REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

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In re Brown

Bar Docket No. 29272

In the Matter of TYLER EUGENE BROWN, *Respondent.*

(561 P.3d 522)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Order of Disbarment.*

This court admitted Tyler Eugene Brown to the practice of law in Kansas on June 13, 2022. The court administratively suspended Brown's Kansas law license on October 2, 2024, due to his noncompliance with annual requirements to maintain his law license. The court notes that as of the date of this order, Brown had not paid any of the annual registration and continuing legal education fees related to the administrative suspension of his Kansas law license.

Brown now faces a Kansas disciplinary complaint, and the parties jointly move the court to accept Brown's voluntary surrender of his Kansas law license under Supreme Court Rule 230(a) (2024 Kan. S. Ct. R. at 287). In support, the parties agree that Brown's misappropriation of funds from an international labor union commonly referred to as "the Boilermakers Union" constitutes grounds for disciplinary action under the Kansas Rules of Professional Conduct (KRPC). Specifically, they agree that Brown's actions violate KRPC 8.4(b) (2024 Kan. S. Ct. R. at 430), which provides "[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

This court grants the parties' joint motion, accepts Brown's voluntary surrender of his law license, disbars Brown under Rule 230(b), and revokes Brown's license and privilege to practice law in Kansas.

This court further orders the Office of Judicial Administration to strike the name of Tyler Eugene Brown 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 Kansas disciplinary case pending against Brown terminates effective the date

of this order. The Disciplinary Administrator may direct an investigator to complete any 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 Brown under Supreme Court Rule 229 (2024 Kan. S. Ct. R. at 286), and that Brown comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

Dated this 7th day of January 2025.

State v. Gomez

No. 126,225

STATE OF KANSAS, *Appellee*, v. PATRICIO SABAS GOMEZ, *Appellant*.

(561 P.3d 908)

SYLLABUS BY THE COURT

1. TRIAL—*Claim by Defendant a Jury Instruction Contained 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.

2. COURTS—*Decision of Appellate Court Changes Law—Change Acts Prospectively.* When an appellate court decision changes the law, that change acts prospectively and applies only to all cases, state or federal, that are pending on direct review or not yet final on the date of the appellate court decision.

3. STATUTES—*General Attempt Statute Does Not Apply When Statute Includes "Attempt" as Part of Crime.* When a statute expressly includes "attempt" as part of the crime, the general attempt statute, K.S.A. 21-5301(a), does not apply. When a statute does not expressly include "attempt" as part of the crime, K.S.A. 21-5301(a) acts as a default rule to prosecute someone for attempting that crime.

4. SAME—*Definitions Applicable in Article 57 of Kansas Criminal Code.* The definitions in K.S.A. 21-5701 apply only to statutes in Article 57 of the Kansas Criminal Code.

5. SAME—*Definitions Applicable to Entire Kansas Criminal Code*. The definitions in K.S.A. 21-5111 apply to the entire Kansas Criminal Code, unless the particular context clearly requires a different meaning.

6. CRIMINAL LAW—*Acquittal of Underlying Felony—No Effect on Felony Murder Conviction Based on Underlying Felony*. An acquittal of direct responsibility for the underlying felony does not vitiate the conviction of felony murder based on the underlying felony.

Appeal from Sedgwick District Court; JEFFREY E. GOERING, judge. Oral argument held September 11, 2024. Opinion filed January 10, 2025. Affirmed in part, vacated in part, and remanded with directions.

Emily Brandt, 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 Patricio Sabas Gomez' direct appeal following his convictions for first-degree felony murder, attempted distribution of methamphetamine, and criminal possession of a weapon. Gomez raises three issues on appeal. First, he argues the State failed to present sufficient evidence of each alternative underlying felony it relied on to support his felony-murder conviction. Next, Gomez argues the State failed to present sufficient evidence to support his conviction for attempted distribution of methamphetamine. Finally, he claims that his sentence for attempted distribution of methamphetamine is illegal.

We affirm Gomez' convictions. The State presented sufficient evidence of each alternative underlying felony it relied on to support Gomez' felony-murder conviction, as well as sufficient evidence to support his conviction for attempted distribution of methamphetamine. But Gomez is entitled to sentencing relief due to the district court's imposition of an illegal sentence for his attempted distribution of methamphetamine conviction. As a result, this court must vacate that portion of Gomez' sentence and remand to the district court for resentencing.

FACTUAL BACKGROUND

On the evening of September 30, 2021, Danielle Hampton called 911 to report that her boyfriend, Michael Martinez, had been shot at the Extended Stay Hotel in Wichita. Upon arrival, law enforcement discovered Martinez' body lying in the entryway of a hotel room with three 9-millimeter shell casings nearby. Martinez was pronounced dead at the scene. His cause of death was a gunshot wound to his back. Inside the hotel room, law enforcement found about 1 gram of a white crystal substance, later determined to be methamphetamine, on an ironing board and on an end table between the bed and the closet.

Following law enforcement's investigation, the State charged Gomez with one count each of first-degree felony murder, attempted distribution of methamphetamine, attempted aggravated robbery, and criminal possession of a weapon. To support the felony-murder charge, the State alleged Gomez killed Martinez while committing the inherently dangerous felonies of attempted distribution of methamphetamine or attempted aggravated robbery.

Gomez entered a guilty plea to the criminal possession of a weapon charge, and the case proceeded to a jury trial on the remaining charges. At trial, the State presented evidence of a drug deal gone wrong that resulted in Martinez' death. As support for this theory, the State primarily relied on witness testimony from Hampton and Shae Roberts, who were both present when Martinez was killed.

Hampton testified that in September 2021, she and Martinez had been staying at the hotel and were struggling with methamphetamine addiction. Hampton said Martinez was involved in a forgery/identity theft scheme to fund his addiction. On September 30, 2021, Martinez contacted a friend, Roberts, through Facebook Messenger to buy methamphetamine. When Roberts arrived at the hotel, Hampton went downstairs to let her inside. A man, later identified as Gomez, was with Roberts. Hampton did not know Gomez but let them both inside and they followed her upstairs. Once inside the room, Hampton noted that Martinez appeared to know Gomez.

Hampton went into the bathroom, as she often did during Martinez' drug deals. After several minutes, Hampton heard the others laughing and joking, so she came out of the bathroom. Martinez was sitting on the bed while Gomez and Roberts stood in the kitchen area. On a nearby table, Hampton saw some methamphetamine on a scale. Martinez was on his phone attempting to transfer $60 to Gomez through Cash App as payment for the drugs. Hampton tried to help Martinez with the transaction, but the cash transfer never went through.

According to Hampton, Gomez grew agitated, pulled a gun from his jacket, and said, "[Y]ou know why I'm here." Gomez accused Martinez and Hampton of extorting from Roberts her clothes and profile documents she possessed that contained other

people's personal identifying information like social security numbers, addresses, and birthdates. Gomez said he wanted the profiles back, so Martinez started getting them out of the closet. Gomez then told everyone to stop and, while turning to face Hampton, apologized to her, saying she was "at the wrong place at the wrong time." While Gomez was focused on Hampton, Martinez tried to take the gun from Gomez, and the men wrestled in the kitchen area. Hampton heard two gunshots. The wrestling continued until Martinez, realizing he had been shot, moved into the closet. Gomez fired several more shots before he and Roberts ran out of the room, leaving the door open behind them. When Martinez came out of the closet to shut the door, Hampton noticed he had been shot in his back. Martinez fell to the ground and was dead by the time Hampton found the phone to call 911.

Roberts testified for the State pursuant to a plea agreement in which she pled guilty to voluntary manslaughter and attempted distribution of methamphetamine. Roberts met Gomez through a mutual friend and had known him for a few months at the time of Martinez' murder.

On September 30, 2021, Gomez asked Roberts if she knew anybody who "needed work." Roberts understood "work" to mean methamphetamine. Later that day, Martinez contacted Roberts and said he "needed work." Roberts had known Martinez for six months; she braided his hair and occasionally sold him methamphetamine. Roberts told Gomez that Martinez needed a "T-shirt," which meant 1.75 grams of methamphetamine. Roberts said she went with Gomez to the hotel because Martinez had her laptop computer and was fixing her iPads, and she wanted to get them back. Roberts denied that she took Gomez to the hotel to "strong-arm" Martinez into returning her things.

At the hotel, Hampton let Roberts and Gomez into the room where Martinez was waiting. Once inside, Hampton went into the bathroom. Roberts had a scale and a clear Ziploc bag of methamphetamine inside her purse. To verify the agreed-upon amount of 1.75 grams, Roberts weighed the methamphetamine at a coffee table at the foot of a pull-out couch and placed the remaining amount back in her purse. Roberts denied giving the drugs to Martinez after she weighed them, claiming she left them on the scale

while Martinez "was looking for something to put them in." Roberts said the mood in the room appeared normal, and there was no tension between Gomez and Martinez at that time. Martinez then tried to transfer money through Cash App to pay for the drugs, and Hampton's attempts to help with the transfer were unsuccessful. At some point, the tone of the conversation changed, and Gomez grew angry. Gomez asked Martinez about his gang affiliation and accused Martinez of scamming his mother with "hot checks."

Roberts claimed she did not see anyone with a gun but heard a gunshot and then saw Martinez lunge toward Gomez before more shots were fired. After the gunfire stopped, Roberts and Gomez ran out of the room and left the hotel in Gomez' truck. When she fled the room, Roberts took her purse and the scale but left the methamphetamine on the coffee table, probably on top of the scale's lid. Once inside the truck, Roberts saw that Gomez had a gun. Roberts did not find out until later that Martinez had been shot.

The jury found Gomez guilty of first-degree murder and attempted distribution of methamphetamine but found him not guilty of attempted aggravated robbery. The district court imposed a life sentence without the possibility of parole for 620 months, concurrent to a 78-month prison term for attempted distribution of methamphetamine and an 8-month prison term for criminal possession of a weapon.

Gomez 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

Gomez raises three issues on appeal. He argues: (1) the State presented alternative means of committing felony murder but failed to produce sufficient evidence to support each alternative means, (2) the evidence was insufficient to support his conviction for attempted distribution of methamphetamine, and (3) the dis-

trict court imposed an illegal sentence for his attempted distribution of methamphetamine conviction. We address each argument in turn.

1. *Alternative Means*

When the State charges a defendant with a crime that can be committed in more than one way, we refer to it as an alternative-means crime. *State v. Reynolds*, 319 Kan. 1, 4, 552 P.3d 1 (2024). A district court presents the jury with an alternative-means crime when it instructs on a charged offense that provides multiple ways in which the jury could find the State proved a single statutory element. 319 Kan. at 4-5.

Here, the State charged Gomez with first-degree felony murder, alleging he killed Martinez "while in the commission of, attempt to commit, or flight from an inherently dangerous felony, to wit: Distribution of Methamphetamine or Aggravated Robbery." Gomez argues the evidence was insufficient to support a finding of guilt on each of the alternative means on which the jury was instructed—attempted distribution of methamphetamine and attempted aggravated robbery.

a. *Standard of review and relevant legal framework*

Until recently, this court has typically viewed alternative-means issues as implicating questions of jury unanimity and reviewed those issues under a sufficiency of the evidence standard. See, e.g., *State v. Smith*, 317 Kan. 130, 132, 526 P.3d 1047 (2023) (alternative-means issue "implicates whether there is sufficient evidence supporting the conviction"); *State v. Wright*, 290 Kan. 194, 206, 224 P.3d 1159 (2010) (requiring super-sufficiency of the evidence "to ensure a criminal defendant's statutory entitlement to jury unanimity"), *overruled by Reynolds*, 319 Kan. 1. Under our prior precedent, when a defendant raised an alternative-means issue, a reviewing court applied a super-sufficiency of the evidence test. To avoid reversal, the State was required to present sufficient evidence to permit a jury to find each means of committing the crime beyond a reasonable doubt. *Wright*, 290 Kan. at 202-06.

But while Gomez' case was pending, this court decided *Reynolds*, which altered our review of alternative-means issues. By overruling *Wright* and cases following it, we no longer require super-sufficiency of the evidence. We now review alternative-means issues as challenges to jury instructions subject to instructional error reversibility standards:

"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]." *Reynolds*, 319 Kan. at 17.

Although Gomez did not challenge the jury instructions at trial or allege instructional error on appeal, we do not fault him because the parties filed their briefs before our decision in *Reynolds*. Even so, "when an appellate court decision changes the law, that change acts prospectively and applies only to all cases, state or federal, that are pending on direct review or not yet final on the date of the appellate court decision." *State v. Mitchell*, 297 Kan. 118, Syl. ¶ 3, 298 P.3d 349 (2013). Thus, we review Gomez' alternative-means argument as a challenge to the legal and factual appropriateness of the jury instruction setting forth the elements of felony murder. See *Reynolds*, 319 Kan. at 13 ("[A]ny argument there was insufficient evidence to support each alternative means presented actually challenges the instruction's factual appropriateness.") (citing *State v. Wimbley*, 313 Kan. 1029, 1033, 493 P.3d 951 [2021]) ("'Factual appropriateness depends on whether sufficient evidence . . . supports the instruction.'").

b. *Discussion*

When reviewing an alternative-means issue, the appellate court first considers whether the district court presented an alternative-means crime to the jury in the instructions. If so, the reviewing court advances to an error analysis to determine whether the instruction was both legally and factually appropriate. Upon

finding error, the court must decide whether that error was harmless. *Reynolds*, 319 Kan. at 17.

The State charged Gomez with first-degree felony murder, alleging that he killed Martinez while committing, attempting to commit, or fleeing from the inherently dangerous felonies of distribution of methamphetamine or aggravated robbery. Consistent with this charge, the jury instructions provided:

"INSTRUCTION NO. 5

"Patricio Gomez is charged with Murder in the first degree. Patricio Gomez pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. Patricio Gomez killed Michael Raymond Martinez;

"2. The killing was done by Patricio Gomez *during an attempt to commit Distribution of Methamphetamine or an attempt to commit Aggravated Robbery;*

"3. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas.

"The elements of Attempted Distribution of Methamphetamine are set forth in Instruction No. 7.

"The elements of Attempted Aggravated Robbery are set forth in Instruction No. 8." (Emphasis added.)

At the first step, we find Instruction No. 5 clearly sets out alternative means of committing the felony murder charged in this case. See K.S.A. 21-5402(c) (listing the crimes that qualify as "inherently dangerous felon[ies]"); *State v. McClelland*, 301 Kan. 815, 819, 347 P.3d 211 (2015) ("'[D]ifferent underlying felonies supporting a charge of felony murder are alternative means rather than multiple acts.'"); *State v. Beach*, 275 Kan. 603, 623, 67 P.3d 121 (2003) ("The sale of methamphetamine and aggravated robbery are alternative means to commit felony murder.").

To decide whether Instruction No. 5 contained an alternative-means error, we consider whether the felony-murder instruction was legally and factually appropriate. *Reynolds*, 319 Kan. at 17. A jury instruction is legally appropriate when it fairly and accurately states the applicable law. *State v. Broxton*, 311 Kan. 357, 361, 461 P.3d 54 (2020). The State charged Gomez with first-degree felony murder under K.S.A. 21-5402(a)(2), which defines first-degree murder as "the killing of a human being committed . . . in the commission of, attempt to commit, or flight from any inherently dangerous felony." And the State charged distribution of

methamphetamine or aggravated robbery as the underlying inherently dangerous felonies. See K.S.A. 21-5402(c)(1)(D) (aggravated robbery is an inherently dangerous felony); K.S.A. 21-5402(c)(1)(N) and K.S.A. 21-5705(a)(1) (distribution of methamphetamine is an inherently dangerous felony). Instruction No. 5 fairly and accurately reflected the applicable law under which the State charged Gomez. Thus, the instruction was legally appropriate.

Turning to the crux of Gomez' argument, we next determine whether Instruction No. 5 was factually appropriate:

"To be factually appropriate, there must be sufficient evidence, viewed in the light most favorable to the requesting party, to support the instruction. The question therefore becomes whether the instruction was supported by sufficient evidence when viewed in the light most favorable to the State. Such an inquiry is closely akin to the sufficiency of the evidence review frequently performed by appellate courts in criminal cases. Sufficiency of the evidence arguments consider whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. [Citations omitted.]" *State v. Milo*, 315 Kan. 434, 447, 510 P.3d 1 (2022).

Gomez claims the evidence was insufficient to support a conviction under the instructions for each of the underlying inherently dangerous felonies: attempted distribution of methamphetamine and attempted aggravated robbery. In reviewing the sufficiency of the evidence, appellate courts do not reweigh evidence, resolve conflicts in the evidence, or weigh the credibility of witnesses. *State v. Buchanan*, 317 Kan. 443, 454, 531 P.3d 1198 (2023).

i. *Attempted distribution of methamphetamine*

Jury Instruction No. 7 sets forth the elements of attempted distribution of methamphetamine, the first underlying felony:

"The defendant is charged with an attempt to commit distribution of methamphetamine. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant performed an overt act toward the commission of distribution of methamphetamine.
"2. The defendant did so with the intent to commit distribution of methamphetamine.
"3. The defendant failed to complete the commission of distribution of methamphetamine.

