district court rule on an objection in front of the jury. In response, the State contends Mitchell's decisions were strategic choices supported by reasonable professional judgment and, alternatively, that Peters was not prejudiced by the alleged errors.

Standard of review and applicable legal principles

"The court on motion of a defendant may grant a new trial to the defendant if required in the interest of justice." K.S.A. 22-3501(1). An appellate court reviews a district court's decision on a motion for new trial for abuse of discretion. *State v. Breitenbach*, 313 Kan. 73, 97, 483 P.3d 448 (2021). A judicial decision 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. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). The party asserting the district court abused its discretion

bears the burden of showing such abuse of discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

The right to effective assistance of counsel is embodied in the Sixth Amendment to the United States Constitution and "plays a crucial role in the adversarial system." *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985) (adopting *Strickland*). Courts analyze claims of ineffective assistance of counsel under the two-prong test articulated in *Strickland*. Under the first prong, the defendant must show counsel's performance was deficient. If successful, the court moves to the second prong to determine whether the defendant can establish prejudice—that there is a reasonable probability the jury would have reached a different verdict absent counsel's unprofessional errors. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485-86, 486 P.3d 1216 (2021).

To establish deficient performance under the first prong, the defendant must show 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 of the challenged conduct, and evaluate the conduct from counsel's perspective at the time. 313 Kan. 472, Syl. ¶ 4.

A court considering a claim of ineffective assistance of counsel must strongly presume 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.'" 313 Kan. at 485-86. But simply invoking the word "'strategy'" does not protect "'the performance of a criminal defendant's lawyer from constitutional criticism.'" *Sola-Morales v. State*, 300 Kan. 875, 887, 335 P.3d 1162 (2014). The appropriate question when analyzing an attorney's decisions in this area is whether the attorney's choices were objectively reasonable. *Bledsoe v. State*, 283 Kan. 81, 93-94, 150 P.3d 868 (2007).

While some aspects of a criminal case remain with the accused—such as what plea to enter, whether to waive a jury trial, or whether to testify—other aspects of a criminal case—such as what witnesses to call, whether and how to conduct cross-examination, and other strategic and tactical decisions—are left to defense counsel after consultation with his or her client. *Edgar v. State*, 294 Kan. 828, 838, 283 P.3d 152 (2012). "'Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.'" *State v. Betancourt*, 301 Kan. 282, 311, 342 P.3d 916 (2015).

Under the second prong, the defendant must show defense counsel's 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 reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing a claim of ineffective assistance of counsel must consider the totality of the evidence before the judge or jury. *Khalil-Al-salaami*, 313 Kan. at 486.

When, as here, the district court conducts an evidentiary hearing on claims of ineffective assistance of counsel, we review the court's factual findings for substantial competent evidence. We review the court's legal conclusions based on those facts applying a de novo standard of review. See *Khalil-Alsalaami*, 313 Kan. at 486.

Discussion

Peters claims Mitchell's performance was deficient during cross-examination of V.M. and Grandmother, and after a bench conference when Mitchell failed to ask the district court to tell the jury it had sustained an earlier objection.

a. *Failure to adequately impeach V.M. and Grandmother*

Peters argues Mitchell was ineffective for failing to adequately impeach V.M. and Grandmother during cross-examination by introducing evidence of their prior inconsistent statements.

"A defendant's right to impeach a complaining witness' credibility is a fundamental right, protected by the Confrontation Clause of the Sixth Amendment: 'In

all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The primary purpose of the Confrontation Clause is to give the accused the opportunity for cross-examination to attack the credibility of the State's witnesses." *State v. Brooks*, 297 Kan. 945, 952, 305 P.3d 634 (2013).

As with all strategy decisions, "whether and how to conduct cross-examination . . . [is] the exclusive province of the lawyer after consultation with his or her client." *Bledsoe*, 283 Kan. at 92. That said, failure by counsel to impeach the credibility of a witness whose testimony is vital to the State's case can prejudice the defendant and constitute ineffective assistance. See *Brooks*, 297 Kan. at 952-54 (holding that failure to adequately cross-examine victim on a specific issue when victim's credibility was "'all-important'" constituted ineffective assistance). But the failure to "more forcefully" press a witness is not ineffective assistance when the jury is already clearly aware of the facts underlying a particular issue. *State v. Coones*, 301 Kan. 64, 77, 339 P.3d 375 (2014). Similarly, counsel's failure to ask more specific questions related to a witness' prior inconsistent statements is not ineffective assistance when counsel discredits the witness in other ways. *Boldridge v. State*, 289 Kan. 618, 639-40, 215 P.3d 585 (2009).

i. *V.M.*

Peters claims that during V.M.'s cross-examination, Mitchell should have used V.M.'s prior statements to law enforcement and from prior court proceedings "to cement the jury's perception of him as a liar" because V.M., as the only witness placing Peters at the scene of the murder, was essential to the State's case. The district court denied Peters' claim of ineffective assistance of counsel on this basis, finding that Mitchell adequately challenged V.M.'s credibility in other ways and that additional cross-examination would not have changed the result of the trial.

In his brief challenging the district court's decision, Peters points to several inconsistent statements that Mitchell never confronted V.M. with, mainly relating to V.M.'s changing version of events and identification of his accomplices. Peters notes V.M. initially did not identify him as an accomplice and later maintained he did not know Peters' name or know Peters well. Peters

says this conflicted with V.M.'s trial testimony that Peters was a longtime family friend.

At the new trial hearing, Mitchell testified he planned to use an alibi defense at trial based on Peters' insistence that he was not in Wichita at the time of the murder. Mitchell's investigation of this defense was somewhat frustrated by the COVID-19 pandemic and his inability to obtain a trial continuance so he could have more time to investigate.

Mitchell testified he was aware of V.M.'s previous statements, and he used them to prepare for trial. With the alibi defense he presented, however, Mitchell did not want to emphasize V.M.'s identification of Peters. Rather than focusing on line-by-line inconsistencies with V.M.'s prior statements, Mitchell explained his strategy was to attack V.M.'s character. To that end, Mitchell focused on the plea agreement "to bring out that [V.M.] was a liar and a thug and probably the one who pulled the trigger."

During V.M.'s cross-examination, Mitchell elicited testimony that V.M. had a prior burglary conviction and had committed several previous drug-related armed robberies. Mitchell continued to mention V.M.'s criminal past throughout cross-examination. Mitchell also pointed out the favorable terms of V.M.'s plea agreement: the State dismissed the murder charge and charged V.M. as a juvenile in only one count of aggravated robbery. Mitchell explained this meant V.M. had essentially completed his entire sentence by the time of Peters' trial and would "be able to walk away" if he cooperated with the terms of the plea agreement, which included testifying against Peters. And contrary to Peters' assertion, Mitchell did question V.M. about his failure to name Peters as an accomplice during his first interview with law enforcement and got V.M. to concede his story had changed by his next interview, in part based on his understanding of the severity of the charges against him and the penalties he was facing. Mitchell also questioned V.M. about his selective memory and asked why V.M. remembered some details clearly and others not at all.

There is no dispute that V.M.'s credibility was critical to the State's case, so undermining his credibility was therefore critical to Peters' defense. But Mitchell made a judgment call on the strategy to employ during V.M.'s cross-examination, which was within

Mitchell's purview. The law does not require attorneys to exhaust every possible avenue for impeachment, as long as they engage in reasonable efforts to do so. Here, Mitchell engaged in meaningful cross-examination of V.M. that left the jury well-equipped to assess V.M.'s credibility. Mitchell vigorously challenged V.M.'s credibility using his prior convictions and bad acts and by emphasizing the benefits V.M. received by testifying against Peters. Mitchell also pointed out certain inconsistencies in V.M.'s testimony. That he could have pointed out more does not render his performance deficient. See *Boldridge*, 289 Kan. at 639-40.

Even if we were to find Mitchell's cross-examination of V.M. deficient in some respect, Peters cannot establish he was prejudiced as a result because there is no reasonable probability that any of the alleged deficiencies affected the outcome of the trial. See *Khalil-Alsalaami*, 313 Kan. at 486. As discussed, Mitchell impeached V.M.'s credibility so that pointing out additional specific inconsistencies would not have altered the course of the trial.

ii. *Grandmother*

Peters argues Mitchell's cross-examination of Grandmother was deficient because he failed to adequately challenge her ability to identify Peters or introduce evidence of her animosity towards him. Peters contends Grandmother's credibility was key because she was the only witness besides V.M. to place him with V.M. near the scene of the murder. Peters alleges a more thorough cross-examination could have affected the jury's assessment of Grandmother's credibility.

The district court held that while Mitchell's cross-examination of Grandmother was "a closer call," it was objectively reasonable because Grandmother was elderly, sick, and presented as a sympathetic witness. The court found Mitchell made a strategic choice not to confront Grandmother with her inconsistent statements and even if he had, it would not have resulted in a different trial outcome because Grandmother consistently testified she saw Peters at her house shortly before the murder.

As support for his claim of deficient performance, Peters first relies on Grandmother's statement during direct examination that she could "barely see" far enough to identify the color of Peters'

shirt while he sat at the defense table. Peters contends this statement should have prompted Mitchell to challenge Grandmother on her ability to identify Peters on the night of the murder. Peters suggests this line of questioning would have led Grandmother to divulge her medical history and admit she had suffered a diabetic attack that night. Peters also submits Mitchell could have introduced Grandmother's prior statement to law enforcement that she had a diabetic episode just before Peters and Yarbrough arrived at her house the night of the murder.

Peters' argument is unpersuasive. Grandmother's comment about her difficulty in seeing the color of Peters' shirt from the witness stand had no bearing on her ability to identify Peters on the night of the murder. At trial, Grandmother had no issue identifying Peters, who was sitting at the table the farthest away from her. Instead, she had trouble identifying the color of his shirt from that distance. After Grandmother identified Peters' shirt as black and white, the prosecutor thanked her and commented that he had been unable to identify the color of the shirt himself. This exchange would not necessarily call into question Grandmother's testimony that she saw Peters on the front porch from the front door of her house on the night of the murder. Grandmother consistently testified she recognized and knew Peters because he was her grandson Nakari's friend and he was often at her house.

Moreover, Peters' assertion that Grandmother would have admitted to having a diabetic attack compromising her vision on the night of the murder is pure speculation. Even if Grandmother did have an attack that night, it appears irrelevant. In fact, at the motion for new trial hearing, Grandmother denied the diabetic attack had anything to do with her vision; she simply needed to take her medication. And Grandmother claimed she only struggled with her vision when she drove at night.

Peters also asserts Mitchell should have introduced evidence of Grandmother's bias against Peters, including her previous statements to law enforcement that Peters was "'sneaky,'" and she did not want her grandson associating with him.

Although Mitchell did not confront Grandmother with these specific statements, he did pursue a line of questioning which suggested she might have some animosity towards Peters:

"Q: . . . [W]ere you also upset with [Peters]?
"A: No.
"Q: You didn't have any anger towards him?
"A: No.
"Q: You didn't have any ill will towards him because of a potential music deal?
"A: No.
"Q: Okay. You never—you never had any kind of conversations on Snapchat or anything about how you felt about it?
"A: No, I didn't. I don't do that. I don't Snapchat, or whatever you call it, no.
"Q: Okay. So did you sometimes talk to your granddaughters or daughters about how you felt?
"A: No. The only time I talked about how I felt in regards to [Peters] was when I was told that my grandson had got murdered, that he had—

. . . .

"Q: When you say that you—are you talking about your oldest son, ma'am?
"A: Yes, my oldest grandson.
"Q: Okay. And so did you have any anger towards him?
"A: No, I didn't have any anger towards him."

Mitchell's failure to go further in challenging Grandmother on her potential bias against Peters did not constitute deficient performance. See *Coones*, 301 Kan. at 77 (counsel's failure to "more forcefully" press a witness on a given point is not ineffective assistance when jury apprised of facts underlying that issue). Mitchell described Grandmother as "feeble" and testified at the motion for new trial hearing that he would not have "nailed her to the floor just because of the impression I was getting from the jury that they probably wouldn't have appreciated that." The evidentiary record and Mitchell's testimony at the motion for new trial hearing support a finding that Mitchell made a reasonable, strategic decision on how to cross-examine this sympathetic witness.

In sum, Mitchell's cross-examination of Grandmother was not deficient. But even if it was, Peters makes no persuasive argument identifying how additional cross-examination on these issues would have changed the result of the trial. See *Khalil-Alsalaami*, 313 Kan. at 486.

b. *Failure to request a ruling in the jury's presence*

To place Peters' final ineffective assistance of counsel claim in context, some additional factual background is necessary. During Kinsey's redirect examination, she testified that although she still cared for Peters, she

could not forgive him. Then, the following exchange occurred with the prosecutor:

"Q: Forgive him for what?
"A: For everything that he put me through.
"Q: Your federal case—
"A: Yeah.
"Q: —did it start based on some things that [Peters] did with you?"

Mitchell objected, and counsel approached the bench, where they had an off-the-record discussion. Afterward, the district court excused the jury from the courtroom to allow for further discussion. Highly summarized, the prosecutor explained he anticipated Kinsey would testify she engaged in prostitution at Peters' request to help him post bond and hire an attorney. She was later arrested for and convicted of trafficking an underage girl to Oklahoma. The prosecutor believed this testimony was necessary to explain to the jury why Kinsey was so angry with Peters. After consulting with Kinsey's attorney, the prosecutor clarified Kinsey would not testify Peters forced her into prostitution; instead, Kinsey would say she was going to Oklahoma to get money for Peters to hire an attorney.

The district court held the State could not elicit testimony from Kinsey about prostitution or her federal trafficking conviction, whether she implicated Peters or not, because any probative value of this evidence was outweighed by the risk of undue prejudice. The jury then returned to the courtroom, and the State resumed its redirect examination of Kinsey. There was no mention of Mitchell's previous objection.

In ruling on Peters' motion for new trial, the district court made no findings about whether Mitchell's failure to request a ruling on this objection in the jury's presence constituted deficient performance. The court agreed it should have ruled on the objection but held the error was harmless because under the circumstances, it was unlikely that failing to formally rule on the objection in the jury's presence impacted the jury's verdict.

Even so, Peters contends Mitchell should have insisted the district court sustain his objection in front of the jury. He suggests Mitchell's failure to do so opened the door to the possibility that the jury could infer Peters had committed prior crimes and guided the jury towards a guilty verdict. But Peters' suggestion of deficient performance impacting the jury's verdict is unpersuasive and

speculative. When the jury returned to the courtroom after the bench conference, the prosecutor did not reference the objection and proceeded with Kinsey's redirect examination by eliciting testimony that she had been angry with Peters and his family because she felt abandoned and had lost her son. Mitchell's failure to emphasize his previous objection was not deficient, especially since it would have reminded the jury about potentially harmful testimony against Peters. And even if it was, there is no reasonable probability the jury would have reached a different verdict if the district court had told the jury of its ruling. See *Khalil-Alsalaami*, 313 Kan. at 486.

Conclusion

Substantial competent evidence supports the district court's legal conclusion that Mitchell was not ineffective during cross-examination of V.M. and Grandmother or by failing to insist the court rule on his objection in the jury's presence. See *Khalil-Alsalaami*, 313 Kan. at 486. As a result, the district court did not abuse its discretion in denying Peters' motion for new trial based on ineffective assistance of counsel. See *Breitenbach*, 313 Kan. at 97.

2. Batson

After voir dire, Peters, who is Black, unsuccessfully objected to the State's use of peremptory strikes to remove two Black members from the jury panel. Peters argues the district court erred in finding the State's reasons for striking these prospective jurors were race-neutral. The State responds that Peters fails to meet his burden of proving purposeful discrimination.

Standard of review

An exercise of a peremptory strike from the jury panel solely based on the juror's race violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *State v. Dupree*, 304 Kan. 43, 57, 371 P.3d 862 (2016). Such exercise of the peremptory strike violates a defendant's right to a jury of his or her peers and to "purposefully exclude [minority] persons from juries undermine[s] public confidence in the fairness of our

system of justice." *Batson*, 476 U.S. at 87. A challenge to the State's use of a peremptory challenge during jury selection under *Batson* is analyzed in three distinct steps, with different standards of review for each step. *State v. Gonzalez-Sandoval*, 309 Kan. 113, 121, 431 P.3d 850 (2018).

The first step requires the defendant to make a prima facie showing that the prosecutor's challenge was made on the basis of race. Appellate courts exercise unlimited review over the district court's rulings on this showing. 309 Kan. at 121.

If a prima facie showing is made, the second step requires the State to produce a neutral, nondiscriminatory explanation for exercising the peremptory strike. The race-neutral explanation must be facially valid even if it is not necessarily plausible or persuasive. 309 Kan. at 123. Although the burden of production switches, the burden of persuasion never shifts from the opponent of the strike, and the reviewing court must give significant deference to the district court's factual rulings. 309 Kan. at 124. "On appeal, 'we review *de novo* whether the striking party's proffered explanation is race neutral' for purposes of satisfying the second step of the *Batson* inquiry." *United States v. Nelson*, 450 F.3d 1201, 1207 (10th Cir. 2006).

Once the second step is met, the burden shifts and the defendant must show the State's nondiscriminatory explanation is pretextual. At this third step, the district court assesses the plausibility of the State's race-neutral reason in light of all the evidence. *Gonzalez-Sandoval*, 309 Kan. at 126. Because plausibility is a factual matter that hinges on credibility determinations, a reviewing court should give those findings great deference. 309 Kan. at 126. Appellate courts review the decision for abuse of discretion. 309 Kan. 113, Syl. ¶ 7. 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. *Levy*, 313 Kan. at 237.

Additional facts

After voir dire, the parties submitted their peremptory strikes. Peters challenged the prosecutor's use of peremptory strikes to remove from the panel two Black jurors—J.H. and R.H. Counsel argued "we can see no

reason why there should have been strikes, probably one of, I believe, four potential African-American jurors on the panel. There's nothing to indicate other than she would be fair and impartial."

In response, the prosecutor provided two reasons for striking J.H. from the panel. The prosecutor said J.H. "was late coming back from the break this afternoon, which is a pet peeve of mine when people are late. I don't want them on my jury because they're going to hold up the proceedings." The prosecutor added that when asked what verdict she would return if the State failed to prove its case beyond a reasonable doubt, J.H. responded "innocent" rather than "not guilty." As a result, the prosecutor felt J.H. "was overly sympathetic to the defense and overly examining the evidence not just to go with the legal burden but with their own personal belief that it was innocence."

As for R.H., the prosecutor noted that when asked whether a defendant is guilty if he or she does not present witnesses or does not testify, R.H. responded, "Not guilty," to both questions. The prosecutor explained that although R.H. might have misunderstood the questions, he was "not willing to assume that . . . [R.H.] doesn't have a bias and doesn't have an expectation that he's going to vote not guilty no matter what."

In ruling on Peters' objection, the district court assessed the members of the jury panel and noted that of the 39 members, 6 were Black and 6 others were Hispanic, Asian, or Middle Eastern. Two of the Black panel members made the jury, three were struck by the State, and one was struck by the defense. Two of the Hispanic, Asian, or Middle Eastern panel members made the jury, and four were struck by the State. The court found these numbers were "not so lopsided as to indicate a prima faci[e] showing of race-based striking." The court then considered the reasons provided by the State for striking J.H. and R.H. and found them to be race-neutral.

Discussion

a. *Prima facie case by Peters*

The first step of our inquiry, over which we exercise unlimited review, is to determine whether Peters made a prima facie showing that the prosecutor's challenge was made on the basis of race. *Gonzalez-Sandoval*, 309 Kan. at 121. A defendant makes out a prima facie case of

purposeful discrimination by alleging facts or any other relevant circumstances giving rise to an inference of discriminatory purpose. *Batson*, 476 U.S. at 93-94.

In support of Peters' challenge to the State's peremptory strikes removing J.H. and R.H. from the jury panel, defense counsel argued "[t]here's nothing to indicate other than she would be fair and impartial." Although we could construe the gender specific pronoun "she" to mean counsel intended to exclude R.H., a male, from this argument, we decline to do so given counsel's statement immediately preceding the argument expressly states, "We're making a *Batson* challenge to No. 36, Juror 36, [J.H.], and Juror No. 18, [R.H.]."

The State argues defense counsel's objection to the State's peremptory strikes removing J.H. and R.H. from the jury panel does not establish a prima facie showing of race discrimination and, to that end, suggests the district court found Peters had failed to carry his burden at this step. We disagree with the State's characterization of the court's finding. The district court never decided whether Peters' objection—that voir dire established J.H. and R.H. could be fair and impartial—was sufficient to give rise to the inference of discriminatory purpose necessary to make a prima facie showing of race discrimination. Instead, the court found, without prompting from either party, that an objection based on a comparison of the racial makeup of the jury panel members to the number of non-White jurors who ended up on the jury would fail at step one of the *Batson* test because "[t]he numbers are not so lopsided as to indicate a prima faci[e] showing of race-based striking."

Without returning to Peters' fair and impartial argument, the district court then considered the reasons provided by the State for striking J.H. and R.H. and found them to be race-neutral. Given the court's consideration of the State's race-neutral reasons, the court's failure to make an express finding at the first step of the *Batson* test need not concern us on review. The caselaw is clear that the preliminary issue of whether the defendant made a prima facie showing under *Batson* becomes moot once the district court proceeds to the next steps. See *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) ("Once a prosecutor has offered a race-neutral explanation . . . and the trial court has

ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). Thus, we move on to the second step of our analysis.

b. *The State's neutral, nondiscriminatory explanation*

To satisfy the second step of a *Batson* challenge, the State need only provide a specific, race-neutral reason for the use of a peremptory strike. *Gonzalez-Sandoval*, 309 Kan. at 123. The second step of the *Batson* analysis

"does not demand a prosecutor's explanation that is persuasive, or even plausible, but merely facially valid. Further, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. Accordingly, the ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike. [Citations omitted.]" *State v. Pham*, 281 Kan. 1227, 1237, 136 P.3d 919 (2006).

Here, the prosecutor provided two reasons for striking J.H. from the panel: (1) she was late returning from a break during voir dire and (2) she said she would return a verdict of "innocent" rather than "not guilty" if the State failed to prove its case beyond a reasonable doubt. The prosecutor's reason for striking R.H. from the panel was based on his response stating he would find the defendant not guilty if the defendant did not present witnesses or did not testify. Peters concedes the State offered facially race-neutral reasons for striking J.H. and R.H. from the jury.

c. *Pretext*

Once the State offered race-neutral reasons for the challenged strikes, Peters had the burden to show the reasons were pretext to conceal a discriminatory intent. *Gonzalez-Sandoval*, 309 Kan. at 126. To determine whether the race-neutral reason offered is pretext, the district court must "'assess the plausibility of that reason in light of all evidence with a bearing on it.'" 309 Kan. at 126 (quoting *Miller-El v. Dretke*, 545 U.S. 231, 252, 125 S. Ct. 2317, 162 L. Ed. 2d 196 [2005]). The district court's determination in this regard is factual and often turns on the prosecutor's credibility. Thus, appellate

courts are highly deferential when reviewing the district court's findings at this step. *Pham*, 281 Kan. at 1237; see *Flowers v. Mississippi*, 588 U.S. 284, 303, 139 S. Ct. 2228, 204 L. Ed. 2d 638 (2019) ("An appeals court looks at the same factors as the trial judge, but is necessarily doing so on a paper record," so review of factual determinations in a *Batson* hearing is "'highly deferential.'").

A district court may consider multiple factors in determining whether the race-neutral reason offered by the State is pretext for discriminatory intent, including statistical evidence and side-by-side comparisons of jurors. See 588 U.S. at 301-02. But the district court has no duty to consider these factors on its own initiative. *State v. Brown*, 314 Kan. 292, 303, 498 P.3d 167 (2021) (citing *State v. Campbell*, 268 Kan. 529, 535, 997 P.2d 726 [2000]). "Rather, the 'defendant has the burden to create the record of relevant facts and to prove his or her case to the trial court.'" *Brown*, 314 Kan. at 303 (citing *State v. Trotter*, 280 Kan. 800, 818-19, 127 P.3d 972 [2006]).

The evidence presented by Peters to the district court in support of pretext was identical to the evidence he presented to support his prima facie showing: "[W]e can see no reason why there should have been strikes, probably one of, I believe, four potential African-American jurors on the panel. There's nothing to indicate other than she would be fair and impartial." Peters did not challenge the State's characterization of the voir dire answers given by J.H. or R.H. or the inferences the State drew from these answers either during voir dire or at the hearing on the motion for new trial. Based on the facts and arguments presented, the district court found the race-neutral reasons provided by the State for striking J.H. and R.H. from the jury to be worthy of belief and not pretext to conceal discriminatory intent.

On appeal, Peters claims the district court abused its discretion in making this finding. Because he does not allege an error of law or fact, we construe his claim to allege the court's decision is so arbitrary that no reasonable jurist would agree with it. To that end, Peters argues a district court assessing the plausibility of the race-neutral reasons provided by the State for striking jurors should consider statistical evidence of the number of minority prospective jurors struck, side-by-side comparison of responses given by White members of the jury panel who the State did not strike, and the illogical or implausible nature of

the prosecutor's explanation. But as noted above, Peters failed to raise any of these arguments before the district court. As a result, we do not consider them in determining whether the district court abused its discretion. See *Brown*, 314 Kan. at 304; *Gonzalez-Sandoval*, 309 Kan. at 128 (defendant's failure to raise arguments or evidence of pretext before the district court precludes appellate court from considering them for the first time on appeal).

Although Peters may have alleged facts sufficient to give rise to an inference of discriminatory intent in striking J.H. and R.H. from the jury, the prosecutor provided race-neutral reasons for those strikes, and the district court accepted those reasons as supported by the actions and statements of the jurors. Given Peters presented no further evidence of purposeful discrimination to the district court, under our deferential standard of review we hold the district court did not abuse its discretion in denying Peters' *Batson* challenge. See *Gonzalez-Sandoval*, 309 Kan. at 129 (concluding defendant failed to meet his burden under the third *Batson* step where no argument or evidence offered to demonstrate State's race-neutral reason was pretext for discrimination).

3. Prosecutorial error

Peters next argues the prosecutor committed reversible error by misstating the evidence during closing argument.

Standard of review and legal framework

Peters did not object to the prosecutor's comments, but we review prosecutorial error claims arising out of comments made during closing argument even in the absence of a contemporaneous objection. We may, however, consider the presence or absence of an objection as part of our analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Prosecutors have wide latitude in crafting their arguments and drawing reasonable inferences from the evidence so long as the argument is consistent with the defendant's constitutional right to a fair trial. Even so, "[a]ny argument 'must accurately reflect the evidence, accurately state the law, and cannot be "intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law."'" *State v. Longoria*, 301 Kan. 489, 524, 343 P.3d 1128 (2015); see also *State v. Davis*,

306 Kan. 400, 413-14, 394 P.3d 817 (2017) ("A prosecutor 'cross[es] the line by misstating the law,'" and "'a prosecutor's arguments must remain consistent with the evidence.'"). "In determining whether a particular statement falls outside of the wide latitude given to prosecutors, the court considers the context in which the statement was made, rather than analyzing the statement in isolation." *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019).

Appellate courts use a two-step process to analyze claims of prosecutorial error. First, we determine whether error occurred. A prosecutor commits error if the act complained of fell outside the wide latitude afforded the prosecutor to present the State's case in a manner consistent with the defendant's constitutional right to a fair trial. *State v. Thomas*, 311 Kan. 905, 910, 468 P.3d 323 (2020). Second, if we find error, we must determine whether the error prejudiced the defendant's due process rights to a fair trial, asking whether the State has shown beyond a reasonable doubt that the error did not affect the outcome of the trial in light of the whole record—there is no reasonable possibility that the error contributed to the verdict. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

Discussion

Peters complains the prosecutor misstated the evidence when discussing V.M.'s testimony that he had attempted to shoot Devore, but his gun did not fire. In closing, the prosecutor pointed out V.M. did not have to admit he attempted to shoot Devore because V.M.'s admission was supported by "zero evidence from anybody else that he tried to shoot." Peters contends the prosecutor used this inaccurate and misleading statement to infer that V.M.'s testimony was credible.

To place Peters' argument in proper context, we review the relevant portion of the prosecutor's closing argument. The prosecutor talked about the physical evidence in the case and explained it supported V.M.'s testimony that Devore was attacked on the front porch. The prosecutor also noted V.M.'s description of the altercation in the bedroom—that J.S. shot Devore on his right

side—was consistent with the coroner's finding that a bullet traveled through Devore's right side and went out his left side. The prosecutor then stated:

> "[V.M.] admitted to crimes he's never been charged with. Stuff that people don't know he was involved in, these other aggravated robberies. He says this is what I do. I get called on—I guess I'm the muscle. Is he a kid without a conscious? Maybe. You can decide that for yourselves. But is he a kid that can be corroborated and that you can believe.
>
> "I didn't shoot—I shot him. I tried to shoot but my gun didn't go off. Why did he need to say that? *There is zero evidence from anybody else that he tried to shoot.* If he's making it up, if he's lying about this, why does he even have to say to you, I tried to shoot. But he did. He put himself on the line and said I tried to shoot, my gun didn't go off.
>
> "And then remember what was found at ballistics. This gun, the one with the green tape, matches some of the bullets in the house. This gun, the Glock, that was found underneath his seat when he was arrested. I said, [V.M.], you understand we submit for ballistics, if it shows that your gun was fired. He said, nope, I didn't fire my gun. And you know what, the evidence is this gun was not fired in the house. There's no evidence that it was fired. But he admits he tried to. Well, why in the world would you admit that if you didn't have to." (Emphasis added.)

Peters asserts the evidence at trial contradicts the prosecutor's statement suggesting there was zero evidence from anybody else that V.M. tried, but failed, to shoot Devore; specifically, A.B. and D.R. initially implicated V.M. as the shooter. Peters argues the prosecutor's statement wrongly suggested that V.M. had no reason to admit that he tried to shoot Devore when, in fact, V.M.'s testimony explained the eyewitness accounts that he shot Devore.

Generally, prosecutors may not offer their personal opinions about the credibility of witnesses. Prosecutors do, however, have wide latitude to craft arguments that include reasonable inferences to be drawn from the evidence. This latitude allows prosecutors to explain to juries what they should look for in assessing witness credibility. *State v. Stone*, 291 Kan. 13, 19, 237 P.3d 1229 (2010). But a prosecutor errs when arguing a fact or factual inference without an evidentiary foundation. *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021).

Contrary to Peters' allegation, a careful reading of the prosecutor's argument reveals that the challenged statement constituted

a fair representation of the evidence. Other than V.M.'s own testimony, there was no evidence that he had tried, but failed, to shoot Devore. Although A.B. and D.R. initially implicated V.M. as the shooter, they both testified at trial that they did not see who pulled the trigger. And neither A.B. nor D.R. testified they saw V.M. try, but fail, to shoot Devore. Placed in context, the prosecutor's statement provided legitimate facts the jury could consider when assessing V.M.'s credibility and was within the wide latitude allowed when discussing the evidence in closing argument. Because there was no prosecutorial error, we need not reach the prejudice prong of the prosecutorial error analysis. See *Sherman*, 305 Kan. at 109.

4. *Jury instruction*

The State charged Peters with aggravated robbery. On appeal, Peters argues the district court erred by not instructing the jury on the lesser offense of attempted aggravated robbery. Peters acknowledges he did not request this instruction below but argues the district court's failure to give the instruction resulted in clear error, requiring reversal of his aggravated robbery conviction. See K.S.A. 22-3414(3). The State counters that Peters invited any error and, in the alternative, contends an attempt instruction was not factually appropriate in this case.

When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether we can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below, i.e., whether the instruction was legally and factually appropriate; and (3) assessing whether the error requires reversal, in other words, whether the error can be considered harmless. Whether a party has preserved a jury instruction issue affects the appellate court's reversibility inquiry at the third step. *State v. Holley*, 313 Kan. 249, 253-54, 485 P.3d 614 (2021). When a defendant has failed to raise the jury instruction challenge below, we review for clear error. *State v. Betancourt*, 299 Kan. 131, 135, 322 P.3d 353 (2014). The defendant will not be entitled to reversal

based on clear error unless the appellate court is "'firmly convince[d] . . . that the giving of the instruction would have made a difference in the verdict.'" *State v. Cooper*, 303 Kan. 764, 771, 366 P.3d 232 (2016).

a. *Step 1: preservation and invited error*

Peters concedes he did not request this instruction below. But the State alleges that beyond failing to request the instruction, Peters invited the error by specifically declining the district court's offer to instruct on any lesser offenses. While the failure to preserve an instructional error claim only affects the standard of review applied at the final step, Kansas courts will not review an instructional error claim when the invited error doctrine applies. The doctrine's application is a question of law over which an appellate court has unlimited review. *State v. Douglas*, 313 Kan. 704, 706, 490 P.3d 34 (2021).

The invited error doctrine precludes a party from asking a district court to rule a certain way and then challenging that ruling on appeal. *Douglas*, 313 Kan. at 706-07. In the context of an instructional error, the mere failure to request an instruction does not trigger invited error. But "when a defendant actively pursues what is later argued to be an error, then the doctrine most certainly applies." *State v. Sasser*, 305 Kan. 1231, 1236, 391 P.3d 698 (2017). Application of the invited error doctrine "turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal." *Douglas*, 313 Kan. at 708. "The ultimate question is whether the record reflects the defense's action *in fact induced* the court to make the claimed error." 313 Kan. at 708. To that end, we have repeatedly held defendants do not invite error by informing or confirming to the court that they are not requesting lesser offense instructions or any additional lesser offense instructions. See, e.g., *State v. Valdez*, 316 Kan. 1, 14-15, 512 P.3d 1125 (2022) (defense counsel's statement that she was only requesting one lesser offense instruction did not constitute invited error precluding review of defendant's claim on appeal that the district court should have instructed the jury on another lesser offense); *Douglas*, 313 Kan. at 707-09 (defense counsel's statement that "I am not

requesting any lesser included offenses" did not constitute invited error; statement did not amount to counsel "inducing" the court to act); *State v. Walker*, 304 Kan. 441, 445, 372 P.3d 1147 (2016) (no invited error when counsel merely confirmed he had not requested any lesser included offense instructions); cf. *State v. Jones*, 295 Kan. 804, 812-13, 286 P.3d 562 (2012) (invited error occurred when record showed the district court confirmed its willingness to instruct on the lesser included offense of the charged crime, but defendant objected to giving it).

At the end of the instructions conference, the following exchange occurred:

"THE COURT: All right. Are there any other instructions that either side is asking me to include?

"MR. MITCHELL: No, Your Honor.

"MR. EDWARDS [the prosecutor]: No, sir.

"THE COURT: And to be clear, I've asked you throughout the trial to consider whether either side is asking for lesser included offenses. Is either side asking me to include lesser included offenses for any of the crimes charged?

"MR. EDWARDS: I don't believe there are any appropriate factually or legally in this case.

"MR. MITCHELL: No, Your Honor.

"THE COURT: All right. Thank you. I'm now putting the—I agree, I don't think they're factually appropriate, but for the record I just want to make sure we had that included."

Applying the doctrine here, counsel's statement affirming he was not requesting any lesser included offense instructions did not constitute invited error. Although the invited error doctrine does not preclude consideration of Peters' claim, his lack of objection to the district court's failure to give an attempted aggravated robbery instruction means he must show clear error if we reach the third step of the analysis.

b. *Step 2: instructional error*

At the second step, we consider the merits of Peters' claim to determine whether an error occurred. In considering the merits, we employ unlimited review of the entire record to consider whether an attempted aggravated robbery instruction would have been legally and factually appropriate. *Holley*, 313 Kan. at 254. If we find the instruction would have been

legally and factually appropriate, the district court's failure to give the instruction was error. *Cooper*, 303 Kan. at 770.