"4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas.

"The State must prove that the defendant committed the crime intentionally. A defendant acts with intent when it is the defendant's conscious objective or desire to do the act complained about by the State or to cause the result complained about by the State. An overt act necessarily must extend beyond the mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

"The elements of the completed crime of distribution of methamphetamine are as follows:

"1. The defendant distributed methamphetamine.
"2. The quantity of methamphetamine distributed was at least 1 gram but less than 3.5 grams.
"3. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas.

"'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."

The elements and definitions set forth in Instruction No. 7 are derived from the following statutes within the designated articles of the Kansas Criminal Code:

Article 53. Anticipatory Crimes

K.S.A. 21-5301(a): A person is guilty of attempt if the person makes an overt act toward committing a crime, with the intent to commit it, but fails to complete it.

Article 57. Crimes Involving Controlled Substances

K.S.A. 21-5705(a)(1): It is unlawful to distribute methamphetamine.

K.S.A. 21-5701(d): As used in K.S.A. 21-5701 through K.S.A. 21-5717, "distribute" includes actual, constructive, or attempted transfer from one person to another, including sales or offers for sale.

Construing these three statutes together, Gomez argues attempted distribution of a controlled substance is an impossible

criminal act under K.S.A. 21-5301(a). Gomez' argument requires us to interpret the relevant statutes. "Statutory interpretation is a question of law subject to de novo review." *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023).

"The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. [Citations omitted.]" *Eckert*, 317 Kan. at 27.

We begin our statutory interpretation analysis with Article 57, which is the part of the criminal code dealing with crimes involving controlled substances. K.S.A. 21-5705(a)(1) is the substantive criminal statute making it unlawful for any person to distribute methamphetamine. K.S.A. 21-5701(d) is a subsection of the definitional statute for crimes involving controlled substances and defines "distribute" as "the actual, constructive or attempted transfer from one person to another of some item." Applying the definition of "distribute" as an "attempted transfer," the Legislature clearly and unambiguously intended K.S.A. 21-5705(a)(1) to criminalize the attempt to transfer methamphetamine from one person to another.

In arguing the crime of attempted distribution is impossible, Gomez fails to acknowledge that K.S.A. 21-5705(a)(1) expressly criminalizes both distribution and attempted distribution of a controlled substance. Instead, Gomez relies on K.S.A. 21-5301(a), which defines the separate crime of attempt as "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." When the substantive crime is distribution of methamphetamine, a person is guilty of attempted distribution of methamphetamine under K.S.A. 21-5301(a) if the person intended to distribute methamphetamine, made an overt act toward distribution, but failed to complete the distribution.

Gomez' impossibility argument hinges on applying K.S.A. 21-5701(d)'s definition of "distribute" as an "attempted transfer"

to the crime of attempted distribution of methamphetamine under K.S.A. 21-5301(a). Because a completed distribution and an attempted transfer are one and the same under this definition, he claims the crime of distributing methamphetamine is complete as soon as the person attempts to transfer it. According to Gomez, this makes it impossible to commit the crime of attempted distribution under K.S.A. 21-5301(a) because the State will never be able to prove the person failed to complete the distribution, which is a requirement for conviction under the attempt statute. See K.S.A. 21-5301(a) ("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." [Emphasis added.]).

Gomez' argument is unavailing, mainly because it ignores the clear directive in K.S.A. 21-5701 limiting application of the statute's definitions to only those statutes in Article 57. See K.S.A. 21-5701(d) ("*As used in K.S.A. 21-5701 through 21-5717, and amendments thereto*" the word "distribute" means the actual, constructive, or attempted transfer from one person to another. [Emphasis added.]). Although K.S.A. 21-5705(a)(1) and K.S.A. 21-5701(d) define the crime of distributing methamphetamine as complete when the person attempts to transfer it, the definition's limited application shows the Legislature did not intend for it to apply to other parts of the criminal code, including the attempt statute in Article 53.

Because the Legislature intended the definitions in K.S.A. 21-5701 to be limited to Article 57, we turn to K.S.A. 21-5111, which provides definitions for words used across the entire criminal code, unless the particular context clearly requires a different meaning. K.S.A. 21-5111(g) defines "distribute" as the actual or constructive transfer of some item from one person to another. Notably, this definition does not include an attempted transfer. Using this definition, K.S.A. 21-5301(a) clearly and unambiguously criminalizes an attempt to distribute methamphetamine when the State proves a person intended to transfer methamphetamine, made an overt act toward transfer, but failed to complete the transfer. See *Milo*, 315 Kan. at 447 (applying K.S.A. 21-5111[g] definition of "distribute" to K.S.A. 21-5301[a] in

considering whether sufficient evidence supported the jury's finding that the defendant attempted to distribute marijuana).

But even if we assume ambiguity in K.S.A. 21-5701(d)'s definition of "distribute" when read alongside the attempt statute, K.S.A. 21-5301(a), Gomez' claim still fails. When a statute is ambiguous, we turn to rules of statutory construction. See *State v. Arnett*, 307 Kan. 648, 653, 413 P.3d 787 (2018) ("If the language of the statute is unclear or ambiguous," the court may turn "to canons of statutory construction, consult legislative history, or consider other background information to ascertain the statute's meaning."). Particularly relevant here is the rule that courts must construe statutes to avoid absurd or unreasonable results. Equally fundamental is the rule that courts must presume the Legislature does not intend to enact meaningless legislation. *Jarvis v. Dept. of Revenue*, 312 Kan. 156, 165, 473 P.3d 869 (2020). As Gomez readily concedes, applying the definition of "distribute" from the controlled substances statute to the attempt statute means that attempted distribution of a controlled substance can never be a crime under K.S.A. 21-5301(a). This result is both unreasonable and absurd because, when read this way, the statute criminalizing the attempted distribution of a controlled substance, K.S.A. 21-5705(a), is rendered meaningless.

In sum, and using the applicable definitions for each statute, the language in both K.S.A. 21-5705(a)(1) and K.S.A. 21-5301(a) clearly and unambiguously criminalize an attempt to distribute methamphetamine when the State proves a person intended to transfer methamphetamine, made an overt act toward transfer, but failed to complete the transfer. Given the crime can be proved under both statutes, however, we would be remiss in failing to note that the prison sentence for an attempted distribution of a controlled substance under K.S.A. 21-5301(a) is six months lower than the prison sentence for the same conviction under K.S.A. 21-5705(a)(1). See K.S.A. 21-5301(d)(1) ("An attempt to commit a felony which prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months.").

To explain this variance, we turn to *State v. Mora*, 315 Kan. 537, 542, 509 P.3d 1201 (2022). The case involved a drug deal

that turned into a robbery, during which Mora's codefendant shot and killed the victim. Relevant here, the State charged Mora with felony murder based on the inherently dangerous felony of attempted aggravated robbery under an aiding and abetting theory. On appeal, Mora challenged the aiding and abetting instruction because it imposed criminal liability based on foreseeability instead of specific intent to commit the crime of aggravated robbery. 315 Kan. at 541. In response, the State argued the instruction was proper because aggravated robbery is a general intent crime under K.S.A. 21-5420. Although this court agreed aggravated robbery is a general intent crime, we held the separate offense of attempting to commit a crime under K.S.A. 21-5301(a) controlled, and it required specific intent to commit the crime. Thus, even though the completed crime (aggravated robbery) is a general intent crime, the jury needed to find specific intent to commit the aggravated robbery to convict on the separate offense of attempt under K.S.A. 21-5301(a).

Although we decided K.S.A. 21-5301(a) dictated the outcome in *Mora*, we pointed out that the statute will not be controlling in every case. We observed that in some cases, the Legislature purposefully included "attempt" language in the substantive criminal statute governing the crime at issue. By expressly including it, we found the Legislature intended the statute itself to govern how attempts to commit that crime are prosecuted. Thus, when a statute expressly includes "attempt" as part of the crime, K.S.A. 21-5301(a) (the general attempt statute) does not apply. When a statute does not expressly include "attempt" as part of the crime, K.S.A. 21-5301(a) acts as a default rule to prosecute someone for attempting that crime. *Mora*, 315 Kan. at 542-43.

Relevant here, K.S.A. 21-5705(a)(1) expressly includes attempt as a way to violate the substantive criminal statute governing distribution of methamphetamine. By including attempted distribution as a way to violate the statute, the Legislature intended the crime of attempted distribution of methamphetamine to be controlled by K.S.A. 21-5705(a)(1) and not by the general attempt statute, K.S.A. 21-5301(a). In practice, this means the crime of attempted distribution of methamphetamine should be charged in the following way:

1. The defendant unlawfully distributed methamphetamine, K.S.A. 21-5705(a)(1),

2. by attempting to transfer it to another person, K.S.A. 21-5701(d),

3. with attempt being defined as an intent to transfer, an overt act toward transfer, and a failure to transfer, K.S.A. 21-5301(a).

See also Black's Law Dictionary 156 (12th ed. 2024) (defining an attempt as "1. The act or an instance of making an effort to accomplish something, esp. without success. 2. *Criminal law*. An overt act that is done with the intent to commit a crime but that falls short of completing the crime."); Merriam-Webster Online Dictionary (defining an attempt as "the act or an instance of trying to do or accomplish something," often unsuccessful).

Unlike the example above, the charging document in this case alleges Gomez violated K.S.A. 21-5301(a) (attempt) by committing an overt act toward distribution of methamphetamine (as defined by K.S.A. 21-5705[a][1]), intending to commit that distribution, but failing to do so. Although it deviates from what the Legislature intended, the charging document is statutorily sufficient to allege commission of the crime.

Instruction No. 7 is consistent with the charging document. In the first paragraph of Instruction No. 7, the court instructed that "each of the following claims must be proved" to find Gomez guilty of attempted distribution of methamphetamine:

> "1. The defendant performed an overt act toward the commission of distribution of methamphetamine[.]
> "2. The defendant did so with the intent to commit distribution of methamphetamine[.]
> "3. The defendant failed to complete the commission of distribution of methamphetamine.
> "4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas."

In the third paragraph, the court instructed that the commission of distribution of methamphetamine is complete if the defendant distributed at least 1 gram but less than 3.5 grams of methamphetamine.

In the fourth paragraph, the court instructed that "distribute" means "the actual, constructive, or attempted transfer of an item from one person to another."

Gomez claims the evidence was insufficient to support a conviction for attempted distribution of methamphetamine under these instructions. Like his argument alleging an impossible crime under K.S.A. 21-5301(a), his claim hinges on the jury choosing the "attempted transfer" definition of "distribute" in paragraph four and dropping it into the elements in paragraph one:

> "1. The defendant performed an overt act toward the commission of distribution of methamphetamine.
> "2. The defendant did so with the intent to commit distribution of methamphetamine.
> "3. The defendant failed to complete the [attempted transfer] of methamphetamine.
> "4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas."

Although we already have determined that the Legislature did not intend the "attempted transfer" definition of "distribute" to be used in the separate crime of attempt, Gomez' sufficiency argument fails for a more obvious reason. When the "actual transfer" definition of "distribute" in paragraph four is dropped into the elements of paragraph one, the instruction reads:

> "1. The defendant performed an overt act toward the commission of distribution of methamphetamine.
> "2. The defendant did so with the intent to commit distribution of methamphetamine.
> "3. The defendant failed to complete the [actual transfer] of methamphetamine.
> "4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas."

To find Gomez guilty of attempted distribution of methamphetamine using the "actual transfer" meaning of distribution as set forth above, the State had to prove Gomez committed an overt act toward the crime of distributing methamphetamine but failed to complete the actual transfer of the methamphetamine. Here, the State presented evidence that Gomez and Roberts brought methamphetamine to the hotel room with the expectation of receiving $60 from Martinez in exchange for 1.75 grams of methamphetamine. Roberts weighed out the quantity of methamphetamine to be transferred and testified that as she did so, Martinez was looking for a container to put the drugs in. After Martinez was unable to pay for the drugs through Cash App, the conversation

grew heated, and Gomez pulled out a gun and shot Martinez while they fought over the gun. Law enforcement found roughly 1 gram of methamphetamine left in the room.

Applying the "actual transfer" definition of "distribute" to these facts, Gomez failed to complete the crime of distribution because the methamphetamine was never actually transferred to Martinez. There is no evidence that the drugs were handed over, given, or sold to him. Roberts took the methamphetamine out of her purse and weighed it on the scale. Martinez' attempts to pay for the drugs were unsuccessful. Although 1 gram of methamphetamine was left behind in the hotel room, nothing in the record suggests that anyone other than Roberts handled or possessed the drugs before Martinez was shot. Roberts left the methamphetamine on the table and specifically denied that she delivered the drugs to Martinez after weighing them. See *Milo*, 315 Kan. at 448 (evidence sufficient to support instruction for attempted distribution of marijuana where marijuana baggies, cash, and gift card remained on the kitchen counter as defendant fled victim's home; transfer of marijuana was never completed).

Viewed in the light most favorable to the prosecution, the evidence presented at trial establishes that a rational factfinder could have found beyond a reasonable doubt that Gomez performed an overt act toward distributing methamphetamine by bringing the drugs to the hotel but failed to complete the distribution. Because there was sufficient evidence presented to support a finding that Gomez attempted to distribute methamphetamine, the felony-murder instruction claim that Gomez killed Martinez while unlawfully attempting to distribute methamphetamine was factually appropriate.

ii. *Attempted aggravated robbery*

Jury Instruction No. 8 set forth the elements of attempted aggravated robbery:

"The defendant is charged with attempted aggravated robbery. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant performed an overt act toward the commission of aggravated robbery, to wit: pointed a gun and demanded property from the person or presence of Michael Martinez.

"2. The defendant did so with the intent to commit aggravated robbery.

"3. The defendant failed to complete the commission of aggravated robbery.

"4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas.

"The State must prove that the defendant committed the crime intentionally. A defendant acts with intent when it is the defendant's conscious objective or desire to do the act complained about by the State or to cause the result complained about by the State.

"An overt act necessarily must extend beyond the mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

"The elements of the completed crime of aggravated robbery are as follows:

"1. The defendant knowingly took property from the person or presence of Michael Martinez.

"2. The taking was done by force.

"3. The defendant was armed with a dangerous weapon.

"4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas."

Gomez argues the State presented insufficient evidence of attempted aggravated robbery as an underlying felony for the felony-murder charge. In support of this argument, he notes the jury convicted him of felony murder based on attempted aggravated robbery but acquitted him on the separate charge of attempted aggravated robbery. Gomez claims these inconsistent verdicts necessarily mean there was insufficient evidence to support the felony-murder conviction. But Gomez' argument misconstrues the law. An accused need not be convicted of the underlying felony to be convicted of felony murder. *Beach*, 275 Kan. 603, Syl. ¶ 4 ("[A]n acquittal of direct responsibility for the underlying felony does not vitiate the conviction of felony murder based on the underlying felony."); *State v. Wise*, 237 Kan. 117, 123, 697 P.2d 1295 (1985) ("[A]n acquittal of the underlying felony is not inconsistent with a conviction of felony murder.").

We acknowledge there may be times when a jury's verdict on one charge is inconsistent or even illogical based on its verdict on another charge. Yet any inquiry into the underlying reasons for the inconsistency would impermissibly require the court to look behind the verdicts to discover a motive, purpose, or meaning in the jury's actions. See *United States v. Powell*, 469 U.S. 57, 64-65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). For example, the jury might have chosen to exercise its absolute, if unsanctioned, power

of nullification, despite sufficient evidence to support the crime. Or perhaps the verdict was the result of a compromise or a mistake by the jury. Without knowing why the jury entered a particular verdict, the court cannot speculate that the verdict was reached as a result of insufficient evidence.

Thus, regardless of the jury's not guilty verdict on the attempted aggravated robbery charge, review of the issue before us remains the same—whether, based on the evidence presented, a rational factfinder could have found beyond a reasonable doubt that Gomez killed Martinez during an attempted aggravated robbery. *Beach*, 275 Kan. at 615-17, 622; see *Powell*, 469 U.S. at 67 (sufficiency of the evidence review "should be independent of the jury's determination that evidence on another count was insufficient").

Here, Hampton testified that after the Cash App transfers failed, Gomez pulled out a gun, said, "[Y]ou know why I'm here," and accused Hampton and Martinez of extorting from Roberts profile documents she possessed that contained other people's personal identifying information like social security numbers, addresses, and birthdates. According to Hampton, Gomez said he wanted the profile documents back, so Martinez started to get them out of the closet. Martinez then rushed at Gomez, and they wrestled over the gun before Martinez was shot. There is no evidence that Gomez or Roberts took the profile documents or any other property not brought with them when they left the hotel room.

Gomez discounts Hampton's testimony as evidence of a robbery attempt, claiming Roberts' testimony made no mention of Gomez demanding her property from Martinez. But Roberts testified she told Gomez she wanted to get her laptop and iPads back from Martinez and, after the tension escalated, Gomez told Martinez to give Roberts her "stuff" back.

Viewing the evidence outlined above in the light most favorable to the prosecution, a rational factfinder could have found beyond a reasonable doubt that Gomez performed an overt act toward aggravated robbery by brandishing a gun and demanding the return of Roberts' property from Martinez, but failed to complete the crime before Martinez was killed. Because there was sufficient

evidence presented to support the attempted aggravated robbery charge, the felony-murder instruction claim that Gomez killed Martinez while attempting to commit an aggravated robbery was factually appropriate.

c. *Conclusion*

Because Instruction No. 5 was both legally and factually appropriate, Gomez has failed to show any alternative means error in the district court's felony-murder instruction. See *Reynolds*, 319 Kan. at 16-17.

2. *Attempted distribution of methamphetamine as a stand-alone crime*

Incorporating his arguments from the first issue, Gomez argues the evidence was insufficient to support his conviction for attempted distribution of methamphetamine because the crime of distribution was completed. But as we found above, and viewing the evidence in a light most favorable to the State, there was sufficient evidence presented at trial from which a rational factfinder could have found beyond a reasonable doubt that Gomez performed an overt act toward distributing methamphetamine by bringing the drugs to the hotel but failed to complete the distribution. Thus, Gomez' claim of insufficient evidence necessarily fails.

3. *Illegal sentence*

Finally, Gomez claims his 78-month prison sentence for attempted distribution of methamphetamine is illegal because it exceeds the statutorily allowed maximum sentence. The State agrees that the district court imposed an illegal sentence.

Although Gomez raises this argument for the first time on appeal, K.S.A. 22-3504(a) allows courts to "correct an illegal sentence at any time while the defendant is serving such sentence." A sentence "that does not conform to the applicable statutory provision" is illegal. K.S.A. 22-3504(c)(1). Whether a sentence is illegal within the meaning of K.S.A. 22-3504 is a question of law over which an appellate court has unlimited review. *State v. Claiborne*, 315 Kan. 399, 400, 508 P.3d 1286 (2022).

Gomez' illegal-sentence claim is a clear example of the confusion created when, as here, a criminal statute governing the crime at issue expressly includes attempt as part of the crime, but the State charges the crime under the general attempt statute. As we explained in the preceding section, the Legislature intended for a substantive criminal statute to govern the crime at issue in those cases where it expressly included attempt as part of the crime in the statute. And for purposes of sentencing, it appears that is what the court did here. Gomez had a criminal history score of A. Distribution of methamphetamine is a severity level 3 drug felony. See K.S.A. 21-5705(a)(1); K.S.A. 21-5705(d)(3)(B). The applicable drug grid block lists a sentencing range of 83-78-74 months for a distribution conviction. See K.S.A. 21-6805(a). The court sentenced Gomez to 78 months, the midrange sentence in drug grid block.

But as we also explained above, the State charged Gomez with, and the jury convicted him of, attempted distribution of methamphetamine under the general attempt statute, K.S.A. 21-5301(a). Under K.S.A. 21-5301(d)(1), "[a]n attempt to commit a felony which prescribes a sentence on the drug grid shall reduce the prison term prescribed in the drug grid block for an underlying or completed crime by six months." Given he was convicted under the attempt statute, the presumptive sentencing range for Gomez' conviction was 77-72-68 months. See K.S.A. 21-5301(d)(1). Because Gomez' 78-month sentence for attempted distribution of methamphetamine exceeds the statutorily allowed maximum sentence, it is illegal and therefore must be vacated.

Gomez' convictions are affirmed. His sentence for attempted distribution of methamphetamine is vacated, and the case is remanded for resentencing.

* * *

ROSEN, J., concurring: I concur in the majority's conclusion affirming Gomez' convictions and its analysis and ruling on Gomez' sentencing claim. I write separately because I believe Gomez has correctly identified a legally inappropriate jury instruction.

The State charged Gomez with felony murder, alleging that Michael Martinez was killed while Gomez was committing attempted distribution of methamphetamine or attempted aggravated robbery. After a jury found him guilty, Gomez argued on appeal that the State had failed to provide sufficient evidence of both attempted distribution and attempted aggravated robbery, so the felony-murder conviction could not stand. Gomez' argument tracked our longstanding rule that a conviction of a crime that can be committed in more than one way will stand only if the jury indicated it unanimously relied upon a means of committing the crime for which there was sufficient evidence or, in the absence of that indication, there was sufficient evidence of every means. See *State v. Wright*, 290 Kan. 194, Syl. ¶ 2, 224 P.3d 1159 (2010). But a majority of this court recently discarded this rule in *State v. Reynolds*, 319 Kan. 1, 17, 552 P.3d 1 (2024). Now, when a defendant alleges an alternative means error as Gomez did, this court analyzes the issue applying our less demanding instructional error framework. 319 Kan. at 17. That analysis questions whether the instructions to the jury were legally and factually appropriate, and, if they were not, whether the instructions created prejudicial error. 319 Kan. at 17.

I disagreed with the majority's decision to overturn our previous approach to alleged alternative means error. I still do. Under what I believe is the correct approach, this court would consider whether sufficient evidence supported both of the felonies underlying Gomez' felony-murder conviction, conclude that it does, and affirm the conviction. But this is no longer the way of this court, so I will not belabor this point. Instead, I will address the flaw I see in the majority's analysis as this court embarks upon its new approach.

The new approach begins by asking whether the jury instructions for felony murder were legally appropriate. *Reynolds*, 319 Kan. at 17. The relevant portions of the instructions are as follows:

"INSTRUCTION NO. 5

"Patricio Gomez is charged with Murder in the first degree. Patricio Gomez pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. Patricio Gomez killed Michael Raymond Martinez;

"2. The killing was done by Patricio Gomez during an attempt to commit Distribution of Methamphetamine or an attempt to commit Aggravated Robbery;

. . . .

"The elements of Attempted Distribution of Methamphetamine are set forth in Instruction No. 7.

"The elements of Attempted Aggravated Robbery are set forth in Instruction No. 8."

"INSTRUCTION NO. 7

"The defendant is charged with an attempt to commit distribution of methamphetamine. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant performed an overt act toward the commission of distribution of methamphetamine[.]

"2. The defendant did so with the intent to commit distribution of methamphetamine[.]

"3. The defendant failed to complete the commission of distribution of methamphetamine.

. . . .

"The State must prove that the defendant committed the crime intentionally. A defendant acts with intent when it is the defendant's conscious objective or desire to do the act complained about by the State or to cause the result complained about by the State. An overt act necessarily must extend beyond the mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

"The elements of the completed crime of distribution of methamphetamine are as follows:

"1. The defendant distributed methamphetamine.

"2. The quantity of methamphetamine distributed was at least 1 gram but less than 3.5 grams.

"3. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas.

"'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."

"INSTRUCTION NO. 8

"The defendant is charged with attempted aggravated robbery. The defendant pleads not guilty. To establish this charge, each of the following claims must be proved:

"1. The defendant performed an overt act toward the commission of aggravated robbery, to wit: pointed a gun and demanded property from the person or presence of Michael Martinez.

"2. The defendant did so with the intent to commit aggravated robbery.

"3. The defendant failed to complete the commission of aggravated robbery.

"4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas.

"The State must prove that the defendant committed the crime intentionally. A defendant acts with intent when it is the defendant's conscious objective or desire to do the act complained about by the State or to cause the result complained about by the State.

"An overt act necessarily must extend beyond the mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

"The elements of the completed crime of aggravated robbery are as follows:

"1. The defendant knowingly took property from the person or presence of Michael Martinez.

"2. The taking was done by force.

"3. The defendant was armed with a dangerous weapon.

"4. This act occurred on or about the 30th day of September 2021, in Sedgwick County, Kansas."

The majority concludes that Instruction No. 5 was legally appropriate. I agree. This instruction accurately sets out the applicable law generally defining felony murder. See *State v. Wimbley*, 313 Kan. 1029, 1034, 493 P.3d 951 (2021) (instructions are legally appropriate when they "fairly and accurately state the applicable law").

The analysis should naturally move forward to consider the legal appropriateness of the rest of the felony-murder instructions—those defining the crimes underlying the felony-murder charge. This is especially true in this case because Gomez has argued the State could not prove the elements in the attempted distribution instruction. See *Reynolds*, 319 Kan. at 17 (when defendant argued insufficient evidence supported one means of a crime, this court focused on whether instruction for that means was legally and factually appropriate in new alternative means analysis). But the majority does not do this. It instead moves on to consider whether the remaining instructions were factually appropriate. I believe the majority skips a very important step, one that reveals a legally inappropriate jury instruction. I analyze this step here.

I begin with Instruction No. 8, because it suffers no flaws. It accurately sets out the elements of an attempted crime under K.S.A. 21-5301, which are an "overt act toward the perpetration"

of a crime, an intent to commit that crime, and the failure to execute that crime. And it accurately sets out the elements of aggravated robbery. See K.S.A. 21-5420 ("knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person" while "armed with a dangerous weapon"). These instructions are an accurate reflection of the law.

But Instruction No. 7 is not an accurate reflection of the law. Again, it correctly sets out the elements of an attempted crime under K.S.A. 21-5301, and it correctly sets out the elements of distribution of methamphetamine in K.S.A. 21-5705(a)(1) ("distribute or possess with the intent to distribute . . . [o]piates, opium or narcotic drugs, or any stimulant designated in K.S.A. 65-4107[d][3]"). It also correctly sets out the definition of "distribute" as it is used in the definitions of crimes involving controlled substances: "the actual, constructive or *attempted* transfer from one person to another." (Emphasis added.) K.S.A. 21-5701. But the correct recitation of the language in these statutes does not amount to a legally appropriate instruction because they provided an "inaccurate picture" of the "applicable law." *State v. Z.M.*, 319 Kan. 297, 327, 333, 555 P.3d 190 (2024); *Wimbley*, 313 Kan. at 1034.

When a substantive criminal statute indicates an attempt would in fact *complete* the crime, as does the distribution statute in this case, the general attempt statute—K.S.A. 21-5301—is inapplicable. This court said as much in *Mora* and the majority confirms it today, explaining:

"[In *Mora*,] [we] observed that in some cases, the Legislature purposefully included 'attempt' language in the substantive criminal statute governing the crime at issue. By *expressly including it, we found the Legislature intended the statute itself to govern how attempts to commit that crime are prosecuted. Thus, when a statute expressly includes 'attempt' as part of the crime, K.S.A. 21-5301(a) (the general attempt statute) does not apply. When a statute does not expressly include 'attempt' as part of the crime, K.S.A. 21-5301(a) acts as a default rule to prosecute someone for attempting that crime. Mora, 315 Kan. at 542-43.*" (Emphasis added.) 320 Kan. at 16.

The practical problems with applying the general attempt statute to a crime that can be completed by an attempt are evident in this case. By incorporating K.S.A. 21-5301, instruction seven informed the jury the State could prove Gomez was guilty by proving he attempted but

failed to attempt to transfer methamphetamine. This is, as Gomez argues, legally impossible.

The majority acknowledges this problem and agrees K.S.A. 21-5301 is inapplicable to Gomez' case. It observes, "By including attempted distribution as a way to violate the statute, the Legislature intended the crime of attempted distribution of methamphetamine to be controlled by K.S.A. 21-5705(a)(1) and not by the general attempt statute, K.S.A. 21-5301(a)." 320 Kan. at 16. Given this conclusion, I cannot see how Instruction No. 7 can be legally appropriate. I would hold it is not and move on.

Because at least one of the instructions is legally inappropriate, this court's new approach to alternative means problems requires we simply consider whether this inappropriate instruction caused prejudicial error. See *Reynolds*, 319 Kan. at 17. Because Gomez did not object to the legally inappropriate instruction at trial, this means this court must "be firmly convinced the jury would have reached a different verdict had" the instruction been correct. *Reynolds*, 319 Kan. at 18.

I am not firmly convinced the jury would have reached a different conclusion had it been appropriately instructed. Instruction No. 7 presented a legally impossible means of committing the charged crime, but it also presented legally *possible* means of committing the crime. The jury had the option to find Gomez guilty if Martinez died while Gomez attempted but failed to *actually* transfer methamphetamine. As the majority concludes, there was ample evidence of this crime. Consequently, I cannot be firmly convinced that a legally correct Instruction No. 7 would have caused the jury to reach a different conclusion. I would affirm the felony-murder conviction based on this analysis.

For the same reasons, I would also affirm Gomez' independent conviction of attempted distribution of methamphetamine over Gomez' argument that it cannot stand because there was insufficient evidence to support it.

LUCKERT, C.J., and WALL, J., join the foregoing concurrence.

No. 122,036

In the Matter of MARK D. MURPHY, *Respondent.*

(562 P.3d 195)

ORDER OF DISCHARGE FROM PROBATION

ATTORNEY AND CLIENT—*Motion for Discharge from Probation—Order of Discharge from Probation*.

On October 16, 2020, the court suspended Mark D. Murphy's Kansas law license for a two-year period. The court ordered that following one year of suspension, Murphy could petition for an early reinstatement provided that he enters into a probation plan approved by the Office of the Disciplinary Administrator (ODA). *In re Murphy*, 312 Kan. 203, 473 P.3d 886 (2020).

On December 30, 2021, the court granted the parties' joint motion to stay the second year of the suspension period, reinstated Murphy's law license, and placed him on probation pursuant to the terms and conditions set forth in the probation plan approved by the Disciplinary Administrator. *In re Murphy*, 314 Kan. 515, 500 P.3d 1188 (2021).

On December 29, 2024, Murphy filed a motion to be discharged from probation. The ODA responded that Murphy has complied with his probation, confirmed Murphy's eligibility to be discharged from probation, and voiced no objection to such discharge. See Supreme Court Rule 227(g)(1) (2024 Kan. S. Ct. R. at 281) (probation discharge).

This court notes the ODA's response, grants Murphy's motion, and fully discharges Murphy from probation. Accordingly, this disciplinary proceeding is closed.

The court orders the publication of this order in the Kansas Reports and assesses any remaining costs of this proceeding to Murphy.

Dated this 17th day of January 2025.

Bar Docket No. 15198

In the Matter of LANCE MICHAEL HALEY, *Respondent.*

(562 P.3d 195)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Order of Disbarment.*

This court admitted Lance Michael Haley to the practice of law in Kansas on October 4, 1991. The court administratively suspended Haley's Kansas law license on October 9, 2007, due to his noncompliance with annual requirements to maintain his law license. 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 March 12, 2018, the court suspended Haley's law license for one year upon finding he violated various rules of professional conduct. *In re Haley*, 307 Kan. 540, 411 P.3d 1216 (2018). Though the court gave him the option to avoid the one-year suspension, Haley never attempted to have his administrative suspension lifted, nor has he ever petitioned the court for reinstatement of his law license as required after the one-year suspension period expired. Haley's law license also remains administratively suspended.

On January 7, 2025, Haley'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). At the time, Haley faced a complaint docketed by the Disciplinary Administrator.

This court accepts Haley's surrender of his Kansas law license, disbars him pursuant to Rule 230(b), and revokes his license and privilege to practice law in Kansas.

The court further orders the Office of Judicial Administration to strike the name of Lance Michael Haley 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 Haley, and that Haley comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

Dated this 24th day of January 2025.

State v. Harris

No. 125,936

STATE OF KANSAS, *Appellee*, v. ROBERT LEE HARRIS JR., *Appellant.*

(562 P.3d 1001)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fifth Amendment Privilege against Self-Incrimination—Application.* The privilege against self-incrimination under the Fifth Amendment to the United States Constitution applies only when the accused is compelled to make a testimonial communication that is incriminating.

2. SAME—Miranda *Procedural Safeguards Protect against Involuntary Interrogations.* The procedural safeguards adopted by the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), protect individuals from the inherent compulsions of the interrogation process.

3. SAME—*Statement Not Compelled if Individual Waives Privilege against Self-Incrimination.* A statement is not compelled under the Fifth Amendment if an individual voluntarily, knowingly, and intelligently waives the constitutional privilege against self-incrimination. Without a *Miranda* advisory, however, a suspect's unwarned statement during custodial interrogation is presumed to be compelled and therefore involuntary.

4. SAME—*Whether Renewed* Miranda *Warning Required at Start of New Questioning—Totality of Circumstances Consideration.* If a suspect waived the constitutional rights explained in an earlier *Miranda* warning, the question of whether a renewed *Miranda* warning is required at the start of a new questioning session boils down to whether—considering the totality of the circumstances—the suspect continues to understand and voluntarily waives the constitutional rights explained in the initial *Miranda* warning.

5. SAME—Miranda *Safeguards Complied with by Police—If Government Coercion Defendant's Statement May Be Involuntary*. Even when police have complied with the procedural safeguards of *Miranda*, a defendant's statement to the police may still be involuntary, and therefore inadmissible, if it was extracted by impermissible government coercion.

6. SAME—*Coercive Police Tactics—Two Broad Categories.* Coercive police tactics fall into two broad categories: those that are inherently coercive, resulting in a per se violation of the Due Process Clause, and those that are coercive under the circumstances given the nature of the interrogation and the unique traits of the individual suspect.