"An attempt is 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 parties agree an instruction for attempted aggravated robbery would have been legally appropriate because it is a lesser included offense of aggravated robbery. See K.S.A. 21-5109(b)(3) (a crime is a lesser included crime if it is an attempt to commit the crime charged); *State v. Plummer*, 295 Kan. 156, 160-61, 283 P.3d 202 (2012) (identifying the inclusion of jury instructions for lesser included offenses as legally appropriate).

Even if legally appropriate, however, a district court's failure to instruct on the lesser included offense is erroneous only if the instruction would have been factually appropriate. In deciding whether an instruction was factually appropriate, we must determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, to support the instruction. *Holley*, 313 Kan. at 255.

Peters argues an attempt instruction would have been factually appropriate in this case because V.M.'s testimony was the only evidence suggesting that an aggravated robbery was ever completed. Although the trial evidence established the four intruders intended to rob Devore, Peters claims no evidence corroborated V.M.'s testimony that he stole money and marijuana from Devore on the porch. Because law enforcement discovered significant amounts of marijuana in the bedroom in the house where the robbery occurred, Peters alleges the jury could have inferred that the intruders tried, but failed, to commit a robbery. Given V.M.'s credibility issues, Peters contends the jury should have had the option to convict on attempted aggravated robbery.

The State responds an attempted aggravated robbery instruction was not factually appropriate because V.M.'s testimony is evidence that an aggravated robbery occurred, even if the intruders failed to take anything from inside the house.

Peters' argument essentially asks this court to reweigh the evidence relied upon by the jury and make a credibility determination in his favor, which we cannot do. See *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021) (appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses). There is simply no evidence to demonstrate that a jury instruction for attempted aggravated robbery was supported by the facts of the case. No evidence refutes V.M.'s testimony that an aggravated robbery occurred on the front porch. The only people on the porch were the four intruders and Devore; besides Peters, V.M. was the only one who testified about the alleged robbery on the porch. And Peters' argument disregards other pieces of circumstantial evidence that corroborate V.M.'s testimony. D.R. testified he told Devore not to conduct his drug deal inside the house. Thus, it is logical to infer that when Devore went outside, he would have had with him whatever amount of marijuana and cash were necessary for the drug deal. There was no evidence that Devore was found with any money or drugs on his person. Additionally, there was evidence of blood on the front porch, and Devore was bleeding from his head when he came back inside the house. This evidence aligns with V.M.'s claim that Devore was attacked and robbed on the porch. Finally, evidence of marijuana found inside the house does not factually support a jury instruction for attempted aggravated robbery because it is irrelevant to whether an aggravated robbery occurred on the porch.

Because a jury instruction for attempted aggravated robbery was not factually appropriate, the district court did not err in failing to include the instruction. As a result, there is no error for this court to analyze in step three.

5. *Sufficiency of the evidence*

Peters argues the evidence presented at trial does not support his conviction for criminal possession of a weapon due to an error in the stipulation the State relied on to prove this charge. The State concedes the evidence was insufficient to support Peters' conviction and that it must be reversed on this basis.

"'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 factfinder could have found the defendant guilty beyond a reasonable doubt.'" *Aguirre*, 313 Kan. at 209.

In Count 8 of the complaint, the State charged Peters with criminal possession of a weapon under K.S.A. 2017 Supp. 21-6304(a)(2). This statute provides that a person criminally possesses a weapon when:

"within the preceding five years [the person] has been convicted of a felony, other than those specified in subsection (a)(3)(A), under the laws of Kansas or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for a felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was not found to have been in possession of a firearm at the time of the commission of the crime." K.S.A. 2017 Supp. 21-6304(a)(2).

At trial, the parties entered into a written stipulation relating to this charge. But neither the parties nor the district court recognized that the stipulation erroneously said Peters' prior adjudication was for a felony offense listed in K.S.A. 2017 Supp. 21-6304(a)(3)(A), rather than for a felony "other than those specified in subsection (a)(3)(A)." See K.S.A. 2017 Supp. 21-6304(a)(2). The stipulation provided:

"1. On April 28, 2015, defendant Deizmond Peters was adjudicated a juvenile offender for a felony offense listed in K.S.A. 21-6304(a)(3)(A).
"2. The defendant was not found to be in possession of a firearm at the time of the prior crime and has not had the prior adjudication expunged or been pardoned for such crime.
"3. It is the parties' agreement that this stipulation satisfies elements 2 and 3 of the instruction on count 8, criminal possession of a weapon by a convicted felon."

The district court admitted the stipulation into evidence, and the court later instructed the jury on the elements of criminal possession of a weapon by using the same erroneous language in the stipulation.

The stipulation was the only evidence before the jury on the criminal possession of a weapon charge, and it stated Peters had a prior felony adjudication for an offense listed in K.S.A. 2017

Supp. 21-6304(a)(3)(A). But Peters' previous felony adjudication was for attempted burglary, which is not an offense listed in K.S.A. 2017 Supp. 21-6304(a)(3)(A). Given the error in the stipulation, the evidence does not support Peters' conviction for criminal possession of a weapon. As a result, Peters' conviction must be reversed.

6. *Cumulative error*

Peters argues the cumulative effect of the alleged errors requires reversal of his convictions. Because we have identified only one error—insufficient evidence to support his criminal possession of a weapon conviction—there is no error to accumulate and therefore no basis to reverse Peters' remaining convictions. See *State v. Ballou*, 310 Kan. 591, 617, 448 P.3d 479 (2019) (single error cannot support reversal under cumulative error doctrine).

7. *Constitutional right to a jury trial*

Next, Peters argues the district court violated his jury trial rights under section 5 of the Kansas Constitution Bill of Rights when it considered his 2015 juvenile adjudication to determine his criminal history score for sentencing. He contends the Kansas Sentencing Guidelines Act (KSGA) violates section 5 of the Kansas Constitution Bill of Rights because it permits judicial fact-finding of prior adjudications without first requiring the State to prove those adjudications to a jury beyond a reasonable doubt. In response, the State argues Peters did not preserve this claim for appellate review and that it otherwise lacks merit.

A constitutional challenge to the KSGA involves a question of law subject to unlimited review. *State v. Wetrich*, 307 Kan. 552, 555, 412 P.3d 984 (2018).

Discussion

The parties dispute whether Peters preserved this issue for appellate review. While the record reflects Peters did challenge his criminal history below, he did not make the specific argument he now alleges on appeal.

A presentence investigation report found Peters had a criminal history score of B, based in part on a prior felony conviction for fleeing and eluding and a juvenile adjudication for attempted burglary. Before sentencing, Peters challenged his criminal history score as erroneous and unconstitutional under *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). He argued his juvenile adjudication did not fall under any "prior conviction" exception and thus must be submitted to a jury and proven beyond a reasonable doubt. Peters' argument did not mention his jury trial rights under section 5 of the Kansas Constitution Bill of Rights.

Typically, constitutional issues cannot be raised for the first time on appeal. *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). Exceptions to this general rule exist, including when the issue involves only questions of law and is finally determinative of the case or when consideration of the issue is necessary to serve the ends of justice or prevent a denial of fundamental rights. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019). Peters alleges both exceptions apply to warrant review of his arguments.

The decision to address an unpreserved issue for the first time on appeal is a prudential one, even when one of the exceptions is satisfied. *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020). Neither exception appears applicable here. First, resolution of Peters' constitutional challenge is not finally determinative of the case because if he is correct, then the case would merely return to the district court for resentencing. Second, Peters' fundamental rights are not at risk because this court rejected a similar argument in *State v. Albano*, 313 Kan. 638, 487 P.3d 750 (2021). In *Albano*, we addressed whether the use of a defendant's criminal history—without a finding by a jury—to increase the defendant's sentence violated section 5 of the Kansas Constitution Bill of Rights. After examining Kansas common law, we noted that, in Kansas, juries have traditionally determined guilt, and the role of the court is to determine punishment and issues relevant to it, including a defendant's criminal history. 313 Kan. at 646-51. Finding no authority to support the contention that Kansas had adopted a common-law rule inconsistent with this traditional division of functions

when the Kansas Constitution was adopted in 1859, we held that "[s]ection 5 of the Kansas Constitution Bill of Rights does not guarantee defendants the right to have a jury determine the existence of sentence-enhancing prior convictions under the revised Kansas Sentencing Guidelines Act." 313 Kan. 638, Syl. ¶ 4.

Peters acknowledges our holding in *Albano*, but suggests it is distinguishable because his case involves a juvenile adjudication. He asserts that because juvenile adjudications did not exist before the 20th century, there was no established common-law practice of using prior juvenile adjudication findings to increase the permissible range of a criminal defendant's sentence in 1859.

But Peters' argument ignores the fact that *Albano* is premised on our finding that the traditional function of the court is to determine punishment and to make findings relevant to punishment, including a defendant's criminal history. We held that "such judicial findings do not impair the traditional functions of the jury in Kansas criminal proceedings." 313 Kan. at 657. Imposing legally appropriate punishment includes making findings related to a defendant's criminal history. See 313 Kan. at 650 ("Kansas has never recognized a general rule that sentence-enhancing prior convictions must be proven to a jury."). These findings also necessarily include consideration of a defendant's prior juvenile adjudications and thus do not impair the traditional functions of the criminal jury in Kansas. See *State v. Fischer*, 288 Kan. 470, 472-75, 203 P.3d 1269 (2009) (juvenile adjudications in Kansas after June 20, 2008, are akin to adult prosecutions because juveniles adjudicated after that date have a right to a jury trial); *State v. Hitt*, 273 Kan. 224, 235-36, 42 P.3d 732 (2002) (use of juvenile adjudications in calculating criminal history does not violate a defendant's constitutional rights under *Apprendi*).

Criminal history findings made to calculate a sentence fall within the exclusive purview of the court to determine punishment. Thus, the KSGA's method of determining a defendant's criminal history—which includes consideration of any prior convictions or juvenile adjudications—does not implicate a defendant's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. See *Albano*, 313 Kan. at 656-57. Peters' constitutional challenge necessarily fails under *Albano*.

8. *Jail credit*

At sentencing, the district court and the parties agreed Peters was entitled to 1,437 days of jail credit. But the sentencing journal entry of judgment omitted the jail credit award, and the parties recognize the sentencing journal of judgment must be corrected to include it.

This discrepancy in the journal entry is a simple clerical error which can be addressed by a nunc pro tunc order correcting the portion of the journal entry to include Peters' jail credit award. See K.S.A. 22-3504(b) ("Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.").

Judgment of the district court is affirmed in part, reversed in part, and the case is remanded with directions to vacate Peters' sentence for criminal possession of a weapon, to resentence him without the reversed conviction, and to issue a nunc pro tunc order correcting the sentencing journal entry of judgment to include 1,437 days of jail credit.

Affirmed in part, reversed in part, vacated in part, and remanded with directions.

State v. Trass

No. 122,713

STATE OF KANSAS, *Appellee*, v. BRENNAN R. TRASS, *Appellant*.

(556 P.3d 476)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Sixth Amendment Right of Criminal Defendants to Assistance of Legal Counsel.* The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to assistance of legal counsel during all critical stages of a criminal proceeding.

2. SAME—*Denial of Sixth Amendment Right to Assistance of Counsel—Appellate Review.* Whether a criminal defendant has been denied the Sixth Amendment right to assistance of counsel is a constitutional issue over which appellate courts exercise unlimited review.

3. CRIMINAL LAW—*Defendant May Waive Right to Counsel Through Express or Implied Waiver.* A criminal defendant may waive the right to counsel through waiver, an intentional and voluntary relinquishment of a known right or privilege. A defendant's waiver of the right to counsel under the Sixth Amendment may be expressly stated or implied by the defendant's conduct.

4. SAME—*Defendant May Forfeit Right to Counsel.* A criminal defendant may forfeit the right to counsel. Unlike waiver, forfeiture results in the loss of a right through some action or inaction.

5. SAME—*Right to Counsel May Be Forfeited by Egregious Conduct or by Intent to Disrupt Judicial Proceedings*. As a matter of first impression, a defendant may be found to have forfeited the right to counsel regardless of whether the defendant knew about or intended to relinquish the right when the defendant engaged in egregious misconduct, or a course of disruption intended to thwart judicial proceedings. Forfeiture is an extreme sanction in response to extreme conduct that jeopardizes the integrity or safety of court proceedings and should be used only under extraordinary circumstances as a last resort in response to the most serious and deliberate misconduct.

6. TRIAL—*Structural Errors Affect Fundamental Fairness of Trial—Deprives Defendant of Due Process Protections.* Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings.

7. SAME—*Sixth Amendment Right to Counsel Violation is Structural Error—Automatic Reversal of Conviction.* Violation of the Sixth Amendment right

to counsel is a structural error affecting the trial mechanism; it requires automatic reversal of a defendant's conviction.

Appeal from Reno District Court; TRISH ROSE, judge. Oral argument held March 27, 2024. Opinion filed September 27, 2024. Reversed and remanded with directions.

Clayton J. Perkins, of Capital Appellate Defender Office, argued the cause, and *Meryl Carver-Allmond*, of the same office, was with him on the briefs for appellant, and *Brennan R. Trass*, appellant, was on supplemental briefs pro se.

Thomas R. Stanton, district attorney, 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.: In 2015, the State charged Brennan R. Trass with first-degree felony murder and criminal possession of a firearm for killing Jose Morales during a drug deal. Before trial, the district court appointed multiple attorneys to represent Trass after conflicts with existing counsel arose, which caused significant delay. Two weeks before the trial was scheduled to begin in 2019, the court allowed Trass' attorneys to withdraw based on an alleged conflict in the attorney-client relationship. Finding that Trass had either waived or forfeited his right to counsel by his conduct, the district court ordered Trass to represent himself at trial with the assistance of standby counsel. On the last day of the nine-day trial, Trass grew frustrated with the district court's rulings, refused to participate, and asked to return to the jail. After the judge removed Trass from the courtroom, his standby counsel took over representation for the rest of the trial. The jury convicted Trass as charged.

Trass filed a direct appeal with this court. During the briefing process, the State discovered an unresolved competency issue, so we remanded the case to the district court to determine the feasibility of a retrospective competency hearing and, if feasible, directed the court to conduct the hearing. After determining it was feasible, the district court held a retrospective competency hearing where it found that Trass was competent before and throughout his 2019 trial.

Now back before this court, Trass makes several arguments relating to the retrospective competency hearing. He also alleges a violation of his statutory speedy trial rights, violations of his

constitutional rights to counsel and to testify, jury instruction error, insufficiency of the evidence supporting his felony-murder conviction, and cumulative error.

Based on the analysis below, we conclude the district court violated Trass' right to counsel under the Sixth Amendment to the United States Constitution. Because a violation of this fundamental right constitutes structural error affecting the trial mechanism, Trass is entitled to reversal of his convictions for first-degree felony murder and criminal possession of a firearm, and the case is remanded to the district court for a new trial. We also conclude the district court did not violate Trass' statutory right to a speedy trial and the evidence was sufficient to support Trass' felony-murder conviction. Given remand for a new trial is required, we find it unnecessary to address the balance of Trass' claims on appeal, i.e., whether the district court erred in certain respects during the retrospective competency proceedings, whether the district court violated Trass' constitutional right to testify, whether a jury instruction on self-defense was legally appropriate, and whether the cumulative effect of the alleged errors violated Trass' constitutional right to a fair trial.

FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2015, law enforcement responded to reports of gunfire at a residence in Hutchinson. Once inside, officers located an injured male, later identified as Jose Morales, lying on the floor in a bedroom. Morales had bullet wounds to his left hand and upper abdomen. Despite life-saving efforts, Morales later died from his injuries.

Law enforcement discovered drug evidence inside the residence, including digital scales with methamphetamine residue, two plastic bags of methamphetamine, and various items of drug paraphernalia.

Trass later contacted law enforcement and admitted to shooting Morales. Trass said he went to Morales' house to complete a drug transaction that he had started the previous day. While Morales weighed and packaged the methamphetamine, Trass claimed he grew paranoid that Morales and others planned to kill him. Believing Morales was reaching for a gun inside his safe, Trass

grabbed a gun from Morales' waistband and fired at least two or three times at him. Trass said he took the gun and a bag of methamphetamine and ran home, where he hid the gun in his basement. Trass said he reported the incident to law enforcement "because he knew he messed up."

The State charged Trass with first-degree felony murder and criminal possession of a firearm. Before trial, the district court appointed multiple attorneys to represent Trass after various conflicts arose. The frequent change in counsel caused several trial continuances, and the trial was finally set to begin in March 2019. Two weeks before trial, the district court allowed the two attorneys then representing Trass to withdraw based on an alleged conflict in the attorney-client relationship. Finding that Trass had waived or forfeited his right to counsel by his conduct, the court ordered Trass to represent himself at the upcoming suppression hearing and trial with the assistance of standby counsel. Both the suppression hearing and trial began as scheduled, where Trass appeared pro se. On the last day of the nine-day trial, Trass grew frustrated with the district court's rulings, refused to participate, and asked to return to the jail. As a result, the district court removed Trass from the courtroom and standby counsel represented Trass for the rest of the trial.

The jury convicted Trass as charged. The district court imposed a life sentence without the possibility of parole for 618 months consecutive to a 20-month term of imprisonment.

Trass filed a direct appeal with this court. During the briefing process, the State notified us of an unresolved pretrial competency issue, so we remanded the case to the district court to conduct a retrospective competency hearing, if feasible. Finding it was feasible, the district court held an evidentiary hearing in February 2023 and concluded that Trass was competent before and during his 2019 trial. Trass' appeal returns to this court.

Jurisdiction is proper. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 22-3601); K.S.A. 22-3601(b)(3)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court); K.S.A. 21-5402(b) (first-degree murder is off-grid person felony).

ANALYSIS

Trass raises several issues on appeal. Along with multiple briefs filed by his attorney, Trass filed three pro se briefs. Trass essentially raises the same issues as counsel but provides additional authority and argument. Those issues include: (1) whether the district court erred in certain respects during the retrospective competency proceedings, (2) whether the district court violated Trass' statutory right to a speedy trial, (3) whether the district court violated Trass' constitutional right to counsel, (4) whether the district court violated Trass' constitutional right to testify, (5) whether a jury instruction on self-defense was legally appropriate, (6) whether the evidence was sufficient to support Trass' felony-murder conviction, and (7) whether the cumulative effect of the alleged errors violated Trass' constitutional right to a fair trial. Because resolution of his claim that the district court violated his constitutional right to counsel could impact the outcome of other issues raised, we address it first.

I. *Constitutional right to counsel*

Standard of review

Trass argues the district court committed structural error when it found he involuntarily waived his Sixth Amendment right to counsel based on his conduct and forced him to proceed pro se at trial with only the assistance of a conflicted standby counsel. Because he is arguing on appeal that the district court unlawfully deprived him of his constitutional right to effective assistance of counsel, Trass asserts the district court's decision is subject to de novo review by this court. The State disagrees, characterizing Trass' argument as one alleging that the district court erred in denying his request to appoint new counsel, which the State contends is subject to an abuse of discretion standard on review. Upon review of the record and the briefs, we agree with Trass that the issue he presents alleges a violation of the constitutional right of assistance of counsel, a question over which we exercise unlimited review. See *State v. Anderson*, 294 Kan. 450, 464, 276 P.3d 200 (2012). We also generally exercise unlimited review over questions related to the rights of assistance of counsel. *State v. Couch*,

317 Kan. 566, 574, 533 P.3d 630 (2023); *State v. Jones*, 290 Kan. 373, 376, 228 P.3d 394 (2010). To the extent the district court made findings of fact when it held Trass waived or forfeited his right to counsel, we apply a bifurcated standard of review by reviewing the court's fact-findings for substantial competent evidence and its legal conclusion based on those facts de novo. See *Couch*, 317 Kan. at 575.

Additional relevant facts

Before addressing the merits of Trass' argument, we find it helpful to review in some detail the history of attorney appointments in this case. In all, 11 attorneys entered an appearance for Trass at some point before trial, although it is more accurate to say that Trass was represented by seven sets of attorneys.

August 2015

The district court appointed the Public Defender's Office to represent Trass. Three attorneys in the office were assigned to the case at one point or another.

February 2017

Trass moved for appointment of new counsel based primarily on a failure by the Public Defender's Office to communicate a plea offer and personal family issues preventing the lead attorney in the office assigned to his case from working on the case and communicating with him. Counsel from the Public Defender's Office validated Trass' concerns at the hearing on the motion. The district court granted the motion and appointed Steve Osburn.

April 2017

After reviewing the State's discovery, Osburn promptly moved to withdraw due to a conflict of interest with several of the State's witnesses. The district court granted the motion and appointed Shannon Crane.

Trass moved for new counsel soon thereafter, alleging a conflict of interest and lack of trust because Crane represented his mother and sister's landlord and was currently in the process of evicting them from their

home. The district court denied Trass' motion, apparently adopting the State's argument that the eviction issue was not a conflict because it did not directly involve Trass but instead only involved his family.

August 2017

Trass again moved for new counsel, alleging Crane filed a dispositive motion without consulting him as he requested; failed to acknowledge or return his phone calls, emails and letters; and told him when she did talk to him that she was "very busy" and did not have "much time" to discuss his case. At a hearing on the motion, the district court indicated its primary concern was whether Crane felt she could continue to have the type of relationship with Trass necessary to advocate on his behalf. When Crane responded in the negative, the court granted the motion and later appointed Carl Maughan.

February 2018

Maughan moved to withdraw based on the belief that Trass did not trust him and the relationship between them had deteriorated to the point where Maughan was constantly trying to balance how best to represent Trass while actively building "a defense to potential claims of ineffective assistance of counsel and/or civil liability." The district court granted the motion to withdraw and advised Trass it needed to contact the director of the Board of Indigent Defense Services for input on the next appointment. The court later appointed Sam Kepfield.

March 2018

Kepfield moved to withdraw due to the conflict created by his previous representation of an individual in an unrelated case who had been identified as a witness in Trass' case. The district court appointed Kevin Loeffler and Michael Llamas.

May 2018

Trass moved for new counsel, alleging he attempted to contact Loeffler by telephone over a dozen times since counsel was appointed two months earlier, but Loeffler failed to acknowledge or return his phone calls. Trass also alleged Loeffler filed motions for continuance and for a competency evaluation without his knowledge, unnecessarily

delaying a hearing on his motion to dismiss for speedy trial violations, which was a top priority for him.

June 2018

Loeffler and Llamas moved to withdraw, arguing a conflict of interest developed after Trass told them he believed he was not being properly represented and that they were conspiring with the District Attorney's Office against him. At the hearing on the motion, Loeffler advised the district court that Trass asked him to continue to represent him when they visited before the hearing that morning. But Loeffler went on to say he thought the "relationship has broken down to such an extent that I don't think that I can adequately represent him." The court warned Trass that if conflicts with his attorneys continued, he might end up going to trial without an attorney. The court granted counsels' motion to withdraw and appointed Bobby Hiebert and Monique Centeno.

March 2019

Two weeks before Trass' trial was scheduled to begin in March 2019, Hiebert and Centeno moved to withdraw. The motion alleged that an irreparable rift in the attorney-client relationship existed, and that Trass no longer wanted to work with counsel based on his belief that they were conspiring with the State and working against him. The motion said Trass insisted that counsel take meritless or unnecessary actions, berated counsel, and communicated with counsel in a disrespectful and racially derogatory manner.

At a March 12, 2019 hearing on the motion to withdraw, counsel provided additional context by detailing the disagreements and conflicts with Trass. As Hiebert was speaking to the court, Trass interrupted by objecting to Hiebert's comments and announced Hiebert and Centeno were fired. Given this outburst, the district court removed Trass from the courtroom. After Hiebert and Centeno finished explaining the reasons for their withdrawal request, the prosecutor detailed the appointment of the many attorneys who previously represented Trass and noted the difficulties in finding conflict-free attorneys. Given the assertions by Hiebert, however, the prosecutor agreed counsel should be permitted to withdraw. The district court judge stated,

"Well, here's what we're going to do. I will allow the withdraw. The outburst of the defendant today made it evident to me that counsel could not be effective adversaries for Mr. Trass because of his hostility and you have my appreciation, Counsel, much appreciation for stepping in and doing an excellent job.

"What we're going to do tomorrow . . . is have a hearing where Mr. Trass will be brought back and I'm going to tell him that he is now representing himself. I have no options for appointment. I've conferred with the head of BIDS . . . and she has confirmed to me my ability to require—well, basically to proceed with the defendant representing himself. And then the question, my question to Mr. Trass will be, do you wish to proceed to trial March 25? And we'll go from there."

The next day, March 13, 2019, Trass appeared at a hearing without counsel. The district court advised Trass he would be representing himself: "This hearing this morning is to advise you, Mr. Trass, that I'm finding that you have waived your right to appointed counsel by your conduct. . . . I am finding that appointment of new counsel would be an exercise in futility." After reciting the history of attorney appointments in the case, the judge concluded:

"As I stated to begin this hearing you have waived your right to appointed counsel. This trial will proceed on March 25 at nine a.m. The next hearing is Monday March 18, this coming Monday at nine a.m. And that is a hearing on your motion to suppress evidence. I am requiring recently appointed Attorney, Bobby Hiebert, to remain as standby counsel. Mr. Hiebert will not be at the table with you, however, he will be in the courtroom during the trial. Those are the orders of the Court. Thank you for your attention."

When Trass tried to speak, the judge would not allow it, stating, "This is not a time for comment. This is the time when I advise you of my rulings." The judge told Trass that any further communication with the court must be by written motion.

After this hearing, the State filed a motion requesting a follow-up hearing for the district court to "advise the defendant of the pitfalls of representing himself, to inquire as to what discovery the defendant may possess, and to inquire as to whether the defendant will be ready to go forth on the motion to suppress and jury trial." The motion stated: "It is the State's position that case law requires the Court to advise the defendant as to the pitfalls of representing himself at trial even in light of the finding that the defendant has waived the right to appointed counsel."

At the scheduled March 18, 2019, hearing, Trass appeared pro se with Hiebert as standby counsel. The court began the hearing

by providing the parties with copies of the court rules. With no discussion about the disadvantages of self-representation or inquiry into Trass' receipt of discovery or his readiness to proceed, the court began the suppression hearing. The State offered into evidence several exhibits and presented testimony from five witnesses; Trass cross-examined each witness. Before the evening recess, the prosecutor expressed concerns about Trass' ability to obtain and review all the discovery before trial and other outstanding motions, including the State's motion on the required self-representation advisories. In response, the judge stated:

"The Court is not continuing this trial. The defendant has known since last October when the discussion was about this trial setting. So to state that the defendant has only had 13 days is not accurate. Defendant waived his right to counsel. He—and I made a record as far as my finding and waiving the right to counsel doesn't mean an automatic continuance. All the same dates apply. The defendant knew or should have known that the Court would make these findings."

At the continued suppression hearing the next day, Trass testified on his behalf. He presented no other evidence but complained about his inability to subpoena witnesses in time for the hearing. After the district court denied Trass' motion to suppress, it took up several of the pro se motions he had filed, including a motion for self-representation. The judge stated,

"Defendant also yesterday filed a motion for self-representation. On March 13 of this year, just last week, I ruled that the defendant had forfeited his right to appointed counsel and I went through the history of his case, almost four years, in appointing various attorneys, who were either—who Mr. Trass asked to have terminated or the attorneys, themselves, asked to withdraw or sometimes in both actually occurred. The last two attorneys, Mr. Hiebert and Ms. Centeno asked to withdraw. I made my ruling and Mr. Trass stated in court, you're fired, to those attorneys. And I felt the record justified my findings that, Mr. Trass, you forfeited your right to appointed counsel, which leaves you representing yourself. And then we come to your request for self-representation, which in essence is granted because you have forfeited your right to counsel and barring hiring counsel, which you of course have that right to do. I will note that in the four years that you have—I should state you were first placed in custody in 2015 August. In that period of time you had made no request or suggestion to hire an attorney, nor has any hired attorney represented, or entered an appearance on your behalf. But barring your right to hire counsel, you are representing yourself."

The court then moved on to the discovery issues, and the prosecutor again expressed concerns about the volume of discovery provided to Trass and his inability to receive some of it at the jail. The prosecutor noted Trass had requested a 30-day continuance. While agreeing Trass had "brought this on himself," the prosecutor believed this was a reasonable request under the circumstances, stating, "I just don't see how [Trass] can review the discovery before Monday, Judge, and be prepared for trial." Trass addressed the court and detailed the difficulty he had accessing the law library and reviewing the discovery. He reiterated his request for a 30-day continuance but asked for at least 2 to 3 more weeks. The court recognized Trass' limitations and said it would ask the jail to provide him with as much access to the discovery as possible. But the judge denied Trass' request for continuance:

"Well, this trial is not being continued. This is the 12th trial setting for this case March 25. Some 200 people have been notified that, that may be jurors in this case. Mr. Trass, you . . . have been represented by counsel from August 18, 2015, until March 13, 2019. You via your counsel have had access to the discovery that is part of this case. That consideration goes into my denial of the motion to continue. Also, the court has to consider the witnesses who for the 12th trial setting now have planned on this trial March 25, and as I mentioned the citizens who have been summoned to appear as a potential member of the jury. I am not continuing this case."

On March 20, 2019, Trass moved to withdraw his motion for pro se representation and argued the district court had violated his Sixth Amendment right to counsel by forcing him to proceed pro se. Trass denied he had forfeited or waived his right to counsel and objected to the district court's finding that he had. Claiming he never knowingly or intelligently waived his right to counsel, Trass also asserted that the court failed to advise him of the potential disadvantages of self-representation. The next day, Trass filed a motion alleging ineffective assistance of counsel based on the severe disadvantages resulting from his forced self-representation. It is unclear whether the district court ruled on these motions before trial.

The nine-day jury trial began on March 25, 2019, where Trass appeared pro se with Hiebert as standby counsel. At various points throughout the trial, Trass objected to his forced self-representation, denied that he had chosen to represent himself, and said he

"might have sought another remedy" had he known that firing Hiebert and Centeno meant he would be waiving his right to counsel. In response to Trass' suggestion that the court had denied his motion to withdraw his request for self-representation, the judge said,

"[Y]our motion to withdraw your motion to represent yourself wasn't denied. I ruled that motion moot because I had already ruled that you forfeited your right to appointed counsel which left you either hiring an attorney or representing yourself, and you are here representing yourself and conducting yourself very appropriately and I want to commend you again for that fact."

On the last day of trial, Trass became frustrated with the district court's rulings and accused the court and the prosecutor of colluding to deprive him of his rights. After Trass refused to participate in his defense any further and said he wanted to return to the jail, the judge removed him from the courtroom. Trass did not return for the rest of the trial.

Hiebert took over Trass' defense; he rested the defense's case, appeared at the jury instructions conference, conducted closing argument, provided input in the court's response to a jury question, and appeared for the jury's verdict. Hiebert and Trass each filed posttrial motions. More than once, Hiebert unsuccessfully attempted to withdraw from representation. Despite both Hiebert's and Trass' attempts to remove him, Hiebert continued to represent Trass during posttrial proceedings and sentencing and filed a notice of appeal on Trass' behalf.

Discussion

The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to assistance of legal counsel during all critical stages of a criminal proceeding. *Lee v. United States*, 582 U.S. 357, 363, 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017); *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). An indigent defendant is entitled to have an attorney appointed by the court to represent him or her. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (The "noble ideal" of fair and impartial criminal adjudications "cannot be realized if the poor man [or woman] charged with [a] crime has to face his

[or her] accusers without a lawyer to assist him [or her]."). The right to counsel is a fundamental component of our criminal justice system. See *United States v. Cronic*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) ("'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his [or her] ability to assert any other rights he [or she] may have.'"). The right to counsel is so central to a fair trial that its denial can never be treated as harmless error. *Chapman v. California*, 386 U.S. 18, 23, n.8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Jones*, 290 Kan. at 382 (A violation of the Sixth Amendment right to counsel constitutes structural error; "[e]rrors are structural when they 'defy analysis by "harmless-error standards"' because they 'affect[] the framework within which the trial proceeds.'").

But the right to an attorney is not an unqualified right. The Sixth Amendment does not extend to the appointment of counsel of choice or to a meaningful relationship with appointed counsel. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) ("[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he [or she] prefers."); *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) (rejecting claim that Sixth Amendment guarantees a "'meaningful relationship'" between an accused and counsel); *United States v. Leggett*, 162 F.3d 237, 247 (3d Cir. 1998) ("[T]here is no constitutional right to be represented by a lawyer who agrees with the defendant's trial strategy."); *State v. Brown*, 305 Kan. 413, 424, 382 P.3d 852 (2016) (A defendant does not have the "right to 'compel the district court to appoint the counsel of [his or her] choice.'"); *State v. Williams*, 226 Kan. 82, 88, 595 P.2d 1104 (1979) (A defendant may not demand different appointed counsel "in the absence of good cause being shown."). While a criminal defendant "must be provided a fair opportunity to obtain counsel of his or her choice, this right cannot be manipulated to impede the efficient administration of justice." *State v. Anthony*, 257 Kan. 1003, 1019-20, 898 P.2d 1109 (1995) (citing *State v. Bentley*, 218 Kan. 694, 695, 545 P.2d 183 [1976]).

Criminal defendants may also relinquish their right to counsel. Courts have recognized two ways in which a defendant may do so: by waiver or forfeiture. Although these terms are related and are often used interchangeably, they are unquestionably distinct. See *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("Waiver is different from forfeiture."); *Freytag v. C.I.R.*, 501 U.S. 868, 895 n.2, 111 S. Ct. 2631, 115 L. Ed. 2d 764 (1991) (Scalia, J., concurring in part) ("[O]ur cases have so often used [the terms waiver and forfeiture] interchangeably that it may be too late to introduce precision."). As discussed below, these distinctions between waiver and forfeiture are especially significant in the context of the Sixth Amendment right to counsel.

1. *Waiver of the right to counsel*

A waiver is an intentional and voluntary relinquishment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); see *Vreeland v. Zupan*, 906 F.3d 866, 876 (10th Cir. 2018) ("[W]hen we say a defendant has waived a particular right, we mean that the defendant has knowingly, voluntarily, and intentionally chosen to relinquish it."). Thus, the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. *Montejo v. Louisiana*, 556 U.S. 778, 786, 129 S. Ct. 2079, 173 L. Ed. 2d 955 (2009).

1.1 *Express waiver*

The most common method of waiving a right is by an affirmative written or verbal statement on the record. See *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (To proceed pro se, "the accused must 'knowingly and intelligently' forgo" the benefits associated with the right to counsel and "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish . . . '[the accused's] choice is made with eyes open.'"); *State v. Youngblood*, 288 Kan. 659, Syl. ¶ 1, 206 P.3d 518 (2009) ("An accused's waiver of the right to counsel may not be presumed from a silent record."). While this court does not require the use of a specific checklist to

decide whether a waiver of the right to counsel is knowing and intelligent, it has suggested a three-step framework to assist district courts in making this determination:

"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.

"To assure the defendant appreciates the consequences of waiving representation by counsel . . . the court [should] explain that the defendant will be held to the same standards as an attorney; that the judge will not assist in or provide advice about presenting a defense; and that it is advisable to have an attorney because many trial techniques, evidence rules, and the presentation of defenses require specialized training and knowledge. [Citation omitted.]" *State v. Burden*, 311 Kan. 859, 863-64, 467 P.3d 495 (2020).

1.2 *Waiver by conduct*

Along with an express waiver, a defendant may also implicitly waive the right to counsel through his or her conduct. See, e.g., *United States v. Hughes*, 191 F.3d 1317, 1323 (10th Cir. 1999) (recognizing waiver of right to counsel by conduct, "particularly when that conduct consists of tactics designed to delay the proceedings"); *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d Cir. 1995) ("Once a defendant has been warned that he [or she] will lose his [or her] attorney if he [or she] engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed pro se and, thus, as a waiver of the right to counsel."); *State v. Buckland*, 245 Kan. 132, 138-39, 777 P.2d 745 (1989) (finding waiver of right to counsel where the defendant both refused appointed counsel and asserted he was not proceeding pro se or waiving his right to be represented by an attorney).