7. CRIMINAL LAW—*When Officers Have Reasonable Basis to Believe Court Will Issue Order—Not Inherently Coercive.* Advising an accused that

officers can obtain an order compelling fingerprint access or the passcode to unlock a cell phone is not inherently coercive if officers have a reasonable basis to believe that a court will issue such an order.

8. SAME—*Analysis of Coercion Based on Nature of Interrogation and Traits of Individual Suspect—Totality of Circumstances Required to Determine if Voluntary Statement or Coercion.* Analysis of coercion based on the nature of the interrogation and the unique traits of the individual suspect requires courts to assess the totality of the circumstances to determine whether the suspect's statement was a voluntary act of free and independent will or the result of impermissible coercion that overcame the suspect's rational intellect and free will.

Appeal from Johnson District Court; NEIL B. FOTH, judge. Oral argument held September 10, 2024. Opinion filed January 31, 2025. Affirmed.

Michael P. Whalen, of Law Office of Michael P. Whalen, argued the cause and was on the briefs for appellant.

Kendall S. Kaut, assistant district attorney, argued the cause, and *Sommer Mackay*, assistant district attorney, *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: A jury convicted Robert Lee Harris Jr. of first-degree premeditated murder of his wife. On direct appeal, he challenges the district court's denial of his motion to suppress evidence retrieved from his locked cell phones. Specifically, he argues law enforcement obtained the passcodes necessary to unlock the cell phones in violation of his Fifth Amendment privilege against self-incrimination. But substantial competent evidence supports the district court's finding—based on its assessment of the totality of the circumstances—that law enforcement did not compel Harris to involuntarily make incriminating statements against his will. First, the initial *Miranda* warning given to Harris was still effective and his prior *Miranda* waiver had not expired when the detective asked him to provide the passcodes, so there is no presumption that Harris was compelled to involuntarily disclose them. Second, the detective who requested the passcodes had a reasonable basis to believe a court would issue an order to compel fingerprint access or the passcodes to open the phones when the detective informed Harris that he could obtain such an order, so this statement was not inherently coercive. Third, when we consider the totality of the circumstances, including the detective's statement, other interrogation

details, and the individual characteristics of Harris as the accused, we are not persuaded Harris involuntarily provided the passcodes due to impermissible government coercion. Thus, the district court did not err by denying Harris' motion to suppress the evidence obtained from the search of the phones.

FACTS

On January 8, 2018, Overland Park police responded to Harris' residence after a neighbor reported a disturbance from Harris' apartment, including hearing loud noises and a woman call out, "[H]elp me." The neighbor testified he saw Harris drag a large, heavy trash can down the apartment stairs to his wife's SUV and was concerned there could be a body in the trash can. While waiting for the police to arrive, the neighbor saw Harris make several trips to the dumpster while carrying smaller white trash bags.

Officers made contact with Harris at his apartment. After some discussion, Harris allowed officers into the apartment so they could determine whether there was an injured person inside. They found no one else in the apartment but noted broken glass on the floor and reddish-pink stains on the carpet in the dining/living room area. The officers ran a records check on Harris and discovered he had an outstanding warrant for his arrest.

Several hours later, Harris called 911 and reported his wife missing. The same officers from the previous call responded to his apartment, and Harris agreed to speak to them. Inside the apartment, officers noticed a rug that was previously in the living room had been moved to the dining room to cover the red stains they saw earlier. Harris admitted to moving the rug and eventually gave consent for officers to swab the stains to test for human blood. Officers also noted the smell of bleach inside the apartment, and Harris told them he had been cleaning.

The officers asked Harris to come outside to the patrol car to fill out paperwork regarding a missing person, including consent to search forms. Harris agreed. While in the patrol car, Harris used his cell phone several times. Officers asked Harris if he would go to a different location to speak with detectives. Harris initially agreed but then changed his mind. At that point, officers arrested

Harris for the outstanding warrant. In a search incident to the arrest, officers found two cell phones in Harris' pockets, among other items.

Officers transported Harris to the Tomahawk Ridge police station, where he was held for questioning overnight and interviewed for several hours by Detectives Erin Johnson and Marcus Meyer. Before asking any questions, Detective Meyer read Harris the *Miranda* warning advising Harris of his constitutional rights. Video footage shows Harris seated in an interview room, wearing leg shackles but no handcuffs. Harris said he understood his rights and agreed to answer some questions.

The first interview lasted approximately one and a half hours, at which point Harris invoked his right to remain silent. Detectives stopped asking questions at that time and left the room. They told Harris to knock on the door if he changed his mind. Less than 10 minutes later, Harris knocked on the door and asked to speak with the detectives. When they reentered, Harris asked how it worked to get an attorney. Detective Meyer explained the court would appoint one after Harris was arraigned. Harris then asked, "[W]hat happens next?" Detectives interpreted this question as Harris wanting to talk further about the investigation. Detective Meyer then asked Harris where his wife was and ultimately accused Harris of lying when Harris claimed not to know.

During this second stage of the interview, which lasted about 50 minutes and into the morning of January 9, Harris initially denied having anything to do with his wife's disappearance. But Harris later told detectives he and his wife had an argument that turned into a physical altercation. He then admitted that he held her down until she died, probably by suffocation. Detective Meyer pressed Harris on what he had done with his wife's body, suggesting things would be better for Harris if he told the truth, but making no specific promises. Detective Meyer told Harris that his wife's family deserved to know where she was for their peace of mind and to give her a proper burial. Harris eventually told detectives where he had disposed of his wife's body and pointed to a map revealing a location of East 163rd Street and Kentucky Road in Raymore, Cass County, Missouri. Detectives drove to that location and found a body, later identified as Harris' wife, wrapped in black

trash bags. Autopsy results indicated her cause of death was asphyxiation by manual strangulation.

Also on January 9, law enforcement obtained a search warrant for the two cell phones—a Samsung Galaxy S7 and an iPhone 6s—recovered from Harris during his arrest. The warrants did not contain any language about the method for unlocking the devices. Around 3 p.m. that day, Detective Mike Melvin and another detective went to the Johnson County Detention Center, met with Harris in an interview room at the jail, served him the search warrants, and asked him for the passcodes to access information on the phones. They did not re-*Mirandize* Harris before asking him for the passcodes. While he was reading the search warrant, Harris asked if this was something he needed an attorney for, and Detective Melvin replied that "it was up to [Harris]." Detective Melvin then advised Harris that officers could obtain a court order compelling Harris to provide fingerprint access or the passcodes. Shortly after, Harris provided a passcode for the iPhone and a passcode pattern to open the Samsung.

The detectives ultimately extracted incriminating data from the devices, including call logs, text messages, internet history, and search results. The call logs and text messages revealed that Harris lied to his wife about going to work on January 8, lied to his boss about being in a car accident on January 8 to explain why he could not go to work, and asked his wife to come home for lunch because he was feeling sick. The extraction also revealed internet search queries for, "How long does it take someone to die in a plastic bag?" and, "How long does it take to die of plastic bag suffocation?" These internet searches were conducted early in the morning on January 8, starting at 5:44 a.m.

Harris filed a pretrial motion to suppress the cell phone evidence, claiming law enforcement obtained the passcodes required to extract this evidence in violation of his Fifth Amendment privilege against self-incrimination. After reviewing the parties' briefs and hearing testimony on the matter, the district court made a number of factual findings and ultimately concluded Harris "voluntarily disclosed his cell phone passcodes, knowing the incrimi-

nating information they might yield" during the subsequent interrogation. Given its finding that the disclosure was voluntary, the district court denied Harris' motion to suppress.

ANALYSIS

On appeal, Harris claims the district court erred in denying his motion to suppress the cell phone evidence. In support, he argues the detectives violated his Fifth Amendment privilege against self-incrimination by compelling him to involuntarily disclose his cell phone passcodes.

When a defendant moves to suppress evidence based on a violation of the Fifth Amendment privilege against self-incrimination, the State bears the burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights. *Colorado v. Connelly*, 479 U.S. 157, 168-69, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). When reviewing a district court's ruling on a motion to suppress, the appellate court reviews the factual underpinnings of the ruling under a substantial competent evidence standard, but it reviews the ultimate legal conclusion drawn from those facts de novo. It does not reweigh the evidence, assess witness credibility, or resolve conflicting evidence. *State v. Younger*, 319 Kan. 585, 602, 556 P.3d 838 (2024).

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "The resulting privilege against compulsory self-incrimination fulfills the essential role in our adversarial justice system of ensuring the State achieves criminal convictions by its own efforts, not by the forced disclosures of the accused." *State v. Showalter*, 319 Kan. 147, 154, 553 P.3d 276 (2024) (citing *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55, 84 S. Ct. 1594, 12 L. Ed. 2d 678 [1964]; *Ullmann v. United States*, 350 U.S. 422, 427, 76 S. Ct. 497, 100 L. Ed. 511 [1956]).

Although the privilege must be liberally construed, it "does not independently proscribe the compelled production of every sort of incriminating evidence." *Fisher v. United States*, 425 U.S. 391, 408, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); *Hoffman v.*

United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Instead, the privilege applies only when the accused is (1) compelled (2) to make a testimonial communication (3) that is incriminating. *Showalter*, 319 Kan. at 155 (citing *Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 189, 124 S. Ct. 2451, 159 L. Ed. 2d 292 [2004]).

1. *Compelled disclosure*

Harris makes two arguments to support his claim that he was compelled to involuntarily disclose the passcodes. First, he argues the detectives' failure to re-*Mirandize* him before asking for the cell phone passcodes creates a presumption that he was compelled to involuntarily disclose them. Second, he claims the detectives used coercive tactics to overcome his free will, which compelled him to involuntarily disclose the passcodes.

a. Miranda

In *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court adopted procedural safeguards to protect individuals from the "inherent compulsions of the interrogation process." The "main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis v. Thompkins*, 560 U.S. 370, 383, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). Thus, before an individual in custody is subjected to questioning, law enforcement must inform the individual that "he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444.

A suspect may waive the rights in the *Miranda* warning if the waiver is made voluntarily, knowingly, and intelligently. *Colorado v. Spring*, 479 U.S. 564, 573, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987) ("A statement is not 'compelled' within the meaning of the Fifth Amendment if an individual 'voluntarily, knowingly and intelligently' waives his constitutional privilege.") (quoting *Miranda*, 384 U.S. at 444). Without the *Miranda* advisory, however, an unwarned custodial statement is presumed to be "compelled"

and therefore involuntary. Unwarned custodial statements are generally inadmissible at trial in the State's case-in-chief. *Oregon v. Elstad*, 470 U.S. 298, 317-18, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985).

Harris does not challenge the district court's finding that he was properly advised of his constitutional rights under *Miranda* and that he voluntarily, knowingly, and intelligently waived those rights during his initial interrogation on the evening of January 8 and into the early morning hours of January 9. Thus, he has abandoned those particular arguments on direct appeal. See *State v. Davidson*, 315 Kan. 725, 728, 510 P.3d 701 (2022) ("[A] party waives or abandons any argument not made on appeal[.]"). Rather, Harris argues the *Miranda* warning and his waiver had expired by the afternoon of January 9, when officers served him with a search warrant for the cell phones and asked him to provide the passcodes. Without a renewed *Miranda* warning for this second interrogation, Harris claims his disclosure of the passcodes was compelled and therefore involuntary.

Once the police provide the *Miranda* warning at the start of a custodial interrogation and the suspect understands and waives these rights, this court has generally found it unnecessary for the police to repeat the *Miranda* warning at each successive interview. *State v. Mattox*, 280 Kan. 473, 488, 124 P.3d 6 (2005); *State v. Pyle*, 216 Kan. 423, Syl. ¶ 9, 532 P.2d 1309 (1975). "To adopt an automatic second warning system would be to add a perfunctory ritual to police procedures rather than provide the meaningful set of procedural safeguards envisioned by *Miranda*." *State v. Boyle*, 207 Kan. 833, 841, 486 P.2d 849 (1971). That said, a renewed *Miranda* warning may be necessary under some circumstances. The question of whether a suspect needs a renewed *Miranda* warning at the start of a new questioning session boils down to whether—considering the totality of the circumstances—the suspect continues to understand and voluntarily waives the constitutional rights explained to them in the initial *Miranda* warning. See *State v. Nguyen*, 281 Kan. 702, 723-24, 133 P.3d 1259 (2006) (citing *Brown v. State*, 661 P.2d 1024, 1031 [Wyo. 1983] [considering totality of circumstances to determine "'whether the prior [*Miranda*] warnings were effective to sufficiently advise the accused

of his constitutional rights so that the prior voluntary and knowing waiver of those rights continued its efficacy'"]).

This court has considered several factors when conducting a totality-of-the-circumstances analysis, including, but not limited to, the time between the valid waiver and the subsequent interrogation; whether the suspect remained in custody during the elapsed time; whether intervening circumstances occurred in the interim that would affect the suspect's understanding of the original warning; the suspect's age, education level, state of mind, and prior experience with law enforcement; and whether there was a change in location or law enforcement personnel between the first and subsequent interrogations. See, e.g., *Mattox*, 280 Kan. at 487-88 (holding renewed *Miranda* warning not required after a valid waiver if suspect remained in custody during the elapsed time and the subsequent interrogation took place within a reasonable time, so long as nothing occurred in the interim that would affect suspect's understanding of the original warning); *Nguyen*, 281 Kan. at 724 (holding *Miranda* warnings and waiver did not expire over the course of five to eight hours when adult suspect was transported to jail by a different officer to a different location, even though suspect spoke limited English and did not have an interpreter on the drive); *State v. Davis*, 268 Kan. 661, 678, 998 P.2d 1127 (2000) (holding a renewed *Miranda* warning not required when 17-year-old juvenile defendant with significant experience with law enforcement was transported to a detention center and made further incriminating statements to a worker).

Our totality of the circumstances analysis is flexible in that we have never required the district court to consider a discrete set of factors to decide whether a renewed *Miranda* warning is required. But Harris urges us to do so by adopting an exclusive list of factors used by other state jurisdictions, specifically:

"'(1) the length of time between the giving of the first warnings and the subsequent interrogation . . . ; (2) whether the warnings and the subsequent interrogation were given in the same or different places . . . ; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers . . . ; (4) the extent to which the subsequent statement differed from any previous statements . . . ; (5) the apparent intellectual and emotional state of the suspect.'" *In re Interest of Miah S.*, 290 Neb. 607, 615, 861 N.W.2d 406 (2015).

See also *State v. Williams*, 26 Neb. App. 459, 920 N.W.2d 868 (2018) (citing *Missouri v. Seibert*, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d 643 [2024]).

We decline Harris' invitation to adopt an exclusive list of factors to decide whether a renewed *Miranda* warning is required. The United States Supreme Court has explained that a flexible "totality-of-the-circumstances analysis" is preferred when assessing whether a prior *Miranda* waiver is still valid because this approach ensures "inquiry into all the circumstances surrounding the interrogation." *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979) (explaining this approach *requires* courts to consider *all* the relevant circumstances of each particular case "to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel"). And this court recently conveyed a similar message in *State v. G.O.*, 318 Kan. 386, 403, 543 P.3d 1096 (2024), by articulating a list of "potential" factors to be considered in a voluntariness inquiry while making clear that "trial judges need not address every factor" so long as judges articulate the factors on which their findings are based.

Consistent with *Mattox*, the district court here examined the totality of the circumstances and found the following factors relevant:

> "15 hours earlier [Harris] knew his rights, waived his rights, then successfully asserted his rights before waiving them again. There were no significant intervening circumstances before the detectives came back to him the same day. The question defendant asked, essentially 'do I need a lawyer for this,' indicates that he knows he has the right to a lawyer, he is just questioning whether he needs one. He also knows from his earlier interrogation that if he asserts his right, it will be honored. He was told that it was up to him to make that choice."

Based on these articulated factors, the district court concluded the initial *Miranda* warning provided to Harris was still effective and his prior *Miranda* waiver had not expired when officers served him with a search warrant for the cell phones and asked him to provide the passcodes.

But Harris challenges the district court's conclusion, claiming the totality-of-the-circumstances analysis supporting it was flawed and incomplete. He claims it was flawed because the district court minimized the significance of the 15-hour gap between

the two interrogations in reaching its conclusion. And he claims it was incomplete because the court failed to consider that the two interrogations took place in different locations and related to different subjects and that the State failed to introduce evidence of his state of mind.

The record does not support Harris' claim that the court minimized the significance of the 15-hour gap between the two interrogations. Consistent with *Mattox*, the district court expressly recognized that any lapse of time between a *Miranda* waiver and subsequent interrogation "must be assessed in view of defendant's knowledge and conduct and other relevant circumstances." Although the 15-hour gap between interrogations is longer than this court's previous decisions holding a *Miranda* warning did not expire, Harris does not allege an intervening event occurred during the gap that impacted his continued ability to understand and waive his *Miranda* rights at the second interrogation. We find no error in the district court's assessment of this factor.