Notably, "[a] court is under no less obligation to ensure that [a] waiver is knowing and intelligent when voluntariness is deduced from conduct than when it is asserted expressly." *United States v. Allen*, 895 F.2d 1577, 1579 (10th Cir. 1990) (defendant's refusal to accept appointed counsel and failure to hire his own did not waive right to counsel where district court made no inquiry to determine whether waiver was knowing and intelligent); see *Hughes*, 191 F.3d at 1323-24 ("[A] waiver [by conduct] may be valid absent an inquiry by the court where 'the surrounding facts

and circumstances, including [the defendant's] background and conduct, demonstrate that [the defendant] actually understood his [or her] right to counsel and the difficulties of pro se representation and knowingly and intelligently waived his [or her] right to counsel."); *Goldberg*, 67 F.3d at 1102-03 (no valid waiver by conduct where "the district court took no affirmative step to ensure that Goldberg 'truly appreciate[d] the dangers and disadvantages of self-representation'"); *United States v. Bauer*, 956 F.2d 693, 695 (7th Cir. 1992) (finding waiver by conduct where the defendant was warned of the dangers of self-representation and could afford to hire an attorney but refused to do so); *United States v. Fazzini*, 871 F.2d 635, 641-42 (7th Cir. 1989) (defendant's failure to cooperate with his fourth appointed attorney waived his right to counsel where district court had warned his conduct would result in the defendant proceeding pro se); *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) ("[A] persistent, unreasonable demand for dismissal of counsel and appointment of new counsel . . . is the functional equivalent of a knowing and voluntary waiver of counsel" where district court warned the defendant that failure to cooperate with his fourth attorney would signal a waiver of the right to counsel.); *Buckland*, 245 Kan. at 138-39 (knowing and intelligent waiver of right to counsel where district court repeatedly advised the defendant to obtain new counsel or have one appointed and emphasized that the defendant could not be represented by a nonlawyer; defendant's original attorney also warned the defendant it would be unwise to proceed without counsel); *State v. Landeo*, No. 118,156, 2019 WL 3518513, at *14-16 (Kan. App. 2019) (unpublished opinion) (invalid waiver of right to counsel by conduct where district court did not advise the defendant "about the requirements and perils of proceeding pro se" when it allowed counsel to withdraw and refused to appoint another attorney); *State v. Jones*, No. 118,846, 2019 WL 1087102, at *6 (Kan. App. 2019) (unpublished opinion) (Before ordering the defendant to proceed pro se based on waiver of right to counsel by conduct, the defendant must be "fully informed of his rights and the potential dangers of self-representation.")

Although the United States Supreme Court has not ruled directly on whether a defendant may implicitly waive the *right to*

counsel at trial through his or her conduct, it has considered whether a defendant may implicitly waive the Sixth Amendment *right to be present* in the courtroom at trial through misconduct. The Court held that a defendant could lose this right if, after being warned by the judge that the defendant will be removed if the disruptive behavior continues, the defendant nevertheless insists on behaving in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with the defendant in the courtroom. *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

2. *Forfeiture of the right to counsel*

Whether a defendant can be held to have forfeited his or her right to counsel through misconduct appears to be an issue of first impression in Kansas. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Goldberg*, 67 F.3d at 1100; see *Vreeland*, 906 F.3d at 876 ("When we say a defendant has forfeited a particular right, we mean that the defendant has lost the right through some action or inaction, but has done so under circumstances that preclude characterizing the loss as knowing, voluntary, and intentional.").

Courts have recognized that a defendant may in some cases forfeit the right to counsel where a defendant's actions "frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward." *State v. Simpkins*, 373 N.C. 530, 536, 838 S.E.2d 439 (2020); see *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993) ("'[A] court must be wary against the "right of counsel" being used as a ploy to gain time or effect delay.'"). A defendant may forfeit the right to counsel without warning by engaging in "severe misconduct or a course of disruption aimed at thwarting judicial proceedings." *State v. Hampton*, 208 Ariz. 241, 244, 92 P.3d 871 (2004); see *Goldberg*, 67 F.3d at 1102 (forfeiture of the right to legal representation requires "extremely serious misconduct"). When a district court finds that a defendant

has forfeited his or her right to counsel, the court need not determine whether the defendant knowingly and intelligently waived the right before requiring the defendant to proceed pro se.

Courts have held a defendant's aggressive, abusive, or threatening behavior, as well as conduct that was meant to obstruct legal proceedings, rises to the level of egregious misconduct warranting forfeiture of the right to counsel. See, e.g., *Leggett*, 162 F.3d at 240, 251 (defendant forfeited right to counsel at sentencing hearing by physically attacking counsel; defendant punched, choked, scratched, and spit on counsel); *Goldberg*, 67 F.3d at 1101 ("[B]ecause of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct."); *United States v. McLeod*, 53 F.3d 322, 325-26 (11th Cir. 1995) (defendant forfeited right to counsel at motion for new trial hearing by engaging in repeatedly abusive, threatening, and coercive behavior; defendant threatened to sue attorney and had attempted to persuade him to engage in unethical conduct); *United States v. Jennings*, 855 F. Supp. 1427, 1432-33, 1444-45 (M.D. Pa 1994), *aff'd* 61 F.3d 897 (3d Cir. 1995) (defendant forfeited right to counsel after he punched his attorney and later made threatening remarks against the prosecutor, corrections officers, and his former counsel; conduct was "extreme and outrageous"); *State v. Montgomery*, 138 N.C. App. 521, 524-25, 530 S.E.2d 66 (2000) (defendant forfeited constitutional right to counsel through purposeful conduct and tactics to delay orderly processes of the court, including disruptive and assaultive behavior).

Given the fundamental nature of the constitutional right at stake, however, only the most egregious and severe misbehavior will support a defendant's forfeiture of the right to counsel without warning and an opportunity to conform his or her conduct to an appropriate standard. See, e.g., *Gilchrist v. O'Keefe*, 260 F.3d 87, 100 (2d Cir. 2001) (encouraging trial courts to take intermediate steps to protect counsel, short of the complete denial of counsel; suggesting the defendant could be punished for misconduct by considering it in imposing sentence or by separately prosecuting the defendant for misconduct); *State v. Holmes*, 302 S.W.3d 831, 848 (Tenn. 2010) (defendant did not forfeit his fundamental constitutional right to counsel following verbal threat and physical assault); *Commonwealth v. Means*, 454 Mass. 81, 92-95, 907 N.E.2d 646

(2009) ("Forfeiture is an extreme sanction in response to extreme conduct that imperils the integrity or safety of court proceedings" that should be used only under "extraordinary circumstances" as a "last resort in response to the most grave and deliberate misconduct."); *State v. Boykin*, 324 S.C. 552, 554, 558, 478 S.E.2d 689 (1996) (defendant's conduct in one instance of verbal abuse and physical threatening not severe enough to constitute forfeiture of right to counsel).

In *Means*, the Massachusetts Supreme Judicial Court reviewed state and federal court decisions and noted four considerations that generally govern whether forfeiture is appropriate: (1) it is typically applied "where a criminal defendant has had more than one appointed counsel, perhaps because in those circumstances the means of proceeding . . . have been exhausted or found futile"; (2) it is rarely applied to deny representation during trial and is more commonly invoked during pretrial or posttrial stages of a criminal proceeding; (3) it may be appropriate when a defendant commits or threatens to commit acts of violence; and (4) it "should be a last resort in response to the most grave and deliberate misconduct." 454 Mass. at 93-95.

Although we have never held as a matter of law that a criminal defendant in Kansas can forfeit the right to counsel through misconduct, we do so today. Specifically, a defendant may be found to have forfeited the right to counsel without warning or an opportunity to conform conduct to an appropriate standard upon a finding by the court that the defendant engaged in egregious misconduct or a course of disruption related to counsel with an intent to thwart judicial proceedings. In making this finding, the court must be mindful that forfeiture is an extreme sanction in response to extreme conduct that jeopardizes the integrity or safety of court proceedings and should be used only under extraordinary circumstances as a last resort in response to the most serious and deliberate misconduct.

3. *Application to Trass*

To determine whether the district court violated Trass' Sixth Amendment right to counsel, we must first clarify whether this case involves waiver or forfeiture. Trass did not expressly waive his right to counsel, so he could only *implicitly* waive the right through conduct or by forfeiting the right. The district court used the terms interchangeably,

stating Trass had either "waived" his right to counsel "by conduct" or "forfeited" his right to counsel.

3.1 *Waiver by conduct*

A review of the record reflects Trass did not implicitly waive his right to counsel based on his conduct. As discussed, waiver of counsel by conduct requires that a defendant first be warned about the consequences of his or her conduct, including the risks of proceeding pro se. See *Goldberg*, 67 F.3d at 1102-03 (no valid waiver by conduct where "the district court took no affirmative step to ensure that Goldberg 'truly appreciate[d] the dangers and disadvantages of self-representation'"); *Means*, 454 Mass. at 91 ("The key to waiver by conduct is misconduct occurring after an express warning has been given to the defendant about the defendant's behavior and the consequences of proceeding without counsel."). The district court did tell Trass that it was running out of attorneys to appoint and that his continued requests for new counsel could result in his appearance at trial without an attorney. But the court never advised Trass that any future misconduct would be treated as an implied waiver of counsel or warn him of the dangers of self-representation. See *Faretta*, 422 U.S. at 835 (A defendant should be made aware of the dangers and disadvantages of self-representation, so that the record will establish the choice is made "'with eyes open.'"); *State v. Hughes*, 290 Kan. 159, 171, 224 P.3d 1149 (2010) ("It is not up to the defendant to know what 'fully advised' means. It is the judge who is burdened with assuring that [defendant's] rights have been adequately protected."). The court's failure to advise Trass about the disadvantages of self-representation—even after the State encouraged the court to hold a hearing to do so—precludes a finding that Trass knowingly, voluntarily, and intentionally chose to relinquish his right to counsel. See *Montejo*, 556 U.S. at 786 (The Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent.).

3.2 *Forfeiture*

Having determined Trass did not knowingly or voluntarily waive his right to counsel, we now must decide whether Trass engaged in misconduct so extreme and severe that it allowed the district court to permissibly conclude he forfeited his right to be represented by counsel

without warning or an opportunity to conform his conduct to an appropriate standard. This decision requires us to balance Trass' constitutional right to counsel against the district court's legitimate interest in efficiently and judiciously managing its proceedings. In balancing these interests, we review the court's fact-findings for substantial competent evidence but review de novo its legal conclusion that those facts allowed the court to permissibly conclude Trass forfeited the right to counsel without warning and an opportunity to conform his conduct to an appropriate standard. See *Anderson*, 294 Kan. at 464; *Couch*, 317 Kan. at 575.

In deciding Trass forfeited his right to counsel, the district court appeared to find that Trass created conflicts of interest between himself and his appointed attorneys over the nearly four-year period from arraignment to trial, and that his actions in this regard amounted to egregious misconduct and a course of disruption intended to thwart judicial proceedings. We disagree. In six of the seven instances when the court appointed a new attorney for Trass, the reasons for allowing counsel to withdraw appear both reasonable and legitimate: (1) counsel failed to communicate a plea offer and counsel had family issues preventing counsel from working on his case; (2) counsel had a conflict of interest with the State's witnesses; (3) counsel had a conflict because counsel was trying to evict Trass' mother and sister from their home and because a counsel told Trass she was very busy and had little time to discuss his case; (4) counsel had a conflict of interest based on his overarching worry that Trass would file an ineffective assistance of counsel claim against him; (5) counsel had a conflict of interest by his previous representation of an individual in an unrelated case who had been identified as a witness in Trass' case; and (6) counsel failed to return calls or contact Trass in the first two months after being appointed and counsel filed a competency motion without his knowledge. Simply put, we refuse to construe Trass' zealous representation of his own legal interests in seeking conflict-free and responsive counsel to advocate on his behalf as misconduct or disrespect of the legal system, let alone egregious misconduct or a course of disruption intended to thwart the judicial proceedings against him.

In the seventh instance, Hiebert and Centeno said Trass insisted they take meritless or unnecessary actions, communicated in a disrespectful and racially derogatory manner, and berated them for not doing exactly as he instructed. At a hearing on Hiebert and Centeno's motion, Trass was disruptive and had to be

removed from the courtroom after he interrupted counsel and said that they were fired. Although the district court's desire to avoid any further postponement to the long-pending trial is understandable, Trass' conduct did not demonstrate the severe or egregious obstructive and dilatory behavior which would allow the court to permissibly conclude the defendant had forfeited the right to counsel. See *United States v. Welty*, 674 F.2d 185, 189 (3d Cir. 1982) ("While we can understand, and perhaps even sympathize, with the frustration and exasperation of the district court judge, even well-founded suspicions of intentional delay and manipulative tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights."). Thus, we conclude the district court deprived Trass of his constitutional right to counsel during pretrial proceedings and during the nine-day trial.

Having determined the district court deprived Trass of his constitutional right to counsel, we turn to his claim of structural error requiring reversal of his conviction and remand for a new trial. "Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings." *State v. Cantu*, 318 Kan. 759, Syl. ¶ 4, 547 P.3d 477 (2024). Structural errors defy harmless-error analysis because they "'affect[ ] the framework within which the trial proceeds.'" *Jones*, 290 Kan. at 382 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 [1991]).

Violation of a Sixth Amendment right to counsel like we have found here is subject to structural error analysis. *Fulminante*, 499 U.S. at 309-10 (The entire trial is obviously impacted by the absence of counsel for a defendant, and so depriving a defendant of the right to counsel is a structural defect in the trial mechanism that defies analysis by harmless-error standards.); *Jones*, 290 Kan. at 382-83 (A violation of the Sixth Amendment right to counsel constitutes structural error; "[e]rrors are structural when they 'defy analysis by "harmless-error standards"' because they 'affect[] the framework within which the trial proceeds.'"). As a structural defect in the trial mechanism, the violation of Trass' Sixth Amend-

ment right to counsel requires automatic reversal of his convictions. See *State v. Bentley*, 317 Kan. 222, 232, 526 P.3d 1060 (2023) (citing *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 [1999]).

Given remand for a new trial is required, we find it unnecessary to address the majority of Trass' remaining arguments on appeal. However, we do address Trass' speedy trial and sufficiency of the evidence claims because a resolution in his favor on either issue would affect the State's ability to retry him.

II. *Statutory right to a speedy trial*

Trass next alleges his statutory right to a speedy trial was violated because more than 150 days passed between his arraignment and his jury trial. See K.S.A. 22-3402(a). Although Trass alleged a constitutional speedy trial violation in his pro se brief, he provided no accompanying argument. As a result, Trass has waived any constitutional argument. See *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (A point raised incidentally in a brief and not argued therein is deemed waived or abandoned.).

A statutory speedy trial claim raises a question of law over which this court exercises unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). When evaluating a speedy trial claim, any factual questions are reviewed for substantial competent evidence. This court exercises unlimited review over whether those facts as a matter of law support the district court's legal conclusion. *State v. Vaughn*, 288 Kan. 140, 143, 200 P.3d 446 (2009).

The speedy trial statute requires the State to bring a defendant to trial within 150 days of arraignment if the defendant is in custody. K.S.A. 22-3402(a). The State has the burden of meeting this time requirement, and the defendant does not have to assert the right. *State v. Queen*, 313 Kan. 12, 16, 48 P.3d 1117 (2021); see *State v. Thomas*, 291 Kan. 676, 695, 246 P.3d 678 (2011) (defendant need not take any affirmative steps to make sure he or she is tried within the speedy trial timeframe). If the State fails to bring the defendant to trial within the prescribed time, the defendant "is "entitled to be discharged from further liability to be tried for the crime charged." K.S.A. 22-3402(a). Recognizing the realities of

litigation, however, the statute makes an exception for delays that occur "as a result of the application or fault of the defendant." K.S.A. 22-3402(a).

Trass was arraigned on January 4, 2016. Trass' jury trial began on March 25, 2019. As explained above, Trass was represented by several different attorneys in the time between arraignment and trial. As a result, the trial had to be continued many times. Throughout the case, Trass filed motions raising speedy trial concerns and seeking dismissal on speedy trial grounds. The district court denied Trass' motion to dismiss after finding that 135 days had accrued on the speedy trial clock and that all other delays were attributed to Trass.

Although the parties' calculations differ from that of the district court, they agree that at least 133 days of the delay is properly charged to the State (January 4, 2016, to March 22, 2016, and October 18, 2016, to December 12, 2016). This discrepancy is irrelevant, however, given the analysis below finding no additional delay should be attributed to the State.

Trass contends the district court improperly counted the following four periods of time against him because he did not personally agree to these continuances. To place Trass' arguments in context, our analysis of each claim of error begins with a review of other facts relevant to the respective time.

September 13, 2016, to October 18, 2016

Trass personally appeared with defense counsel at a hearing on June 3, 2016. Counsel requested a continuance of the jury trial that was scheduled for June 14, 2016. The prosecutor agreed to the continuance "as long as the time is charged to the defendant." When asked for suggestions about a new trial date, defense counsel said he wanted to confer with the lead attorney in the case and agreed to report to the court the next week. The judge then spoke directly to Trass, stating, "[Y]our counsel will let you know the new date, but it is continued. Trial is continued from June 14." The record reflects no response from Trass.

The record does not explain how a new trial date was settled on. On June 15, 2016, the register of actions listed a trial date of September 13, 2016. That same day, the register of actions also

listed October 18, 2016, as a "[n]ew trial date agreed to." Trass argues that the delay from September 13, 2016, to October 18, 2016, should not be applied to him because there was no continuance hearing held at which he could have personally objected to any delay beyond September 13, 2016.

This argument lacks merit. At the June 3rd hearing, Trass raised no objection when the district court said that the trial would be continued, and that counsel would advise him of the new trial date. And the prosecutor's comments at the hearing made clear that whatever delay was caused by the continuance would be charged to Trass. Nothing in the record shows that the trial date change from September 13, 2016, occurred because of any new request for a continuance. Thus, the court was not required to hold another hearing or otherwise obtain Trass' personal agreement before setting the October 18, 2016 trial date. Because this delay arose from defense counsel's request for a continuance, the time was properly charged to Trass.

February 13, 2017, to February 21, 2017

Trass personally appeared with defense counsel at a hearing on November 23, 2016. Because of family circumstances, counsel requested a continuance of the jury trial that was scheduled for December 12, 2016. The district court spoke to Trass directly about the continuance:

"THE COURT: . . . I'm sure you'd like to get your case tried but I need to know that you are accepting that continuance.

"THE DEFENDANT: Yes. The only issue I just want to make sure that, I mean, we still get a date set. Maybe early next year, something. February or March. I don't know. I don't want it to be, you know, status, status into late next year. I'd just like some dates set, so we can also keep track of my speedy trial right.

"THE COURT: Now, because you mentioned that the time between December 12 and whenever I set it doesn't get charged against the State.

"THE DEFENDANT: Yes, ma'am."

After confirming Trass' acknowledgment that "the time won't count . . . against the State," the district court granted counsel's request for a continuance and rescheduled the trial for February 13, 2017.

The district attorney, who did not attend this hearing, later notified the district court via email that he was unavailable the week of February 13th and requested that the trial be rescheduled for the next week. He asked that the rescheduling "be considered as pursuant to the defendant's prior request for continuance." Defense counsel responded via email, "No objection." The court then rescheduled the trial for February 21, 2017.

Trass argues this time should not count against him for the same reason discussed above—there was no hearing where he could personally agree or object to any additional delay beyond February 13, 2017.

Like his previous allegation, Trass' claim of error here is unfounded. Trass was personally present at the hearing where he agreed to a trial continuance. He also agreed "that the time between December 12 and *whenever* [*the court*] *set*[*s*] *it doesn't get charged against the State*." (Emphasis added.) The district court's rescheduling of the trial date from February 13th to February 21st to accommodate the district attorney's schedule did not constitute a continuance that required Trass' approval. Because this delay arose from defense counsel's request for a continuance, the time was properly charged to Trass.

February 21, 2017, to September 25, 2017

On February 21, 2017, Trass filed a pro se motion for new counsel based on several complaints that his attorney, Christine Jones, was ineffective. At a hearing on February 24, 2017, the district court granted the motion, appointed Steve Osburn to represent Trass, and continued the trial to May 1, 2017.

Soon after, Osburn moved to withdraw due to a conflict. At a hearing on April 4, 2017, the district court granted the motion and appointed Shannon Crane to represent Trass. At the hearing, the parties discussed the speedy trial clock and Osburn noted that "we are still within speedy trial in the case."

At a hearing on April 7, 2017, Crane appeared for a status hearing where she advised the district court that she had no conflicts and could accept the appointment. Trass did not appear at the hearing. Because of the extensive discovery, Crane said she

could not be ready for the May 1st trial. The court agreed a continuance was warranted and scheduled a hearing where a new trial date could be set in Trass' presence. The parties again discussed that the case was still within the speedy trial window.

Trass appeared at a hearing on April 14, 2017, where the parties verified that Crane had no conflicts that would prevent her from representing Trass. Crane again advised the district court that she could not be ready for trial on May 1st, and the prosecutor agreed Crane could not effectively prepare for a trial by then. The court granted the request for a continuance but did not schedule a new date at that time. At the end of the hearing, the court declined Trass' request to personally address the court.

On April 28, 2017, Trass appeared with Crane at a status hearing, and the district court scheduled the trial for September 25, 2017.

Trass claims the district court improperly attributed this entire delay to him because (1) he was never advised that asking for new counsel would impact his speedy trial rights, (2) counsel asked for a continuance outside his presence, and (3) he was not allowed to personally speak to the court about the continuance.

Contrary to Trass' arguments, a reasonable delay caused by a change in defense counsel is properly chargeable to the defendant and does not count against the speedy trial deadline. *State v. Timley*, 255 Kan. 286, 293-96, 875 P.2d 242 (1994) (finding no violation of the defendant's speedy trial rights based on continuances granted due to repeated change in appointed counsel), *disapproved on other grounds by State v. Nunez*, 298 Kan. 661, 316 P.3d 717 (2014), and *State v. Brooks*, 298 Kan. 672, 317 P.3d 54 (2014); *State v. Lawrence*, 38 Kan. App. 2d 473, 479, 167 P.3d 794 (2007) (relying on *Timley* to find no violation of the defendant's speedy trial rights based on delay so the defendant could obtain a new attorney).

The entire delay from February 21, 2017, to September 25, 2017, resulted from Trass' request for new counsel. The district court granted this request and appointed Osburn to represent Trass. Osburn later withdrew due to a conflict. Next, the court appointed Crane, who requested a continuance to have adequate time to prepare for trial. Although Trass did not personally request or

approve these continuances, they were still granted for his benefit. See *Timley*, 255 Kan. at 296 ("The ethical rule prohibiting an attorney from representing a client when there is a conflict of interest is for the benefit of the client. A continuance to allow newly appointed counsel adequate time to prepare for trial is also for the benefit of the defendant."). As a result, this time was properly charged to Trass.

July 23, 2018, to November 5, 2018

On June 4, 2018, Kevin Loeffler and Michael Llamas moved to withdraw from representation, citing an inability to effectively communicate with Trass based on his belief that they were conspiring with the State against him. At a hearing on the motion, the prosecutor pointed out Trass' "pattern of conduct" in creating conflict with his attorneys but agreed that counsel should be allowed to withdraw. The prosecutor noted it would be impossible for a new attorney to be ready for the jury trial scheduled for July 23, 2018. The district court later granted counsel's motion to withdraw.

The district court next appointed Bobby Hiebert and Monique Centeno to represent Trass. They moved to continue the July 23, 2018 trial. At a hearing on the motion, Hiebert said he had not yet spoken with Trass, who had objected to the requested continuance, and noted it would be extremely difficult to try the case as scheduled. Following discussion with the parties about the complicated nature of the case and speedy trial considerations, the district court judge continued the trial to November 5, 2018, stating, "I can't in good conscience ask an attorney that I've appointed within the last month to prepare for a murder trial within 17 days." The court charged the time from July 23 to November 5 to Trass because it was "necessitated by [his] request to fire his attorney." When Trass objected that the time was charged to him, the court told Trass to sit down and be quiet. The prosecutor then clarified that Trass had not requested the removal of his previous counsel; counsel had asked to withdraw due to their inability to communicate with Trass.

Based on his objection to counsel's requested continuance, Trass claims the district court erred in counting the time from July 23, 2018, to November 5, 2018, against him. Trass' argument fails for the same reason as his previous one. A reasonable delay caused by a change in

defense counsel—even if not initiated by the defendant—is properly chargeable to the defendant and does not count against the speedy trial deadline. See *Timley*, 255 Kan. at 293-96. The continuance under these circumstances was done solely for Trass' benefit and was thus properly charged to him.

Conclusion

Substantial competent evidence supports the district court's decision to attribute the four periods of time referenced above to Trass for speedy trial purposes. Because Trass was brought to trial within the 150-day statutory window, his speedy trial argument necessarily fails.

III. *Sufficient evidence*

Trass challenges the sufficiency of the evidence supporting his felony-murder conviction, alleging the State did not establish that the killing occurred within the res gestae of the underlying felony drug possession. In other words, Trass claims the State failed to prove he committed the crime of murder while possessing methamphetamine because the evidence established that he did not take control of the methamphetamine until after the shooting.

When reviewing the sufficiency of the evidence to support a conviction, we review the evidence in the light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In doing so, we do not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Spencer*, 317 Kan. 295, 302, 527 P.3d 921 (2023).

Felony murder is statutorily defined as the killing of a human being "in the commission of, attempt to commit, or flight from any inherently dangerous felony." K.S.A. 21-5402(a)(2). The State charged Trass with felony murder based, in relevant part, on a killing that happened "during the commission of or attempt to commit" unlawful possession of methamphetamine. Possession of methamphetamine is expressly designated in the statute as an inherently dangerous felony. See K.S.A. 21-5402(c)(1)(N); K.S.A. 21-5706(a); K.S.A. 65-4107(d)(3). Consistent with the statutory definition, the district court instructed the jury that to find Trass guilty of felony murder, the State had to prove that Trass killed Morales and that "[t]he killing was done while Brennan Trass was

committing possession of a controlled substance, to wit: methamphetamine."

Trass' argument challenges the State's proof of causation. "'The felony-murder statute requires two elements of causation. First, the death must occur within the res gestae of the underlying felony. Second, there must be a direct causal connection between the felony and the homicide.'" *State v. Pearce*, 314 Kan. 475, 480, 500 P.3d 528 (2021) (quoting *State v. Phillips*, 295 Kan. 929, 940, 287 P.3d 245 [2012]). Trass focuses solely on the first causation element and presents no argument on the second. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (An issue not briefed is deemed waived or abandoned.).

The res gestae of a crime includes the acts committed "'before, during, or after the happening of the principal occurrence when those acts are so closely connected with the principal occurrence as to form, in reality, a part of the occurrence.'" *Pearce*, 314 Kan. at 480. "Deaths 'caused within the time and circumstances' of an underlying felony's res gestae qualify as felony murders." *State v. Nesbitt*, 308 Kan. 45, 51-52, 417 P.3d 1058 (2018).

As support for his assertion that Morales' death did not occur within the res gestae of methamphetamine possession, Trass points to evidence in the record that he did not take possession of the methamphetamine until after he shot Morales.

Contrary to Trass' argument, the underlying felony and the victim's death need not occur simultaneously. "[T]he death need not occur during or after the commission of the felony to support a conviction for felony murder. The question for the jury is whether the death is within the res gestae of the crime, regardless of the actual sequence of events." *State v. Jacques*, 270 Kan. 173, 189-90, 14 P.3d 409 (2000), *abrogated on other grounds by State v. Milo*, 315 Kan. 434, 510 P.3d 1 (2022). As this court clarified:

"'Under the felony-murder rule, the killing may precede, coincide with, or follow the felony and still be considered as occurring in the perpetration of the felony offense, as long as there is a connection in time, place, and continuity of action. As long as the underlying felony and the killing are part of one continuous transaction, it is irrelevant for purposes of felony murder whether the felony took place before, after, or during the killing. In a felony murder, the killing need not occur in the midst of the commission of the felony, as long as that felony is not

merely incidental to, or an afterthought to, the killing.'" *Nesbitt*, 308 Kan. at 52 (quoting 40 Am. Jur. 2d, Homicide § 68).

Whether the underlying felony has been abandoned or completed to remove it from the ambit of the felony-murder rule is ordinarily a question of fact for the jury to decide. *State v. Beach*, 275 Kan. 603, 610, 67 P.3d 121 (2003).

Thus, to determine whether Trass "was committing" possession of methamphetamine when he shot Morales, "the jury could consider the moments immediately preceding the shooting, the moment of the shooting, and the moments immediately after the shooting." See *State v. Dupree*, 304 Kan. 377, 389-90, 373 P.3d 811 (2016). It does not matter whether Morales was shot before or after Trass possessed the methamphetamine because the instruction permitted the jury to consider all the acts together as it determined whether a killing occurred while Trass "was committing" possession of methamphetamine. Even if the jury accepted Trass' testimony that he took the methamphetamine after he shot Morales and was leaving the scene, his act of taking the methamphetamine was so closely related to the killing that it was part of the same occurrence, given the proximity in time and the undisputed evidence that Morales and Trass were engaged in a drug transaction at the time of the killing. See *State v. Jackson*, 280 Kan. 541, 546, 124 P.3d 460 (2005) (affirming jury's conclusion that a murder occurred "during" a drug transaction when transaction "had not been completed but was still in process"); *Dupree*, 304 Kan. at 390-91 (struggle with victim at door to residence, shot that killed victim, and entry into residence happened so close together that they were all part of the same occurrence and within the res gestae of aggravated burglary); *Jacques*, 270 Kan. at 189-90 (attempt by victim to buy cocaine, the stabbing of victim, and the later purchase of the cocaine by the defendant constituted one continuous transaction).

Given the proximity in time and relation between the drug transaction and the killing, Trass' taking of the methamphetamine was part of the same occurrence as the killing and occurred within the res gestae of the felony possession crime. As a result, the evidence is sufficient to support the jury's finding that Trass killed Morales while possessing methamphetamine.

CONCLUSION

The district court violated Trass' right to counsel under the Sixth Amendment to the United States Constitution. Because this violation constitutes structural error affecting the trial mechanism, we reverse his convictions for first-degree felony murder and criminal possession of a firearm and remand for a new trial before a different judge.

Reversed and remanded with directions.

LUCKERT, C.J., not participating.

No. 124,610

STATE OF KANSAS, *Appellee*, v. RILEY D. MOORE, *Appellant.*

(556 P.3d 466)

SYLLABUS BY THE COURT

1. TRIAL—*Crime of Aggravated Kidnapping—Term of Bodily Harm Requires No Definition in Jury Instruction*. To prove aggravated kidnapping under K.S.A. 21-5408(b), the State must demonstrate bodily harm was inflicted upon the person kidnapped. The term "bodily harm" is readily understandable and requires no instructional definition.

2. SAME—*Cumulative Error Analysis—Unpreserved Instructional Issues May Not Be Aggregated if Not Clearly Erroneous*. Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 22-3414(3) limits a party's ability to claim them as error.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 16, 2023. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Oral argument held March 27, 2024. Opinion filed September 27, 2024. Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed.

Kasper Schirer, 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

BILES, J.: Both parties seek our review of a Court of Appeals decision reversing Riley D. Moore's aggravated kidnapping conviction after the panel determined the cumulative prejudicial impact of two unpreserved jury instruction errors denied him a fair trial. See *State v. Moore*, No. 124,610, 2023 WL 4065032, at *1 (Kan. App. 2023) (unpublished opinion). The State faults the panel for not considering each error's prejudicial effect separately before analyzing the cumulative effect. We agree. The panel needed to consider whether each unpreserved instructional issue constituted clear error before moving to combine them. See *State*

v. Waldschmidt, 318 Kan. 633, Syl. ¶ 9, 546 P.3d 716 (2024) ("Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 2022 Supp. 22-3414[3] limits a party's ability to claim them as error."). The panel skipped this threshold step.

We also hold neither instructional issue is clearly erroneous. See *State v. Martinez*, 317 Kan. 151, 162, 527 P.3d 531 (2023) (to determine clear error, a reviewing court must be firmly convinced the jury would have reached a different verdict had the issue not occurred). This means the panel mistakenly included them in a cumulative error analysis, although we acknowledge it did not have *Waldschmidt*'s guidance. Even so, the panel erred in its analytical approach, and we overturn the reversal of Moore's conviction.

In his disagreements with the panel, Moore claims the evidence cannot support the aggravated kidnapping conviction and the panel should have reversed for that reason. He also urges us to decide an issue the panel avoided—whether the district court's non-PIK instruction, defining aggravated kidnapping's taking-or-confining element, was factually and legally appropriate. We reject all his arguments on the merits.

We reinstate Moore's aggravated kidnapping conviction and affirm the district court's judgment on the issues subject to review.

FACTUAL AND PROCEDURAL BACKGROUND

As a post-breakup conversation deteriorated into violence, Moore dragged M.M. into a garage, closed the door, ripped the door opener off the wall, and prevented her from leaving. She managed to escape, but he followed her, and a physical altercation ensued near the street. She suffered abrasions to her side, pain, and tears to her clothing. The State brought multiple charges against Moore. A jury found him guilty of aggravated kidnapping, criminal threat, and domestic battery; it also determined each crime was an act of domestic violence. The district court ordered him to serve a 123-month prison sentence.

Moore appealed the aggravated kidnapping conviction, arguing insufficient evidence of bodily harm. He also claimed instructional errors denied him a fair trial. The panel rejected the first

argument but reversed the conviction after mostly agreeing with the second claim. *Moore*, 2023 WL 4065032, at *7, 10. In so holding, it avoided deciding his contention that the district court improperly deviated from the PIK instructions to define aggravated kidnapping's taking-or-confining element over his objection.

The State petitioned for review of the panel's cumulative error analysis. Moore cross-petitioned its sufficiency determination and conditionally cross-petitioned on the non-PIK instruction. We granted review on all issues. 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).

SUFFICIENT EVIDENCE OF BODILY HARM

We start with the sufficiency question because if we agree with Moore, it requires his conviction's reversal no matter what we think about the panel's cumulative error analysis. See *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018) (noting if evidence from the first trial is insufficient to support conviction, retrying a defendant on the same charges would violate double jeopardy protections). As explained, we hold sufficient evidence supports the verdict.

Additional facts

Moore got "heated" during a post-breakup conversation, so M.M. briefly left her home to avoid arguing. She returned when his car was gone, but he came back and became threatening. She went outside, and Moore followed. He made physical contact she described as "being tackled."

He grabbed M.M.'s upper shoulder and arm and dragged her into the home's attached garage, causing abrasions to her sides and tears to her outer coat. He shut the overhead garage door. When she tried to keep it open, he shut it again. M.M. did not feel free to leave. Sometime during the altercation, Moore pulled the garage door opener off the wall. The garage has "four doors, two overhead, one that connects to the interior of the home and one that exits into the back yard." A piece of wood used as a locking device blocked the backyard door. The arguing continued.

At some point M.M. secretly dialed 911, resulting in a six minute and 14 second recording of what Moore said. While M.M. cried, he can be heard yelling:

"You're gonna die tonight. You ready?

. . . .

"If you don't talk to me, we're both gonna die.

. . . .

"Fuck you. I'm burning this whole house down tonight.

. . . .

"Either you talk to me and you die and I die, or it's just me dying.

. . . .

"Stop! Please! This is what I don't want! Don't do this! Please . . . just want you to talk to me! Please! You can walk away from me right now and just know that I'm going to be here dead. Ok, this will be the last time you talk to me."

M.M. asked to step outside, but Moore blocked her and pulled her back into the garage. Eventually, he let her out the door to the backyard, lifting the wooden barricade. She "tiptoe[d], being watchful of where he's at," trying to ensure he did not follow her. But he did through a different exit. She tried to get in her vehicle and lock the doors, but he jumped into the passenger seat first. She got out and ran across the yard towards the roadway. He chased after her, and another physical altercation ensued near the street. He grabbed her by the arms of her two coats and ripped the coats off, causing her pain.

An off-duty officer saw the confrontation and observed that as M.M. stood up and attempted to get away from Moore, he tried to shove her towards the street. The officer who took her report described her as "extremely distraught, very upset, she seem[ed] terrified." Her voice shook, and she sounded out of breath.

M.M.'s version of events softened at both the preliminary hearing and the trial. She thought the charges were too severe, and Moore's mother asked her to call the prosecutor's office to drop the charges. Before the jury, she testified Moore was a good person at heart and she still loved him.

When it came time to instruct the jury, the district court's aggravated kidnapping instruction stated:

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

"1. The defendant took or confined [M.M.] by force;
"2. The defendant did so with the intent to terrorize [M.M.];
"3. Bodily harm was inflicted on [M.M.];
"4. The act occurred on or about the 22nd day of January, 2021, in Sedgwick County, Kansas."

It did not define "bodily harm."

Standard of review

When a defendant challenges the evidence's sufficiency, an appellate court reviews the trial evidence in the light most favorable to the prosecution and decides whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Butler*, 317 Kan. 605, 608, 533 P.3d 1022 (2023). Here, we must also review applicable statutes. Statutory interpretation is a question of law, so our review is unlimited. *State v. Hambright*, 310 Kan. 408, 412, 447 P.3d 972 (2019).

Discussion

The panel held the evidence sufficiently showed bodily harm to sustain Moore's aggravated kidnapping conviction. *Moore*, 2023 WL 4065032, at *7. Moore attacks that view in two ways. First, he contends the panel improperly allowed the State to rely on both the dragging and the streetside altercation to establish bodily harm even though the latter was not part of the State's theory in the district court. Second, he argues the evidence fails to support the bodily harm element as a matter of law because our caselaw excludes trivial injuries likely to result from a simple kidnapping. We agree with the panel that the evidence sufficiently supports this conviction.

As to his first claim, Moore alleges the State's appellate argument should be confined to its trial theory that he says relied on M.M.'s abrasions from being dragged into the garage to establish bodily harm. He argues the State focused only on those abrasions to avoid a potential multiple acts problem by excluding the streetside clash, which he sees as a separate act.

To start, we reject his assumption that this is a multiple acts case. Incidents are factually separate when independent criminal acts occur at different times or when a fresh impulse motivates a later criminal act. *State v. Kesselring*, 279 Kan. 671, 683, 112 P.3d

175 (2005). In *Kesselring*, the court determined a kidnapping victim's momentary freedom after jumping out of the kidnapper's car did not create a multiple acts case because there was no new criminal impulse and the kidnapper's companion quickly returned the victim to the car. 279 Kan. at 682-83. The *Moore* panel correctly applied *Kesselring* to hold the incident here involved a continuous act, not separate ones. It explained:

"The facts viewed favorably to the State show that Moore took the victim to the garage and a short time later, with no meaningful passage of time or fresh impulse by Moore, then grabbed her when she was near the street. These two acts—taking the victim to the garage and trying to stop her from leaving—occurred close in time, close in location, and were both motivated by Moore's desire to talk to the victim about their relationship. Moore acted with the same impulse when he took the victim to the garage as when he tried to stop her by the street after she left the garage—and those were not separate criminal acts." *Moore*, 2023 WL 4065032, at *6.

Next, Moore incorrectly frames this as a restriction on the State's appellate theory when the issue is sufficiency. The question before us is whether any evidence presented to the jury demonstrated bodily harm when viewed in the light most favorable to the State. See *State v. Pepper*, 317 Kan. 770, 777, 539 P.3d 203 (2023) (providing evidence sufficiency only determines whether the evidence was strong enough to reach a jury by asking if a rational trier of fact could find the crime's essential elements beyond a reasonable doubt). At trial, the State introduced evidence of both "parts" of the incident and discussed them during closing arguments, even though it emphasized the dragging abrasions heavily. We consider all the evidence, including the streetside altercation, just as the jury did. Moore cannot cherry-pick the State's closing arguments to limit the sufficiency analysis on appeal.

Is there sufficient evidence of bodily harm?

Aggravated kidnapping is "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to inflict bodily injury or to terrorize the victim . . . *when bodily harm is inflicted upon the person kidnapped*." (Emphasis added.) K.S.A. 21-5408(a)(3) and (b). Moore argues M.M. only suffered trivial minor abrasions that cannot support bodily harm as a matter of law. Again, we disagree.

We begin by considering what the statute means by "bodily harm." See *State v. Boyer*, 289 Kan. 108, 109, 209 P.3d 705 (2009) ("Any analysis of a statute must start with the language of the statute itself."). The Kansas Criminal Code does not explicitly define the term, but its meaning is not so difficult to understand. Black's Law Dictionary defines bodily harm as "[p]hysical pain, illness, or impairment of the body." Black's Law Dictionary 861 (11th ed. 2019). And Merriam-Webster defines it as "any damage to a person's physical condition including pain or illness." Merriam-Webster Online Dictionary (defining bodily harm as bodily injury).

But instead of interpreting the statute based on its ordinary and common meaning, Moore urges us to apply the definition established by our precedent. In *State v. Brown*, 181 Kan. 375, 389, 312 P.2d 832 (1957), the court relied on legislative history and stated: "[A]ny touching of a victim against her will, with physical force, in an intentional, hostile and aggravated manner, or the projecting of such force against the victim by the kidnaper is 'bodily harm' within the meaning of the statute providing the death penalty if the person kidnaped suffered bodily harm." It reached that understanding by borrowing California law's definition because our Legislature had similarly strengthened the penalty for kidnapping causing bodily harm "as a result of an aroused public feeling." 181 Kan. at 386, 388-89.

Nearly 20 years later, *State v. Taylor*, 217 Kan. 706, 538 P.2d 1375 (1975), narrowed *Brown*'s definition to match California law's trivial injuries exclusion. The *Taylor* court explained:

> "[California] now recognizes that some 'trivial' injuries are likely to result from any forcible kidnapping by the very nature of the act. It concludes that insignificant bruises or impressions resulting from the act itself are not what the legislature had in mind when it made 'bodily harm' the factor which subjects one kidnapper to a more severe penalty than another. A significant policy reason for making the distinction is to deter a kidnapper from inflicting harm upon his victim, and to encourage the victim's release unharmed. It was, in that court's view, *only unnecessary acts of violence upon the victim, and those occurring after the initial abduction which the legislature was attempting to deter. Therefore, only injuries resulting from such acts would constitute 'bodily harm.*'" (Emphasis added.) 217 Kan. at 714.

The court then determined "[t]his refinement . . . fits within the limits of our own prior cases" and recognized rape in *Brown*

was bodily harm as an unnecessary, violent act not part of the kidnapping. 217 Kan. at 714. Applying this definition, it held throwing a child unable to swim into a river was bodily harm because it was intentional, hostile, and aggravated force applied outside a forcible kidnapping's scope. 217 Kan. at 714-15.

The most commonly cited case now defining bodily harm is *Royal*, although it just restates *Brown*'s general definition with *Taylor*'s trivial injuries exclusion. The Comment to PIK Crim. 4th 54.220 advises:

> "In *Royal*, the Supreme Court, relying on California cases noted a definition of 'bodily harm' to be 'any touching of the victim against the victim's will; with physical force, in an intentional, hostile and aggravated manner, or the projecting of such force against the victim by the kidnapper not including trivial injuries likely to result from any forcible kidnapping by the very nature of the act.' [Citation omitted.]"

The *Royal* court addressed two separate instructional issues for aggravated kidnapping. First, it considered the district court's failure to instruct on simple kidnapping as a lesser included offense. It carefully distinguished the case's facts, in which the defendant cut the victim with a knife, from a California case excluding minor cuts from an escape attempt: a scraped knee, nosebleeds, fainting, and stomach distress from bodily harm. *Royal*, 234 Kan. at 222 (citing *People v. Schoenfeld*, 111 Cal. App. 3d 671, 168 Cal. Rptr. 762 [1980]). Second, it examined the district court's failure to define bodily harm and held the omission was not error because "[t]he term is readily understandable and no instructional definition is . . . necessary," especially when bodily harm was uncontested. 234 Kan. at 223.

One may quibble whether our caselaw ignores the statute's plain meaning, but that is of little concern under the facts of Moore's case. We view the evidence in the light most favorable to the prosecution and hold a reasonable jury could find he caused M.M. bodily harm. There is no factual dispute she had physical injuries—she suffered abrasions and felt pain when Moore dragged her about 25 feet across pavement and grabbed her near the street. We hold sufficient evidence supports this aggravated kidnapping conviction.

THE PRESERVED JURY INSTRUCTION ISSUE

We turn next to Moore's jury instruction challenge not addressed by the panel. He notes Instruction No. 7—providing the caselaw definition of the taking-or-confinement element—was not a standard pattern instruction and was given over his objection. He argues the definition's addition was both legally and factually inappropriate. He claims it "watered down" the element's meaning. The challenged instruction provided:

"The 'taking or confinement' requires no particular distance or removal, nor any particular time or place of confinement. It is the taking or confinement that supplies the necessary element of kidnapping."

Standard of review

Our review is unlimited in deciding whether the complained-of instruction is legally appropriate. We determine whether the instruction was factually appropriate by viewing the evidence in the light most favorable to the requesting party, i.e., the prosecution. Upon a finding of error, we consider whether that error was harmless, using the degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 256 P.3d 801 (2011). *State v. Plummer*, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012).

Discussion

We begin with *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), because the record reflects its definition prompted the district court to give the challenged instruction. There, the defendants argued their conduct did not meet kidnapping's taking-or-confining element because their movement and confinement of the victims was minor and inconsequential. The court ultimately held their actions met the element because the statute requires "no particular distance of removal, nor any particular time or place of confinement. Under our present statute it is still the fact, not the distance, of a taking (or the fact, not the time or place, of confinement) that supplies a necessary element of kidnapping." 219 Kan. at 214.

In *State v. Smith*, 232 Kan. 284, 654 P.2d 929 (1982), the court weighed in on the same issue raised by Moore and upheld the in-

struction based on *Buggs*. In *Smith*, the defendant forced the victim to walk from her second-floor bedroom downstairs to his car, but she escaped before getting into the vehicle. As with Moore's taking-or-confining instruction, the *Smith* instruction stated:

"'In connection with the charge of Kidnapping, you are instructed that no particular distance of removal is required, nor any particular time or place of confinement. Under our law, it is the fact, not the distance of the taking, and the fact, not the time or place of confinement, that supplies the necessary element of Kidnapping.'" 232 Kan. at 290.

The *Smith* court concluded the challenged instruction was legally appropriate. 232 Kan. at 290. Likewise, the instruction Moore objected to is legally valid because it fairly and accurately states the law from *Buggs*. See *State v. Strong*, 317 Kan. 197, Syl. ¶ 1, 527 P.3d 548 (2023) (jury instructions are legally appropriate when they fairly and accurately state the applicable law).

Buggs defined "taking or confining" through statutory interpretation. See *State v. Fredrick*, 292 Kan. 169, 175, 251 P.3d 48 (2011) (when interpreting statutes, courts determine the meaning of plain and unambiguous language and do not read something into the statute that is not readily found in it). This definition of K.S.A. 21-5408(a)'s language remains binding precedent, even if *Buggs* incorrectly decided the separate point of law in defining "facilitate" under subsection (a)(2). See *State v. Butler*, 317 Kan. 605, 612, 533 P.3d 1022 (2023) ("[W]e do not lightly disapprove of precedent. Our court decided *Buggs* nearly five decades ago. And under the principle of stare decisis, unless clearly convinced otherwise, '"points of law established by a court are generally followed by the same court . . . in later cases"' to promote stability in the legal system. [Citations omitted.] The continuing validity of *Buggs* is not an issue briefed by the parties. Nor did we agree to consider it when we granted review. And perhaps most importantly, we need not revisit *Buggs* to resolve this appeal. So we save that question for another day."); *State v. Couch*, 317 Kan. 566, 600, 533 P.3d 630 (2023) (Stegall, J., dissenting) (criticizing *Buggs*' definition of "facilitate" for the court's failure to conduct a plain language analysis before considering other sources).

And a trial court may modify PIK instructions as the facts require. *State v. Bernhardt*, 304 Kan. 460, 470-72, 372 P.3d 1161

(2016). The deviation from the PIK was warranted because Moore only moved M.M. about 25 feet to the garage. Confinement was also at issue, and the jury even asked, "Can we hear [the responding officer's] statement regarding the description of back door upon arrival." Further, although the exact duration was unclear, the incident occurred briefly. The 911 call lasted just six minutes and 14 seconds.

Moore argues the given instruction risks misleading the jury because it must determine whether the State proved each element beyond a reasonable doubt, not whether the State presented minimally sufficient evidence. But his argument is nonsensical because a reasonable doubt standard has nothing to do with a jury instruction's factual appropriateness. See *Plummer*, 295 Kan. 156, Syl. ¶ 1.

Moore cites several cases as support, but none are persuasive. Both *State v. Nelson*, 223 Kan. 572, 574, 575 P.2d 547 (1978), and *State v. McKessor*, 246 Kan. 1, 10-11, 785 P.2d 1332 (1990), affirmed the district court declining to use *Buggs* to define taking or confining another *to facilitate the commission of another crime*. These cases pertain to facilitation under K.S.A. 21-5408(a)(2), not to terrorizing the victim under (a)(3). For that same reason, *State v. Brooks*, 222 Kan. 432, 435, 565 P.2d 241 (1977), is inapplicable although it considers evidence sufficiency, not jury instructions. Finally, Moore points to some California decisions, noting *Buggs* (and Kansas caselaw on kidnapping generally) favorably cites such cases. But *Buggs* declined to follow California law in defining taking or confining. 219 Kan. at 209-16.

An instruction is factually appropriate when sufficient evidence, viewed in the light most favorable to the requesting party, supports that instruction. *State v. Stafford*, 312 Kan. 577, 581, 477 P.3d 1027 (2020). Here, the State presented evidence Moore dragged M.M. into the garage (taking) and prevented her from leaving for a short time (confinement). Although Moore points to a jury question about the condition of the door M.M. eventually escaped through, the evidence still shows he took and confined the victim when viewed in the light most favorable to the State.

We hold the district court did not err in giving the non-PIK instruction over Moore's objection as it defined taking or confining properly under Kansas law and was factually appropriate.

THE UNPRESERVED JURY INSTRUCTION ISSUES

Turning to the State's issue on review, it argues the panel improperly aggregated two unpreserved jury instruction issues without first finding clear error and then wrongly concluded their cumulative effect denied Moore a fair trial. We agree with the State, although our rationale relies on *State v. Waldschmidt*, 318 Kan. 633, Syl. ¶ 9, 546 P.3d 716 (2024), released after the panel decided Moore's appeal.

Additional facts

Moore claimed for the first time on appeal the district court failed to instruct on bodily harm's definition and omitted specific intent to hold the victim from the instruction. For convenience, recall the instruction stated:

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

"1. The defendant took or confined [M.M.] by force;
"2 The defendant did so with the intent to terrorize [M.M.];
"3. Bodily harm was inflicted on [M.M.];
"4. The act occurred on or about the 22nd day of January, 2021, in Sedgwick County, Kansas."

All agree this instruction does not define bodily harm and is missing language from the pattern instructions. Moore correctly notes the second element should have stated: "The defendant did so with the intent *to hold* [M.M.] . . . to terrorize [M.M.]." (Emphasis added.) See PIK Crim. 4th 54.220 (2019 Supp.). But at trial he did not object to the given instruction.

The panel agreed with Moore on both points. *Moore*, 2023 WL 4065032, at *8-9. But it did not decide whether either issue amounted to clear error before moving into its cumulative error analysis. The panel merely held the "two errors are so related and entwined as to create substantial prejudice to Moore and deny him a fair trial." 2023 WL 4065032, at *10.

Before oral argument, we ordered the parties to be prepared to discuss whether unpreserved instructional issues that are not clearly erroneous can be included in a cumulative error analysis under K.S.A. 22-3414(3). Shortly after argument, we released our decision in *Waldschmidt*, and the State filed a notice of additional authority asking us to apply *Waldschmidt*. See Supreme Court Rule 6.09(a)(2) (2024 Kan. S. Ct. R. at 40). Moore responded, acknowledging *Waldschmidt* impacts our analysis.

Discussion

The panel failed to consider whether each unpreserved instructional issue was clearly erroneous. K.S.A. 22-3414(3) expressly states, "No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires . . . *unless the instruction or the failure to give an instruction is clearly erroneous*." (Emphasis added.) This means a party may not claim an unpreserved issue as error without a clear error determination. *Waldschmidt*, 318 Kan. at 659-63. Even so, the panel's analytical approach was wide of the mark regardless of *Waldschmidt* when it incorrectly described its review standard as:

"This court will find clear error only when it is firmly convinced the jury would have reached a different verdict absent the erroneous instruction. *Crosby*, 312 Kan. at 639. However, when the court finds multiple errors that cumulatively affect the trial—even when none of the errors alone constitute clear error—the standard for reversal changes. In the case of multiple, cumulative errors, this court must determine 'whether the totality of the circumstances substantially prejudiced the defendant and denied that defendant a fair trial.' See *Taylor*, 314 Kan. at 173 (finding cumulative error where five errors were identified, requiring reversal)." *Moore*, 2023 WL 4065032, at *10.

In citing *State v. Taylor*, 314 Kan. 166, 496 P.3d 526 (2021), which did not include an instructions challenge, and conducting its analysis as it did without considering each error's individual impact, the panel failed to appreciate its errors involved unpreserved instructional issues subject to K.S.A. 22-3414(3).

Failure to define bodily harm

At trial, Moore did not request the definition instruction. On review, the State does not challenge the panel's holding that the instruction should have been given, so the remaining question is

whether the failure to define bodily harm was clear error. See *State v. Jarmon*, 308 Kan. 241, Syl. ¶ 1, 419 P.3d 591 (2018) ("When an instructional error was not raised in the district court and is asserted for the first time on appeal, failing to give a legally and factually appropriate instruction will result in reversal only if the failure was clearly erroneous."). Clear error exists when the court is firmly convinced the outcome would have been different had the instruction been given. Moore bears the burden to establish that, and this court's review is de novo based on the entire record. See *State v. Bentley*, 317 Kan. 222, 242, 526 P.3d 1060 (2023).

Relying on his sufficiency argument, Moore believes a properly instructed jury would have acquitted him of aggravated kidnapping because bodily harm requires more than trivial injuries. But we already concluded sufficient evidence supports the bodily harm element because Moore dragged M.M. across the pavement, scraping her sides, and grabbed her near the street, causing her pain. Given that, we are not firmly convinced the outcome would have been different.

The omitted specific-intent-to-hold instruction

Similarly, we need only resolve whether the district court clearly erred in omitting the specific-intent-to-hold element because Moore did not request it at trial and the State does not contest that the missing language should have been given. See *Jarmon*, 308 Kan. 241, Syl. ¶ 1.

Moore begins by asking us to adopt a more stringent constitutional harmless error standard from *State v. Richardson*, 290 Kan. 176, 224 P.3d 553 (2010) (adopting *Neder v. United States*, 527 U.S. 1, 9-10, 119 S. Ct. 1827, 144 L. Ed. 2d 35 [1999]), instead of the clear error framework in *Jarmon*, 308 Kan. at 244 (providing clear error "applies with equal force when the defendant fails to object to an instruction that omits an element of a crime"). He argues *Jarmon* did not overrule *Richardson*. But we reject his suggestion. For one, this court updated its standard of review for jury instruction issues in *Plummer*, 295 Kan. 156, Syl. ¶ 1, well after *Richardson*. For another, the *Jarmon* court implicitly addressed *Richardson* when it found the clear error framework adheres to *Neder*. See *Jarmon*, 308 Kan. at 244; *Richardson*, 290 Kan. at 182-83 (adopting *Neder*'s framework). We hold clear error analysis

remains the standard. See *State v. Jones*, 313 Kan. 917, 927, 492 P.3d 433 (2021) ("In the absence of a contemporaneous objection, the failure to include an essential element of the crime in jury instructions is still reviewed for clear error.").

Moving on to apply the clear error standard, Moore's bare assertion is that "[M.M.] testified that [Moore] never stopped her from leaving the garage." But that ignores how he dragged her into the garage, immediately closed the door, and prevented her from reopening it. And she told officers she did not feel free to leave. She testified otherwise only after discovering the charges and their severity. This evidence does not firmly convince us the jury would have issued a different verdict had a complete instruction been given.

Cumulative error analysis by the panel

Interpreting K.S.A. 22-3414(3), the *Waldschmidt* court concluded that "[n]o party may claim as error the giving or failing to give an instruction unless (1) that party objects by stating a specific ground or (2) the instruction or failure to give an instruction is clearly erroneous." *Waldschmidt,* 318 Kan. at 660. Accordingly, "[w]hen no clear error occurs with an unpreserved instructional issue, there is no error to aggregate." 318 Kan. at 661. Since neither unpreserved instructional issue meets the clear error standard, the statute provides Moore cannot claim them as error in a cumulative error analysis. The panel erred by considering them as it did.

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

* * *

STEGALL, J., concurring: I concur in the result. I cannot join the majority opinion because it cites and relies on the statutory analysis contained in our flawed *Buggs* decision. *State v. Buggs*, 219 Kan. 203, 215, 547 P.2d 720 (1976). As I have previously argued, *Buggs* should be overruled. *State v. Couch*, 317 Kan. 566, 604, 533 P.3d 630 (2023) (Stegall, J., dissenting).

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

No. 125,672

M & I MARSHALL & ILSLEY BANK, *Appellee*, v. KEVIN HIGDON and GRETCHEN HIGDON, *Appellants*, v. EQUITY BANK, *Appellee/Garnishee*.

(556 P.3d 498)

SYLLABUS BY THE COURT

1. CONFLICT OF LAWS—*Resolution of Conflict-of-Laws Issue—Appellate Review.* Resolution of a conflict-of-laws issue involves a question of law over which appellate courts exercise unlimited review.

2. SAME—*Resolution of Conflict-of-Laws Issue—Restatement Followed by Appellate Courts.* When addressing choice of law issues, Kansas appellate courts traditionally follow the Restatement (First) of Conflict of Laws (1934).

3. SAME—*Choice-of-Law Analysis under Restatement—Law of Forum State to Determine if Substantive or Procedural Issue*. A choice-of-law analysis under the Restatement (First) of Conflict of Laws begins by looking to the law of the forum state to determine whether a given issue is substantive or procedural. All procedural matters are governed by the law of the forum state. If a substantive matter, the category of substantive law will control what law is applied, as different rules apply to different legal categories.

4. HUSBAND AND WIFE—*Joint Ownership of Real or Personal Property by Husband and Wife in Missouri—Presumption of Tenancy by Entirety Created*. In Missouri, joint ownership of real or personal property by husband and wife creates a presumption of a tenancy by the entirety. Because the interest in a tenancy by the entirety cannot be divided, a judgment against either the husband or the wife alone may not attach to property held as a tenancy by the entirety.

5. SAME—*Tenants in Common or Joint Tenants with Rights of Survivorship of Property in Kansas—Tenancy by Entirety Not Recognized in Kansas.* Property in Kansas may be jointly owned as tenants in common or as joint tenants with rights of survivorship. Kansas does not recognize tenancy by the entirety as a form of property ownership. A joint tenant's ownership is severable for meeting the demands of creditors.

6. SAME—*Under Facts of this Case Issue of Bank Account Ownership Opened in Missouri Is Substantive Issue for Choice of Law Analysis—Property Ownership Issue.* Under the facts of this case, the issue of whether a husband and wife owned property in a bank account opened in the state of Missouri, as tenants by the entirety, such that judgment against either the husband or the wife alone may not attach to the property, or as joint tenants with right of survivorship when garnishment occurs in the state of Kansas,

which is severable to meet the demands of creditors, was not a procedural issue controlled by laws of the forum state but was a substantive issue for purposes of choice-of-law analysis. This issue related to property ownership, rather than contracts, when resolving a conflict-of-laws question.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 668, 536 P.3d 898 (2023). Appeal from Johnson District Court; PAUL C. GURNEY, judge. Oral argument held May 8, 2024. Opinion filed September 27, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded with directions.

Kristopher C. Kuckelman, of Payne & Jones, Chartered, of Overland Park, argued the cause, and was on the briefs for appellants.

Ashlyn Buck Lewis, of Lewis Rice LLC, of Kansas City, Missouri, argued the cause, and *Louis J. Wade*, of the same firm, was with her on the briefs for appellee M & I Marshall & Ilsley Bank.

The opinion of the court was delivered by

STANDRIDGE, J.: Kevin and Gretchen Higdon challenge the Court of Appeals decision to affirm the district court's denial of their motion to quash garnishment of a jointly owned bank account to satisfy a judgment obtained by M & I Marshall & Ilsley Bank against Kevin. In support of its decision, the Court of Appeals panel construed the conflict-of-laws question as one requiring application of Kansas procedural law to determine what types of assets are exempt from attachment in a garnishment case. But the panel's focus on the cause of action before the district court was misplaced and failed to address the actual conflict at issue—the form of ownership of the Higdons' bank account, a substantive property issue. Because the ownership interest was created in Missouri, the First Restatement of Conflict of Laws favors application of Missouri law. And because the Higdons' account is considered a tenancy by the entirety under Missouri law, M & I Bank cannot use its judgment against Kevin to garnish the account. For these reasons, we reverse and remand to the district court with directions to pay the garnished funds to the Higdons.

FACTS

In 2009, Kevin and Gretchen were married and have since continuously resided in Missouri. In 2009 or 2010, they opened an account at Adams Dairy Bank, which was located exclusively in

Missouri. The Higdons signed the account agreement in Missouri. The agreement identified Kevin or Gretchen as the account owners and listed the ownership type as "Joint (Right of Survivorship)."

In October 2010, the circuit court in Jackson County, Missouri, entered a consent judgment in favor of M & I Bank and against Kevin and other defendants, jointly and severally, for a total sum of $552,487.18. Gretchen was not a named defendant in the judgment.

Adams Dairy Bank later merged into Equity Bank, which has locations in Kansas.

In April 2017, M & I Bank registered its Missouri judgment in Kansas with the Johnson County District Court. The court issued an order for garnishment that was served on Stanley Bank, but it is unclear from the record whether any garnishment occurred at that time.

In March 2022, M & I Bank renewed its judgment under K.S.A. 60-2403 in the Johnson County District Court and filed a request seeking to garnish Kevin's account at Equity Bank. The court issued an order of garnishment that was served on Equity Bank in Kansas. In response to the garnishment order, Equity Bank declared that it held $388,911.12 in an account belonging to Kevin.

The Higdons moved to quash the garnishment, alleging Missouri substantive law should apply because they signed the contract entering into the account agreement in Missouri. The Higdons claimed that under Missouri law, their bank account was exempt from attachment because it was owned by Kevin and Gretchen as husband and wife in a tenancy by the entirety. In the alternative, the Higdons argued that if Kansas law applied, M & I Bank's garnishment could only attach to Kevin's half of the account's funds.

In response, M & I Bank argued that even if Missouri substantive law applied to determine ownership of the Higdons' account, the judgment against Kevin was properly registered in Kansas and was subject to all enforcement mechanisms available under Kansas law. To that end, M & I Bank claimed Kansas procedural law

dictates the Higdons' bank account was not exempt from garnishment because Kansas does not recognize property ownership held in a tenancy by the entirety. As a result, M & I Bank asserted it was entitled to the portion of the account owned by Kevin.

After considering the arguments and evidence summarized above, the district court denied the Higdons' motion to quash. Characterizing the issue as a procedural matter related to classification of property for attachment purposes, the court applied Kansas law. Because Kansas does not recognize tenancy by the entirety, the district court held "the subject garnishment can attach to the Higdons' joint bank account because Kansas property classification would find that the bank account held as joint tenants with the right of survivorship rather than tenants in the entirety, and judgment creditors can recover money from joint bank accounts."

On appeal, the Higdons argued the district court improperly applied Kansas procedural law to classify the account. They claimed that under the applicable Missouri substantive law, the funds in the account were not subject to garnishment. *M & I Marshall & Ilsley Bank v. Higdon*, 63 Kan. App. 2d 668, 673, 536 P.3d 898 (2023). A Court of Appeals panel disagreed and affirmed the district court, holding Kansas law applied to allow garnishment of the Higdons' account. 63 Kan. App. 2d at 681.

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

ANALYSIS

The Higdons argue the Court of Appeals mischaracterized the conflict-of-laws issue here as one involving an application of procedural law to determine what types of assets are exempt from attachment in a garnishment case. They contend the issue instead implicates the form of ownership of the bank account, which requires interpretation of the account agreement—a question of substantive contract law. Applying Missouri law, the Higdons maintain the entire account is not subject to garnishment because they own it as a tenancy by the entirety.

Resolution of a conflict-of-laws issue involves a question of law over which appellate courts exercise unlimited review. See *Kipling v. State Farm Mutual Automobile Insurance Co.,* 774 F.3d 1306, 1310 (10th Cir. 2014); *Raskin v. Allison*, 30 Kan. App. 2d 1240, 1241, 57 P.3d 30 (2002).

1. *Overview and relevant legal framework*

When addressing choice of law issues, Kansas appellate courts traditionally follow the Restatement (First) of Conflict of Laws (1934). *In re K.M.H.*, 285 Kan. 53, 60, 169 P.3d 1025 (2007); *ARY Jewelers v. Krigel*, 277 Kan. 464, 481, 85 P.3d 1151 (2004). Under this approach, the forum state first decides whether a given question is one of substance or procedure and then selects the law of a jurisdiction based on the location of a certain event. See Restatement (First) of Conflict of Laws § 332 (setting forth *lex loci contractus*, i.e., the law of the state where the contract is made governs); § 378 (tort claims governed by law of the state where injury occurred). Kansas is one of a minority of states that continues to follow the First Restatement. See Symeonides, *Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey*, 69 Am. J. Comp. L. 177, 189 & n.39 (2021) (listing Kansas as one of nine states that continues to follow the First Restatement). Most states have adopted all or part of the principles of the Second Restatement, which usually requires weighing and balancing various broad interests and policies when making choice-of-law decisions. See Restatement (Second) of Conflict of Laws (1971).

Notwithstanding this tradition, Kansas appellate courts have cited the Restatement (Second) of Conflict of Laws with approval at times. See, e.g., *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 483-84, 509 P.3d 1211 (2022) (quoting § 18: requisite intent to acquire a domicil and § 20: domicil of person having two dwelling places); *Padron v. Lopez*, 289 Kan. 1089, 1101, 220 P.3d 345 (2009) (quoting § 107: non-final judgment); *Vanier v. Ponsoldt*, 251 Kan. 88, 103, 833 P.2d 949 (1992) (quoting § 129: mode of trial); *Farha v. Signal Companies, Inc.*, 216 Kan. 471, 481, 532 P.2d 1330 (1975) (stating agreement with § 52: foreign corporations—other relationships); *Master Finance Co. of Texas*

v. Pollard, 47 Kan. App. 2d 820, 826-27, 283 P.3d 817 (2012) (quoting § 99: methods of enforcement); *In re Adoption of Baby Boy S.*, 22 Kan. App. 2d 119, 126, 912 P.2d 761 (1996) (citing § 289: law governing adoption); *In re Estate of Phillips*, 4 Kan. App. 2d 256, 263-64, 604 P.2d 747 (1980) (citing § 18: requisite intent to acquire a domicil).

But this court has not signaled that it intends to abandon the First Restatement. See, e.g., *In re K.M.H.*, 285 Kan. at 60 (applying First Restatement to contract dispute); *Brenner v. Oppenheimer & Co.*, 273 Kan. 525, 540, 44 P.3d 364 (2002) ("'Kansas follows the *lex loci* rule, not the 'most significant relationship' rule'" in the Second Restatement.); *Ling v. Jan's Liquors*, 237 Kan. 629, 634, 703 P.2d 731 (1985) ("[T]he law of the state where the tort occurred—*lex loci delicti*—should apply.").

A choice-of-law analysis begins by looking to the law of the forum state to determine whether a given issue is substantive or procedural. See Restatement (First) of Conflict of Laws § 584. The line between substance and procedure is not always clear. Substantive law is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties." Black's Law Dictionary 1729 (11th ed. 2019). On the other hand, procedural law is "[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves." Black's Law Dictionary 1457 (11th ed. 2019); see Restatement (First) of Conflict of Laws § 585, comment a ("Matters of procedure include access to courts, the conditions of maintaining or barring action, the form of proceedings in court, the method of proving a claim, the method of dealing with foreign law, and proceedings after judgment.").

In deciding whether an issue is substantive or procedural, the First Restatement creates an expectation that the "court will examine the entire transaction which is before it. This includes the statute or other rule of law creating the alleged right or duty, and its interpretation thereof by the courts of that state." Restatement (First) of Conflict of Laws § 584, comment b. The characterization of an issue as either substantive or procedural is critical to deciding which state law applies to the legal issue presented. All proce-

dural matters are governed by the law of the forum state. Restatement (First) of Conflict of Laws § 585. If a substantive matter, the category of substantive law will control what law is applied, as different rules apply to different legal categories. See Restatement (First) of Conflict of Laws § 332 (setting forth *lex loci contractus*, i.e., the law of the state where the contract is made governs); § 378 (tort claims governed by law of the state where injury occurred).

2. *Conflicting Missouri and Kansas law*

The parties and the courts below agree that the conflict-of-laws issue before us involves how ownership of the Higdons' bank account is classified. The account agreement lists Kevin and Gretchen as owners of the account and describes the account type as "Joint (Right of Survivorship)." The Higdons' ownership of the account is classified differently under Missouri and Kansas law.

In Missouri, joint ownership of real or personal property by husband and wife creates a presumption of a tenancy by the entirety. *Hanebrink v. Tower Grove Bank & Trust Co.*, 321 S.W.2d 524, 527 (Mo. App. 1959); see *Wehrheim v. Brent*, 894 S.W.2d 227, 229 (Mo. App. 1995). A bank account is personal property that may be held in a tenancy by the entirety. See Mo. Rev. Stat. § 362.470.5 ("Any deposit made in the name of two persons or the survivor thereof who are husband and wife shall be considered a tenancy by the entirety unless otherwise specified."); *Scott v. Union Planters Bank*, 196 S.W.3d 574, 577 (Mo. App. 2006) ("'It is well established at common law that there can be an estate by the entirety in a bank account.'") (quoting *Brown v. Mercantile Bank*, 820 S.W.2d 327, 336 [Mo. App. 1991]).

"'A tenancy by the entirety, which exists only between a husband and wife, is based on the common law fiction that the husband and wife hold property as one person.'" *Scott*, 196 S.W.3d at 577; see *Wehrheim*, 894 S.W.2d at 228-29 ("Where property is owned in tenancy by the entireties, each spouse . . . owns an undivided interest in the whole of the property and no separate interest."); Black's Law Dictionary 1768 (11th ed. 2019) (defining tenancy by the entirety as "[a] common-law estate in which each spouse is seised of the whole of the property"). Because the interest in a tenancy by the entirety cannot be divided, a judgment

against either the husband or the wife alone may not attach to property held as a tenancy by the entirety. See *Hanebrink*, 321 S.W.2d at 527 ("[W]here a judgment and execution are against the husband alone such judgment cannot in any way affect property held by the husband and wife in the entirety. Neither can it affect any supposed separate interest of the husband, for he has no separate interest.").