As for Harris' claim that the district court did not expressly consider the changed location, the differences in subject matter, and his state of mind, Harris fails to explain how the court's failure to expressly consider these missing factors tainted the waiver of his *Miranda* rights. Again, the key consideration in deciding whether a renewed warning is necessary is whether the suspect continues to understand and voluntarily gives up *Miranda* rights at the start of the new questioning session. Simply identifying factors that the district court did not consider in its totality-of-the-circumstances analysis is not enough to establish that the court erred in concluding his *Miranda* waiver was still valid when questioning resumed.

In sum, we find substantial competent evidence supports the district court's finding, based on its assessment of the totality of the circumstances, that "there is nothing to indicate that defendant Harris did not know or understand his *Miranda* rights when he was re-interviewed on the afternoon of January 9, 2018." Thus, we conclude the detectives were not required to readminister the *Miranda* warning before asking Harris to provide the cell phone passcodes. Because the initial *Miranda* warning and Harris' prior

Miranda waiver were still effective at the time, no presumption of compulsion attached to Harris' disclosure of the passcodes.

b. *Coercive tactics*

In addition to asserting his disclosure of the cell phone passcodes was compelled in the absence of a renewed *Miranda* warning, Harris also claims his disclosure was involuntary due to law enforcement coercion. As evidence of coercion, Harris points to Detective Melvin's request that he provide the passcodes and the subsequent statement that officers could obtain a court order compelling him to provide fingerprint access or the passcodes. Because the issue of whether this information can be compelled is still an open legal question in Kansas, Harris argues the detective's assertion "was not necessarily a true statement" and thus coercive. He contends the district court should have considered this coercive tactic as a factor in its voluntariness analysis and suppressed the electronic evidence derived from the phones on this basis.

Even when police have complied with the procedural safeguards of *Miranda*, a defendant's statement to the police may still be involuntary, and therefore inadmissible, if it was extracted by impermissible government coercion. *G.O.*, 318 Kan. at 397; see *Dickerson v. United States*, 530 U.S. 428, 444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000) ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry."). Both the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment protect against involuntary confessions caused by coercive police tactics. *G.O.*, 318 Kan. at 397 ("The Fifth Amendment test for voluntariness substantially tracks the voluntariness test applied under the Due Process Clause of the Fourteenth Amendment.") (citing *Connelly*, 479 U.S. at 169-70). A statement is involuntary if obtained as a result of interrogation tactics that overcame a defendant's rational intellect and free will. *Connelly*, 479 U.S. at 164 ("Absent police conduct causally related to the [statement], there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."). This standard balances the competing value of fair-

ness to the accused against the legitimate interest of having effective law enforcement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-26, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Coercive police tactics fall into two broad categories: those that are inherently coercive, resulting in a per se violation of the Due Process Clause, and those that are coercive under the circumstances given the nature of the interrogation and the unique traits of the individual suspect. *G.O.*, 318 Kan. at 397 (citing *Miller*, 474 U.S. at 109). The first category 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 (citing *Miller*, 474 U.S. at 109). The second category involves tactics that are coercive based on the details of the interrogation as they relate to the unique characteristics of the accused. 318 Kan. at 397-98 (citing *Miller*, 474 U.S. at 109-10). Analysis of coercion in a particular case requires courts to assess the totality of the circumstances and determine whether a defendant's statement was a voluntary act of his or her free and independent will or the result of impermissible coercion. 318 Kan. at 398 (citing *Connelly*, 479 U.S. at 165).

In support of his coercion argument, Harris cites to federal and state caselaw articulating the test for an involuntary confession obtained by inherently coercive tactics that include threats of violence and/or improper promises of benefit. See *Hutto v. Ross*, 429 U.S. 28, 30, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976); *State v. Brown*, 286 Kan. 170, 174, 182 P.3d 1205 (2008). We therefore assume Harris is arguing, at least tacitly, that Detective Melvin's statement about obtaining a court order to compel him to provide the passcodes was inherently coercive and thus constituted a per se violation of the Fifth Amendment.

Though in the context of assessing consent under the Fourth Amendment and not the voluntariness of statements under the Fifth Amendment, this court has held that an officer's threat to obtain a warrant based on probable cause is not inherently coercive if probable cause indeed exists. See *State v. Brown*, 245 Kan. 604, 612-13, 783 P.2d 1278 (1989) (consent to search was not coerced

after officer stated a search warrant could be obtained because evidence established there would have been probable cause to conduct the search). Thus, notifying a person that a search warrant can be obtained is not inherently coercive if there is a basis for the warrant to issue. 245 Kan. at 612-13; see also *United States v. Creech*, No. 99-3205, 2000 WL 1014868, at *2 (10th Cir. 2000) (unpublished opinion) ("[W]here some basis exists to support an application for a search warrant, an officer's expressed intention to seek a search warrant in the absence of consent does not render a consent involuntary."). Extending this principle to the issue presented here, advising an accused that officers can obtain an order compelling fingerprint access or the passcode to unlock a cell phone is not inherently coercive if officers have a reasonable basis to believe that a court will issue such an order. Thus, to resolve Harris' claim of inherent coercion, we must decide whether Detective Melvin had a reasonable basis to believe that a court would issue an order to compel fingerprint access or the passcodes to the phones at the time the detective made this statement.

Appellate courts in Kansas have yet to address whether police can obtain a court order compelling an accused to provide fingerprint access or a passcode to a cell phone. And courts around the country are divided over the issue. See *State v. Lemmie*, 311 Kan. 439, 448-49, 462 P.3d 161 (2020) (opting not to delve into the nature of cell phone passcodes when any possible violation of the defendant's Fifth Amendment right was harmless); *Privilege Against Self-Incrimination as Applied to Compelled Disclosure of Password or Production of Otherwise Encrypted Electronically Stored Data*, 82 A.L.R. 7th art. 4 (2023) (collecting and discussing state and federal cases that show courts are split on whether compelled disclosure of cell phone passcodes are protected under the Fifth Amendment privilege against self-incrimination).

Relying on the unsettled nature of the issue, Harris argues Detective Melvin's statement that officers could obtain an order to compel fingerprint access or the passcodes was inherently coercive because it "was not necessarily a true statement." But in making this argument, Harris attempts to change the standard for assessing whether this police tactic was inherently coercive. Rather

than evidence that there was a reasonable basis for law enforcement to believe the court will issue an order compelling fingerprint access or passcodes, Harris insists on absolute certainty that the court will do so. Harris provides no argument or legal authority to support this proposed change in the standard for assessing coercion in this context, and we find no reason to depart from the existing standard.

The record before us supports a finding that Detective Melvin had a reasonable basis to believe that a court would issue an order to compel fingerprint access or the passcode to the phones at the time the detective informed Harris that he could obtain such an order. Detective Melvin agreed he told Harris that officers could obtain "a judicial order compelling the defendant to either use his finger print or give up the pass codes or something of that nature" because Detective Melvin had obtained such an order in the past. Harris has provided no information to the contrary. And neither this court nor the United States Supreme Court prohibit a trial court from issuing an order compelling the disclosure of digital access credentials. Based on the evolving nature of digital privacy and security laws and Detective Melvin's past experience in obtaining an order compelling digital access credentials, the statement that officers could obtain such an order was not inherently coercive.

Alternatively, Harris argues coercion based on a totality of the particular circumstances of the interrogation and his own personal characteristics. As mentioned, this court has identified a non-exhaustive list of potential factors courts may consider in a voluntariness analysis relating to the details of the interrogation and the characteristics of the accused:

> "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.

These factors need not be equally weighted. Rather, any single factor or a combination of factors "'may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the [statement] was not therefore a free and voluntary act. [Citation omitted.]'" *G.O.*, 318 Kan. at 401 (quoting *State v. Sharp*, 289 Kan. 72, 81, 210 P.3d 590 [2009]).

The evidentiary record establishes that the interaction between the detectives and Harris was short, on the order of minutes, and essentially involved detectives serving Harris with the cell phone search warrants and asking him to provide the passcodes to unlock the phones. Harris was not unduly restrained, and the detectives did not raise their voices or behave in an aggressive manner. The tone of the interaction appears to have been conversational, and after a brief discussion, Harris provided the codes. In his *Miranda* argument, Harris described the circumstances leading up to this point as being "under interrogation and locked in the jail for at least seventeen hours" prior. In fact, Harris was interrogated for two to three hours of the total time he was initially detained before being transported to jail, and the subsequent interrogation took place many hours later, though within the same day. Our caselaw indicates the duration and manner of the interrogations were reasonable. Thus, the circumstances of the interrogation in which detectives asked Harris to provide the passcodes were not unduly coercive.

Turning to potential vulnerabilities of the accused, Harris does not claim personal characteristics unique to him—like his age, level of education, background, or mental condition—impacted the voluntariness of his password disclosure. Indeed, the evidence showed Harris was 30 years old at the time, fluent in English, employed at a local cancer hospital, and highly involved as a leader in the church he attended. Nothing about Harris' personal characteristics leads us to believe he was particularly vulnerable to law enforcement pressure under the circumstances.

Although Harris may have felt pressure to provide the passcodes, the Fifth Amendment is not violated whenever a person feels "'pressure'" to speak; rather, to amount to compulsion, that pressure must

overcome the "'resistance'" of the suspect such that his "'will [is] overborne.'" *Dickerson*, 530 U.S. at 434. There is no evidence here that Harris resisted Detective Melvin's request or that the detective's statement impaired Harris' capacity for self-determination and caused him to involuntarily provide the passcodes. Detective Melvin did not threaten adverse consequences if Harris refused to provide the passcodes. When the detective told Harris that officers could obtain an order compelling him to provide fingerprint access or the passcodes, Harris had a choice: he could provide access to the phones or return to his cell to wait for a court order. Harris chose to provide the passcodes and did so "pretty early on in the conversation."

The voluntariness test requires us to determine whether the State satisfied its burden to show Harris provided the passcodes as an exercise of his own free will or whether, as Harris claims, law enforcement coerced him to do so by overcoming his free will—either because Detective Melvin's statement was inherently coercive or coercive under the totality of the circumstances. We conclude that Detective Melvin's statement was not coercive on its own or under the totality of the circumstances and that Harris provided the passcodes voluntarily of his own free will.

2. *Testimonial communication*

Harris also argues the disclosure of his cell phone passcodes to law enforcement was a testimonial communication subject to the Fifth Amendment privilege against self-incrimination and thus the evidence retrieved as a result should have been suppressed. Although the testimonial status of passcodes and passwords is a novel and developing area of law, this court has yet to reach the underlying merits of the issue. See, e.g., *Lemmie*, 311 Kan. at 448-49 (opting not to delve into the testimonial nature of cell phone passcodes when any possible violation of the defendant's Fifth Amendment right was harmless).

Given we have already determined Harris voluntarily disclosed his cell phone passcodes, it is unnecessary to decide in this case whether disclosure of the passcodes was testimonial because even if it was, the privilege against self-incrimination applies only when the accused is *compelled* to make such a disclosure. See *Showalter*, 319 Kan. at 155 (citing *Hiibel*, 542 U.S. at 189).

3. *Incriminating*

Neither party addresses whether the passcodes disclosed by Harris were "incriminating" for Fifth Amendment purposes. On this issue, the United States Supreme Court has held the Fifth Amendment's self-incrimination protection encompasses "compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *United States v. Hubbell*, 530 U.S. 27, 37, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000). But because we have determined Harris was not compelled to disclose his cell phone passcodes, we need not, and do not, address the incrimination element of the privilege.

CONCLUSION

Substantial competent evidence supports the district court's finding, based on its assessment of the totality of the circumstances, that Harris' disclosure of the cell phone passcodes was voluntary and not obtained in violation of his Fifth Amendment privilege against self-incrimination. The initial *Miranda* warning and Harris' waiver were still valid at the second interrogation, so a renewed *Miranda* warning was not needed. Further, Detective Melvin had a reasonable basis to believe a court would issue an order to compel fingerprint access or the passcodes to the phones at the time the detective informed Harris that he could obtain such an order, so this tactic was not inherently coercive. Finally, considering the totality of the circumstances, including the details of the second interrogation and Harris' specific characteristics, we conclude Harris provided the passcodes voluntarily of his own free will. Thus, the district court did not err by denying Harris' motion to suppress the evidence retrieved from the cell phones as a result of his voluntary disclosure of the passcodes.

Affirmed.

State v. Adams

No. 126,130

STATE OF KANSAS, *Appellant*, v. CHRISTOPHER SHAWN ADAMS, *Appellee*.

(563 P.3d 719)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fifth Amendment Protects Witness from Being Compelled to Testify if Risk of Incrimination.* The Fifth Amendment to the United States Constitution protects a witness from being compelled to testify where the testimony sought exposes the witness to a legitimate risk—meaning a real and appreciable danger—of incrimination, not a hypothetical or speculative one.

2. SAME—*Fifth Amendment Privilege against Self-Incrimination—Witness Cannot Invoke Based on Risk of Future Perjury Prosecution.* A witness cannot invoke the Fifth Amendment privilege against self-incrimination to avoid testifying based on the risk of a *future* perjury prosecution. The possibility of a future perjury prosecution is a hypothetical or speculative risk that every witness faces regardless of whether the witness intends to testify truthfully or falsely and consistently or inconsistently with a prior statement or testimony.

3. CRIMINAL LAW—*Witness' Fifth Amendment's Privilege against Self-Incrimination Extinguished by Grant of Use and Immunity*. A witness' Fifth Amendment privilege is extinguished by a grant of use and derivative use immunity which protects against the use of compelled testimony in a criminal trial, as well as evidence derived directly or indirectly from it, to the same extent as the Fifth Amendment privilege.

4. CONSTITUTIONAL LAW—*Statutory Exceptions to Immunity Allowing Prosecution for Perjury While Giving Immunized Testimony.* Statutory exceptions to immunity allowing prosecution for perjury committed while providing otherwise immunized testimony are constitutional because a grant of immunity need only be as protective as the Fifth Amendment to replace the privilege.

Review of the judgment of the Court of Appeals in 64 Kan. App. 2d 132, 547 P.3d 593 (2024). Appeal from Ellis District Court; THOMAS DREES, judge. Oral argument held December 10, 2024. Opinion filed February 14, 2025. 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.

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

Heather R. Fletcher, of Johnson Fletcher, LLC, of Hays, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: This case arises from the State's interlocutory appeal in Christopher Adams' criminal case. Adams faces multiple counts of battery based on allegations that he punched two men and pushed his girlfriend, Stephanie Lang, outside a bar. When questioned at the scene, Lang identified Adams as the attacker of a victim who was knocked unconscious and suffered significant injuries. But when called to testify at Adams' preliminary hearing, Lang claimed she did not remember what happened. Based on her inconsistent statements, the State charged Lang with alternative counts of perjury and interference with law enforcement and warned it would charge her with perjury again if she testified the same way at Adams' trial. Before Adams' trial, Lang asserted the Fifth Amendment privilege, citing a risk of incrimination in her pending perjury case and the potential she could face a new charge of perjury if she testified the same way at Adams' trial. Despite the State offering Lang statutory use and derivative use immunity—which would make her trial testimony and any evidence derived from it inadmissible in the pending perjury case—the district court found she could still invoke the Fifth Amendment privilege because the State's grant of immunity would not protect her from a new perjury charge.

A majority panel of the Court of Appeals affirmed the district court, holding that a grant of use and derivative use immunity is insufficient to protect a witness' Fifth Amendment rights when the witness faces an imminent risk of being charged with perjury. Chief Judge Karen Arnold-Burger dissented, arguing the issue was controlled by federal and state court caselaw holding that the threat of a future perjury charge cannot be the basis for invoking the Fifth Amendment privilege since there is no constitutional privilege to lie.

We granted the State's petition for review of the panel majority's decision affirming the district court's ruling that Lang could assert her Fifth Amendment privilege not to testify. For the reasons discussed below, we reverse the panel majority's decision and adopt the relevant aspects of the dissent's rationale. To the extent Lang had a Fifth Amendment privilege not to testify at Adams'

trial based on her pending perjury case, it was extinguished by the State's grant of use and derivative use immunity. And Lang's fear of a new perjury charge for testimony she may provide at Adams' trial is not a valid basis for invoking the privilege. We therefore remand to the district court to compel Lang's testimony in Adams' trial under the terms of the State's authorized grant of immunity.

FACTS

The State charged Christopher Adams with aggravated battery for allegedly "sucker punching" and seriously injuring a man outside a Hays bar and grill in September 2021. Neither the man nor onlookers could identify the attacker, but descriptions later matched that of Adams. Lang reportedly witnessed the crime. When questioned by police during a recorded interview at the scene, Lang said Adams punched a man in the face outside the bar, knocking him to the ground. The State also charged Adams with domestic battery and simple battery based on reports that he grabbed and threw Lang to the ground and punched another man who tried to intervene in the domestic dispute.

At Adams' preliminary hearing, the State called Lang as a witness on the aggravated battery charge. Contrary to her original recorded statements to police, Lang denied seeing Adams punch anyone outside the bar. She said she may not have been truthful with the officers that night because they had threatened to take away her children. Lang also said she could not recall everything she told police because she was very intoxicated. But Lang said she did remember briefly checking the pulse of an unconscious person lying on the ground. The State called one of the officers who questioned Lang at the scene and played the recorded interview in which she implicated Adams in the charged crimes. Ultimately, the magistrate judge found Lang's testimony was not credible and bound Adams over for trial based on other witness testimony.