Missouri's presumption of tenancy by the entirety is rebuttable by evidence that is "so strong, clear, positive, unequivocal and definite as to leave no doubt in the trial judge's mind." *Beamon v. Ross*, 767 S.W.2d 580, 582 (Mo. App. 1988); see *Nelson v. Hotchkiss*, 601 S.W.2d 14, 20 (Mo. 1980) ("The presumption that a conveyance to husband and wife creates an estate by the entirety may be overcome only by a clear and express declaration."); *Scott v. Flynn*, 946 S.W.2d 248, 251 (Mo. App. 1997) ("[A]bsent a specific disclaimer that the account is not being held as tenants by the entirety, an account card signed by a husband and wife as joint tenants with right of survivorship must be considered a tenancy by the entirety."). Here, the parties do not attempt to rebut the presumption that under Missouri law, the Higdons' account is a tenancy by the entirety.

Unlike Missouri, Kansas no longer recognizes tenancy by the entirety as a form of property ownership. See *Stewart v. Thomas*, 64 Kan. 511, 514-15, 68 P. 70 (1902); *Walnut Valley State Bank v. Stovall*, 1 Kan. App. 2d 421, 426, 566 P.2d 33 (1977), *rev'd on other grounds by* 223 Kan. 459, 574 P.2d 1382 (1978). Property in Kansas may be jointly owned as tenants in common or as joint tenants with rights of survivorship. Tenancy in common is defined as "tenancy by two or more persons, in equal or unequal undivided shares, each person having an equal right to possess the whole property but no right of survivorship." Black's Law Dictionary 1769 (11th ed. 2019). A joint tenancy "differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share." Black's Law Dictionary 1767 (11th ed. 2019).

Kansas law presumes that when two individuals hold property together, a tenancy in common is created unless the language used "makes it clear that a joint tenancy was intended to be created." K.S.A. 58-501; *Robertson v. Ludwig*, 244 Kan. 16, 19, 765 P.2d

1124 (1988). A joint tenant's ownership is severable for meeting the demands of creditors. See *Walnut Valley State Bank v. Stovall*, 223 Kan. 459, 464, 574 P.2d 1382 (1978) ("[A] garnishment upon a joint tenancy bank account severs the joint tenancy, creating a tenancy in common."). Equal ownership between joint tenants is presumed but is rebuttable. 223 Kan. at 464. Here, the parties do not rebut the presumption that under Kansas law, Kevin and Gretchen share equal ownership of the account as joint tenants with rights of survivorship.

In sum, M & I Bank's ability to garnish the Higdons' bank account depends on which state's law applies. Under Missouri law, M & I Bank cannot garnish the tenancy by the entirety account because its judgment is against Kevin alone. But under Kansas law, M & I Bank can garnish Kevin's half of the joint tenancy account.

3. *Conflict analysis*

3.1 *The panel's conflict analysis*

In its conflict-of-laws analysis, the Court of Appeals panel considered whether Kansas or Missouri law applied to determine whether the Higdons owned their joint bank account as tenants by the entirety or as joint tenants. The panel focused its analysis on deciding whether the bank account ownership issue is more properly characterized as a matter arising out of contract or a garnishment action. The Higdons argued the issue arose out of a contract dispute under which Missouri substantive law would apply. *M & I Bank*, 63 Kan. App. 2d at 676-79; see *In re K.M.H.*, 285 Kan. at 60 (In conflict-of-laws cases involving contractual disputes, Kansas courts apply the First Restatement; the law of the state where the contract is made governs.).

The panel rejected the Higdons' argument, finding the issue did not involve a contract dispute or an action to enforce a judgment, so Missouri substantive law did not apply. Instead, the panel held Kansas law applied because it was filed as a garnishment action, which is "a remedial procedural statutory vehicle that may be used as an aid to collect a judgment." *M & I Bank*, 63 Kan. App. 2d at 677; see K.S.A. 2023 Supp. 60-731(a) ("As an aid to the collection of a judgment, an order of garnishment may be obtained

at any time after 14 days following judgment."); K.S.A. 2023 Supp. 61-3504(a) (same); Restatement (First) of Conflict of Laws § 600 ("The law of the forum determines matters pertaining to the execution of a judgment, and what property of a judgment defendant within the state is exempt from execution and on what property within the state execution can be levied, and the priorities among competing execution creditors.").

Noting that Kansas exemption statutes apply to determine what type of assets are exempt from attachment, the panel held: "The substantive Missouri decisional law has the same effect as a statutory garnishment exemption not recognized in Kansas. The account agreement under Missouri law, by creating a tenancy by the entirety, places the subject funds beyond the reach of a Kansas garnishment, working as a de facto exemption." *M & I Bank*, 63 Kan. App. 2d at 679. The Court of Appeals panel concluded the district court correctly applied Kansas law to find that the Higdons' account created a joint tenancy rather than a tenancy by entirety and that Kevin's half of the account was subject to garnishment by M & I Bank. 63 Kan. App. 2d at 681.

But the panel's focus on the cause of action before the district court was misplaced and failed to address the actual conflict at issue, which is neither contractual nor related to the garnishment procedure. The panel's suggestion that applying Missouri law to create a tenancy by the entirety account creates a de facto exemption from garnishment under Kansas law is flawed because the conflict at issue does not involve what classifications of property are subject to or exempt from attachment. Rather, the question we must decide is whether the Higdons own the bank account as a tenancy by the entirety or as joint tenants. The form of the Higdons' property interest in the account is a substantive issue. See *Halley v. Barnabe*, 271 Kan. 652, 663, 24 P.3d 140 (2001) (substantive laws establish the rights and duties of parties).

The Missouri Court of Appeals addressed a similar conflict-of-laws question in

Farmers Exchange Bank v. Metro Contracting Services, Inc., 107 S.W.3d 381 (Mo. App. 2003). There, the court considered whether Missouri or Kansas law applied in determining whether judgment debtors held a writ of attachment on a promissory note

as tenants by the entirety or as tenants in common where the judgment debtors acquired their interest in the note while Kansas residents. 107 S.W.3d at 386-87. The court explained:

"[T]he question posed here is not what classifications of property are subject to attachment, but whether the Eaton note was properly classified as being held by the Russells as tenants by the entirety or tenants in common, the former, unlike the latter, not being subject to attachment in this state. In other words, the conflict of laws question presented is not a question of what classifications of personal property are subject to attachment and execution, which would be governed by the laws of the forum state as a matter of procedure, but a question of how the appellant's interest in the Eaton note is classified. And, thus, because issues of one's rights and duties are substantive issues, as opposed to procedural issues which relate to enforcement of those rights and duties, the issue in our case as to whether the Eaton note proceeds were subject to attachment and execution is not a procedural issue controlled by the laws of the forum state, as the appellant contends, but a substantive issue." *Farmers Exchange Bank*, 107 S.W.3d at 391.

Finding that the judgment debtors' interest in the note proceeds was properly classified as a property interest, the court applied Missouri's conflict-of-laws doctrine for property under the Second Restatement. Under § 258—titled "Interests in Movables Acquired during Marriage"—the domicile state at the time movable personal property was acquired controls. Restatement (Second) of Conflict of Laws § 258. As a result, the court found Kansas law applied to determine the judgment debtors' interest in the note. *Farmers Exchange Bank*, 107 S.W.3d at 392-94.

The panel acknowledged the holding in *Farmers Exchange Bank*: "Using that same law, Missouri law would apply here, assuming it was the domicile state for the Higdons when they acquired the movable property placed into their bank account." *M & I Bank*, 63 Kan. App. 2d at 680. But the panel ultimately found the decision unpersuasive because "Kansas does not apply the Second Restatement"; instead, "[t]he Kansas Supreme Court relies on the First Restatement of Conflict of Laws." 63 Kan. App. 2d at 680.

We are not persuaded by the panel's reasons for discounting the analysis in *Farmers Exchange Bank*, largely because the Missouri court's logic in determining whether the conflict-of-laws question was procedural or substantive is separate from its application of the Second Restatement. The question at issue there is nearly identical to the one presented here.

3.2 *Application of the First Restatement*

Applying the First Restatement to the substantive issue here, we look to its relevant property law provisions.

Section 291 states:

> "Interests in movables acquired by either or both of the spouses in one state continue after the movables have been brought into another state until the interests are affected by some new dealings with the movables in the second state." Restatement (First) of Conflicts of Laws § 291.

Section 292 states:

> "Movables held by spouses in community continue to be held in community when taken into a state which does not create community interests." Restatement (First) of Conflicts of Laws § 292.

The illustration in section 292 states:

> "A and B, husband and wife, acquire chattels while domiciled in state X, by the law of which they hold the chattels in community. They take the chattels to state Y which has no provisions for community holding. The chattels are there attached by a creditor of the husband. The validity of the attachment is determined by the law of Y with regard to the attachment of property owned in common for a debt of one of the owners." Restatement (First) of Conflicts of Laws § 292.

Thus, under the traditional approach of the First Restatement, the Higdons' Missouri tenancy by the entirety bank account continues to be held in a tenancy by the entirety in Kansas, regardless of whether Kansas recognizes the undivided spousal property interest. See Restatement (First) of Conflicts of Laws §§ 291-92. And because Kansas garnishment proceedings are a procedural mechanism to enforce rights already determined by substantive law, it is not a "new dealing" that affected the Higdons' property interest. See Restatement (First) of Conflicts of Laws § 291.

Finally, and consistent with the illustration following Restatement (First) of Conflicts of Laws § 292, the validity of the garnishment procedure (which prescribes the steps for having a right or duty judicially enforced) is governed by the law of Kansas, the forum state in which the garnishment proceeding is pending. See Restatement (First) of Conflict of Laws § 585, comment a ("Matters of procedure include access to courts, the conditions of maintaining or barring action, the form of proceedings in court, the

method of proving a claim, the method of dealing with foreign law, and proceedings after judgment."). But the conflict-of-laws question here—the form of ownership of the Higdons' bank account—is a substantive property issue governed by Missouri law.

4. *Conclusion*

Because the ownership interest was created in Missouri, the First Restatement favors application of Missouri law. Under Missouri law, the Higdons' bank account is considered a tenancy by the entirety. Although Kansas, as the forum state, governs the garnishment procedure, see Restatement (First) of Conflict of Laws § 585, no garnishment can occur here because M & I Bank's judgment against Kevin cannot attach to the Higdons' tenancy by the entirety bank account.

Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded with directions to pay the garnished funds to the Higdons.

No. 124,601

STATE OF KANSAS, *Appellee*, v. KIMBERLEY S. YOUNGER, *Appellant*.

(556 P.3d 838)

SYLLABUS BY THE COURT

1. TRIAL—*Confrontation Clause Violation—Harmless Error Analysis*. A violation of the Sixth Amendment Confrontation Clause is subject to harmless error analysis.

2. SAME—*Cross-Examination Essential to Fair Trial*. The opportunity to conduct cross-examination is essential to a fair trial and helps assure the accuracy of the truth-determination process.

3. SAME—*An Exception to Right to Face-to-face Confrontation—Individualized Determination by Judges to Meet Constitutional Requirements.* In order to meet constitutional requirements, judges must make individualized determinations that an exception to the right to face-to-face confrontation is necessary to fulfill other important policy needs.

4. EVIDENCE—*Statements by Defendant in Custody Must Be Voluntary to Be Admissible.* To be admissible as evidence, statements by a defendant who is in custody and subject to interrogation must be voluntary and, in general, made with an understanding of the defendant's constitutional rights.

5. CRIMINAL LAW—*Statements Made in Custodial Interrogation Excluded under Fifth Amendment—Exception if Procedural Safeguards and* Miranda *Warnings.* Statements made during a custodial interrogation must be excluded under the Fifth Amendment to the United States Constitution unless the State demonstrates it provided procedural safeguards, including *Miranda* warnings, to secure the defendant's privilege against self-incrimination.

6. SAME—*Custodial Interrogation—Triggers Procedural Safeguards*. Procedural safeguards concerning self-incrimination are triggered when an accused is in custody and subject to interrogation.

7. SAME—*Custodial Interrogation—Invocation of Right to Counsel Any Time by Suspect.* A suspect may invoke the right to counsel at any time by making, at a minimum, some statement that could be reasonably construed as an expression of a desire for the assistance of an attorney during a custodial interrogation.

8. SAME—*Invocation of Right to Counsel by Suspect—No Further Questioning unless Knowing and Intelligent Waiver of Right.* Once a suspect has invoked the right to counsel, there may be no further questioning unless the suspect both initiates

further discussions with the police and knowingly and intelligently waives the previously asserted right.

9. SAME—Miranda *Warnings Required before Custodial Interrogation.* The procedural safeguards of *Miranda* are not required when a suspect is simply taken into custody; they only begin to operate when a suspect in custody is subjected to interrogation.

10. EVIDENCE—*If Law Enforcement Officers Do Not Prompt Spontaneous Statements—No Basis for Finding Subtle Compulsion*. When law enforcement officers say nothing to prompt spontaneous statements from a suspect, there is no basis for finding even subtle compulsion.

11. SAME—*Statements Freely and Voluntarily Given—Admissible in Evidence*. Statements that are freely and voluntarily given without compelling influences are admissible in evidence.

12. CRIMINAL LAW—*Reminder to Accused that Attorney Might Intervene to Stop Interview—No Proof of Coercion.* Reminding an accused person that an attorney might intervene to stop them from speaking with investigators is not proof of coercion and does not constitute an impermissible extension of the interview.

13. SAME—*Accused Person's Request for Counsel Prevents Further Interrogation—Exception.* Once an accused person has expressed a desire to deal with police only through counsel, they may not be subject to further interrogation by the authorities until counsel has been made available, unless the accused person initiates further communication, exchanges, or conversations with the police.

14. SAME—*Accused's Request for Counsel—Accused May Change Mind and Talk to Police without Counsel.* Even after requesting counsel, an accused may change his or her mind and talk to police without counsel, if the accused initiates the change without interrogation or pressure from the police.

15. SAME—*Recorded Conversations—Knowledge by Defendant Not Necessary*. The fact that a defendant is in custody and does not know his or her conversations are being recorded does not render the conversations involuntary or the products of custodial interrogations.

16. SAME—*Valid Consent to Search—Two Conditions.* For a consent to search to be valid, two conditions must be met: (1) there must be clear and positive testimony that consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion, express or implied.

17. TRIAL—*Sequestering Witness—Trial Court's Discretion.* A trial court's decision whether to sequester a witness lies within that court's discretion. Furthermore, the trial court has discretion to permit certain witnesses to remain in the courtroom even if a sequestration order is in place.

18. CRIMINAL LAW—*Sentencing—Restitution Amount—Actual Damage or Loss Caused by the Crime.* The appropriate amount for restitution is that which compensates a victim for the actual damage or loss caused by the defendant's crime.

19. SAME—*Sentencing—Restitution Amount—Burden on State*. The State has the burden of justifying the amount of restitution it seeks.

Appeal from Barton District Court; JAMES R. FLEETWOOD, judge. Oral argument held September 11, 2023. Opinion filed October 4, 2024. Affirmed in part, reversed in part, and remanded with directions.

Clayton J. Perkins, of Capital Appellate Defender Office, argued the cause, and *Caroline M. Zuschek* and *Kathryn D. Stevenson*, of the same office, were with him on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, argued the cause, and *Kris Kobach*, attorney general, was with him on the briefs for appellee.

Sharon Brett, of ACLU Foundation of Kansas, was on the brief for amicus curiae American Civil Liberties Union of Kansas.

The opinion of the court was delivered by

ROSEN, J.: A jury convicted Kimberly S. Younger of one count of capital murder, one count of conspiracy to commit first-degree murder, one count of solicitation to commit first-degree murder, and one count of theft. Although she did not personally kill anyone, her coconspirators all testified that she was the principal organizer and planner of the two murders. She appeals, primarily challenging evidentiary rulings.

It is undisputed that two men killed two victims; those men confessed and pleaded guilty. Witness after witness placed the defendant in the present case not only at the scene of the crimes but as the person who orchestrated the crimes. The complained-of errors, while argued expansively and thoroughly, do not ultimately result in reversible prejudice to the defendant.

The facts in this case, as developed in the course of a nine-day jury trial, are complicated and, at times, read more like a fictional drama than a real-world criminal act.

FACTS AND PROCEDURAL BACKGROUND

Jason Wagner owned a carnival company that provided entertainment at fairs in the Midwest. In late July 2018, his company moved from a fair in Oklahoma and set up rides and concessions at the Barton County fair.

Frank Zaitshik owned a competing carnival company headquartered in Florida. Zaitshik is either a regular businessman whose company, like Wagner's, earns a profit by providing entertainment, or he is a sinister crime boss who has close ties to the Sicilian mafia and who masterminded a pair of murders at the Barton County fair. The former is the theory of the State and almost all the witnesses at the trial; the latter is the description provided by the defendant in this case and is the persona the defendant convinced others to obey. Zaitshik spells his name with an "s"; on a Facebook page generated from Younger's phone, his name is spelled with a "c." In this opinion, the individual's name will be spelled "Zaitchik" when referring to the man the conspirators believed or pretended was a crime lord; the name will be spelled "Zaitshik" when referring to the actual carnival operator who testified at trial.

Alfred and Pauline Carpenter were an elderly couple from Wichita who traveled around the Midwest, setting up their camper and trailer at state fairs and selling inexpensive merchandise to fairgoers. They intended to close down and sell their business after the Barton County fair.

Kimberley Younger, the defendant and appellant in this case, is a woman in her fifties who worked for Wagner for several years as a truck driver and ticket seller. Younger was known to her employers and coworkers by several different names, none of them Kimberley Younger. She had a Florida driver's license under the name "Myrna Khan." She was known to her friends as "Jenna Roberts." And, at one point in the investigation, she identified herself as "Tiffany Jones." She purported to have connections with Frank Zaitshik, who, she maintained, operated a criminal enterprise through his carnival company.

Younger was romantically involved with, and possibly married to, Michael Fowler, another carnival employee. The two shared a unit in the carnival's mobile bunkhouse. Over time, Fowler became convinced that Zaitchik wanted to legally adopt him so that Fowler could become the heir to Zaitchik's crime empire, even though Fowler had never met Zaitchik. Fowler was led to this belief because he started receiving Facebook messages from "Frank Zaitchik" indicating a desire to develop a close father-son relationship and because Younger, known to Fowler as

Jenna, passed along messages that she had supposedly received from Zaitchik. After a while, Younger showed Fowler adoption papers on her computer that Zaitchik supposedly had sent her. Zaitchik indicated through his Facebook messages that he had no children and wanted an heir, but Fowler would have to carry out certain activities to prove himself worthy of and loyal to Zaitchik's syndicate. This included ferreting out rival Mexican crime families who were attempting to undercut Zaitchik's business.

Among other things, Zaitchik told Fowler that two bodyguards named Gino and Kip had been assigned to shadow and protect him as he travelled from fair to fair. Although Fowler never actually saw either of these two men, he believed they were real because Zaitchik always seemed to know what Fowler was doing almost as soon as he did it.

After a time, Zaitchik communicated to Fowler that he would have to carry out a killing so that he would have blood on his hands and would not be able to walk away from his "family." Zaitchik directed Fowler to scout out vehicles at various fairs, which Zaitchik would screen based on their license plates and determine whether they belonged to Mexican drug cartel members. When the time was right, Zaitchik would tell him whom he had to kill.

Also caught up in this scheme were Rusty Frasier and his girlfriend, Christine Tenney. They worked at the carnival and shared a unit in the same bunkhouse as Fowler and Younger. They understood that Fowler was destined to inherit a fortune, and Younger gave them instructions, supposedly provided by Zaitchik, on how they were to assist Fowler. Younger told Tenney that it was Fowler who was supposed to complete the kills, and it was Frasier's and Tenney's job to help him. Younger mentioned another carnival worker, Zach Panacek, as a possible target. The final member of this group was Fowler's nephew, Thomas Drake, who also worked for the carnival.

On the evening of Friday, July 13, 2018, Younger took breaks from her ticket-selling job and talked with Alfred Carpenter about possibly buying his trailer and camper. Zaitchik supposedly sent Fowler Facebook messages telling him the Carpenters were going to be the target. Late that night, Younger invited Alfred out of the camper to talk with Fowler about the camper. According to Fowler

and Frasier, her plan was that Fowler was to slit Alfred's throat with a knife while Younger distracted Alfred. Alfred fought back, however, almost gaining the advantage over Fowler. Frasier, who was backing Fowler up, rushed in to intervene and stabbed Alfred with a different knife. Then Fowler shot Alfred twice. He proceeded into the trailer, where Pauline was getting out of bed, and shot her four times, mortally wounding her.

Following Younger's instructions (again supposedly provided by Zaitchik), the foursome then put Alfred's body in the camper near Pauline's and cleaned up around the site. Tenney and Drake participated in the cleanup, obtaining bleach and other cleaning supplies. With Younger driving, they took off with the trailer attached to the truck and camper in the early morning of July 14.

After several stops along the way, including a stop to replace a flat tire on the trailer, they arrived in Van Buren, Arkansas. Fowler's daughter and son-in-law were living in an apartment complex there called Vista Hills, and the group stayed with them. From there they took the camper to an unpopulated area in Ozark National Forest, where Fowler's son-in-law and the boyfriend of another daughter assisted them in putting the bodies in a shallow ravine and covering them with a mattress and some rocks and dirt. While they were away, Tenney secretly contacted her sister and told her she was with a group of individuals who had murdered two people and she needed help. The sister then contacted law enforcement.

Responding to the call from Tenney's concerned sister, Van Buren police went to the apartment to investigate whether Tenney was being held against her will. When they arrived, they sought out the manager. Meanwhile, Alfred and Pauline's daughters were becoming worried that their parents had not returned home and were not answering their phones. They contacted law enforcement in Wichita.

While the police were looking around the apartment complex, Younger approached and told them her name was Tiffany Jones and she helped the apartment manager out on nights and weekends. Police noticed the camper with a Kansas license plate and inquired about Alfred and Pauline. Younger said she knew the couple and they had wanted to play at a nearby casino. She said

she took them to a car rental place so they could drive to the casino without having to take the camper. Although a data check revealed that the truck and camper were registered to Alfred and Pauline Carpenter of Wichita, the police had no definitive evidence of foul play and they returned to their station.

After investigating inquiries about the Carpenters from the Van Buren police, an officer with the Wichita Police Department informed the Van Buren police that the Carpenters were not at their home and their daughters were worried that something had happened to them. A check of their own files led the Van Buren police to conclude that the woman who identified herself as "Tiffany Jones" was not really Tiffany Jones. This was sufficient for the police to deem Younger in violation of Arkansas law under theories of criminal impersonation or obstruction of government operations, and they returned to the Vista Hills apartment complex.

While obtaining more information about the Carpenters' disappearance, the police noticed Younger driving back to the parking lot. She again told them her name was Tiffany Jones. When one of the officers obstructed her path to the second-story apartment, she became belligerent, and he placed her under arrest. He handcuffed her, took her cell phone, and placed her in the back of the squad car.

Younger then said she would tell him the truth and told him her name was Myrna Khan. While the officer continued to investigate the situation, he left her alone in the back of the car, but he turned on audio and video recording devices in the car. While she was sitting alone in the back seat for about two hours, Younger made various comments out loud that were incriminating and were recorded without her knowledge.

She was then transported to the police station, and, a few hours later, was interviewed by Sergeant Daniel Perry. Another officer occasionally helped out, and later, at Younger's request, the local county attorney sat in on the interview. During the course of the interview, Younger asked to speak to Fowler privately. Unbeknownst to her, Fowler had agreed to wear a wire, and their conversation was recorded. Police also asked Younger if they could search her backpack. She agreed and signed a consent form.

In the backpack, the officers found the handgun that had been used to kill the Carpenters.

Assisted by Younger's coconspirators and Fowler's family members, police located the victims' bodies fairly quickly. Fowler and Frasier were detained and eventually confessed to having killed the Carpenters. While Younger was being interviewed at the station, the others started cooperating with law enforcement almost immediately.

Younger initially denied that any murder had taken place, but she eventually told an elaborate version of what had happened, blaming the events on a crime syndicate directed by a man named Frank Zaitchik, whose hired hitman, a carnival employee named Fred Viney, carried out the killings and forced her and her friends to clean up the site and dispose of the vehicles and bodies.

On December 6, 2018, the State filed a complaint charging Younger with one count of capital murder of Alfred and Pauline, an alternative count of first-degree premeditated murder of Alfred, an alternative count of first-degree murder of Pauline, one count of conspiracy to commit premeditated first-degree murder, one count of solicitation to commit first-degree premeditated murder, and one count of theft of property valued between $25,000 and $100,000.

Before Younger's trial, Fowler pleaded guilty to two counts of premeditated first-degree murder and one count of felony theft, and he received two consecutive hard 50 life sentences for the murders. This court affirmed the denial of his motion for a downward departure sentence in *State v. Fowler*, 315 Kan. 335, 508 P.3d 347 (2022). Frasier pleaded guilty to two counts of first-degree murder. Tenney pleaded guilty to one count of obstruction of justice and one count of aggravated robbery.

All three would testify against Younger at her trial, which was conducted in September 2021 and lasted nine days. Before jury deliberations began, the State voluntarily dismissed counts two and three, the alternative individual counts of first-degree murder of Alfred and Pauline. The jury found Younger guilty of count one, capital murder; count four, conspiracy to commit first-degree murder of Alfred; count five, solicitation to commit the first-degree murder of Alfred; and count six, theft.

For the primary on-grid offense of conspiracy to commit first-degree murder, the court sentenced Younger to a guideline sentence of 174 months. For the conviction for solicitation to commit first-degree murder, the court sentenced her to a standard term of 59 months. For the theft count, the court sentenced her to a standard sentence of 12 months. These sentences were to run consecutive to each other and to the sentence for the first count, which was capital premeditated murder. For that crime, she was sentenced to an off-grid term of lifetime imprisonment with no possibility of parole. The court further ordered restitution of $34,427.46 and ordered Younger to make regular payments of the amount of 25 percent of her monthly personal income.

ANALYSIS

Right to Confront Witness

Younger contends her constitutional right to confront witnesses against her was violated when the State's rebuttal witness Frank Zaitshik was allowed to testify remotely.

Throughout the trial, evidence was introduced showing that the other participants in the murders believed "Frank Zaitchik" was the boss of a crime family who adopted Michael Fowler and required him to commit a murder in order to be fully accepted into the family. By means of Facebook messages to Fowler and Frasier and supposed messages to Younger, which she passed on to Fowler and Frasier, the purported Zaitchik gave detailed, often minute-by-minute instructions to the two men on how they were to proceed. In addition, testifying in her own defense, Younger asserted that Zaitchik ran a criminal enterprise, paid her to transport drugs and guns around the country, and hired bodyguards to shadow Fowler and protect him from a supposed hitman.

In rebuttal, the State called on Frank Zaitshik to testify. Over Younger's written and oral objections, the court allowed Zaitshik to testify by means of a two-way live video exchange that took place before the jury. The court allowed this exceptional form of testimony because of Zaitshik's concerns about COVID-19, which was surging at the time. In a fairly brief appearance, Zaitshik testified he had no connections with criminal enterprises, he had no

idea who Fowler or Younger (either by her given name or her various aliases) were, he had never directed anyone to commit murders, and he did not have Italian ancestry.

On appeal, Younger argues that allowing Zaitshik to appear by video technology violated her right under the Kansas and United States Constitutions to confront witnesses against her.

Standard of Review

This court employs an unlimited standard of review when addressing issues relating to the Confrontation Clause of the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. See, e.g., *State v. Belone*, 295 Kan. 499, 502, 285 P.3d 378 (2012); *United States v. Cotto-Flores*, 970 F.3d 17, 39 (1st Cir. 2020) (whether trial judge made specific findings sufficient to permit the use of closed-circuit television testimony is a legal issue subject to de novo review).

When the trial court makes the required specific findings, however, that decision may be reviewed for clear error. See *Hernandez v. New York*, 500 U.S. 352, 369, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (when there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous); *United States v. Cox*, 871 F.3d 479, 484 (6th Cir. 2017) (factual findings of district court supporting closed-circuit television testimony are reviewed for clear error).

A violation of the Sixth Amendment Confrontation Clause is subject to harmless error analysis. See, e.g., *State v. Bennington*, 293 Kan. 503, 524, 264 P.3d 440 (2011). Under this standard, this court must be persuaded beyond a reasonable doubt that the error did not affect the trial's outcome in light of the entire record, which is to say, there was no reasonable possibility that the error affected the verdict. The prosecution, as the party benefiting from the error, bears the burden of showing the error was harmless. 293 Kan. at 524.

Analysis

The Confrontation Clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S.

Const. amend. VI. That guarantee applies to criminal defendants in both federal and state prosecutions. See *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (Sixth Amendment applicable to states through the Fourteenth Amendment). Similarly, a criminal defendant in Kansas has the right to "meet the witness[es] face to face." Kan. Const. Bill of Rights, § 10. Younger maintains her rights under both Constitutions were violated.

A. Federal Constitutional Right to Confront Witnesses

In *Pointer*, 380 U.S. 400, the Supreme Court held that the Sixth Amendment right to confront witnesses is a fundamental right.

The impetus to the Sixth Amendment was "the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *California v. Green*, 399 U.S. 149, 156, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

This court has emphasized the cross-examination aspect of the right to confront witnesses, holding that the primary purpose of the Confrontation Clause is to give the accused the opportunity for cross-examination to attack the credibility of witnesses for the State. Such cross-examination is essential to a fair trial and helps assure the accuracy of the truth-determination process. *State v. Thomas*, 307 Kan. 733, 738, 415 P.3d 430 (2018); *State v. Friday*, 297 Kan. 1023, Syl. ¶ 19, 306 P.3d 265 (2013).

This court has held, however, that a defendant's fundamental right to a face-to-face confrontation with an adversarial witness is not absolute and is subject to narrow exceptions when necessary to further important public policies. *State v. Chisholm*, 245 Kan. 145, 150, 777 P.2d 753 (1989). In order to meet constitutional requirements, a judge must make an individualized determination that an exception is necessary to fulfill other important policy needs. 245 Kan. at 150 (discussing requirements in context of K.S.A. 22-3434 child testimony out of presence of defendant).

A year later, the United States Supreme Court agreed in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). The Supreme Court adopted a two-part test to evaluate a Confrontation Clause challenge to a Maryland statute allowing a child abuse victim to testify outside the presence of the criminal defendant using one-way, closed-circuit television. The Supreme Court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850.

When evaluating the reliability of the testimony under the second part of the *Craig* test, the Supreme Court found it "significant" that, apart from a face-to-face confrontation, "Maryland's procedure preserves all of the other elements of the confrontation right: The child witness must . . . testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies." *Craig*, 497 U.S. at 851. The Court noted that the presence of these key elements of confrontation "ensures that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." 497 U.S. at 851. Given the presence of these safeguards, the Court ultimately concluded that "to the extent that a proper finding of necessity has been made, the admission of such testimony would be consonant with the Confrontation Clause." 497 U.S. at 857.

Younger argues on appeal that the reasons given for allowing Zaitshik to testify remotely were insufficient to override her constitutional right to in-person confrontation.

In light of the State's pretrial motion to allow Zaitshik to appear via a tele-video conference and Younger's objection to that motion, the trial court held an evidentiary hearing on the motion at which Zaitshik made a virtual video appearance by Zoom.

Zaitshik was in Syracuse, New York, on business at the time. His home was in Florida. He testified he was 75 years old and he believed he had increased risks for severe illness if he contracted

COVID. He had high blood pressure and was 50 pounds overweight. Although he had been flying recently, it had been seven months since his vaccination and there were increasing numbers of break-through COVID cases, so he did not plan on flying anymore. He also was no longer going into restaurants or other indoor public places. When he met with people in the course of business, he limited his interactions to people who he knew were fully vaccinated and who maintained social distancing outside. He told the court that the spread of the Delta variant was making him "more and more nervous." "I don't want to gamble with my life. I'm only doing what I absolutely have to do to remain in the world post-COVID."

The judge stated he was aware that Barton County was "a hot spot," and the Barton County Jail had cases in the jail among both the inmates and staff. The judge opined that danger to the witness sufficed to allow an exception to the in-court confrontation clause requirement. He held the video connection would suffice to allow meaningful examination and cross-examination and granted the State's motion, overruling Younger's objection.

At the time of the trial, COVID presented a very real threat. The country was experiencing the peak of the second surge of the pandemic. Younger herself filed a voluntary consent to appear by audio or video conference and to waive a public court proceeding at the depositions of Tenney and Frasier because of the COVID risks and precautionary measures. On the fifth day of the jury trial, a juror called in and reported he had tested positive for COVID, and the court then asked the county medical officer to come in and test all the other jurors, the court staff, the attorneys, and the judge. One juror refused to be tested and was sent home. The remaining individuals tested negative, and the trial continued with alternate jurors.

An analogous situation arose in *United States v. Akhavan*, 523 F. Supp. 3d 443, 455 (S.D.N.Y. 2021). A witness for the prosecution was 57 years old and had been diagnosed with hypertension and atrial fibrillation. It appeared no one in his household had been vaccinated against COVID. He and his wife were the primary caretakers of the witness' 83-year-old mother-in-law. He lived in California and would have to travel by commercial flight to testify

at the trial in New York. The defendants objected on Confrontation Clause grounds.

The court examined the witness' circumstances and specifically found:

> "[The witness'] age and preexisting conditions place him at increased risk of serious illness or death if he were to contract COVID-19. The CDC has found that people aged 50-64 are 400 times more likely to die and 25 times more likely to be hospitalized from COVID-19 than children aged 5-17 years, and are more than 25 times more likely to die and 3 times more likely to be hospitalized than young adults aged 18-29. On top of that, 'adults of any age' with 'heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies' 'are at increased risk of severe illness' from COVID-19, and 'adults of any age' with hypertension 'might be at an increased risk for severe illness.'" *Akhavan*, 523 F. Supp. 3d at 452.

The court found the witness' circumstances "exceptional" and granted his request to testify by two-way video. *Akhavan*, 523 F. Supp. 3d at 456. The Second Circuit affirmed on that issue, holding there was no clear error in the district court's findings. *United States v. Patterson*, No. 21-1678-CR, 2022 WL 17825627, at *4 (2d Cir. 2022) (unpublished opinion), *cert. denied sub nom. Weigand v. United States*, ___ U.S. ___, 143 S. Ct. 2639 (2023). See also *State v. Comacho*, 309 Neb. 494, 515-16, 960 N.W.2d 739 (2021) (remote testimony of a witness who had tested positive for COVID-19); *State v. Milko*, 21 Wash. App. 2d 279, 290-94, 505 P.3d 1251 (2022) (remote testimony of a witness whose child had compromised health); *State v. Johnson*, No. 1-CA-CR 21-0015, 2021 WL 5457502, at *2 (Ariz. Ct. App. 2021) (unpublished opinion) (remote testimony permitted based on a witness' age and "significant health issues" as well as the risk of travel out of state and "the need to minimize the risk and spread of COVID-19"); *State v. Roberson*, No. A21-0585, 2022 WL 664184, *2-3 (Minn. Ct. App. 2022) (unpublished opinion) (remote testimony of an immunocompromised witness); *Commonwealth v. Cuevas*, No. 930 MDA 2021, 2022 WL 2112998, *8-9 (Pa. Super. 2022) (unpublished opinion) (remote testimony of a witness who awakened on the day of trial with a fever).

Here, the trial court, after hearing testimony and argument, held:

"I will also mention his concerns are related to COVID. He is 78 [*sic*] years old. He does have other issues related to his . . . concerns over COVID. As the State has mentioned, also the Court is aware that . . . Barton County . . . is a hot spot. And specifically Barton County Jail has had cases in the jail, both among the inmates, as well as staff, which raises further concerns. And there's issues over an appropriate booster shot. . . . I'm going to overrule the objection."