The prosecutor later charged Lang with perjury for testifying falsely at the preliminary hearing or in the alternative interfering with law enforcement by making false statements to the investigating police officers.

In anticipation of being called to testify at Adams' trial, Lang's counsel sent a letter to the district court advising that Lang intended to invoke the Fifth Amendment privilege against self-incrimination at trial, even if offered immunity for her testimony. Citing the immunity statute's exception for perjury and the risk that she could face a new perjury charge if her testimony "does not align with the State's version of 'the truth,'" Lang claimed any grant of immunity would be inadequate to protect her Fifth Amendment rights.

In response to the letter, the State offered Lang use and derivative use immunity under K.S.A. 22-3415(b)(2) in exchange for her trial testimony. The offer made clear that any sworn statements Lang made during Adams' trial could not be used against her in a future criminal trial, including in her ongoing perjury case. But consistent with the plain language of the immunity statute, the offer expressly excluded immunity from perjury for false statements made under oath during Adams' trial. See K.S.A. 22-3415(d) ("No immunity shall be granted for perjury[.]").

At the start of Adams' trial, Lang asserted her Fifth Amendment privilege, raising the same arguments as in her pre-trial letter. After reviewing the State's offer of immunity and given the statute's exception for perjury, the district court agreed with Lang that the immunity offer was insufficient to protect her Fifth Amendment rights because she would not be immunized from a future perjury charge. Based on Lang's invocation of the privilege, the court concluded she was unavailable as a witness. To avoid this outcome, the prosecutor offered to dismiss the existing perjury charge against Lang with prejudice so Adams' trial could proceed. But the court found this solution inadequate because Lang could still face a new perjury charge based on her trial testimony.

Due to the import of Lang's testimony, the State sought an interlocutory appeal under K.S.A. 22-3603 on grounds that the district court's ruling "substantially impaired the State's case" by "effectively suppress[ing] the bulk of [its] evidence."

A majority panel of the Court of Appeals affirmed the district court's ruling that Lang could invoke the Fifth Amendment privilege against self-incrimination due to the "substantive and immediate" risk of a future perjury charge. *State v. Adams*, 64 Kan. App.

2d 132, 138, 547 P.3d 593 (2024). And given the immunity statute's perjury exception, the majority concluded the State's grant of use and derivative use immunity was not coextensive with Lang's Fifth Amendment privilege. 64 Kan. App. 2d at 139.

Chief Judge Arnold-Burger authored a lengthy dissent. She pointed out that the threat of criminal prosecution for perjury, which has long been codified under Kansas law, lies at the core of our justice system and is one every witness faces. But she explained such a threat is not a basis to assert the Fifth Amendment privilege, warning "[i]f that were enough, the search for the truth in courtrooms around this country would come to a screeching halt." *Adams*, 64 Kan. App. 2d at 157 (Arnold-Burger, C.J., dissenting). In support, she cited United States Supreme Court authority addressing the extent of the Fifth Amendment privilege in the context of the federal immunity statute. 64 Kan. App. 2d at 159 (Arnold-Burger, C.J., dissenting) (citing *United States v. Apfelbaum*, 445 U.S. 115, 100 S. Ct. 948, 63 L. Ed. 2d 250 [1980] [holding that immunized testimony cannot be used in a criminal trial for offenses committed *before* the grant of immunity, but statutory exceptions allowing prosecutions for perjury committed during immunized testimony are constitutional]). The Chief Judge would have held Lang could not invoke the Fifth Amendment privilege to avoid testifying at Adams' trial because the State's grant of use and derivative immunity is coextensive with her privilege; thus, Lang faces no risk of incriminating herself in her pending perjury case. And the Chief Judge would have rejected Lang's claim of privilege based on a future charge of perjury because the Fifth Amendment does not confer a privilege to lie. 64 Kan. App. 2d at 163-65 (Arnold-Burger, C.J., dissenting).

We granted review of the State's petition challenging the panel majority's decision. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review); K.S.A. 22-3603 (allowing interlocutory appeals by the State); *State v. Newman*, 235 Kan. 29, 34, 680 P.2d 257 (1984) (interpreting K.S.A. 22-3603 to permit interlocutory appeals of evidentiary rulings that "substantially impair the state's ability to prosecute the case").

ANALYSIS

The question presented is whether an immunized witness properly invokes the Fifth Amendment privilege based solely on the risk of being charged with perjury in the future. To answer this question, we first consider whether and to what extent Lang had a Fifth Amendment privilege not to testify at Adams' trial. We then will consider whether Lang could continue to assert any such privilege once the State offered use and derivative use immunity for her testimony.

The determination of whether a witness can assert the Fifth Amendment privilege against self-incrimination is a question of law over which this court has unlimited review. *State v. George*, 311 Kan. 693, 706, 466 P.3d 469 (2020).

1. *Whether and to what extent Lang had a Fifth Amendment privilege not to testify at Adams' trial*

"The power of government to compel persons to testify in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence." *Kastigar v. United States*, 406 U.S. 441, 443, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). But the government's power to compel testimony is not absolute. The most significant constraint on this power is an individual's Fifth Amendment privilege against compulsory self-incrimination. 406 U.S. at 444.

The Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. This provision applies to the states through the Due Process Clause of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *State v. Brown*, 286 Kan. 170, 173, 182 P.3d 1205 (2008). Section 10 of the Kansas Constitution Bill of Rights also extends a privilege against self-incrimination, which this court has held offers no less protection than the Fifth Amendment. *State v. Faidley*, 202 Kan. 517, 520, 450 P.2d 20 (1969). Additionally, K.S.A. 60-425 codifies a statutory privilege against self-incrimination. See *State v. Green*, 254 Kan. 669, 679, 867 P.2d 366 (1994) (holding the constitutional protection is broader in scope than that of the statute).

A witness can assert the Fifth Amendment privilege against self-incrimination in any proceeding when he or she reasonably believes a disclosure "could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar*, 406 U.S. at 444-45. Unlike a criminal defendant who "can invoke a blanket privilege not to testify at their own trial, a compelled witness may only assert the privilege on a question-by-question basis and must establish a legitimate risk of incrimination to justify silence." *State v. Showalter*, 319 Kan. 147, 155, 553 P.3d 276 (2024) (citing generally 3 Crim. Prac. Manual § 88:9; comparing scope of the privilege when asserted by an accused versus a compelled witness). A legitimate risk of incrimination presents a real and appreciable danger of incrimination, not a hypothetical or speculative one. *Showalter*, 319 Kan. 147, Syl. ¶ 6, 156 (citing federal cases expressing risk-of-incrimination standard).

In her pretrial letter to the court, Lang argued the Fifth Amendment privilege against self-incrimination protected her from testifying based on a legitimate risk that—if she testifies the same way she did in the preliminary hearing—the State (1) will use her testimony as additional evidence in her pending criminal perjury case and (2) will follow through on its threat to file a second criminal perjury case against her in the future.

We agree with Lang that, before the State offered her use and derivative use immunity, she faced a legitimate risk of incrimination in her pending case if she testified at trial. In that case, the State charged Lang with perjury and, alternatively, interference with law enforcement based on discrepancies between her preliminary hearing testimony and her original statements to law enforcement. Since the State could have used Lang's testimony at Adams' trial to prove she perjured herself at Adams' preliminary hearing, she faced a legitimate risk of incrimination if she were compelled to testify at trial. Lang could therefore invoke her Fifth Amendment privilege at Adams' trial to avoid incriminating herself in *her own* criminal case.

We disagree with Lang, however, that the Fifth Amendment privilege protected her from testifying at Adams' trial based on the risk of a *future* perjury charge. A witness cannot invoke the Fifth

Amendment privilege against self-incrimination to avoid testifying based on the risk of a future perjury prosecution for providing false or inconsistent testimony. Any witness testifying under oath faces the prospect of being charged with perjury for providing allegedly false testimony. See K.S.A. 54-105 ("All oaths and affirmations alike subject the party who shall falsify them to the pains and penalties of perjury."); K.S.A. 21-5903(a)(1) (defining perjury as "intentionally and falsely . . . testifying . . . to any material fact upon any oath or affirmation legally administered in any cause, matter or proceeding before any court").

The Fifth Amendment does not shield a witness from the risk of a future perjury charge because there is no constitutional privilege to lie. *Brogan v. United States*, 522 U.S. 398, 404-05, 118 S. Ct. 805, 139 L. Ed. 2d 830 (1998) ("[N]either the text nor the spirit of the Fifth Amendment confers a privilege to lie.") (citing *Apfelbaum*, 445 U.S. at 117 ["[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely."]). And the privilege is not preemptively available to a witness who may be telling the truth since the issue of whether the testimony is true or false goes to the merits of a potential perjury charge and is irrelevant to whether the privilege is available.

Moreover, the *possibility* of a future perjury prosecution is hypothetical or speculative even when, as here, the witness subjectively fears a perjury charge because the anticipated, compelled testimony may conflict with a prior statement or sworn testimony. Again, this is true regardless of the truth or falsity of the anticipated testimony. The panel majority concedes as much by acknowledging that "[a]ny witness testifying under oath—*even a truthteller*—faces an abstract risk of being charged with perjury by a mistaken or overly zealous prosecutor. That sort of metaphysical chance grounded in the witness' abstract and entirely subjective fear is insufficient" to trigger the Fifth Amendment protection against self-incrimination. 64 Kan. App. 2d at 137 (citing *Ohio v. Reiner*, 532 U.S. 17, 21, 121 S. Ct. 1252, 149 L. Ed. 2d 158 [2001] ["danger of 'imaginary and unsubstantial character' will not suffice"] [quoting *Mason v. United States*, 244 U.S. 362, 366, 37 S. Ct. 621, 61 L. Ed. 1198 (1917)]; *In re Grand Jury Subpoena*

(McDougal), 97 F.3d 1090, 1094 [8th Cir. 1996] [recognizing subjective belief of witness that testimony might result in perjury charge insufficient to permit assertion of privilege against self-incrimination]).

Notwithstanding this precedent, the panel majority concluded Lang had a Fifth Amendment privilege to avoid a potential future charge of perjury. Describing the situation as an "unusual circumstance," the panel found Lang's existing perjury charge, coupled with the State's threat to charge her with perjury again if she repeated her preliminary hearing testimony at trial, transformed the "abstract or hypothetical" danger of being prosecuted for perjury that every witness faces into "the sort of real danger permitting an individual to invoke the privilege." 64 Kan. App. 2d at 138-39. In so finding, however, the majority panel failed to distinguish between the risk to a person when they provide testimony that could be used to prove commission of a crime and the risk to a person when he or she provides false or inconsistent testimony under oath and subjectively fears a future perjury charge. The former is protected by the Fifth Amendment privilege against self-incrimination while the latter is not. As a result, the panel improperly extended the scope of the Fifth Amendment privilege—which never shields a witness from the threat of future exposure for perjury, whatever the nature of the risk. Instead, as Chief Judge Arnold-Burger correctly explained in her dissent, the only legitimate risk of incrimination Lang faced was the danger of incriminating herself in her pending perjury case, so this was the full extent of her Fifth Amendment privilege. See 64 Kan. App. 2d at 161 (Arnold-Burger, C.J., dissenting).

2. *Whether Lang could continue to assert her Fifth Amendment privilege once the State offered use and derivative use immunity for her testimony*

The district court found Lang retained her Fifth Amendment privilege against self-incrimination despite the State's grant of statutory use and derivative use immunity because she could still face a future charge of perjury for testimony she might give at Adams' trial. The State argues the court's ruling is counter to state

and federal court caselaw holding that immunity from use and derivative use is coextensive with the scope of the Fifth Amendment privilege, and thus is sufficient to compel testimony over a claim of the privilege.

Even when a legitimate risk of incrimination is present, the State can still compel a witness to testify by granting immunity that is coextensive with the Fifth Amendment privilege. *Ullmann v. United States*, 350 U.S. 422, 439, 76 S. Ct. 497, 100 L. Ed. 511 (1956) ("Immunity displaces the danger" to be feared by testifying.); *Kastigar*, 406 U.S. at 448 (upholding constitutionality of immunity statutes). To supplant the privilege, the immunity must "supply a complete protection from all the perils against which the constitutional prohibition was designed to guard." 406 U.S. at 450-51. This court and the United States Supreme Court have held the combination of use and derivative use immunity is commensurate with Fifth Amendment protection. This immunity protects against the use of compelled testimony, as well as evidence derived directly or indirectly from it, "in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his [or her] Fifth Amendment privilege absent the grant." *Apfelbaum*, 445 U.S. at 128; *Kastigar*, 406 U.S. at 453; *State v. Delacruz*, 307 Kan. 523, 534, 411 P.3d 1207 (2018). Such a grant of immunity therefore overcomes a claim of privilege.

Here, the State offered Lang use and derivative use immunity in exchange for her testimony at Adams' trial. The offer expressly declared the following relevant conditions about the grant of immunity:

- It was coextensive with the Fifth Amendment privilege against self-incrimination;
- It applied to sworn statements made during Adams' trial, *except for false statements or perjury*;
- It did not apply to any statements made before the first day of Adams' trial (i.e., prior to the grant of immunity);
- It in no way affected the State's prosecution of Lang's ongoing perjury case, other than to render her immunized testimony inadmissible.

Under these conditions, the State would be barred from using Lang's compelled testimony or any inculpatory evidence derived from her testimony against her, with one important exception: prosecutions

for perjury committed while giving otherwise immunized testimony. See K.S.A. 22-3415(b)(2) ("Any person granted use and derivative use immunity may be prosecuted for any crime, but the state shall not use any testimony against such person provided under a grant of such immunity or any evidence derived from such testimony."); K.S.A. 22-3415(d) ("No immunity shall be granted for perjury as provided in K.S.A. 21-5903, and amendments thereto, which was committed in giving such evidence."). As a result, Lang's immunized testimony would be inadmissible in her pending perjury case, but she would not be shielded from a future prosecution for perjury based on any false, sworn statements made while testifying. Contrary to Lang's argument and the district court's ruling, this result does not make the grant of immunity insufficient to protect her Fifth Amendment rights. As Chief Judge Arnold-Burger correctly explained:

"[T]he proper focus for determining whether a grant of immunity is coextensive with the Fifth Amendment does not require treating the witness as if they had remained silent. Rather, the focus should be on the 'protections conferred by the privilege,' which reflects 'the fact that immunity statutes and prosecutions for perjury committed during the course of immunized testimony are permissible.' [Citations omitted.]" *Adams*, 64 Kan. App. 2d at 159 (Arnold-Burger, C.J., dissenting) (quoting *Apfelbaum*, 445 U.S. at 125-27).

Immunity statutes which provide exceptions for perjury are entirely consistent with the Fifth Amendment since compelled "testimony remains inadmissible in all prosecutions for offenses committed prior to the grant of immunity that would have permitted the witness to invoke his Fifth Amendment privilege absent the grant." *Apfelbaum*, 445 U.S. at 128. In other words, a grant of immunity must only be as protective as the Fifth Amendment to displace the privilege; it need not be broader.

This is where the district court erred. It appears to have conflated the risk of making an incriminating statement in light of an existing criminal charge—which the Fifth Amendment protects against—with the risk of making a future perjurious statement, which is not protected by the Fifth Amendment. The following exchange illustrates the district court's confusion as it considered the State's offer of immunity:

"THE COURT: [Lang] is charged with perjury from a prelim. She's charged, based under your theory that she said, 'I didn't see anything. I don't know who hit who.' Okay?

If she testifies that way today, that's what she's charged with. If she today testifies, 'I saw the defendant hit the victim,' then she has confessed to the perjury from the prelim.

"MR. ANDERSON [the prosecutor]: Which the State cannot use against her at—

"THE COURT: But you can't grant—

"MR. ANDERSON: —at subsequent hearings in her current—

"THE COURT: But you can't grant that immunity, Mr. Anderson.

"MR. ANDERSON: But—

"THE COURT: That's the problem.

"MR. ANDERSON: But I'm not granting her immunity from perjury in that instant. I'm granting her immunity from an incriminating statement. Because she's not committing perjury, she's committing an incriminating statement, and I'd grant[] her immunity from use of that incriminating statement.

"THE COURT: Well, it's all the same thing, Mr. Anderson."

The proper analysis requires us to consider the scope of Fifth Amendment protection and whether the grant of immunity is coextensive with that protection. Here, the State's grant of use and derivative use immunity removed the legitimate risk of incrimination Lang faced because it prevented the State from using any evidence derived directly or indirectly from her testimony at Adams' trial against her in her pending perjury case—which was the basis for her Fifth Amendment privilege. And the immunity grant's term excluding immunity for perjury under K.S.A. 22-3415(d) is consistent with the protections conferred by the Fifth Amendment, which do not extend to the abstract risk of a future perjury charge. Importantly, the same analysis applies when the witness anticipates testifying under oath—truthfully or falsely—and in a manner consistent or inconsistent with prior statements or testimony.