Although the trial court might have reasonably ruled differently, the concerns over the spiking pandemic suffice to allow an at-risk witness to testify remotely. The evidence supported the trial court's decision.

Younger argues at length that video testimony is subject to technical problems and has sometimes proved inferior in other proceedings. But she makes no showing that Zaitshik's testimony to the jury had any technical difficulties or that Zaitshik did not understand what was going on. The transcript contains no suggestion that the court reporter had any difficulty understanding the testimony.

Younger's counsel suggested no problems in communicating with Zaitshik and engaged with him in a full cross-examination. In *Craig*, 497 U.S. at 852, the Court held that "use of [a] one-way closed circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of the Confrontation Clause."

Younger also contends that Zaitshik was, at most, only temporarily unavailable, and remote testimony should not be permitted for witnesses who might be available at some indeterminate later time. She suggests, for example, that the pandemic had ebbed by May 1, 2023, implying that the trial could have been postponed for a couple of years until Zaitshik's concerns were mitigated. We note that Zaitshik would have been even older if the trial had been postponed; his blood pressure might have become an even greater concern, as also his weight. And other witnesses would have been years further down the road from the events about which they were testifying.

Younger suggests other alternatives. A pretrial deposition might have been used instead of the Zoom testimony. But she does not explain how a recorded deposition is a better alternative than live remote testimony, and Zaitshik was called as a rebuttal witness, meaning that it was not necessarily viable for the State to

know what testimony he would have to rebut. She also notes that the trial court employed measures to reduce the risk of COVID transmission in the courtroom. It is unknown how effective such measures were or how they might have mitigated Zaitshik's special health concerns.

Perhaps Younger's most compelling argument is that Zaitshik had traveled to Oklahoma shortly before the trial: if he could safely travel to Oklahoma, why could he not safely travel to Barton County, Kansas? While this is a fair question, the trial judge considered a constellation of factors, including Barton County's particular COVID risks, in reaching an informed decision that the circumstances justified admitting Zaitshik's remote testimony. We will not second-guess this legitimate determination by the trial judge.

We have reviewed the trial court's findings and determine they were legally sufficient and were supported by the record. Because the trial court chose between two permissible views of the evidence, we will not find clear error in that choice. See *Hernandez*, 500 U.S. at 369. We therefore find no violation of the federal Constitution's Confrontation Clause and no error in allowing Zaitshik to testify remotely.

B. State Constitutional Right to Meet Witnesses Face to Face

Younger argues broadly without elaboration that section 10 of the Kansas Constitution Bill of Rights provides rights that are "distinct from and broader than the Sixth Amendment text."

This argument was not made to the district court and is therefore not preserved for appeal. Younger's attorney quoted from section 10 but then argued the objection as if it were a Sixth Amendment objection. As her attorney stated at argument on the objection: "Judge, you have my objection. Yes, it is based on confrontation grounds." The written objection made no claim that the Kansas Constitution provides greater protection in this arena than the federal Constitution.

Issues not argued before the district court may not be asserted on appeal. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018); *State v. Kelly*, 298 Kan. 965, 971, 318 P.3d 987 (2014).

Here, Younger's counsel explicitly told the trial court his objection was grounded on federal constitutional confrontation considerations. Furthermore, Younger does not present in her appellate brief any analysis or support, either historical or in caselaw, for her proposition that section 10 is to be understood to provide different protections from the Sixth Amendment. While we note the extensive discussion of this subject in the brief of the amicus curiae, in the absence of argument to the trial court or analysis by the appellant to this court, we conclude this is not the appropriate case to decide whether section 10 provides defendants with greater protection than the Sixth Amendment.

Admission of Younger's Statements to Police

While waiting in the police car at the apartment complex, Younger made statements to the police before she had received notification of her *Miranda* rights. She also made unsolicited statements while sitting alone in the car, and these statements were recorded. Later, at the police station, she signed a form stating that she understood her rights and then talked about wanting a lawyer. Although she did not get to speak with a lawyer, she proceeded to make a number of statements to police.

The trial court suppressed some of the statements but allowed the jury to hear others over her objections. During her interview, Younger also asked to speak with Fowler. Fowler privately agreed to wear a recording device, and the statements she made to him were admitted at trial. She contends on appeal that these statements should have been suppressed and her convictions should be reversed.

Standard of Review and Rules Relating to the Suppression of Evidence

In order to be admissible as evidence, statements by a defendant who is in custody and subject to interrogation must be voluntary and, in general, made with an understanding of the defendant's constitutional rights. See, generally, *State v. Parker*, 311 Kan. 255, 257-58, 459 P.3d 793 (2020); *State v. Mattox*, 305 Kan. 1015, 1042-43, 390 P.3d 514 (2017).

Statements made during a custodial interrogation must be excluded under the Fifth Amendment to the United States Constitution unless the State demonstrates it used procedural safeguards, i.e., *Miranda* warnings, to secure the defendant's privilege against self-incrimination. These safeguards are triggered only when an accused is (1) in custody and (2) subject to interrogation. *Parker*, 311 Kan. at 257.

This court applies a dual standard when reviewing a decision ruling on a motion to suppress a confession. It reviews the factual underpinnings of the trial court's ruling under a substantial competent evidence standard. It reviews the ultimate legal conclusion drawn from those facts de novo. It does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence. *State v. Dern*, 303 Kan. 384, 392, 362 P.3d 566 (2015).

The voluntariness of a waiver of a defendant's *Miranda* rights is a question of law that an appellate court determines de novo based on the totality of the circumstances. *Parker*, 311 Kan. at 257; *Mattox*, 305 Kan. at 1042; *State v. Kirtdoll*, 281 Kan. 1138, 1144, 136 P.3d 417 (2006).

The voluntariness of a defendant's *Miranda* rights waiver can be implied under the circumstances. *Kirtdoll*, 281 Kan. 1138, Syl. ¶ 1. Certain factors may contribute to a finding of voluntariness, such as the defendant explicitly saying that he or she understood his or her rights and then proceeding to answer questions. 281 Kan. at 1146-47; see also *State v. Wilson*, 215 Kan. 28, 30, 523 P.2d 337 (1974) (when defendant says he or she understands his or her rights and makes no showing that statements were coerced or in some other way involuntary, *Miranda* safeguards are satisfied).

A suspect can invoke the *Miranda* right to counsel at any time by making, at a minimum, some statement that could be reasonably construed as an expression of a desire for the assistance of an attorney during a custodial interrogation. *State v. Moore*, 311 Kan. 1019, 1035, 469 P.3d 648 (2020). Courts review requests for attorneys during custodial interrogation by looking for two components: (1) "the suspect 'must articulate his desire to have counsel present sufficiently clearly that [an objectively] reasonable police officer in the circumstances would understand the statement to be

a request for an attorney'"; and (2) "the request must be for assistance with the custodial interrogation, not for subsequent hearings or proceedings. '" *Moore*, 311 Kan. at 1035.

Law enforcement must scrupulously honor a suspect's clear invocation of *Miranda* rights, which cuts off any further interrogations elicited by express questioning or its functional equivalent. *Moore*, 311 Kan. at 1035. A suspect's responses to postinvocation questions may not be used to cast retrospective doubt on the clarity of the initial invocation. *State v. Aguirre*, 301 Kan. 950, 957-58, 349 P.3d 1245 (2015) (citing *Smith v. Illinois*, 469 U.S. 91, 100, 105 S. Ct. 490, 83 L. Ed. 2d 488 [1984]).

Once a suspect has invoked *Miranda* rights, there may be no further questioning unless the suspect (a) initiated further discussions with the police and (b) knowingly and intelligently waived the previously asserted right. *Aguirre*, 301 Kan. at 961. See also *State v. Salary*, 301 Kan. 586, 604, 343 P.3d 1165 (2015) ("[I]f the accused has unambiguously invoked the right to counsel, questioning must cease immediately and may be resumed only after a lawyer has been made available or the accused reinitiates the conversation with the interrogator.")

The State has the burden to prove the voluntariness of a confession by a preponderance of the evidence—that the statement derived from the defendant's free and independent will. The court looks at the totality of the circumstances surrounding the confession to determine whether the confession was voluntary by considering the following nonexclusive factors: (1) the defendant's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the defendant to communicate on request with the outside world; (4) the defendant's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the defendant's fluency with the English language. *State v. Bentley*, 317 Kan. 222, 228-29, 526 P.3d 1060 (2023).

A. Younger's Statements in the Police Car

After patrolman Kevin Dugan arrested Younger, he handcuffed her, confiscated her cell phone, and placed her in the back of his patrol car. He activated the car's electronic recording equipment and then went to investigate other individuals in the vicinity.

He did not explain her *Miranda* rights to her at that time. She was left alone in the car for about two hours. While she was alone in the car, Younger made several statements out loud that were picked up electronically and recorded. Among other things, she said, "'Get rid of the gun,'" and "'Don't break, Scott.'" (Scott Spencer was Fowler's son-in-law.) She also repeatedly said, apparently commenting to the police, "'Stop talking to them. Talk to me.'" Younger sought to suppress these statements, but the trial court allowed the jury to hear them.

The trial court allowed the State to introduce the answers Younger gave to the questions about her name and her spontaneous interjections she made afterwards while she was alone in the car. She argues on appeal that the introduction of these statements was erroneous and prejudicial.

No one was present when Younger made her statements, and no one was asking her questions. The procedural safeguards of *Miranda* are not required when a suspect is simply taken into custody; they only begin to operate when a suspect in custody is subjected to interrogation. See *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); *State v. Dudley*, 264 Kan. 640, 642, 957 P.2d 445 (1998).

The surreptitious tape recording of a defendant's statements while seated in the rear of a marked police car does not violate the defendant's rights against compelled self-incrimination. See, e.g., *State v. Edrozo,* 578 N.W.2d 719 (Minn. 1998). When officers say nothing at all to prompt spontaneous statements from a suspect, there is no basis for finding even subtle compulsion. *Dudley*, 264 Kan. at 644.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment. . . ." *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "'[A]n accused's statement may be found to be voluntary and spontaneous and, thus, admissible even though it is made after the accused is arrested and in custody.' [Citations omitted.]" *State v. Richardson*, 256 Kan. 69, 86, 883 P.2d 1107 (1994) (quoting *State v. Mooney*, 10 Kan. App. 2d 477, 480, 702 P.2d 328, *rev. denied* 238 Kan. 879 [1985]).

The State properly cites to cases holding there was no *Miranda* violation when suspects were left alone in the back seats of police cars. See, e.g., *United States v. Hernandez-Mendoza*, 600 F.3d 971, 977 (8th Cir. 2010) (leaving defendants alone in a police car with recording device activated was not functional equivalent of interrogation; no *Miranda* violation); *Stanley v. Wainwright*, 604 F.2d 379, 382 (5th Cir. 1979) (no *Miranda* violation when police recorded suspects left alone in back of a police car because *Miranda* "does not protect spontaneous utterances made by detainees"); *United States v. Colon*, 59 F. Supp. 3d 462 (D. Conn. 2014) (rejecting argument that recorded statements of codefendants left alone in back of police vehicle were product of custodial interrogation).

While it is true that Younger was in custody and was unaware that her statements in the car were being recorded and could be used against her, she was not constitutionally protected from incriminating herself by making spontaneous statements and there was no error in admitting her outbursts.

B. Younger's Interview Statements

Following her arrest and transport to the Van Buren police station, various officials took part in an interview with Younger. The interview was recorded and transcribed. It began at around 5:10 a.m. and continued, with numerous interruptions, for about five hours. At the outset, Younger was informed of her *Miranda* rights and signed a document acknowledging she understood them.

During the interview, Younger initially denied knowing anything about anyone being killed. She averred that Fowler and Frasier had done nothing wrong. After a time, she announced she would tell investigators everything that happened. She told them her legal name was Kimberley Younger, and she proceeded to recount an involved story about a "carnival mafia" crime lord named "Frank Zaitchik" who had taken control of Fowler's, Frasier's, and her own lives. She denied involvement in murdering anyone, but she claimed she and her friends were forced to clean up after the murders by a Zaitchik hitman who threatened her life if she resisted. She mentioned that she was diabetic and needed periodic

insulin shots. And she occasionally said she wanted an attorney, but she provided her longest narrative after she told the interrogating officer that she would speak without counsel.

At the outset, Younger told the police officer that she had not had her insulin, which she would normally take around 1:00 a.m. She mentioned a previous arrest for a DWI, and then said her name was Myrna Khan. The officer then went over her *Miranda* rights with her, asking her if she understood each one, and she replied she did. He then said:

"Get you to sign right there please, ma'am. Okay this next part down here, Myrna, it says no promises or threats have been used against me to induce me to waive the rights listed above. With full knowledge of my rights, I hereby knowingly and intelligently waive them and agree to answer questions. That's just basically sayin' I haven't promised you anything and I haven't threatened you to make you talk to me, okay?"

She answered: "I'm not waiving my rights. I'm saying that I'll talk to you."

He said in response: "That's not saying you're givin' up your rights. These are always your rights. And I can't—there's nobody that can take those rights away from you, okay? Lemme go see if he found some cigarettes, okay?" She then inquired about where her own cigarettes and phone were. After a cigarette break, the two engaged in a dialogue in which the officer said he was investigating the missing people and he had already talked with Fowler, Frasier, and Tenney. He told her the others had cooperated and helped police find the victims' bodies. She then denied the existence of any murder victims and said she did not believe the others had told the police anything about the murders. She said, "I'm not involved in any of this." The officer then offered her an opportunity to smoke a cigarette if she would calm down and stop "actin' crazy and yellin'."

After a cigarette and water break, the following exchange took place:

"[Younger]: Send someone in here.
"[Officer]: Yes
"[Younger]: Can you ask that detective to come in please?
"[Officer Perry]: (Returns to the room.) Hey, what's up?
"[Younger]: I will tell you exactly what happened.
"[Officer Perry]: Okay.

"[Younger]: But I need two conditions.

"[Officer Perry]: Okay.

"[Younger]: First I want an attorney here.

"[Officer Perry]: Okay.

"[Younger]: Second, I wanna talk to my husband privately.

"[Officer Perry]: Okay.

"[Younger]: I'd prefer it to be outside where he and I can both have a cigarette because I'm sure he's Jonesin' as bad as I am.

"[Officer Perry]: Okay.

"[Younger]: If you will agree to those, I will tell you exactly what happened. But you must promise to protect him and I. Christine and Rusty were not involved.

"[Officer Perry]: Okay?

"[Younger]: Let them go.

"[Officer Perry]: Do you understand that I've gotta run everything out through—I can't promise you that but I can—I'll have to talk to the prosecutor and he'll have to—

"[Younger]: I don't know why they're admitting to something they didn't do. It's bothering me. I don't know why. And when you hear what I have to say, you'll understand why Mike and I did what we did. But we are still not involved in killing those people.

"[Officer Perry]: Okay.

"[Younger]: But I need a—a lawyer here to make sure that my rights aren't bein' trampled on.

"[Officer Perry]: Okay.

"[Younger]: Because if we go against the—the people that did do this, it'll get us dead, even if we're in prison.

"[Officer Perry]: Okay. Lemme talk to the prosecutor, okay? Fair enough? Everything has to go through him and you know that. Okay?

"[Younger]: Unfortunately I do."

Perry left the room. There followed a restroom and a cigarette break. Younger said she needed her insulin because her blood sugar was rising. Perry returned to the room, and another exchange took place:

"[Officer Perry]: Um, I talked to the prosecutor and he said he didn't have any problem with that. Um, do you have a lawyer? Or you—

"[Younger]: No.

"[Officer Perry]: —would you be like the—

"[Younger]: I can't call the lawyer that I know.

"[Officer Perry]: Okay. Um—

"[Younger]: That would throw everything—that would put Michael's and my life in complete danger. The longer we spend at this Police Station, the less likely I'm gonna be able to explain it all away. (Nods head.) And you're gonna want me to explain it all away.

"[Officer Perry]: Okay. This is my deal and I'm just gonna be honest with ya. If I bring an attorney in here, period, he's probably gonna tell you don't talk. You know that.

"[Younger]: I can't listen to him.

"[Officer Perry]: Okay, I'm—I just—you that's probably what he's gonna say.

"[Younger]: I just want him to protect my rights.

"[Officer Perry]: I gotcha.

"[Younger]: This story is something you're gonna have a hard time swallowing until you get all the details.

"[Officer Perry]: Okay. Fair enough."

The two then talked about Younger's phone and email accounts. Next, they talked about her request to talk with Fowler. She said she wanted to talk to him outside the interview room and she would agree to them both being handcuffed. When Perry said he would have to accompany them outside, Younger said, "I just don't want you close enough that you can hear what I'm sayin'." She asked for five minutes to talk with Fowler so she could "explain it to him."

Perry and Younger then resumed their discussion of having an attorney:

"[Younger]: And then I will tell you everything but it'd be easier to get your prosecuting attorney in here. And let them hear it all at the same time.

"[Officer Perry]: Okay. Are you still wantin' your attorney in here?

"[Younger]: I'd like an attorney—and I know they're gonna tell me don't talk. But in this case I don't have anything to fear from a capital crime because I didn't commit a capital crime.

"[Officer Perry]: Would a—would a public defender be okay?

"[Younger]: That'd be fine.

"[Officer Perry]: Okay.

"[Younger]: Long as they've been an attorney and know what an attorney—

"[Officer Perry]: Oh, yeah, absolutely.

"[Younger]: —uh, and client—

"[Officer Perry]: Just have a seat a minute and lemme go get him . . . and I'll be right back, okay?

"[Younger]: . . . [O]kay."

Younger then left the room in handcuffs to talk with Fowler. When she returned, she was left alone in the interview room for a while. She said out loud,

"Come on, this is ridiculous. Either you want my information or you don't. Come on, you've had me in this room for over a fuckin' hour now. It's not like I'm gonna run away, goddamn. Come on. You people are gonna get me killed. Come on. Come on. Come on, lemme have a cigarette. Fuck me."

Perry returned, and the two resumed talking.

"[Officer Perry]: Uh, um, got the prosecutor here. We're not able to get a public defender yet. But went and got y'all's property outta the room—

"[Younger]: Yeah?

"[Officer Perry]: —okay? Um, would you have a problem if we went through it and made sure there's nothin' illegal in it? You good with that?

"[Younger]: There shouldn't be anything in there but now can I have a cigarette now please?

. . . .

"[Younger]: I, I don't get why you don't have a prosecutor in here.

"[Officer Perry]: I've got a prosecutor.

"[Younger]: What I'm gonna tell you is—

"[Officer Perry]: You're gonna—are you gonna talk to me without an attorney?

"[Younger]: Yes.

"[Officer Perry]: I—

"[Younger]: That's what Michael told me to do.

"[Officer Perry]: Without an attorney?

"[Younger]: Yes.

"[Officer Perry]: Okay. Okay. We'll do that right now.

. . . .

"[Younger]: Are you guys gonna talk to me anytime soon?

"[Officer Perry]: Yeah, we're . . . fixin' to. We're fixin' to. Fixin' to get 'er done."

Perry left the room and returned with the county attorney. Younger thereupon launched into a lengthy narrative in which she spoke of a carnival underworld, a powerful mob boss named Frank Zaitchik, secretive protectors who followed Fowler and her around the carnival circuit but who were never seen, and a vicious

hitman who killed the Carpenters and who compelled her and her friends to clean up the crime scene and dispose of the camper, the trailer, and the bodies.

She then said, "I don't have anymore to say. I wanna talk to a federal prosecutor. . . . I would like to speak to a federal prosecutor and a—and an attorney please." After the others left her alone in the interview room, she said out loud,

"Gonna get us killed. You're gonna get us killed. The organization is gonna kill us and you guys are sittin' there. They did what—but made it even fuckin' worse. Ugh. Fine, I'll talk without one. Fine, I'll talk. Still want a federal prosecutor. Oh, god, come on. May I use the bathroom please."

Perry returned and said a lot of things were not matching up with what she said. The two talked a little bit longer about her phone and why everyone but her was lying.

The interview concluded with Perry interrupting her statement by saying, "You lawyered up. You lawyered up." She continued to try to speak about what the other accused people said, but Perry again interrupted her to say, "[W]e're done. . . . [Y]ou lawyered up so I'm not gonna talk to you about that part. Okay?"

In addressing Younger's motion to suppress her statements from the interview, the trial court parsed the interrogation into several segments. The court determined that her initial statement that she was not waiving her rights but she would talk to the police did not create a reasonable understanding that she was invoking her right to counsel. Her statements following that were admissible.

The subject of a request for counsel next came up when Younger told Perry she needed a lawyer to make sure her "rights aren't bein' trampled on." The court held this was a clear invocation of the right to counsel and the interrogation had to cease at that time.

Younger then asked for water and cigarettes, and she went on to make unsolicited comments about her life being in danger. After she was informed that a public defender was not immediately available, she said she wanted to make a statement without an attorney being present. Perry asked her again if she wanted to speak without an attorney, and she said yes. The trial court held that this constituted an unsolicited waiver of her right to counsel and she

had reinitiated the interrogation; her subsequent statements were therefore admissible.

The trial court than examined six specific indicators of whether Younger knowingly and intelligently waived her previously asserted right to counsel and whether her statements were voluntary. The court made these findings:

> "1. Younger appeared lucid and alert during all phases of her interview. While she stated she needed an insulin injection, it does not appear that she was adversely affected by the fact it took a while to supply her with the injection.
>
> "2. Though the interview lasted an appreciable amount of time, Younger did not appear tired, and did not complain that she was fatigued. She was, with reasonable promptness, given access to water and restroom facilities. Her biggest concern was satisfying her cigarette habit, and it appeared Perry made every reasonable effort to allow her to smoke when she desired to do so.
>
> "3. Younger did not request to communicate with the outside world. In fact when given the opportunity to contact an attorney she knew she declined, stating it would threaten her safety.
>
> "4. Younger is 56 years of age. She appears to be of average or above average intellect.
>
> "5. Perry was fair in conducting the interview. He did not raise his voice or behave in a threatening manner.
>
> "6. Younger is fluent in the English language.
>
> "This list is inclusive and not exhaustive. In this case the court finds that a major circumstance included in the totality of circumstances is Younger's obvious desire to talk, not only to police, but also to a prosecutor. It is clear from her interview and her conversation with Fowler that she believed telling her story would aid her, her husband, family and friends and perhaps totally absolve some of them. It is also clear that to her, time and secrecy were of the essence. If an attorney could not be procured quickly, it was her desire, or even her demand to proceed without an attorney.
>
> "The court finds that subsequent to her request for an attorney she initiated and desired a further interview with Perry and the prosecutor without an attorney present. The court further finds that her post-request waiver of her right to counsel was voluntary under the totality of the circumstances."

The court's findings relating to Younger's capacity to understand her rights and voluntarily waive them are well supported by

substantial competent evidence. Any suggestion that she was delusional based on the implausibility of her account of the background to the crimes and how the murders took place relates to the content of her statements, not to her capacity to understand the proceedings and her rights. A review of the record in its entirety shows she was fully aware of what was going on and who frequently tried to take control of how the interview was conducted. There was no indication that the delay in taking her insulin, or any other factor, led her to be inarticulate, unfocused, or unable to understand what she was being told or how she was responding to comments and questions.

More complicated is the question of whether and when she invoked her *Miranda* right to counsel and whether and when she reinitiated the interview.

Invocation of the *Miranda* right to counsel requires at least some kind of statement that can reasonably be construed to express a desire for the assistance of an attorney. But if a suspect makes a reference to an attorney that is ambiguous or equivocal so that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, the United States Supreme Court does not require the cessation of questioning. *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). Thus, an accused's remark that "'[m]aybe I should talk to a lawyer'" is not deemed a request for counsel that compels investigators to stop questioning. *Davis*, 512 U.S. at 462.

During the interview, Younger said she wanted to tell her story but she wanted an attorney present to protect her rights. Officer Perry suggested to her that an attorney would not want her to talk, and she replied that she did not have to listen to the attorney. This court has held that reminding an accused that an attorney might intervene to stop him or her from speaking with investigators is not proof of coercion and does not constitute an impermissible extension of the interview:

"[T]he statement that an attorney would advise him not to talk with the KBI may have been made with the intent to obtain a confession from defendant, but logic would dictate an opposite result. The statement, on its face, is not so coercive as to render the waiver and confession involuntary. There is substantial, competent evidence to support the trial court's finding that the statement was not so coercive

that the defendant's will was overcome. Based on the content and surrounding circumstances, there is also competent evidence to hold the statement was not likely to elicit an incriminating statement if defendant didn't want to make one and was not the 'functional equivalent' of direct questioning after the assertion of the right to the presence of counsel, in violation of *Miranda* and *Innis*." *State v. Newfield*, 229 Kan. 347, 359-60, 623 P.2d 1349 (1981).

Here, Younger clearly wanted to tell the police her version of the events. She repeatedly said she wanted to talk; she even showed impatience at delays in the interview when she outright asked whether they even wanted to hear what she had to say. There is little indication of coercive conduct by the police. Often, the interviewing officials said nothing more than "okay" when she said she wanted to proceed with the interview. In conformity with *Newfield*, advising Younger that an attorney would probably tell her not to talk operated more as a *protection* of her rights than a *violation* of her rights—the officer was letting her know that an attorney would probably advise her not to talk, which might have given her pause to reconsider whether she wanted to make any further statements.

The district court suppressed Younger's statements made after she explicitly said she wanted an attorney present on her behalf, along with the county prosecutor in the Arkansas county where she was detained.

Once an accused has expressed a desire to deal with police only through counsel, the accused may not be subject to further interrogation by the authorities until counsel has been made available, unless the accused initiates further communication, exchanges, or conversations with the police. *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). This requirement that interrogation cease is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990).

Nothing in the course of the interview suggests "badgering" on the part of the investigators. To the contrary, it often appears it was Younger who was badgering the officers to continue the interview. Younger wanted the police to hear her version of what happened. She sat in the interview room and said, when no one else was in the room:

"Come on, this is ridiculous. Either you want my information or you don't. Come on, you've had me in this room for over a fuckin' hour now. It's not like I'm gonna run away, goddam. Come on. . . . Come on. Come on. Come on, lemme have a cigarette. Fuck me."

When the detectives returned, Younger said: "Are you guys gonna talk to me anytime soon?"

Even after requesting counsel, an accused may change his or her mind and talk to police without counsel, if the accused initiated the change without interrogation or pressure from the police. See *State v. Straughter*, 261 Kan. 481, 490, 932 P.2d 387 (1997). A comment as simple as, "Well, what is going to happen to me now?" may suffice to reinitiate conversations with law enforcement even when the accused has requested counsel and interrogation has stopped. *Oregon v. Bradshaw*, 462 U.S. 1039, 1042, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983).

When Younger announced that she wanted to tell the whole story and she was willing to do that with only the prosecuting attorney present and no counsel for herself, she reinitiated the interview. And she did so with a vengeance, detailing her personal history, describing the machinations of Frank Zaitchik and his henchmen, and relating the events after the murders as she and her comrades fled across multiple state lines. At no point did she assume any responsibility for the crimes or ascribe any criminal conduct to her friends beyond cleaning up the crime scene.

The police did not use coercive tactics to get Younger to talk or to extend the interview. They did not threaten to withhold her insulin unless she talked. They did not make statements indicating she would be better off telling the truth. The furthest they went was asking her why her friends were all telling a story vastly different from the one she was telling and asking her who was lying. She initially responded that she did not believe her friends would take responsibility for the crimes and the police must be making that up. Then she said her friends were probably afraid of Frank Zaitchik. She insisted that it was important for the police to hear her version of the events so they would understand that no one in her group had committed any crimes.

Considering the record as a whole and taking into account that the trial court suppressed a portion of her statements, we find no

violation of Younger's *Miranda* rights requiring suppression of her other statements. She wanted to talk, she wanted the local prosecutor to hear her story, and she expressed her willingness to talk without an attorney present on her behalf.

C. Younger's Statements to Fowler

During her interrogation, Younger asked for the opportunity to talk with Michael Fowler outside of the interview room. The prosecutor suggested to the detective with whom she was speaking that it would be a good idea to allow her to do that but to ask Fowler if he would be willing to wear a wire. Fowler consented, and, unbeknownst to Younger, the supposedly private conversation was recorded.

Younger argues that her statements to Fowler should have been suppressed.

The police did not coerce Younger or even suggest to her that she should speak with Fowler. It was Younger who broached the subject of talking with him. She explained she wanted to talk with him "outside" the interview room and volunteered they could both be handcuffed during the conversation. Fowler was generally silent during the meeting and did not ask questions. When Younger spoke with him, she told him to blame everything on Fred Viney, a carnival worker with whom Younger did not get along well. The narrative that she wanted Fowler to adopt was that Viney was a hit man, hired by Frank Zaitchik, who killed the Carpenters and who threatened to kill Younger and Fowler if they did not cooperate with him.

Caselaw from other jurisdictions tells us that the fact that a defendant is in custody and does not know his or her conversations are being recorded does not render the conversations involuntary or the products of custodial interrogations.

In *Williams v. Nelson*, 457 F.2d 376 (9th Cir. 1972), a conversation between the defendant and a codefendant was made by means of a concealed microphone without either of them being aware they were being recorded. The court held that the recording was not the product of police coercion because "[t]rickery does not constitute coercion." 457 F.2d at 377. Statements are not considered to be coerced or involuntary as violative of *Miranda*

merely because the speakers are unaware that their statements are being recorded. See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 298, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990) (incarcerated suspect who made incriminating statements to undercover law enforcement officer posing as fellow inmate was not subjected to a custodial interrogation); *Siripongs v. Calderon*, 35 F.3d 1308, 1319-20 (9th Cir. 1994) (surreptitious recording of telephone call in jail by corrections officer standing nearby with a hidden recorder did not violate inmate's rights because his statements were not uttered in response to any interrogation); *Tower v. Ryan*, No. CIV. 09-1186-PHX-MHM, 2010 WL 3327596, at *9 (D. Ariz. 2010) (unpublished opinion) (recording of conversation between defendant and his parents without notice to him of the recording was noncoercive and did not violate the constitutional right to counsel), *report and recommendation adopted* No. CV 09-1186-PHX-MHM, 2010 WL 3328260 (D. Ariz. 2010).

The United States Supreme Court has held that allowing an accused to speak with a spouse does not amount to interrogation:

> "In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards* [*v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981)]: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. The government actions in this case do not implicate this purpose in any way. Police departments need not adopt inflexible rules barring suspects from speaking with their spouses, nor must they ignore legitimate security concerns by allowing spouses to meet in private. In short, the officers in this case acted reasonably and lawfully by allowing Mrs. Mauro to speak with her husband." *Arizona v. Mauro*, 481 U.S. 520, 529-30, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987).

Here, the conversation between Younger and Fowler was entirely voluntary and was carried out at her request. It was not an interrogation. The secret recording of the conversation was not unconstitutional.

Suppression of Evidence from Searches of Younger's Backpack and Cell Phone

Younger filed a motion to suppress evidence taken from her backpack after she gave written consent to a search. The trial court

denied the motion, and she argues on appeal that the trial court erred.

For a consent to search to be valid, two conditions must be met: (1) there must be clear and positive testimony that consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion, express or implied. *State v. Spagnola*, 295 Kan. 1098, 1107, 289 P.3d 68 (2012). The individual's mental state is a factor in determining the voluntariness of consent to search. *State v. Holmes*, 278 Kan. 603, 611, 102 P.3d 406 (2004).

The State has the burden of establishing the scope and voluntariness of the consent to search. Whether a consent is voluntary is an issue of fact that appellate courts review to determine if substantial competent evidence supports the trial court's findings. *State v. James*, 301 Kan. 898, 909, 349 P.3d 457 (2015). The trial court's decision that consent was voluntarily given will not be overturned on appeal unless it was clearly erroneous. *Holmes*, 278 Kan. at 611.

Younger asserts that the record shows that her consent to the searches of her backpack and phone was involuntarily given. She makes these assertions based on her need for insulin, the length of her interrogation, and supposed deception regarding her right to counsel. Although it is true that she did use insulin and the interrogation was lengthy, these facts do not dictate a finding that she was incapable of giving voluntary consent. The record suggests the contrary: she was actually quite engaged in the interview process, and she attempted to steer the investigation toward the contents of her backpack and phone.

The record shows that, during a break in Younger's interview, Officer Perry spoke with Fowler's son-in-law Scott Spencer, who gave Perry permission to go to Spencer's apartment and seize property that Younger had left there. Spencer's wife, who was at the apartment, also gave the officers permission to retrieve Younger's property. The police removed the property and took it back to the station.

During her interview, Perry asked Younger, "[W]ould you have a problem if we went through [your property] and made sure there's nothin' illegal in it? You good with that?" She replied,

"There shouldn't be anything in there but now can I have a cigarette now please?" At around 9:00 a.m., they then went to the property storage room together. When they arrived at the storage room, Perry presented Younger with a form for consent to search her property. Before she signed it, Perry explained to her that she had the right to refuse consent to search her property and she had the right to stop the search at any time even if she earlier gave consent. Younger said, "'I have no problem with that,'" and signed the form. The form that Perry and Younger both signed read:

> "I, Myrna Khan, D.O.B. 5-8-62, having been ask [*sic*] by Sgt. Perry and Det. Wear, who have identified themselves as police officers with the Van Buren Police Dept. for consent to search my Property Bags, located at V.B.P.D. [*sic*]. I have been advised by these officers of my constitutional rights to refuse or stop the search at any time. I have not been threatened or coerced in any way to give consent. I freely, voluntarily and intelligently give them and or their designated asistants [*sic*] the right to conduct this search."

Perry testified at the motion hearing that he was aware that Younger takes insulin and he did not observe any medical or competency symptoms suggesting she was not able to give valid consent. She did not appear to him to be delusional or in distress. Detective Jonathan Wear, who observed the interrogation, also did not observe any medical issues, or see any signs of mental distress or being tired.

Younger identified a red backpack as belonging to her, and Perry began to search it. As he did so, Younger told him that the gun that was used in the murders was in her bag. She watched him search the backpack and did not ask Perry to stop. He found a handgun in the backpack as well as her insulin, which he provided to her so she could inject herself. Perry did not require her to consent to the search as a condition for allowing her to take her insulin.

They returned to the interview room and were joined there by the county attorney, Marc McCune. Questioning continued for more than an hour, and then McCune asked Younger whether he had her permission to look through her phone. She nodded yes. She did not appear to be under duress, and she had previously taken her insulin shot. Perry left the room to get the phone from the evidence cubicle, to which Younger responded, "Okay." Perry

started to go through the phone, but, after about five minutes, Younger said she would like to have an attorney, and the interview ended. The messages that Perry saw on the phone were Facebook messages purporting to be between Frank Zaitchik and Michael Fowler.

Younger's attorney argued to the trial court that she did not provide valid consent for the search of her backpack or her phone. He asserted that the totality of the circumstances showed that Younger was tired, was late in receiving her insulin injection, and had not been provided with a lawyer. Counsel for the State responded that there was no sign of any coercion or mental confusion on Younger's part; she had freely given specific consent to the searches; and Younger did not assert a right to an attorney when she reinitiated the interview.

Following the suppression hearing, the trial judge ruled:

"With the testimony that was given, it's clear to the Court that under a totality of the circumstances that a free and voluntary waiver and agreement to the search of evidence was made; that there—there was no distress involved.

"Her—there was no testimony, nothing evidentiary that suggests that she was suffering from any kind of medical distress as a result of her—medical condition, nor did she ever hear or was there testimony that she was tired, worn out, fatigued. She did seem to be aware, and the statements were voluntary and cooperative. Therefore, the motion . . . on the suppression of evidence is denied."

Substantial competent evidence, found in both the testimony of the interrogating police and the record of the interview, supported the trial court's findings. Younger did not rebut that evidence. In fact, she told the interviewers that they needed to get the murder weapon "to prove we didn't do anything." On appeal, she simply asks this court to draw inferences about her consent that the trial court declined to make. We decline her invitation to reweigh the evidence and conclude the trial court's decision was not clearly erroneous.

Comments by Witnesses About Younger's Credibility

During the trial, two witnesses commented that Younger was a liar or was untrustworthy. Younger did not make contemporaneous objections, but she requested mistrials in breaks following the testimony. The court denied the motions and allowed the trial to proceed. On appeal, Younger contends that the commentary was

not only improper, but it also was so prejudicial that this court must reverse her convictions.

Younger did not object when the statements were made but moved for mistrials after the witnesses testified regarding her credibility.

Officer Kevin Dugan was a patrolman with the Van Buren, Arkansas, police department. He was describing to the jury why he arrested Younger when he returned to the Vista Hills Apartments. He explained that she had identified herself as "Tiffany Jones" when he first went to the apartments, but the file pictures of Tiffany Jones did not match Younger's appearance.

The prosecutor asked Dugan, "So now you got a concern about the name that was given to you by the defendant, right?" Dugan answered, "Yes, sir. At that time I knew we had a criminal violation. It was—she lied to us. Something was going on at that point in time." A little later, the prosecutor asked where he parked his patrol car, and Dugan responded, "We drove in, came around. I actually parked right here, because I was coming to look for her, flat-out knowing that she had already lied to me about her name."

Younger's attorney did not object to either comment at the time, but a few minutes later, during a break, he moved for a mistrial. As he put it,

"Lie was being used. This officer—this witness has said it twice now. I mean, I could have jumped up and objected right at the time. But I—I didn't. I waited until—I waited a few minutes. But I think the appropriate thing for me to do is make a motion for a mistrial and let you rule on that or deal with it, Judge."

The prosecutor responded:

"Judge, as the Court's aware, the officer is from Arkansas. I'm not sure what the rules are in Arkansas. The State can clarify with the defendant—or with the witness about the—well, tell the witness not to use the word 'lie' and to go back and the name was given was not the name that came across on the report and that the name did not match, versus lie."

The judge denied the mistrial motion and suggested the prosecutor advise witnesses not to invade the province of the jury in determining the weight and credibility of testimony.

When the jurors returned to the courtroom, the judge instructed them:

"Ladies and gentlemen of the jury, we've come to this previously, but I want to restate. . . . I've told you previously, but I'm going to restate the fact that the determination of the weight and credit to give to any 'witness'[] statements or testimony during the—either during the investigation or during the trial is solely your responsibility. You'll be the ones to be deciding what value there is in the testimony provided."

The next day, Sparky Fox, a former coworker of Younger testified. The prosecutor asked him, "What would you say about [Younger's] demeanor as you're working with her at the carnival?" Fox responded, "I really—she seemed like—to me like a person I couldn't trust." The prosecutor then said, "Okay. I don't want you to comment on anything to do with credibility. I want to ask [about] her demeanor, so how she interacted with you."

Again, Younger's attorney did not object at the time, but during a break a while later, he said,

"Judge, during Sparky Fox, his testimony, he went—well, regarding when Ms. Domme asked about his demeanor, he kind of said he didn't think of her as being trustworthy. Again, he didn't call her a liar. But I want to point that out. At the time I didn't jump up and object. I'll probably be criticized later for not. But I didn't want to let it go.

"I suppose I have to make another motion for mistrial. I don't know whether you want to instruct them again or leave it as it is. But again, I just can't think I can let it go."

The prosecutor responded that she had corrected the witness, and the judge denied Younger's motion.

Younger's attorney did not register immediate objections to the testimony now challenged. K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Dupree*, 304 Kan. 43, 62-63, 371 P.3d 862, *cert. denied* 580 U.S. 924 (2016) (objections to the evidence at the next recess not sufficient). This rule gives the trial court the opportunity to address the issue and is necessary to bring litigation to an end. *State v. Brown*, 307 Kan. 641, 645, 413 P.3d 783 (2018).

K.S.A. 60-404 is a "legislative mandate limiting the authority of Kansas appellate courts to address evidentiary challenges. . . . [The statute] permits only one outcome regarding unpreserved evidentiary challenges: that the challenge will not be the basis for

setting aside the verdict or reversing the judgment." *State v. Sinnard*, 318 Kan. 261, 282, 543 P.3d 525 (2024).

In *State v. Anthony*, 282 Kan. 201, 212-13, 145 P.3d 1 (2006), this court refused to reach the merits on a similar challenge to evidence introduced to a jury when the defendant failed to make a contemporaneous objection. The court listed numerous cases in support of requiring an objection. The court added: "We do not regard an *Elnicki* issue as one we must address to serve the ends of justice or prevent a denial of fundamental rights. Instead, we adhere to our general rule that a challenge to the admissibility of evidence will not be considered for the first time on appeal. [Citation omitted.]" 282 Kan. at 213-14. See also *State v. Lowery*, 308 Kan. 1183, 1227-28, 427 P.3d 865 (2018) (failure to object to *Elnicki* violations at time they were alleged to have occurred precluded appellate review).

Younger seeks to circumvent the contemporaneous objection requirement by turning to her motions for mistrial. A contemporaneous objection would have permitted immediate corrective relief by the trial court. Consistent with *Sinnard*, *Anthony*, and *Dupree*, we determine that the issue was not properly preserved for appeal, and we will not consider it a factor justifying reversal.

Refusal to Sequester State's Witness

In the course of a hearing on pretrial motions, the State requested that Senior Special Agent Brian Carroll of the Kansas Bureau of Investigation be allowed to remain in the courtroom as an exception to the general sequestration of witnesses. The prosecutor noted that Carroll had reviewed most reports on the case, had gathered every piece of physical evidence from Arkansas, and had assisted the Great Bend Police Department's investigation. Carroll would not be seated at the table with the prosecutor and would only be in front of the bar whenever he might take the stand.

Younger's attorney objected, specifically noting that Carroll's appearance every day would be observed by the jury. The objection did not set out exactly what the problem with that would be, only going so far as to say, "I don't know whether that makes credibility or not for him, but it shows his obvious interest in the case just because he's going to be there . . . ."

The trial judge granted the State's request and overruled the objection, holding: "[U]nder the circumstances, again the vast details involved in this, that it would be appropriate for Inspector Carroll to have an opportunity to be in the courtroom and may be of some benefit. So I'm going to grant the State's request and overrule the objection."

Carroll eventually took the stand a total of six times. Younger complains on appeal about four of his appearances. On the second day of the jury trial, Carroll testified briefly. He identified himself as the "case agent" or "the lead investigator" on the case. His testimony amounted to only six pages of transcript, and Younger's attorney did not cross-examine him. His testimony was limited to describing how the structures and vehicles were located on Friday, July 13, 2018. None of his testimony related to contested facts.

On the next day, the State called him to testify again. He described photographing, documenting, and searching several backpacks and duffle bags found in Arkansas. He also described clothing and other personal items in the containers. In addition, he discussed finding a Casey's General Store receipt from Pratt, Kansas, from the morning of July 14.

Of special interest was the notebook containing handwritten text, captioned "The Plan." The Plan set out a general outline of how killings might be carried out, including distracting the targets, although it did not specifically address the Carpenters or the Barton County fairgrounds. Carroll testified about how he gathered samples of Younger's handwriting to compare them with what was written on "The Plan." He did not testify about whether he made any comparisons between her handwriting samples and "The Plan," and he did not suggest he was qualified to make such comparisons.

On the fourth day of trial, Carroll twice testified again. First, he testified that a Walmart service order had the name "Myrna Khan" at the top, and Myrna Khan was an alias that Younger had sometimes used. He also testified about the contents of some video recordings from surveillance cameras that showed the route of the pickup and trailer as they left the fairgrounds. He later testified about the collection and identification of physical evidence, in-

cluding biological sample swabs. He further testified about a calendar that documented the Carpenters' travels and business transactions and about Thomas Drake's phone subscriber information. Younger's attorney did not cross-examine Carroll following either of these appearances as a witness.

On appeal, Younger contends that Carroll's continuing presence in the courtroom suggested that the jury should give his testimony greater weight than that of other witnesses, prejudicing her defense.

A trial court's decision whether to sequester a witness lies within that court's discretion. Furthermore, the trial court has discretion to permit certain witnesses to remain in the courtroom even if a sequestration order is in place. Allowing a testifying law enforcement officer to sit at the prosecution table is also subject to the trial court's discretion, although the practice is discouraged. When reviewing a claim that the trial court abused its discretion, this court determines whether the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Sampson*, 297 Kan. 288, 292, 301 P.3d 276 (2013).

Allowing a witness for the prosecution to remain in the trial courtroom presents two dangers. The first is that the presence of the witness in close proximity to the prosecutor may unfairly enhance the witness' credibility. See, e.g., *Sampson*, 297 Kan. at 296-97. The second is that witnesses may tailor their testimony to conform with earlier witnesses. 297 Kan. at 297.

In the present case, neither concern is a significant factor tending to show prejudice. Carroll's testimony was nothing more than descriptive: he explained what procedures were used to obtain and preserve evidence and how the evidence was identified. He did not dispute any claims by the defense, and he did not confirm or make any claims by the prosecution except that the evidence was what he collected. His testimony served as foundation evidence for other witnesses, but he himself did not testify that anything associated Younger with any criminal activity.

In *Sampson*, this court cited favorably to *Knight v. State*, 746 So. 2d 423, 430 (Fla. 1998), *cert. denied* 528 U.S. 990 (1999). In *Knight*, the nonsequestered witness' testimony could be compared

to trial transcripts and there was no potential that he or other witnesses could alter their testimony based on his presence in the courtroom. The Florida Supreme Court accordingly found no abuse of discretion in allowing the witness to testify. 746 So. 2d at 430.

Here, Younger does not question the veracity of Carroll's testimony. She also does not question that the identified items were retrieved from the locations that Carroll described. Carroll essentially described to the jurors what they could see with their own eyes: pictures of boxes, a handwritten plan of action, a service receipt, and video footage.

It is difficult to ascertain exactly what impermissible bolstering of other witnesses Carroll provided. He simply identified items. Particularly lacking in Younger's argument is any indication that Carroll "tailored" his testimony based on what he heard other witnesses say. There is no hint that Carroll would have or could have testified differently if he had been sequestered. The danger of fabrication, inaccuracy, and collusion was minimal in the testimony that Carroll provided. Cf. *United States v. Jackson*, 60 F.3d 128, 133, 135 (2d Cir. 1995).

In *Sampson*, this court cited *Jackson*, which set out factors for a court to consider when deciding whether to sequester a witness. These factors include the number of attorneys prosecuting the case, the complexity of the case, how often the State plans to call the officer to testify, and whether the State could present the same testimony through other witnesses. *Sampson*, 297 Kan. at 297-98.

These factors all favor finding no abuse of discretion in the trial court's decision to allow Carroll to remain in the courtroom. Two attorneys were prosecuting the case and, at various times, two were defending. The case was excruciatingly complex, with dozens of witnesses, multiple and varied exhibits, and a theory of culpability involving identity theft, faked social media accounts, manipulation of others, and a trail of evidence stretching from Kansas across Missouri and into Arkansas. Placing the witnesses in a precise sequence must have been extraordinarily challenging. The State intended to call Carroll many times to provide the foundation for evidence and eventually called him six times. And, as the recipient and custodian of much of the evidence, Carroll was

uniquely situated to identify exhibits and explain the chain of custody.

We conclude the trial court did not abuse its discretion in allowing Carroll to be present in the courtroom throughout the trial. He served the purpose of establishing the foundation for evidence in a remarkably complex case, but his testimony was limited to descriptions of the evidence and how it was obtained, as well as descriptions of handwritten texts, photographs, and video recordings. Nothing in the record suggests his testimony was inaccurate or misleading, and nothing suggests his credibility was ever in doubt.

Cumulative Error

Younger argues that even if this court should hold that individual errors were harmless, the cumulative effect was substantial prejudice that denied her right to a fair trial. Because we do not find multiple errors and we do not invoke harmless error analysis, cumulative error does not factor into our decision.

Restitution

K.S.A. 21-6604(b)(1) states that, in addition to other sentencing options, "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." K.S.A. 21-6604(b)(1).

At sentencing, the State submitted a request for restitution based on a claim from State Farm Insurance Company, restitution to the Crime Victims Compensation Board, expenses for the cost of extradition and evidence transport, and court costs. The order was then journalized. Younger asserts four claims of error in the calculation of restitution and the entry of written judgment.

Younger initially argues that the trial court lacked sufficient evidence to support an award of $30,239.93 to State Farm Insurance. The State submitted a letter from the State Farm Claims Department stating that it had paid claims on the trailer and the camper in the amounts of $9,197 and $21,042.93, and it was solely based on this letter that the court awarded restitution for the vehicles.

In property crimes, Kansas courts have consistently found that fair market value should be used as the typical standard for calculating loss or damage for purposes of restitution. The fair market value of property is the price that a willing seller and a willing buyer would agree upon in an arm's length-transaction. However, the restitution statute does not restrict a district court to award only the fair market value as restitution; restitution may include costs in addition to and other than fair market value. The appropriate amount is that which compensates the victim for the actual damage or loss caused by the defendant's crime. *State v. Hall*, 297 Kan. 709, 713-14, 304 P.3d 677 (2013).

Younger's attorney informed the court that it was unclear how the State arrived at its restitution amount. The letter from State Farm does not state how the amount of damages was reached. It also does not explain which claim was for the trailer and which for the pickup truck, or for the contents of either vehicle. Even more perplexing is that the "claimants" were Younger and her coconspirators. Nothing in the record informs who received compensation from State Farm, what became of the vehicles, or whether State Farm recovered some or all of its loss.

The trial court elected to impose restitution without addressing Younger's inquiry regarding how the amount was reached. The State had the burden of justifying its restitution request. See *State v. Dailey*, 314 Kan. 276, 278-79, 497 P.3d 1153 (2021). The State did little to satisfy its burden. Under *Dailey*, the State has forfeited its opportunity to prove the basis for the amount requested, and reversal of the restitution for State Farm's claims is warranted.

Younger also challenges the imposition of *any* civil restitution judgments without factual findings by a jury. This would include the $2626.50 awarded to the Crime Victims Compensation Board. As Younger notes in her brief, this court has recently taken up the question of both the federal and the state constitutional right to have a jury determine civil restitution awards. See *State v. Robison*, 314 Kan. 245, 249-50, 496 P.3d 892 (2021); *State v. Arnett*, 314 Kan. 183, 187-88, 496 P.3d 928 (2021). We have considered Younger's arguments urging this court to reject its holdings in *Robison* and *Arnett*, and we continue to find the reasoning behind

those opinions sound. We therefore do not find error in the imposition of restitution to the Board.

Finally, Younger makes two claims of error with which the State agrees.

At the conclusion of sentencing, the district court judge pronounced that court costs, the DNA database fee, extradition costs, the lab fee, and the booking fee all were "ordered to be collected as part of the restitution amount."

Younger contends this part of the restitution sentence was illegal and must be corrected. She is correct, and the State agrees.

Restitution and court costs are two different things. Restitution is controlled by K.S.A. 21-6604, and court costs are subject to K.S.A. 22-3801 and K.S.A. 28-172a. Restitution is for damages to victims of crimes and may not include various other costs and fees. *State v. Gentry*, 310 Kan. 715, 738, 449 P.3d 429 (2019).

This portion of the restitution order was contrary to statute and therefore illegal. As an illegal sentence, it could be raised at any time. See K.S.A. 22-3504. The inclusion of the other costs is reversed.

Also, at sentencing, the judge announced: "The court also will order that the defendant make payments—consistent regular payments on restitution in an amount that will equal 25 percent of her monthly personal income." The journal entry of sentencing stated only the total restitution to be paid.

The judge's oral pronouncement at sentencing is controlling, not the journal entry. See, e.g., *State v. Edwards*, 309 Kan. 830, 835, 440 P.3d 557 (2019). The journal entry cannot undo the judge's pronounced restitution. Younger points out potential prejudice that she may suffer if the 25 percent limitation is not journalized: the full amount of the restitution could become due immediately under K.S.A. 21-6604(b)(1).

The State agrees that the journal entry is erroneous in omitting the conditions for paying restitution. Such an error is subject to correction as a clerical error through a nunc pro tunc order. *Edwards*, 309 Kan. at 835-36. We find this relief to be appropriate and remand for issuing a nunc pro tunc order.

The convictions are affirmed, the restitution is reversed in part, inclusion of costs in restitution is reversed, and the case is

remanded to the trial court to correct the judgment relating to restitution.

Affirmed in part, reversed in part, and remanded with directions.

* * *

STEGALL, J., concurring: I join in the bulk of the majority's opinion. I write separately to note one point of divergence. The majority declines to address Younger's claim that her rights under section 10 of the Kansas Constitution Bill of Rights were violated when the court permitted Frank Zaitshik to testify via Zoom. Before us, Younger has argued that even if this remote testimony did not violate the Sixth Amendment to the United States Constitution, section 10 provides rights that are distinct from and broader than the Sixth Amendment and should have prevented the testimony. The majority finds Younger's section 10 claim to be unpreserved and declines to address it. *State v. Younger*, 319 Kan. at 600-01. I disagree.

A review of the record shows that Younger did substantively raise the Kansas Constitution below. Her written objection to the Zoom testimony quotes section 10 of the Kansas Constitution Bill of Rights, which provides that "[i]n all prosecutions, the accused shall be allowed . . . to meet the witness face to face." She argued to the district court that permitting Zaitshik to testify remotely violated her right to meet him "face to face." The majority faults her for not making a more robust argument in objection, and so chooses to review only the part of her claim that arises under the Sixth Amendment. But I can see no difference—from a preservation point of view—between Younger's Sixth Amendment objection and her section 10 objection. She objected "to the video conferencing testimony of Frank Zaitshik at the trial based upon the United States Constitution 5th, 6th, and 14th Amendments and Kansas Constitution Sec 10 right to confrontation of witness[es]." She then quoted each Constitution's relevant language. Indeed, she voiced her objection in equal terms as violations of both Constitutions. So it is curious the majority is willing to address one—at length—while finding the other unpreserved.

In my view, this apparent arbitrariness in applying preservation rules is unwise. These rules should not be treated like "a game of magic words or stilted technicalities." *T&J White, LLC v. Williams*, 375 So. 3d 1225, 1236 (Ala. 2022) (Parker, C.J., concurring in part and dissenting in part). We should not require a defendant to do more than simply raise an issue in the form of an objection to preserve it for review on appeal, particularly issues of constitutional import. See, e.g., *United States v. Flores-Martinez*, 677 F.3d 699, 710 n.6 (5th Cir. 2012) (no "'magic words'" required to preserve an issue); *United States v. Lopez*, 309 F.3d 966, 969 (6th Cir. 2002) ("'The preservation of a constitutional objection should not rest on magic words; it suffices that the district court be apprised of the objection and offered an opportunity to correct it.'"); *Corona v. State*, 64 So. 3d 1232, 1242 (Fla. 2011) (defendant not required to "intone special 'magic words'" to preserve a confrontation claim); *M.E. v. T.J.*, 380 N.C. 539, 559, 869 S.E.2d 624 (2022) (no "magic words" required to preserve an issue; rather, preservation rules are "a functional requirement of bringing the trial court's attention to the issue such that the court may rule on it"); *State v. Smith*, 513 P.3d 629, 645 (Utah 2022) ("'Whether a party has properly preserved an argument . . . cannot turn on the use of magic words or phrases.'").

The majority refuses to consider Younger's claim because though she objected on section 10 grounds, she did not make the explicit argument that section 10 provides broader and more robust protections than the Sixth Amendment. However, given that she objected on both section 10 and Sixth Amendment grounds, in my view this is sufficient for us and the lower court to be alerted to the nature of her asserted error. Younger's objection and her appellate arguments "'need not be identical; the objection need only "give the district court the opportunity to address" the gravamen of the argument presented on appeal.'" *United States v. Rodriguez-Leos*, 953 F.3d 320, 324-25 (5th Cir. 2020). And in this instance, it really shouldn't matter whether Younger specifically asserted that section 10 confers broader protections than the Sixth Amendment. When considering an objection on two independent grounds, a reviewing court by necessity ought to evaluate whether those claims rise or fall together or if they require independent

analysis. Requiring Younger to have raised the objection in such a specific way is pedantic and unjustifiably imposes requirements on defendants.

Thus, I would find Younger's section 10 claim properly preserved and before us for a decision. As such, we should—we must—examine whether her rights under section 10 were violated, which invariably includes examining the extent of the protections afforded by the Kansas Constitution's "face to face" guarantee.

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Kansas Constitution utilizes different language, providing: "In all prosecutions, the accused shall be allowed to . . . meet the witness face to face." Kan. Const. Bill of Rights § 10. Section 10—unlike its federal counterpart—plainly and explicitly requires a "face to face" confrontation. Section 10's unequivocal provision that a defendant is entitled to a *face-to-face* confrontation with a witness is not ambiguous. It grants a complete and unqualified right to confront witnesses face-to-face. See *State v. Riffe*, 308 Kan. 103, 113-14, 418 P.3d 1278 (2018) (Stegall, J., concurring) ("But the *meaning* of a law—a statute or a constitutional provision—cannot change until the text of that law changes. . . . '[O]ur constitution is deemed to mean what the words imply to a person's common understanding.'").

To be faithful to our constitutional text requires that we give effect to the actual words the Constitution employs. Often, though not always, this will entail a different mode of analysis than is used in interpreting and applying similar provisions in our federal Constitution. And in my view, it is constitutional error to permit a witness in a criminal trial to testify in a way that denies a defendant the face-to-face encounter that the drafters of the Kansas Constitution envisioned and explicitly guaranteed. See *People v. Fitzpatrick*, 158 Ill. 2d 360, 365-67, 633 N.E.2d 685 (1994) (concluding that the Illinois Constitution's confrontation clause which, like Kansas', provides the accused "'shall have the right . . . *to meet the witnesses face to face*'" unambiguously requires a "face to face" confrontation, which confers broader protections than the Sixth Amendment).

When this court eventually does reach the question of the scope of section 10's protections, it should not simply import Sixth Amendment caselaw that blithely abridges an individual's constitutional right for the sake of an amorphous "important public policy." See *Younger*, 319 Kan. at 595. Section 10 is clear, and "there is simply no room for interpretation with regard to 'the irreducible literal meaning'" of the text. *Maryland v. Craig*, 497 U.S. 836, 865, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) (Scalia, J., dissenting). Section 10 should thus be easily and affirmatively interpreted to ensure "that none of the many policy interests from time to time pursued by statutory law could overcome a defendant's right to face his or her accusers in court." 497 U.S. at 860-62 (Scalia, J., dissenting) (criticizing the majority's reliance on the "widespread belief" of the importance of the public policy of protecting child witnesses because "the Constitution is meant to protect against, rather than conform to, current 'widespread belief'"). When the time comes, I caution this court against applying any form of "'interest balancing'" where the constitutional text "simply does not permit it," as "[w]e are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings." 497 U.S. at 870 (Scalia, J., dissenting).

Despite my disagreement with the majority's decision to decline to explore this paramount question, were we to conclude that admission of Zaitshik's remote testimony did violate Younger's section 10 right to a face-to-face confrontation, that error would still be subject to a constitutional harmless error analysis. See *State v. Williams*, 306 Kan. 175, 202, 392 P.3d 1267 (2017). And given the overwhelming evidence of Younger's guilt in this case, and the fact that Zaitshik was not a key part of the State's case, but merely a rebuttal witness, I am not convinced that there is a reasonable probability that his testimony had any effect on the verdict.

I concur in the judgment of the court.

WILSON, J., joins the foregoing concurring opinion.

No. 125,006

STATE OF KANSAS, *Appellee*, v. TIRRELL L. STUART, *Appellant.*

(556 P.3d 872)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Felony Murder Definition—All Elements of underlying Felony Must Be Established.* Felony murder is the killing of a human being committed in the commission of, attempt to commit, or flight from an inherently dangerous felony. The State must establish all elements of the underlying felony to successfully prove felony murder.

2. SAME—*Acquiring Controlled Substance Does Not Prove Distribution of Controlled Substance.* Simply acquiring a controlled substance in a drug buy is not enough to prove the recipient's guilt for distribution of that controlled substance.

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Oral argument held November 1, 2023. Opinion filed October 4, 2024. Reversed.

Ryan J. Eddinger, Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Claire Kebodeaux, assistant district attorney, argued the cause, and *Mark A. Dupree Sr.,* district attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Felony murder is the killing of a human being committed in the commission of, attempt to commit, or flight from an inherently dangerous felony. K.S.A. 21-5402(a)(2). The State must establish all elements of the alleged underlying felony to successfully prove felony murder. *State v. Milo*, 315 Kan. 434, 442, 510 P.3d 1 (2022). Here, Tirrell Stuart argues the State failed to demonstrate the distribution-of-marijuana offense the State alleged to support his felony-murder conviction. See *State v. Hillard*, 313 Kan. 830, 850, 491 P.3d 1223 (2021) (reversing conviction for conspiracy to distribute methamphetamine, reasoning insufficient evidence showed the buyer agreed to distribute after acquiring). We agree with Stuart. For that reason, we must reverse his felony-murder conviction and vacate the sentence. See *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (noting the Double Jeopardy Clause prohibits a second trial

to let the prosecution fix its insufficient evidence problem from the first trial); *State v. Scott*, 285 Kan. 366, 372, 171 P.3d 639 (2007) (when reversing a conviction based on insufficient evidence, "no retrial on the same crime is possible").

FACTUAL AND PROCEDURAL BACKGROUND

Hanna Lindsay was at Stuart's apartment with other friends when Emilio Lopez contacted her by Facebook Messenger to ask if she wanted to buy some marijuana. She agreed and arranged to get $50 worth. She drove Stuart and three other friends to Lopez' house. Stuart handed Lopez the money, and he handed Stuart the marijuana. Hanna then drove Stuart and the others to pick up another friend, S.L., and they returned to the apartment. Hanna testified they "were all sitting there smoking."

According to Hanna, about two hours later, Stuart asked her to buy more marijuana, so she set up another deal with Lopez for $200 worth. She said she drove back to Lopez', with S.L. sitting in the front passenger seat and Stuart in the back. When they arrived, Hanna recalled Lopez walked over to the front passenger door to talk with her and S.L. through an open window. Stuart handed S.L. the money, who passed it to Lopez, who handed the marijuana to S.L.

The problem came when Lopez said the money seemed fake and grabbed the marijuana back from S.L. Both women testified Stuart shot Lopez through the open front passenger window after Lopez took the marijuana back from S.L. He died in the front yard. The State charged Stuart with felony murder with distribution of marijuana as the predicate felony. Stuart denied being present at this second transaction.

The district court's felony-murder instruction stated:

> "The defendant is charged with Murder in the First Degree. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant killed Emilio Lopez.
>
> "2. The killing was done while defendant was committing distribution of marijuana.
>
> "3. This act occurred on or about the 24th day of January, 2020, in Wyandotte County, Kansas.
>
> . . . .

"The elements of distribution of marijuana are as follows:
"1. The defendant distributed marijuana.
"2. The quantity of the marijuana was less than 25 grams.
. . . .
"'Distribute' means the actual, constructive, or attempted transfer of an item from one person to another, whether or not there is an agency relationship between them. *'Distribute' includes sale, offer for sale, or any act that causes an item to be transferred from one person to another*." (Emphasis added.)

A jury convicted Stuart, and the district court imposed a life sentence without possibility of parole for 25 years. Stuart directly appeals to this court. Jurisdiction is proper. See K.S.A. 22-3601(b)(3), (b)(4).

ANALYSIS

Stuart makes two claims on appeal: The State did not prove the underlying felony of distribution of marijuana supporting the felony-murder verdict; and the trial court failed to instruct the jury on a definition of possession. But we need not reach the second claim because the first one requires reversal of Stuart's felony-murder conviction.

Standard of review

An appellate court reviews evidence sufficiency challenges in the light most favorable to the prosecution to determine whether a rational factfinder could have found a defendant guilty beyond a reasonable doubt. In so doing, the court does not reweigh evidence, assess witnesses' credibility, or resolve evidentiary conflicts. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). This sets a rather low bar for the State to clear on appeal. *State v. Chandler*, 307 Kan. 657, 672, 414 P.3d 713 (2018). Even so, once insufficiency is determined, it is not toothless. See *Scott*, 285 Kan. at 372.

Discussion

Felony murder is "the killing of a human being committed . . . in the commission of, attempt to commit, or flight from any inherently dangerous felony," including distribution of marijuana. K.S.A. 21-5402(a)(2), (c)(1)(N). It is "unlawful for any person to distribute or possess with the intent to distribute" marijuana.

K.S.A. 21-5705(a)(4); K.S.A. 65-4105(d)(17). "'Distribute' means the actual, constructive or attempted transfer from one person to another of some item whether or not there is an agency relationship" and "includes, but is not limited to, sale, offer for sale or any act that causes some item to be transferred from one person to another." K.S.A. 21-5701(d).

Possession is an essential element of distribution, requiring a person have "joint or exclusive control over an item with knowledge of and intent to have such control." K.S.A. 2019 Supp. 21-5701(q); see *State v. Crosby*, 312 Kan. 630, 637-38, 479 P.3d 167 (2021) (providing transferring a controlled substance is impossible without first having joint or exclusive control over the substance at issue). There is no temporal requirement, as made plain by K.S.A. 2019 Supp. 21-5701(q)'s language, despite Stuart's suggestion otherwise.

Viewing the evidence in the light most favorable to the State, we hold Stuart possessed the marijuana through joint control once Lopez handed it to S.L.—she acted as Stuart's intermediary by exchanging the money and drugs for his benefit. See Black's Law Dictionary 1409 (11th ed. 2019) (defining joint possession as "[p]ossession shared by two or more persons"). But this conclusion only gets us part way to sustaining Stuart's conviction because mere possession is not enough to establish distribution, and that is where the State's case runs aground.

The State must also show Stuart distributed or intended to distribute the marijuana beyond personal use. See K.S.A. 21-5701(d). The State's "evidence may be circumstantial—flowing from reasonable inferences and possibly statutory presumptions," "[b]ut it must be present for there to be a conviction." *State v. Mora*, 315 Kan. 537, 548, 509 P.3d 1201 (2022).

Both *Crosby* and *Hillard* discussed distribution's transfer requirement. In *Crosby*, the court held a distribution conviction must be supported by evidence that establishes a defendant first possessed the controlled substance before transferring it to another. *Crosby*, 312 Kan. at 637-38. But it declined to consider whether a person who only receives drugs is guilty of distribution. 312 Kan. at 636. Even so, its discussion signaled a distribution conviction needs more than possession. And shortly after *Crosby*,

the court in *Hillard* concluded distribution requires evidence that demonstrates a defendant further transferred the drug after obtaining possession or possessed with intent to distribute it. *Hillard*, 313 Kan. at 850. The *Hillard* court reversed the distribution conviction, reasoning the State merely showed the defendant "conspired to 'distribute' a controlled substance to herself only," which is possession, not distribution. 313 Kan. at 850. In other words, simply acquiring a controlled substance is not enough to prove the recipient is guilty of distribution.

It seems obvious from the trial record here that the State did not appreciate it needed to prove the intent-to-distribute element to convict Stuart on this felony-murder charge. Its case focused entirely on the drug buy—not what was going to happen afterward to transfer the newly purchased marijuana to someone else. See *Hillard*, 313 Kan. at 850 (noting the State failed to present any evidence of the defendant's "intentions for the drug once she received it"). This seems most apparent from the prosecutor's closing argument outlining "what I have to prove," which explained:

> "No. 2, the killing was done while the defendant was committing distribution of marijuana. At the bottom of [the jury instruction], it talks about the definition of distribute and Kansas law does not talk about the differences between a buyer and a seller in distribution. It says distribution does include the sale, offer for sale or an act that causes an item to be transferred from one person to another, which is a buyer or a seller. *Tirrell Stuart was engaged in distributing marijuana when he gave the money and was trying to get the weed.*
>
> "No. 3, this happened on January 24th of 2020 in Wyandotte County, Kansas. Over and over you heard that Emilio Lopez died at 8000 Greeley here in Wyandotte County, Kansas. We're talking about distribution of marijuana. So those elements are out here too. *We're talking about the defendant Tirrell Stuart distributed marijuana. He was involved in the drug deal. He was an active participant in the drug deal. He provided the money. His goal was to receive drugs, marijuana*." (Emphases added.)

Later the prosecutor said: "And so that's why I submit that the defendant is guilty of distributing marijuana and that he killed [Lopez] *in the middle of that distribution*, that he knew, the defendant knew what he was doing." (Emphasis added.)

The State's closing argument glaringly misstated the law on distribution as described in *Crosby* and *Hillard*. Stuart could not be guilty of distribution under our caselaw simply because, as the prosecutor told the jury, "[H]e gave the money and was trying to

get the weed." And nowhere in the State's closing did it mention it had to prove—or did prove—Stuart intended to transfer the marijuana to someone else after buying it. The State even conceded at oral argument to this court that its prosecution theory did not concern itself with Stuart's intentions for the drug once he acquired it.

If the issue were prosecutorial error, the State's closing argument would be a misstatement of the applicable law. See *State v. Watson*, 313 Kan 170, 171-72, 484 P.3d 877 (2021) (reversing Medicaid fraud conviction when prosecutor misstated the law by arguing submission of timesheets was sufficient regardless of the defendant's intent to defraud). But our issue is evidence sufficiency, so where does that leave us?

To begin with, the State's understanding about what it needed to prove is not really important. Instead, we must ask whether a reasonable juror could find beyond a reasonable doubt that Stuart distributed or intended to distribute the marijuana from Lopez based on the evidence presented. See *State v. Pepper*, 317 Kan. 770, 776, 539 P.3d 203 (2023) (explaining evidence sufficiency asks only if the evidence was ever strong enough that a reasonable trier of fact could have found the crime's essential elements beyond a reasonable doubt). And the State now argues on appeal a "rational fact-finder could find Stuart guilty of distribution because there is a reasonable inference that Stuart was buying to give to his friends and share the marijuana" purchased from the second deal. In other words, in its effort to salvage this conviction, the State drops its earlier assertion that Stuart distributed by receiving the drug from Lopez.

But in advancing this new argument, the State fails to confront *Mora*'s suggestion that the mere act of sharing marijuana with codefendants may remain personal use under some circumstances. See *Mora*, 315 Kan. at 550 ("We reject the State's contention that the mere act of Bledsoe and Mora consuming the marijuana together would satisfy the statutory definition of distribution."). There, the court noted, no evidence supported the defendant "ever sold or offered marijuana for sale, arranged to meet anyone to sell marijuana to, or anything else that could suggest he was engaging in distribution." 315 Kan. at 550. Here, Hanna was also charged

with felony murder, so any marijuana Stuart might have intended to share with her seemingly implicates *Mora*.

This confronts us with yet another legal quandary: Does *Mora* incorrectly limit distribution's statutory definition? See K.S.A. 21-5701(d). Neither party briefed this question, but Stuart did not dispute it. In the end, we will assume, without deciding, the State's new premise on appeal interprets the statute's text correctly. See *State v. Gonzalez*, 307 Kan. 575, 592, 412 P.3d 968 (2018) ("Simply pressing a point without pertinent authority, or without showing why it is sound despite a lack of supporting authority or in the face of contrary authority, is akin to failing to brief an issue. When a party fails to brief an issue, that issue is deemed waived or abandoned.").

In examining the State's new argument and determining whether sufficient evidence existed, we consider both the direct and circumstantial evidence in the record. "Direct evidence is such evidence which, if believed, proves the existence of a fact without inference or presumption, as for example the testimony of an eyewitness as to what he or she actually saw, heard, or touched." *State v. Scaife*, 286 Kan. 614, 620, 186 P.3d 755 (2008). And "'[c]ircumstantial evidence tends to prove a fact in issue by proving other events or circumstances which afford a basis for reasonable inference by the jury of the occurrence of the fact in issue.'" *State v. Evans*, 275 Kan. 95, 105, 62 P.3d 220 (2003). Circumstantial evidence can support a conviction of even the most serious offense and the law does not differentiate between the probative values of direct and circumstantial evidence, treating both as having similar weight in proving relevant facts. *State v. Darrow*, 304 Kan. 710, 720, 374 P.3d 673 (2016); *Scott*, 285 Kan. at 372.