CONCLUSION

Lang's Fifth Amendment privilege, which protects her from being compelled to incriminate herself in her pending perjury case, is extinguishable by a grant of statutory use and derivative use immunity which the State offered in this case. As a result, Lang no longer had a Fifth Amendment privilege. And she could not assert the privilege to avoid a future charge of perjury based on her otherwise immunized testimony because the privilege does not protect against such a risk. Therefore, the district court and the panel majority erred in holding Lang could assert the privilege not

to testify on this basis.

The decisions of the district court and the Court of Appeals are reversed and the matter remanded to the district court with directions to compel Lang to testify in Adams' trial under the State's grant of immunity.

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.

State v. Smith

No. 126,844

STATE OF KANSAS, *Appellee*, v. ROBERT EDWARD SMITH, *Appellant*.

(563 P.3d 697)

SYLLABUS BY THE COURT

1. TRIAL—*Defendant's Constitutional Right to Speedy Trial—Courts Consider Four Factors if Delay before Trial.* In assessing whether a delay before trial violates a defendant's constitutional right to speedy trial, courts typically consider four factors: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of the speedy trial right; and (4) prejudice to the defendant. But if the length of delay is not presumptively prejudicial, courts do not consider the remaining three factors.

2. SAME—*Assessing Presumptive Prejudice if Delay in Right to Speedy Trial—Whether Delay Is Reasonable.* In assessing presumptive prejudice, the passage of time alone is not dispositive. Instead, courts must consider whether the delay is reasonable given the complexity of the case in light of the case's peculiar circumstances.

3. SAME—*Preservation for Appeal an Objection to District Court's Ruling—Accused Must Explain with Reasonable Clarity*. To preserve for appeal an objection to a district court's ruling that a party may not present a particular theory of defense to the jury, the accused need not lay out their exact strategy so long as they explain their theory with reasonable clarity, and show the court sufficient evidence they intend to present in good faith support of that theory.

4. EVIDENCE—*Exclusion of Evidence—When a Violation of Defendant's Fundamental Right to Fair Trial.* In excluding evidence, a district court violates a criminal defendant's fundamental right to a fair trial if the court excludes relevant, admissible, and noncumulative evidence that is an integral part of the theory of the defense.

5. TRIAL—*Amendment to Complaint or Information before Verdict—Two-part Analysis.* K.S.A. 22-3201(e) states that the court may permit a complaint or information to be amended at any time before a verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced. A two-part analysis determines whether an amendment prior to submission of the case to the jury may be permitted: (1) Does the amendment charge an additional or different crime? (2) Are the substantial rights of the defendant prejudiced by the amendment?

6. CRIMINAL LAW—*Challenge to Criminal History Score at Sentencing—Burden on State to Prove Score by Preponderance of Evidence.* When a defendant challenges their criminal history score at sentencing, the State

bears the burden of proving that score by a preponderance of the evidence. In the face of such a challenge, the presentence investigation report is no longer sufficient to carry the State's evidentiary burden.

7. SAME—*Prior Conviction of Crime Defined by Statute Deemed Unconstitutional—Not Used for Criminal History Scoring Purposes.* K.S.A. 21-6810(d)(9) provides that a prior conviction of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes. Under the plain language of this subsection, it is irrelevant whether a subsequent appellate court reversed or repudiated an appellate court's holding that a statute is unconstitutional.

Appeal from Sedgwick District Court; JEFFREY L. SYRIOS, judge. Oral argument held October 29, 2024. Opinion filed February 14, 2025. Convictions affirmed, sentence vacated, and case remanded with directions.

Lindsay N. Kornegay, of Kansas Appellate Defender Office, argued the cause, and *Samuel D. Schirer*, of the same office, was on the briefs 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

WILSON, J.: Following a mistrial and subsequent retrial, Robert Edward Smith directly appeals his convictions for first-degree felony murder, aggravated burglary, attempted aggravated robbery, two counts of aggravated assault, and criminal possession of a weapon, which arose out of the 2016 home invasion and murder of Donna O'Neal. Smith claims he was deprived of his constitutional right to speedy trial; he also alleges prosecutorial error, two violations of his right to present a defense, an error in the district court's decision permitting the State to file a mid-trial amendment to its information, and cumulative error. Smith also claims that he is serving an illegal sentence because the district court erroneously counted a 2003 criminal threat conviction as a person felony. We affirm Smith's convictions but vacate his sentence and remand for resentencing.

FACTS AND PROCEDURAL HISTORY

In 2016, Donna O'Neal was working as a cook at the Sedgwick County Jail. Steven King worked with her there; he also

knew that Donna sold marijuana on the side. Donna and King both knew Smith: King, from when they shared a cell together, and Donna because Smith and his girlfriend, Nakia Johnson, lived in the same apartment complex up until the summer of 2016. King also lived in that apartment complex for about three months, up until the end of July 2016, when he was staying with his friend Gary Black.

On the evening of October 8, 2016, Donna met with her son, Clifford O'Neal, and her friend, Yeni Seleno, at her apartment in Wichita. The three planned to go out on the town. But as they were getting ready for the evening, an armed man kicked in the front door and demanded money and drugs. According to Seleno and Clifford, Donna acted like she knew the man. Clifford got on the ground, as the man commanded, but Donna charged the intruder and started wrestling him as he was "trying to get in [Donna's] pockets"; Seleno "immediately" fled the apartment. According to Clifford—who remained on the ground throughout—the ensuing struggle lasted "a couple minutes," and ended when the intruder shot Donna multiple times. The intruder then fled the apartment.

Seleno and Clifford reunited and called 911 at 9:18 p.m. Donna died shortly thereafter, having been shot three times by a .25 caliber weapon.

Police had little to go on, at first. Investigators located no useful surveillance footage from the area around the apartments, and Seleno's and Clifford's descriptions were relatively generic. Seleno said the intruder was "a mid-thirties-aged black male" of "average height and average weight"; at trial, all she could say was that he was "not old." Clifford described the attacker as a bald Black man of about 200 pounds, whom he had never seen before.

The next morning, King learned of Donna's murder at work. King went to the police to report that, several months before, Smith had proposed that the two of them rob Donna. King wanted no part of the plan and warned Donna about it. Indeed, on June 30, 2016, Donna had sent Smith text messages that suggested she knew about the plan; Smith apparently did not respond to Donna's messages.

After King provided this lead, the investigation focused on Smith. Smith's cell phone data suggested that he was near Donna's

apartment complex minutes after the shooting before gradually moving towards the apartment Smith shared with Johnson.

Johnson had gone to her sister's house earlier in the evening of October 8; Smith was at their apartment when she returned at about 10 p.m. Because Smith and Johnson's relationship had been rocky in recent months, they did not say much to each other; nevertheless, Johnson believed Smith was acting normally. Smith slept at their apartment that night and stayed there until about 5 p.m. on October 9.

On the evening of October 9, Smith called his friend and fishing companion Edward McDaniel. McDaniel picked Smith up, let him stay the night at his place, and then drove him to Kansas City on October 10. McDaniel described Smith as oddly quiet at the time, in contrast to their previous encounters. Cell tower data suggests that Smith's phone arrived in Kansas City at least around noon on October 10.

Investigators searched Johnson's sister's house for Smith on October 9, telling her that they believed Smith had shot someone. Johnson's sister called Johnson to complain about the search.

After police searched Johnson's sister's house, Smith called Johnson several times to apologize, indicate that he had messed up, and state that he needed to turn himself in to the police—though he did not provide details. During one of these conversations, Johnson asked Smith what he had done; Smith only responded that he "fucked up" and would turn himself in. Johnson told Smith "they said that you shot somebody," and Smith responded, "I fucked up, I fucked up, I'm sorry." During another call, Smith accused Johnson of being with the police and trying to set him up; Johnson expressed that she was trying to get Smith to understand what the police said he had done, and asked why he kept calling her when there was nothing she could do.

Much later, investigators tested shell casings, Donna's fingernails, and Donna's clothing for DNA. Investigators could not exclude Smith as a partial contributor to a sample taken from Donna's shirt collar, with a 1-in-90 chance that the profile was from a random, non-related person. Further, Smith's DNA could not be excluded from a sample taken from Donna's pants pocket, with a

1-in-118,000 probability that the sample belonged to a random unrelated person. At every sampled site where DNA was reportable for comparison purposes, King was excluded as a contributor.

The State ultimately charged Smith with one count of felony murder, one count of aggravated burglary, one count of attempted aggravated robbery, two counts of aggravated assault, and one count of criminal possession of a weapon by a convicted felon. Because of the parties' extensive pretrial litigation and the COVID-19 pandemic, the case did not go to jury trial until July 12, 2021. King testified at this trial. The jury was unable to reach a verdict, however, and the district court declared a mistrial.

The State conducted DNA testing after the mistrial. Between the parties' litigation around this evidence and the COVID-19 pandemic, Smith's retrial was delayed to May 8, 2023. King died of natural causes in the interim; his testimony at the first trial was read to the retrial jury over the defense's objection. The jury ultimately convicted Smith of all charges.

Smith objected to his criminal history at sentencing. Smith argued that his 2003 criminal threat conviction should not be counted as a person felony, based on *State v. Boettger*, 310 Kan. 800, 450 P.3d 805 (2019). The district court overruled Smith's objection, reasoning that the United States Supreme Court's recent decision in *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), controlled.

Smith directly appeals.

ANALYSIS

The 21-month delay between Smith's initial trial and his retrial did not violate Smith's Sixth Amendment right to speedy trial.

Smith first claims that the 21.5-month delay between his initial trial and his retrial violated his Sixth Amendment right to speedy trial. He makes no similar claim as to the delay before his first trial, however.

Smith raised this claim below, preserving it for appellate review. "As a matter of law, appellate courts have unlimited review when deciding if the State has violated a defendant's constitutional right to a speedy trial." *State v. Shockley*, 314 Kan. 46, 61, 494 P.3d 832 (2021).

Additional facts

Smith's first trial began on July 12, 2021, over four and a half years after the initial charge. As part of Smith's defense, defense counsel argued that the State failed to present any DNA evidence tying Smith to the crime. The district court declared a mistrial on July 19, 2021, after the jury failed to reach a unanimous decision.

At a status conference on August 4, 2021, the district court noted that "the State has submitted a request for additional evidence, DNA, possibly cell phone records or cell phone testimony" and that defense counsel "may pursue BIDS request for expert services on the cell phone matters." The court scheduled Smith's second trial to begin on January 24, 2022. A month after the status conference, the court granted the State's motion to obtain saliva samples from Smith to compare his DNA with DNA found on Donna's shirt and pants, although defense counsel indicated Smith would likely seek an independent evaluation of the DNA if the results suggested a match.

On January 7, 2022, the court heard the State's motion to endorse Steven Hoofer as a witness. Hoofer was a forensic examiner that would be drafting a report regarding Smith's DNA, although, at the time of the hearing, the DNA results were not complete. Defense counsel explained Smith "very well may need to talk to the Court about additional time for a defense expert, if that is needed." The court observed the trial, which was scheduled to begin in 17 days, was "coming up pretty quickly" and that counsel had previously "talked about maybe the need to get a continuance after you see that to seek expert advice or opinion or so forth." Further, the court suggested that, because of the still unfinished DNA report, the trial date might need to be pushed out: even if the report was completed before the January 2022 trial date, "I suspect the defense is going to need[] adequate time to respond to it." Defense counsel partially agreed, noting that if the results were inculpatory then "we probably would need to have it looked at," but if the results excluded Smith, then they would be ready for trial.

On January 20, 2022, four days before the trial was scheduled to begin, the court held a hearing on whether the defense was requesting a continuance. The State explained the delays in testing:

> "We tried this case back in January—excuse me—July of 2021. After that the State did proceed with some DNA testing. It took a little bit because of the number of comparisons we had to obtain, including the EMS personnel that were in contact with the victim at the time of her death. Those results were emailed to [defense counsel] last Friday."

In order "to at least have an independent review conducted," defense counsel planned to reach out to BIDS to see who would be available for testing—though he noted that BIDS was backed up due to COVID-19, so it was unclear how long it might take. The court asked Smith himself if he was requesting a continuance of the jury trial, and he said he was. The court granted the continuance and scheduled a hearing for February 11, 2022.

On February 10, 2022, Smith filed a pro se "motion for reappointment of counsel." The motion alleged "a break down in communication and disagreement with the defense of the case." At the prescheduled hearing the next day, defense counsel explained he had not yet been able to secure a DNA expert. The court denied Smith's motion for new counsel and scheduled a status conference in 30 days.

Smith filed another pro se motion for new counsel on March 8, 2022. At a hearing three days later, the court denied the motion and defense counsel explained that Smith still did not have a defense expert. After speaking with other members of the defense bar, counsel learned that all experts, including DNA experts, were "really backed up right now and are pretty slow to get the information just because of their schedules." Based on this, counsel suggested it would be "three to six months before we would be in a position to even think about going to trial." Counsel also discussed Smith's constitutional speedy trial right, explaining that he was unsure whether that right could be waived and noted the primary inquiry was prejudice to the defendant. The court set a new trial date of October 24, 2022.

In the meantime, King died on April 11, 2022.

The court held another status conference on September 30, 2022. At this point, defense counsel had identified an expert witness. Defense counsel told the court that Smith agreed to request a continuance because "he would prefer that we have an expert and that we continue to explore this possibility of having the expert testify for us." The agreement was for the expert to conduct a "DNA case review" rather than retesting the DNA sample. The court asked defense counsel to speak with the expert to determine how long review would take and verify with BIDS that the costs would be covered. The court kept the trial date and continued the case until October 13, 2022.

At the October 13 status hearing, BIDS had still not approved the expert's funding. The court explained that if BIDS declined to pay for the expert, then the trial would begin on October 24 as planned. If, on the other hand, BIDS paid for the expert or defense counsel could not get an answer, then the trial would be continued.

Defense counsel ultimately moved for a continuance. The court granted the motion and set a new trial date of May 8, 2023. Both Smith and defense counsel signed a document, filed October 26, affirming a desire to continue the trial. In early November 2022, Smith sent a letter to the court arguing any DNA-related continuances should be charged to the State.

On April 5, 2023, the State notified the district court that King had died.

On May 1, 2023, Smith, through defense counsel, filed a motion to dismiss based on a constitutional speedy trial violation, which the district court later characterized as a motion to reconsider its previous denial of the speedy trial claim Smith made before his first trial. The motion did not discuss the time devoted to DNA analysis, but instead focused on King's death.

The court held a hearing on several motions on May 4, 2023. Regarding speedy trial, defense counsel argued King's death was prejudicial as he was the State's "key witness," and the jury would not be able to read King's body language during cross-examination. Counsel also noted that the elapsed time would cause witnesses to have memory problems. Further, defense counsel suggested the DNA delays were caused by the State because the State failed to initially test the DNA prior to Smith's first trial. The State

replied that it was ready to try the case in January 2022, after it received its DNA report, and King died several months later, meaning the State did not prevent a jury trial that would have included King. The court denied the motion.

Smith's second trial began on May 8, 2023. At the trial, King's redacted testimony from the first trial was read to the jury. Defense counsel again raised a speedy trial argument following the close of the State's evidence. The court denied the request to reconsider its prior ruling. Defense counsel also raised the constitutional speedy trial issue in a postconviction motion for judgment of acquittal, which the court again denied.

Discussion

The Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights both provide a right to speedy trial. *State v. Otero*, 210 Kan. 530, 531, 502 P.2d 763 (1972). "It is . . . impossible to determine with precision when the right [to a speedy trial] has been denied." *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Instead, we have followed *Barker* in adopting a four-factor balancing test: (1) the length of delay; (2) the reason for delay; (3) the defendant's assertion of the speedy trial right; and (4) prejudice to the defendant. *State v. Ford*, 316 Kan. 558, 561, 519 P.3d 456 (2022); *State v. Hayden*, 281 Kan. 112, 127, 130 P.3d 24 (2006) (observing this court adopted the *Barker* factors in *Otero*). "Because the test requires a balancing, none of these factors is a necessary or sufficient condition for finding a violation. Instead, we consider them together along with any other relevant circumstances." *State v. Owens*, 310 Kan. 865, 869, 451 P.3d 467 (2019).

Our analysis begins and ends with the first factor: the length of delay. Smith's challenge centers on the 21.5 months between the mistrial on July 19, 2021, and the beginning of his second trial, on May 8, 2023.

Two inquiries guide our analysis. First, we must decide whether the relevant interval "has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett v. United States*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). If the delay was not presumptively prejudicial, our

analysis ends. *Owens*, 310 Kan. at 872-73. Second, if we find the delay presumptively prejudicial, we "must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Doggett*, 505 U.S. at 652.