Here, the State failed to introduce direct evidence about the second transaction to establish the distribution element. From the first transaction, we know Stuart "did the deal," by exchanging money for marijuana with Hanna, Yulianna, Bones, and Quavo in the car. But what happened next is less clear because the record is littered with ambiguous pronouns. For example, when discussing the first deal, the prosecutor asked Hanna, "Did you all get weed from [Lopez]?" to which she responded, "Yes, we did." And when the prosecutor asked, "Where did you go after you all got the weed

from Emilio?" Hanna said "we" went to pick up S.L. from work, joining them "all" in the car. The prosecutor then asked, "Where did you guys go?" and Hanna responded that "we" drove to Stuart's apartment. In response to the question "[w]hat happened when you all get back to the apartment?" Hanna testified: "Bones rolled up a blunt. We were all sitting there smoking." She also testified "we hung out for awhile [*sic*]." But this does not tell us if "we" refers to the same group the entire time or what they smoked.

S.L.'s testimony also does not clarify these ambiguities. She said Hanna picked her up from work with "a kid named Bones and his girlfriend Yulianna and a kid named Quavo and a Mexican kid, I don't remember his name. I don't remember who else." She said, "We went to [Stuart's] house" where "[w]e were just hanging out with [Stuart] and we got some beer and we just hung out." But she could not remember if other people were smoking marijuana, just cigarettes. At oral argument, the State conceded S.L. did not smoke any marijuana that night. And what about the mother of Stuart's children who lived in the apartment, but no evidence shows if she was even present?

As defense counsel noted at oral argument, "there's a hole, a pretty big one" in the evidence. And the State concedes it failed to ask if Stuart ever shared his marijuana from the first buy. In any event, believing all of Hanna's testimony, we only know from the direct evidence that Stuart possessed the marijuana from the first deal, but not if he shared it. Similarly, no trial evidence directly shows Stuart ever intended to distribute marijuana from the second transaction.

Even so, that does not end our inquiry because circumstantial evidence, which requires a factfinder to draw reasonable inferences, may equally prove distribution or support a conviction of even the gravest offense. See *Scott*, 285 Kan. at 372; *State v. McBroom*, 299 Kan. 731, 754, 325 P.3d 1174 (2014). A reasonable inference is when "different circumstances are used to support separate inferences or where multiple pieces of circumstantial evidence separately support a single inference. *State v. Banks*, 306 Kan. 854, Syl. ¶ 3, 397 P.3d 1195 (2017). An unreasonable inference, on the other hand, is one based on mere suspicion or inference stacking. *State v. Doyle*, 201 Kan. 469, 489, 411 P.2d 846

(1968) (stating "mere suspicion, however strong, is not enough and juries are not permitted to base verdicts of conviction on suspicion"); *Mora*, 315 Kan. at 547 (noting "stacking one presumption upon another to reach a fact is" prohibited). Simply put, an inference that presumption A, presumption B, and presumption C all independently point to fact D is reasonable and permitted; an inference, however, that presumption A leads to presumption B leads to presumption C leads to fact D is unreasonable and prohibited. *Banks*, 306 Kan. at 861.

So starting with the evidence relating to the first deal, we directly know: (1) the group of friends all went together to "get weed from [Lopez]," (2) Stuart handed Lopez money and Lopez handed him the marijuana, (3) the group picked up S.L. and returned to Stuart's place, and (4) "Bones" rolled a joint and "we all" smoked. Stuart does not dispute these facts. And from the same evidence we can reasonably presume Stuart shared the initial purchase with the friends by smoking at his apartment. We can do so because that assumption flows from separate, proven facts—not from a string of inferences based on a single proven fact. See 29 Am. Jur. 2d Evidence § 214 ("Rule against inference-stacking prohibits an inference where an initial inference is drawn from a fact, and other inferences are built solely and cumulatively upon the first, so that the conclusion reached is too remote and has no sound logical foundation in fact."). In the words of the *Banks* court, the State showed fact A, fact B, and fact C all independently lead to fact D—Stuart distributed the drugs after the first transaction (assuming without deciding the State's distribution premise).

But the reasonable inference (fact D) does not establish the underlying felony of distribution for felony murder, which is premised on the second transaction. When viewed in the light most favorable to the prosecution, the evidence shows the first deal was a discrete occurrence from the second transaction and Lopez' death. The first buy happened earlier in the day with Stuart and his friends going back to the apartment, before Stuart returned for the second buy with a different group. Fact D was unconnected to Stuart shooting Lopez for taking the second drug back. See *State v. Patillo*, 311 Kan. 995, Syl. ¶ 5, 469 P.3d 1250 (2020) (under the felony-murder statute, the killing must occur within the res

gestae of the underlying crime, and there must be a direct causal connection between the felony and the resulting death).

Accordingly, the State must prove Stuart intended to distribute the marijuana from the second deal to establish the underlying felony it alleged. But that is where the "big hole" appears in the State's evidence. Hanna testified that after the first transaction they hung out for a while, at which point Stuart told her "to ask Emilio if [they] could pull up for some more"—$200 worth. She also testified about her Facebook messages with Lopez. She said, "slide me 30gs for 2 bills," meaning 30 grams for $200. Lopez replied, "[Y]ou really want that for $200?" She messaged back, describing that message at trial as indicating Stuart "liked what we had gotten the first time and he wanted to get more of it."

From this, we directly know Stuart liked the initial purchase, and that he asked Hanna to buy a larger quantity. Based on this, the State insists we still can reasonably infer an intent to distribute from the second deal. It reasons Stuart first bought $50 worth and shared it with friends and then asked Hanna to set up a second purchase "to buy even more marijuana." This, in the State's view, strengthens the presumption he was purchasing to again share with his friends like he did after the first buy.

But this pile of guesswork impermissibly requires making an inference based on another inference. The State entirely misses that its proposed presumption is only a logical conclusion if we initially make the separate inference that Stuart distributed the first deal. It incorrectly assumes it directly proved that fact with the evidence discussed above. And it goes on, without any citation to the record, to argue even if he were not going to share with the other friends, Stuart must have intended to share with Hanna and S.L.—even though the State concedes S.L. never smoked at any time that day. All the State has is Hanna "hoping for other people to purchase" marijuana so she could smoke it, but that says nothing about Stuart's state of mind. The State's prosecutorial assumption requires an unreasonably large jump to conclude Stuart intended to distribute the second purchase from what the State proved at trial.

The court in *Mora* illustrates the inference stacking problem presented here. There, the defendant's felony-murder conviction

was based on two underlying felonies: attempted aggravated robbery and distribution of marijuana. In reversing the conviction based on attempted aggravated robbery, the *Mora* court held the State's case impermissibly stacked inferences to conclude the defendant intended to commit aggravated robbery. *Mora*, 315 Kan. at 546-47. The district court first inferred the defendant had no money from the established facts that he lacked a job, home, and car. And from that, the district court made a second inference the defendant necessarily intended to rob the drug dealer because he could not get the marijuana any other way. The same impermissible logic contaminates Stuart's prosecution.

All the State has here is Hanna "hoping for other people to purchase" marijuana so she could smoke it—a fact the dissent hangs its hat on. But her hope says nothing about Stuart's state of mind, which is where the focus needs to be for the State to prove its case. Her desire about smoking Stuart's second purchase does not reveal whether he intended to share it with others or just consume it himself sometime later.

There is insufficient evidence in the record to support the distribution element of the underlying offense, which means the evidence is necessarily insufficient to sustain Stuart's felony-murder conviction. And with that, we need not consider the second issue of instructional error.

Reversed.

* * *

STEGALL, J., dissenting: I would hold there is sufficient evidence to support the conviction for felony murder with the underlying felony of distribution of marijuana. Showing insufficient evidence "is a high burden, and only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt should we reverse a guilty verdict." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020).

The testimony heard by the jury—and explained by the majority—present enough circumstantial evidence to allow a reasonable juror to conclude that Stuart intended to distribute marijuana. *State v. Scott*, 285 Kan. 366, 372, 171 P.3d 639 (2007) (circum-

stantial evidence may support a conviction of even the gravest offense); *State v. Pepper*, 317 Kan. 770, 776, 539 P.3d 203 (2023) (explaining evidence sufficiency asks only if the evidence was strong enough that a reasonable trier of fact could have found the crime's essential elements beyond a reasonable doubt).

"'Distribute is defined as "the actual, constructive or attempted transfer from one person to another of some item whether or not there is an agency relationship." K.S.A. 2019 Supp. 21-5701(d). This "includes, but is not limited to, sale, offer for sale or any act that causes some item to be transferred from one person to another." K.S.A. 2019 Supp. 21-5701(d).'" *State v. Mora*, 315 Kan. 537, 549, 509 P.3d 1201 (2022) (quoting *State v. Crosby*, 312 Kan. 630, 637, 479 P.3d 167 [2021]).

Thus, the question before us is whether a reasonable juror could find beyond a reasonable doubt Stuart was purchasing marijuana with the intent to later transfer, by any act, at least some of that marijuana to another person. K.S.A. 21-5701(d). The majority makes much of the fact that in their view, such a conclusion would require impermissible inference stacking between the first and the second marijuana purchase. This distracts from the possibility that a reasonable juror could make such a finding based solely on the facts surrounding the second transaction. And this possibility is certainly supported by the evidence.

The first transaction does lay the evidentiary back-drop to a full understanding of the second transaction. Stuart had asked Hanna to set up a second purchase—on the same day—for more marijuana from the same person. *State v. Stuart*, 319 Kan. 633, 634, 642, 556 P.3d 872 (2024).

"Hanna testified that after the first transaction they hung out for a while, at which point Stuart told her 'to ask Emilio if [they] could pull up for some more'—$200 worth. She also testified about her Facebook messages with Lopez. She said, 'slide me 30gs for 2 bills,' meaning 30 grams for $200. Lopez replied, '[Y]ou really want that for $200?' She messaged back, describing that message at trial as indicating Stuart 'liked what we had gotten the first time and he wanted to get more of it.'" 319 Kan. 642.

The majority states that "[f]rom this, we directly know Stuart liked the initial purchase, and that he asked Hanna to buy a larger quantity." 319 Kan. 642.

But we also know that Stuart liked what "we" got the first time, and the majority admits there's a reasonable inference that

Stuart shared what "they" got from the first transaction. 319 Kan. 641. Jurors also knew that the second time around, Hanna wanted "other people to purchase" marijuana so "she could smoke it." 319 Kan. 642. And in fact, the evidence shows that Stuart was the "other" person whose marijuana Hanna was planning to smoke. No impermissible inference stacking is required to reach such a conclusion. The majority over-thinks the evidentiary question before us. To a reasonable juror exercising ordinary knowledge and common-sense, the testimony paints a relatively simply picture—a planned marijuana purchase which was intended for later use among a group of friends who had been partying all day, and desired to continue doing so.

I would hold that based on the evidence presented, viewed in the light most favorable to the State, a jury could reasonably conclude that Stuart arranged the second buy with the intention of later distributing that marijuana among friends.

For this reason, I dissent.

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

State v. Frost

No. 98,433

STATE OF KANSAS, *Appellee*, V. KENNETH E. FROST, *Appellant*.

(556 P.3d 870)

SYLLABUS BY THE COURT

APPEAL AND ERROR—*Six Justices Equally Divided on Issue on Appeal—Judgment of Lower Court Must Stand.* When one of the justices of the Supreme Court is disqualified to participate in a decision of the issues raised in an appeal or petition for review, and the remaining six justices are equally divided as to the proper disposition of the appeal, the judgment of the court from which the appeal or petition for review is made must stand.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 31, 2009. Appeal from Johnson District Court; STEPHEN R. TATUM, judge. Oral argument held May 17, 2023. Opinion filed October 4, 2024. Judgment of the Court of Appeals affirming the district court stands. Judgment of the district court is affirmed.

David Scott Patrzykont, of David S. Patrzykont, Attorney at Law, P.A., of Kansas City, argued the cause, and *Gerald E. Wells*, of Jerry Wells Attorney-at-law, of Lawrence, and *Lydia Krebs*, of Kansas Appellate Defender Office, were with him on the briefs for appellant, and *Kenneth Frost*, appellant, was on a supplemental petition for review pro se.

Kendall S. Kaut, assistant district attorney, argued the cause, and *Steven J. Obermeier*, assistant district attorney, *Shawn E. Minihan*, assistant district attorney, *Phill Kline*, former district attorney, *Stephen M. Howe*, district attorney, *Steve Six*, former attorney general, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

PER CURIAM: Kenneth E. Frost challenges a 2009 Court of Appeals' decision affirming his conviction of aggravated indecent liberties with a child for acts that took place more than 20 years ago. Frost has pursued a series of post-conviction proceedings in state and federal court following that 2009 decision. Through these filings, Frost has argued his trial attorney, the attorney who represented him in posttrial proceedings in the district court, and his appellate attorney were ineffective. He also contends the prosecutor erred during arguments to the jury.

He first raised his claims of ineffective assistance of counsel in the district court by filing a motion for new trial. After a hearing, the court denied his motion. Frost then appealed to the Court of Appeals, raising his ineffective assistance of counsel claim,

prosecutorial misconduct, and other issues. The Court of Appeals affirmed the district court. *State v. Frost*, No. 98,433, 2009 WL 2371007, at *3-12 (Kan. App. 2009) (unpublished opinion). This court denied review of the decision on September 7, 2010.

Frost then sought relief in federal court. He was again unsuccessful in both the district court, *Frost v. McKune*, No. 11-3170-SAC, 2013 WL 812153, at *2 (D. Kan. 2013) (unpublished opinion), and in appealing that decision, *Frost v. Pryor*, 749 F.3d 1212, 1227 (10th Cir. 2014). Within one year of the Tenth Circuit's decision, Frost filed a pro se motion under K.S.A. 60-1507 in Johnson County District Court.

In that proceeding, the district court judge held (among other things) that Frost's appellate counsel was ineffective for not including certain issues in Frost's petition that asked this court to review the Court of Appeals 2009 decision affirming his conviction. As a remedy, the court allowed Frost to file a new petition for review. Frost filed a motion with this court, and Justice Melissa Standridge, who was a Court of Appeals judge on the panel that decided the 2009 Court of Appeals decision, recused from consideration of any action by this court. The remaining six members of the court voted to withdraw its 2010 mandate in Frost's direct appeal from his convictions, allowed Frost to file a new petition for review, and allowed Frost to file a pro se supplemental petition for review.

We granted review of both petitions and considered the merits of the arguments raised. The remaining six members of the court are equally divided as to the proper disposition of this appeal. Chief Justice Luckert and Justices Stegall and Wilson would affirm the Court of Appeals decision. Justices Rosen, Biles, and Wall would reverse and grant a new trial.

Since the Supreme Court is equally divided in this case, the judgment of the Court of Appeals affirming the district court stands. *Williams-Davidson v. Lui,* 318 Kan. 491, 492, 544 P.3d 854 (2024). As we explained in *State v. Buchhorn*, 316 Kan. 324, 325, 515 P.3d 282 (2022) (quoting *Paulsen v. U.S.D. No.* 368, 239 Kan. 180, 182, 717 P.2d 1051 [1986]):

"'The general rule in this jurisdiction, and elsewhere, is that when one of the justices is disqualified to participate in a decision of issues raised in an appeal

and the remaining six justices are equally divided in their conclusions, the judgment of the trial court must stand. [Citations omitted.] See also Kansas Constitution, Art. 3, § 2, which provides that the concurrence of four justices shall be necessary to a decision.'"

The court being equally divided, the judgment of the Court of Appeals affirming the district court stands. The district court is affirmed.

STANDRIDGE, J., not participating.

Bar Docket No. 27356

In the Matter of JARED TYLER FRICK, *Respondent.*

(556 P.3d 888)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Voluntary Surrender of License –Order of Disbarment.*

This court admitted Jared Tyler Frick to the practice of law in Kansas on January 11, 2017. Frick's law license has been administratively suspended since December 10, 2020, for failure to pay his attorney registration fees. See Supreme Court Rule 206(f) (2024 Kan. S. Ct. R. at 255) (suspension from the practice of law for failure to comply with annual attorney registration requirements).

On September 26, 2024, Frick's request to voluntarily surrender his license was submitted to the Office of Judicial Administration under Supreme Court Rule 230(a) (2024 Kan. S. Ct. R. at 287). Frick faces a hearing before a hearing panel appointed by the Kansas Board for Discipline of Attorneys (Board). See Supreme Court Rule 204(c) (2024 Kan. S. Ct. R. at 252) (hearing panel appointment); Supreme Court Rule 222 (2024 Kan. S. Ct. R. at 274) (hearing process).

This court accepts Frick's surrender of his Kansas law license, disbars Frick pursuant to Rule 230(b), and revokes Frick's license and privilege to practice law in Kansas.

The court further orders the Office of Judicial Administration to strike the name of Jared Tyler Frick from the roll of attorneys licensed to practice law in Kansas effective the date of this order.

The court notes that under Rule 230(b)(1)(C), any pending Board proceeding or case terminates effective the date of this order. The Disciplinary Administrator may direct an investigator to complete a pending investigation to preserve evidence.

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein be assessed to Frick, and that Frick comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

Dated this 8th day of October 2024.

State v. Martis

No. 126,781

STATE OF KANSAS, *Appellee*, v. GORDON R. MARTIS, *Appellant.*

(556 P.3d 888)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Sentencing—Motion to Correct Illegal Sentence—Cannot Raise Constitutional Claim.* A defendant cannot use a motion to correct an illegal sentence to raise a constitutional claim.

Appeal from Wyandotte District Court; Michael A. Russell, judge. Submitted without oral argument September 12, 2024. Opinion filed October 11, 2024. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, was on the brief for appellant.

Nicholas Campbell, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Gordon Martis filed his third motion to correct an illegal sentence, arguing his hard 40 sentence is unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The district court summarily denied the motion as successive, given the procedural history, but the better view is to deny the motion as an improper procedural vehicle for a constitutional claim. See *State v. Warrior*, 303 Kan. 1008, Syl., 368 P.3d 1111 (2016). We affirm the district court judgment on that basis. See *State v. Ruiz*, 317 Kan. 669, 670, 538 P.3d 828 (2023) (affirming district court on different grounds).

FACTUAL AND PROCEDURAL BACKGROUND

In 1999, Martis carried out a deadly shooting in a parking lot near a nightclub in Wyandotte County, targeting an occupied vehicle. A jury found Martis guilty of one count each of first-degree premeditated murder, second-degree murder, attempted first-degree premeditated murder, and attempted second-degree murder. He received an enhanced hard 40 sentence for the first-degree murder conviction, which required judicial fact-finding of aggravating circumstances under K.S.A. 21-4635 (Furse 1995).

In his direct appeal, Martis asserted this sentence violated *Apprendi*, 530 U.S. at 490, which requires a jury find any fact, other than a prior conviction, that increases a crime's penalty beyond the statutory maximum. His appeal was denied under *State v. Conley*, 270 Kan. 18, 33, 11 P.3d 1147 (2000) (Kansas' hard 40 sentencing scheme is valid under *Apprendi*). *State v. Martis*, 277 Kan. 267, 297-98, 83 P.3d 1216 (2004).

In 2014, Martis filed his first motion to correct an illegal sentence, claiming his sentence was illegal under *Alleyne v. United States*, 570 U.S. 99, 108, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (extending *Apprendi* to mandatory minimum sentences). The district court denied his motion, reasoning *Alleyne* did not apply retroactively. In 2017, Martis submitted his second motion, claiming his sentence was illegal under *State v. Soto*, 299 Kan. 102, 124, 322 P.3d 334 (2014). The district court again denied—this time for improper procedure.

Undeterred, Martis filed this third motion in 2023, arguing his sentence violated the Sixth Amendment of the United States Constitution. He urged the district court to consider a Hawaii Supreme Court case, *Flubacher v. State*, 142 Haw. 109, 119, 414 P.3d 161 (2018) (applying *Apprendi* to invalidate Hawaii's "extended term" sentences). The district court summarily denied his motion for two reasons. First, the court noted Martis was "barred from filing the same claim in a second or successive motion to correct an illegal sentence . . . unless subsequent developments in the law shine new light on the original question of whether the sentence was illegal when pronounced." See *State v. Murdock*, 309 Kan. 585, 592, 439 P.3d 307 (2019) (setting "a threshold burden to prove that a subsequent development in the law undermines the earlier merits determination"). Second, the court reiterated *Alleyne* does not apply retroactively. See *State v. Coleman*, 312 Kan. 114, Syl. ¶ 2, 472 P.3d 85 (2020).

Martis directly appeals the district court's decision to this court. Jurisdiction is proper. See K.S.A. 22-3601(b)(3); *State v. Richardson*, 314 Kan. 132, 145, 494 P.3d 1280 (2021).

THIS MOTION IS PROCEDURALLY BARRED

An appellate court applies a de novo standard of review to a district court's summary denial of a motion to correct an illegal sentence. *State v. Juiliano*, 315 Kan. 76, 79, 504 P.3d 399 (2022).

Martis argues his third motion is not successive because the Hawaii Supreme Court's *Flubacher* decision sheds "new light on the original question of whether the sentence was illegal when pronounced." See *Murdock*, 309 Kan. at 592 (holding a development in the law may retroactively render a legal sentence illegal). But that is not the determinative question. *Coleman* makes clear a sentence imposed in violation of *Alleyne* does not fall within K.S.A. 22-3504's definition of an "illegal sentence." *Coleman*, 312 Kan. at 120.

We affirm the district court on a different basis—use of an improper procedural vehicle. A court should not reach the merits of a motion when there is a procedural bar.

Judgment of the district court is affirmed.

State v. Espinoza

No. 127,346

STATE OF KANSAS, *Appellee*, v. FILIBERTO B. ESPINOZA JR., *Appellant*.

(556 P.3d 882)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Summary Denial of Motion to Withdraw Plea—Appellate Review.* Appellate courts review de novo a district court's summary denial of a motion to withdraw plea because the appellate court has all the same access to the records, files, and motion as the district court.

Appeal from Wyandotte District Court; DANIEL CAHILL, judge. Submitted without oral argument September 12, 2024. Opinion filed October 11, 2024. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, was on the brief for appellant, and *Filiberto B. Espinoza Jr.*, appellant, was on a supplemental brief pro se.

Lois K. Malin, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Filiberto B. Espinoza Jr. pleaded guilty to first-degree felony murder in 2017. He later moved to withdraw his plea, and the district court denied his request without an evidentiary hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, Louis Scherzer was shot in the back outside of a bar in Kansas City, Kansas, and died from the gunshot wound. Law enforcement officers eventually linked Espinoza to the shooting. The State charged him with first-degree premeditated murder, first-degree felony murder in the alternative, conspiracy to commit aggravated robbery, and attempted aggravated robbery, theorizing that Espinoza shot Scherzer during a failed robbery. Espinoza has admitted to the shooting but consistently maintained it was an act of self-defense because he shot Scherzer only when he saw Scherzer pulling a firearm from his waistband.

On September 2017, after half a day of trial, Espinoza pleaded guilty to first-degree felony murder. The district court imposed the

mandatory minimum sentence of life without parole for 25 years. This court affirmed his sentence on appeal in April 2020. *State v. Espinoza*, 311 Kan. 435, 462 P.3d 159 (2020).

On January 5, 2021, Espinoza filed a motion to withdraw his plea. The district court did not rule on that motion before Espinoza filed a second motion to withdraw his plea on November 21, 2023. The district court summarily dismissed both motions on December 20, 2023. In its order, the court observed that the 2021 motion had been "missed" due to "court shutdowns and computer breaches." It ruled the 2021 motion was filed within the one-year time-limit but failed to establish it should be granted to correct manifest injustice. And it ruled the 2023 motion was filed outside of the one-year time limit and had failed to establish that excusable neglect justified its untimeliness.

Espinoza timely appealed from the denial of both motions.

ANALYSIS

Did the district court err when it summarily denied the 2023 motion as out of time?

Espinoza argues that the district court erred when it denied his 2023 motion as out of time, rather than considering its merits alongside the 2021 motion.

"When a motion to withdraw plea is summarily denied by the district court without an evidentiary hearing, this court applies a de novo review. This is because the appellate court has all the same access to the records, files, and motion as the district court." *State v. Smith*, 315 Kan. 124, 126, 505 P.3d 350 (2022).

After sentencing, a court may consider a motion to withdraw a plea "to correct manifest injustice" if the motion is filed within one year of the final order of the last appellate court to exercise jurisdiction on direct appeal. K.S.A. 22-3210(d). The court may extend the one-year time limit when the defendant shows the untimeliness was due to excusable neglect. K.S.A. 22-3210(e).

This court issued its decision in Espinoza's appeal on April 24, 2020. Under usual circumstances, this gave Espinoza until April 24, 2021, to file his motion to withdraw his plea. But on May 27, 2020, in response to the COVID-19 pandemic, this court sus-

pended statutory deadlines. Kansas Supreme Court Administrative Order 2020-PR-058. This effectively stayed the clock on Espinoza's one-year deadline until this court reinstated deadlines on April 15, 2021. Kansas Supreme Court Administrative Order 2021-PR-20. When the suspension lifted, Espinoza had "the same number of days to comply with the deadline or time limitation" as he had "when the deadline or time limitation was . . . suspended." This put his new deadline at approximately March 14, 2022. Espinoza filed his first motion within that deadline on January 5, 2021. But he filed his second motion on November 21, 2023, making that motion out of time.

The district court and both parties agreed Espinoza's 2023 motion was filed beyond the one-year deadline. Espinoza argued in the district court that its untimeliness should be forgiven because he established excusable neglect. The district court disagreed and summarily dismissed the motion.

On appeal, Espinoza first argues his 2023 motion was not untimely because its filing date related back to the filing date of the original, 2021 motion. But he presents his argument for the first time on appeal, and he fails to explain why we should consider this novel issue. If we were to wade into the merits, we would face inadequate appellate briefing. Espinoza cites no authority in support of his claim that an untimely motion to withdraw a plea can relate back to an earlier, timely motion. Due to the lack of preservation and underdeveloped briefing, we decline to consider Espinoza's relation back claim. See *Shelton-Jenkins v. State*, 317 Kan. 141, 144, 526 P.3d 1056 (2023) (arguments presented for first time on appeal were waived); *State v. Swint*, 302 Kan. 326, 346, 352 P.3d 1014 (2015) ("To preserve an issue for appellate review, it must be more than incidentally raised in an appellate brief; it must be accompanied by argument and supported by pertinent authority or an explanation why the argument is sound despite the lack of authority or existence of contrary authority.").

Espinoza next argues that even if his 2023 motion did not relate back to his 2021 filing date, he established excusable neglect for its untimeliness and the district court should have thus reviewed it on its merits.

This court has held that "excusable neglect resists clear definition and must be determined on a case-by-case basis." *Smith*, 315 Kan. at 127. It "implies something more than the unintentional inadvertence or neglect common to all who share the ordinary frailties of mankind." *Smith*, 315 Kan. at 127. "[C]arelessness or ignorance of the law on the part of the litigant or his attorney" does not establish excusable neglect. *Smith*, 315 Kan. at 128.

In his 2023 motion, Espinoza argued he should be permitted to withdraw his plea because when he pleaded, he had been unaware of video evidence from the bar next to the shooting, the victim's toxicology report, and the victim's criminal history, all of which he claims supported his self-defense theory. He also argued he would not have pleaded had he been aware he was entitled to self-defense immunity and suggested he was "forced" to take the plea because he was afraid of being sentenced to a hard 50. He conceded he had filed outside of the one-year deadline but argued the untimeliness of this motion was due to excusable neglect because he did not discover the existence of the video and toxicology report until he returned from Arizona after being "farmed out" to Arizona from October 2019 through December 2020 due to COVID-19. He asserts that he repeatedly attempted to secure this evidence but was continually denied.

The district court held Espinoza had not established excusable neglect. It ruled:

> "Each of the items the Defendant claims he was unaware of make their appearances in various stages during the pendency of the case. The video the Defendant states he only became aware of while in custody, was actually referred to at preliminary hearing and [was] the subject of a defense motion to exclude that very video. The Defendant attaches to this motion the very toxicology report, as an entered exhibit in this case, that he states was unavailable to him to file a timely motion. Defendant claims he attempted to communicate with trial counsel in order to obtain these items along with a copy of the victim's criminal history, but he never explains how not having these items in his personal possession prevented him from filing a motion in a timely manner."

On appeal, Espinoza does not point to any error in the district court's reasoning. He argues the toxicology report was "not available to him within the year following the final judgment of the Supreme Court" and repeats the assertion that he did not become aware of the video footage until after he returned from Arizona.

He also adds that he "only became aware of" a "potential statutory immunity defense . . . after viewing the video and researching the matter further" and that his counsel's failure to uncover the victim's criminal history was "not available to him" until after the one-year deadline passed. In sum, Espinoza argues, he demonstrated excusable neglect because "delays not directly attributable to him were created due to a number of circumstances beyond his control, which included a historic pandemic and unreasonable refusals to provide him with trial and discovery materials."

The record confirms the district court's observations and supports its conclusions. Espinoza moved to suppress the video footage before trial, and the district court held a hearing on that motion, at which Espinoza was present, and two witnesses testified about the available video footage and its contents. At trial, the video footage was admitted into evidence and played for the jury. The record also reveals that the victim's toxicology report, which Espinoza submitted as an attachment to his motion, was admitted into evidence at the preliminary hearing during which Espinoza was present.

As the district court pointed out, Espinoza has failed to explain why he was not aware of the video and toxicology report when they were both presented and admitted as evidence while he was present. One can imagine the pressures of a criminal trial could possibly leave a criminal defendant in the dark about many details of the proceedings, but Espinoza has made no claim about what caused him to miss the evidence that the State put in front of him. And, even if he had, this court has held that excusable neglect is "'something more than the unintentional inadvertence or neglect.'" *Smith*, 315 Kan. at 127. Without further explanation from Espinoza, we cannot attribute his ignorance of the toxicology report and video as anything more than "unintentional inadvertence or neglect." *Smith*, 315 Kan. at 127. He also fails to explain why he could not uncover the victim's criminal history record, learn about statutory self-defense immunity, or realize he felt pressured into taking the plea until six years after his plea. As a result, Espinoza had not established that excusable neglect caused the untimeliness of his 2023 claims.

Espinoza adds an additional argument to support his excusable neglect claim in a supplemental brief. He argues that the district court's failure to rule on his 2021 motion led to the untimeliness of his 2023 motion.

Espinoza's argument is unpersuasive. It appears the 2023 motion triggered the discovery of the 2021 motion, but Espinoza fails to explain how the inaction on the 2021 motion prevented him from filing the second motion until 2023 or uncovering the information he relies upon to advance the claims in that motion.

Espinoza has not established the untimeliness of his 2023 motion was due to excusable neglect and, consequently, the district court made no error when it summarily denied the motion.

Did the district court err when it summarily denied the 2021 motion on its merits?

Espinoza claims he raised issues of fact regarding whether he could establish manifest injustice and thus the district court should have held a hearing on his motions. We have affirmed the district court's decision to summarily dismiss the 2023 motion as out of time. Thus, we consider the merits of only the 2021 motion and again affirm the district court.

In his 2021 motion, Espinoza argued his plea was not understandingly made because, based on the court and his counsel's advice, he believed he would be automatically released after 25 years.

The district court rejected Espinoza's claims and summarily denied the motion because the record revealed that Espinoza had been repeatedly informed of the minimum possible sentence of life without the possibility of parole for 25 years.

On appeal, Espinoza concedes that "[r]ead alone, there is nothing readily apparent or significant in the plea or sentencing transcripts indicating [his] inability to understand his plea." But, he argues, "the motion states facts, which if true, would entitle him to relief."

Because the district court summarily denied the motion, our review is de novo. *Smith*, 315 Kan. at 126.

A district court may grant a timely, postsentence motion to withdraw a plea to correct manifest injustice. K.S.A. 22-3210(d)(2). Courts

generally consider three factors in assessing whether the movant has established manifest injustice: "'(1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made.'" *State v. Johnson*, 307 Kan. 436, 443, 410 P.3d 913 (2018) (quoting *State v. Morris*, 298 Kan. 1091, 1100, 319 P.3d 539 [2014]).

If the motion alleges that counsel was ineffective, the defendant must meet the constitutional test for ineffective assistance of counsel to prevail. *State v. Kelly*, 298 Kan. 965, 969, 318 P.3d 987 (2014). This requires a showing that "the attorney's performance fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for the attorney's errors, the result of the proceeding would have been different." *Kelly*, 298 Kan. at 969.

There are no statutory guidelines for when a court should hold an evidentiary hearing on a motion to withdraw a plea, so this court has directed courts and parties to follow K.S.A. 60-1507 procedures. As such, "[a] hearing on a motion to withdraw a plea of guilty or nolo contendere is limited to those instances in which the defendant's motion raises substantial issues of fact or law and should be denied when the files and records conclusively show that the defendant is entitled to no relief." *State v. Jackson*, 255 Kan. 455, 459, 874 P.2d 1138 (1994).

This case resembles *State v. Fritz*, 299 Kan. 153, 156, 321 P.3d 763 (2014). There, the defendant argued the district court erred in summarily denying his motion to withdraw a plea. He asserted his plea was not understandingly made because he had not been sleeping well when he entered his plea, "which left him vulnerable to pressure from his attorney, who urged him to enter into the plea and who misled him as to the sentence that he would receive. In addition, he believed there were defenses to some or all of the charges against him." *Fritz*, 299 Kan. at 156. This court affirmed the district court's summary denial because the defendant made only "conclusory allegations" while the record indicated "the district court went over the plea agreement in detail" and "inquired whether Fritz was satisfied with the services provided by his attorney, whether he had any complaints about the manner in

which he had been counseled, and whether he had been subject to any threats or promises beyond the specific language of the plea agreement." 299 Kan. at 156-57.

Like in *Fritz*, the district court made no error when it summarily denied Espinoza's 2021 motion. As the district court observed, Espinoza signed the plea petition, which stated he was agreeing to "a maximum punishment which . . . is life eligible for parole after 25 years . . . a fine of $500,000 and post release supervision of life." And, at the plea hearing, the district judge told Espinoza:

"The maximum penalties for this crime, the maximum and minimum penalties are life in prison and you would not be able to be paroled until after the passage of 25 years. It also has a possibility of a fine of $500,000 if the Court found that you could pay that fine.

"You have an obligation to register for the rest of your life and you have signed a notice of the duty to register and Mr. Boone will help you fill out the registration form."

The court asked Espinoza, "Do you understand that?" to which Espinoza replied, "Yes." The court continued, asking Espinoza, "Has any officer or branch of government promised, suggested, or predicted that you'll receive a lighter sentence or probation or any other form of leniency if you plead guilty? Anybody promise you anything if you plead guilty other than that they would dismiss the other charges and consecutive sentence?" Espinoza replied, "No."

Espinoza's own attorney also questioned him about his understanding of the plea:

"MR. BOONE: Filiberto, you know you are entering a plea of guilty today, correct?

"THE DEFENDANT: Yes.

"MR. BOONE: And I read that to you word for word, correct?

"THE DEFENDANT: Yes.

"MR. BOONE: And I asked you if you wanted to read it. You told me you did not need to, correct?

"THE DEFENDANT: Yes.

"MR. BOONE: Do you have any questions for me or the Court at this point and time?

"THE DEFENDANT: No.

. . . .

"MR. BOONE: Is this your decision to enter a plea here today?

"THE DEFENDANT: Yes.