The 21.5-month delay here was substantial; under different circumstances, other courts have deemed similar delays presumptively prejudicial. See, e.g., *State v. Ish*, 174 Idaho 77, __, 551 P.3d 746, 759 (2024); *United States v. Snyder*, 71 F.4th 555, 577 (7th Cir. 2023), *rev'd on other grounds* 603 U.S. 1, 144 S. Ct. 1947, 219 L. Ed. 2d 572 (2024). But "whether the length of delay is presumptively prejudicial depends on the peculiar circumstances of each case, and the mere passage of time is not determinative." *State v. Weaver*, 276 Kan. 504, Syl. ¶ 3, 78 P.3d 397 (2003); see also *Owens*, 310 Kan. at 872. Instead, the analysis "is necessarily dependent upon the peculiar circumstances of the case"; for example, "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 530-31. "[U]nder *Barker*, the overarching consideration in determining whether the delay is presumptively prejudicial is whether the delay is reasonable given the complexity of the case." *Owens*, 310 Kan. at 875.

Smith's crime, broadly speaking, was a drug-related attempted robbery that escalated to a fatal shooting. This was more complex than an ordinary street crime like *Owens*, for example, but less than the "complex" murder proceeding in *State v. Mathenia*, 252 Kan. 890, 895, 942 P.2d 624 (1997). *Owens*, 310 Kan. at 874. Even so, the lack of direct evidence implicating Smith complicates matters significantly: Without eyewitness testimony at the retrial, the State had to rely on circumstantial evidence like DNA testing and cell phone records to prove Smith's involvement. Cf. *Owens*, 310 Kan. at 875 ("This was a simple and straightforward case, and the nature of the evidence involved does not justify a 19-month delay between Owens' arrest and trial.").

Nor can we ignore the events between trials. The State did not simply rest on its laurels. Instead, the State tested various items for DNA and obtained DNA from various individuals for comparison purposes. Once that analysis was complete, Smith worked

with a different expert to evaluate the findings. This process injected more complexity into the already somewhat complex case.

In assessing presumptive prejudice, we are not concerned with who *caused* the delays between the mistrial and the second trial; that analysis would fall under the second *Barker* factor, if we were to reach it. See *Owens*, 310 Kan. at 874 (discussing *State v. Davis*, 277 Kan. 309, 85 P.3d 1164 [2004], as an example of improper conflation of the first and second *Barker* factors). But we cannot overlook either the State's difficulty in obtaining DNA evidence or the defense's need to appropriately respond to it within the overall complexity framework. Likewise, the delays in lab processing brought about by the COVID-19 pandemic further complicated matters and, thus, impact our overall analysis of what delay is *reasonable* given the circumstances.

Ultimately, we conclude that the delay here was not presumptively prejudicial. Instead, the delay was reasonable when viewing both the State's new evidence and Smith's need to rebut that new evidence in light of the purely circumstantial case for Smith's guilt—particularly viewed within the overall state of the world during and after the COVID-19 pandemic, which necessarily slowed all testing down.

Because we find the delay was not presumptively prejudicial, we reject Smith's claim that he was deprived of his constitutional right to speedy trial, without considering the remaining *Barker* factors. See *Owens*, 310 Kan. at 872-73.

The prosecutor did not err during closing arguments.

Smith argues the prosecutor committed three errors during closing arguments: the prosecutor's comments about Clifford's failure to identify Smith as his mother's killer, the prosecutor's argument that a not-guilty plea was not a declaration of innocence, and the prosecutor's remarks that, according to Smith, improperly diluted the State's burden of proof.

We apply a two-step analysis when reviewing claims of prosecutorial error. First, we consider whether the prosecutor exceeded the wide latitude prosecutors are given to conduct the State's case in a manner that does not offend a defendant's constitutional right to a fair trial. *State v. King*, 308 Kan. 16, 30, 417

P.3d 1073 (2018). This wide latitude extends to statements made during voir dire, opening statements, and closing arguments. We do not consider any statement in isolation, but rather look to the statement's context to determine whether error occurred. *State v. Timley*, 311 Kan. 944, 949-50, 469 P.3d 54 (2020).

Second, if we find error, the State must demonstrate beyond a reasonable doubt that the error did not affect the trial's outcome considering the whole record, meaning "there is no reasonable possibility that the error contributed to the verdict." *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021); *King*, 308 Kan. at 30. We may consider the district court's jury instructions and the strength of the evidence against the defendant in determining whether any prosecutorial error is harmless. *Blevins*, 313 Kan. at 436-37. But while the strength of the evidence may inform our inquiry, it is not our primary focus; prejudice may be found even in strong cases. *State v. Sherman*, 305 Kan. 88, 111, 378 P.3d 1060 (2016) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240, 60 S. Ct. 811, 84 L. Ed. 129 [1940]). A contemporaneous objection is not required to preserve claims of prosecutorial error for appellate review, although we may consider whether an objection was raised in our analysis of any alleged error. *Timley*, 311 Kan. at 949.

The prosecutor did not err in discussing Clifford's failure to identify Smith.

Smith first claims the prosecutor erred by arguing facts not in evidence as to Clifford's identification of Smith as his mother's killer. Before addressing this argument, we must first consider what transpired before and during Smith's *first* trial, which resulted in a hung jury.

Clifford identified Smith as his mother's killer at the preliminary hearing. But before the first trial, the defense moved to suppress Clifford's identification.

At the suppression hearing, Detective Michelle Palmer and Clifford both testified about Clifford's identification. Palmer testified that she showed Clifford a six-photo array the day after the shooting; Smith was included in this lineup because King had

given his name to police. Clifford was unable to identify the shooter at this first meeting.

Around a month later, on November 7, 2016, Clifford contacted Palmer to say that he could now identify the shooter after looking up Smith's photograph; they met the next day, at which point Clifford identified Smith. Clifford told Palmer he learned Smith's name from his mom's friends that she worked with. Palmer also learned Smith's name from King.

The district court ruled that Clifford's identification was admissible. As the court put it, Clifford's "methods and his motives, as well as his credibility, will most certainly be vetted by way of cross examination from the defense."

During the first trial, Clifford testified that he was "100 percent sure" Smith was his mother's killer. Clifford admitted that he was unable to identify Smith at first, but later (after speaking with King) Clifford learned of Smith by obtaining his picture from an online database. Clifford again testified that he showed this photograph to detectives several weeks after Donna's shooting. Defense counsel impeached Clifford on his initial failure to identify Smith as his mother's killer; counsel also questioned Detective Palmer about Clifford's initial failure. And in closing, defense counsel thoroughly highlighted the flaws in Clifford's identification for the jury. As counsel put it:

"[Clifford] did the thing none of us are supposed to do. He Googled it and he gets a picture and now he is convincing himself that he knows who did this, but that's all tainted and it's not supported by any other evidence."

In opening statements during the second trial, defense counsel discussed Clifford's flawed identification at some length, including an attempt to undermine Clifford's anticipated testimony that he was "100 percent" certain Smith was Donna's killer. But, contrary to the defense's reasonable expectations, the State did not ask Clifford to identify Smith, and thus there was no discussion of the photo lineup or Clifford's later identification during the trial itself. Instead, during Smith's retrial, the prosecutor and Clifford shared the following exchange:

"Q. The guy that you saw that night that came into the apartment, how long in this whole thing would you say you got to look at his face?

"A. I seen his face the whole time. I will never forget the face.

"Q. To be fair, were you—you said you were laying facedown at parts. Right?

"A. Yeah.

"Q. So were you looking at him the whole time or were there interruptions?

"A. I wasn't looking at him the whole time when I was down on the ground, but, like I said, the glance of looking at him."

But the prosecutor never asked Clifford to identify Smith as his mother's killer—a concern defense counsel raised at the end of Clifford's testimony, to which the court agreed it had "noticed." Defense counsel expressed concern that the prosecutor would try to "bootleg" in Clifford's identification through a detective and asked that Clifford remain subject to recall. After denying that he had any new discovery to provide, the prosecutor replied: "The fact that I choose to put on or not put on or how I put on a piece of evidence, subject to the rules of evidence, is still, I believe, within my discretion."

As the trial progressed, the State made no effort to supplement Clifford's identification. Instead, during closing arguments, the prosecutor said:

"Clifford says a guy walked in and said give me the money and you get down. He got down on the ground. You know, he ate some carpet, I guess the phrase would be. He's laying there on the ground and he hears and he sees some things going on around him. He says there was a tussle, I know I saw a tussle. He tells you that man's face is etched in my brain.

"*At some point somebody may ask you, well, why didn't he identify the defendant as the killer. The only non-speculative, non-assuming, non-guessing answer is this: He wasn't asked.*" (Emphasis added.)

After the district court overruled defense counsel's objection, the prosecutor then said:

"You don't get to guess. You don't get to fill in the blanks and say, well, what would he have said if asked. You may have heard some statements in opening statement that related to that. You can't consider those because those are not evidence. Clifford wasn't asked.

"Let me pause for a moment. Assume or hypothetically think of a different situation. Instead of the man coming in with no mask on, a man comes in wearing a mask with enough skin exposed to say this is a black male. They heard his voice and said that's a black male. Nobody could identify him. Then what evidence do we have? You don't need Clifford O'Neal to say it was the defendant

once you follow the evidence, ladies and gentlemen. You don't need Yeni to be able to identify who it was that committed the aggravated assault against her and the murder of Donna. You may like to know what would he say. Well, he wasn't asked. Don't speculate. Don't guess."

Following another overruled objection, the prosecutor went on:

"Well I'm not shifting any burden. I'm talking about the evidence, ladies and gentlemen, the evidence. He wasn't asked. You cannot assume, period. That's the law."

Then, after a third denied objection, the prosecutor said:

"*Okay. So let's bring it the other way. He would not have identified the defendant. No, that's not supported by the evidence, right*. That's what I'm talking about here, ladies and gentlemen. Follow the evidence, not some guesses." (Emphasis added.)

Smith claims the prosecutor's comments suggested that Clifford *would* have identified Smith, had he been asked to, and that the prosecutor thus "stepped outside the boundaries of permitted argument to ensure that the jury only got half the story (the incriminating half)" of Clifford's identification.

While we acknowledge the immediate intuitive appeal of Smith's argument, we find no error here when reviewing the prosecutor's remarks in context. The prosecutor was correct: the only *certain* reason Clifford did not identify Smith *on the stand* was because he was not asked to make an identification at all. To say more would have gone outside the evidence, and thus constituted error on its own.

Defense counsel took a risk in their opening statements by verbally anticipating evidence the prosecution would present. When that evidence was *not* presented by the prosecution, defense counsel's earlier discussion of Clifford's flawed identification in opening statements provided fair justification for the prosecutor's warning against speculation or guesswork. Consequently, we conclude the prosecutor's remarks did not stray outside the wide latitude afforded to prosecutors and thus were not error.

The prosecutor did not err in arguing, as part of an objection, that a "not guilty" plea was not a declaration of innocence.

Smith next claims the prosecutor erred by suggesting that Smith's not guilty plea was not synonymous with a declaration of innocence. Smith's claim arises from the following exchange during defense counsel's closing arguments:

"[Defense counsel:] Well, they're trying to say that Robert did this and they have the burden of proof. Robert's pled not guilty, I didn't do this. So what do we do? well, the starting point is we look at our—

"[Prosecutor]: Judge, I'm going to object to counsel inserting a statement by the defendant that wasn't made in evidence.

"[Defense counsel]: Your Honor, we entered a plea of not guilty back in 2016.

"[Prosecutor]: *That means the State has to prove it. It doesn't mean the defendant has said anything.*

"[The district court]: I understand. I understand. The jury has been instructed about statements and arguments and remarks of counsel that are not evidence. I want them to follow that instruction as well as all the instructions. Go ahead." (Emphasis added.)

Smith points us to out-of-state authority suggesting that such remarks constitute error because they "undercut the axiomatic principle that a defendant is presumed innocent until proven guilty and need not declare or prove that he is innocent." But these cases are distinguishable. Unlike *United States v. Soto-Beniquez,* 356 F.3d 1, 42 (1st Cir. 2003)—or the other cases Smith cites—the prosecutor's challenged comment here came in reply to the defense's response to the prosecutor's objection, not as a component of the prosecutor's closing argument itself. See also *State v. Belgard*, 410 So. 2d 720, 723-24 (La. 1982) (comments arose during voir dire); *Rairdon v. State*, 557 N.W.2d 318, 324 (Minn. 1996) (comments made during closing); *State v. Wilder*, 124 N.C. App. 136, 142-43, 476 S.E.2d 394 (1996) (same); *State v. Jensen*, 308 Minn. 377, 379-80, 242 N.W.2d 109 (1976) (same).

In *State v. Kahler*, 307 Kan. 374, 383, 410 P.3d 105 (2018), we considered whether a prosecutor's objection during the defense's closing ("even one based on an erroneous application of law") constituted prosecutorial error. In rejecting this claim, we concluded:

"that it is within the prosecutor's permissible latitude to object that the defense is about to go beyond the admitted evidence in its summation to the jury. As we discuss below, the district court's ruling on the prosecutor's objection may have

been erroneous. But this fact has no bearing on the determination of whether the objection itself was prosecutorial error." *Kahler*, 307 Kan. at 383.

While we do not categorically hold that all comments made during objections are exempt from the prosecutorial error paradigm, we recognize that the *target* of such comments is the judge—not the jury. As recognized in *Kahler*, the district court's *ruling* on an objection may be erroneous, but any such error does not catapult a prosecutor's arguments in furtherance of the objection into the realm of prosecutorial error. Further, the prosecutor's statement was correct: Smith had not *said*, "I didn't do this," by entering a legal plea of not guilty. Nor did Smith *testify*, "I didn't do this," so defense counsel's statement to that effect did not constitute evidence for the jury to consider. Again, we find no error here.

The prosecutor did not dilute the burden of proof.

Smith next argues the following comments—made by the second prosecutor during rebuttal—diluted its burden of proof:

"[D]efense counsel kept saying find reasons to doubt. Nowhere in these instructions does it say you must scour to look for reasons to doubt. It is true the State from the very beginning and throughout this whole process has the burden of proof. We have to prove to you beyond a reasonable doubt that the defendant did these crimes. There's nothing in these instructions saying you have to scour looking for doubts."

Because a prosecutor may err "'by making arguments that dilute the State's burden of proof or attempt to define reasonable doubt,' . . . 'prosecutors embellish on the definition of the burden of proof in criminal cases at their peril.'" *State v. Thomas*, 307 Kan. 733, 743, 415 P.3d 430 (2018). But we have not previously addressed statements like the ones Smith challenges here, and, as with his previous claim, Smith supports his argument solely with out-of-state authority.

Again, we find Smith's authority distinguishable. In each of Smith's cited cases, the appellate courts found nonreversible error based on slightly different expressions of the notion that a jury's task is to search for truth, not reasonable doubts. *United States v. Williams*, 690 F.3d 70, 77 (2d Cir. 2012) ("'this is not a search for

reasonable doubt. This is a search for truth . . .'" nonreversible error because it failed to properly frame the question for the jury); *State v. Medina*, 147 N.J. 43, 54, 685 A.2d 1242 (1996) (trial court's instruction, "[w]hile it is your duty to give the defendant the benefit of every reasonable doubt, you do not search for doubt, you search for truth" held nonreversible error because it "improperly eases the State's burden" and because "the jury's duty is to scrutinize the evidence and search for doubt"); *State v. Berube*, 171 Wash. App. 103, 120-21, 286 P.3d 402 (2012) ("'you search for the truth, not a search for reasonable doubt'" non-reversible error because it "'impermissibly portrayed the reasonable doubt standard as a defense tool for hiding the truth, and suggested that a jury's scrutiny of the evidence for reasonable doubt is inconsistent with a search for the truth'"); *People v. Robinson*, 83 A.D.2d 887, 887, 442 N.Y.S.2d 119 (1981) ("'You are not here to search for reasonable doubt. You are here to search for the truth'" nonreversible error because it was an "attempt . . . to subvert the law relative to reasonable doubt.").

But the prosecutor's remarks here are different. By tying his comments to the jury instructions—which, indeed, did *not* instruct to "scour to look for reasons to doubt"—the prosecutor did not misstate the law. Nor did the prosecutor tell the jury its job was to "search for truth" and thus imply that reasonable doubt was incompatible with truth. We thus find no error in the prosecutor's arguments.

The district court did not violate Smith's right to present a complete defense.

Smith next claims the district court violated his right to present a third-party defense by preventing him from arguing that King was O'Neal's killer, or by preventing him from introducing an arrest warrant stemming from a probation violation to explain how certain comments Johnson attributed to him had been misconstrued. Both arguments ultimately tie back to the district court's findings on relevance, including (1) that Smith had no relevant evidence to suggest that King committed the crime, and (2) that the probation violation warrant was irrelevant because there

was no evidence Smith knew about it at the time he made the statements to Johnson.

Standard of review

"[U]nder the state and federal Constitutions a defendant is entitled to present the theory of his or her defense and that the exclusion of evidence that is an *integral* part of that theory violates a defendant's fundamental right to a fair trial . . . . The right to present a defense is, however, subject to statutory rules and case law interpretation of rules of evidence and procedure. [Citations omitted.]" *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (2003).

We review de novo claims that a district court's ruling has interfered with a defendant's right to present a defense. E.g., *State v. Waldschmidt*, 318 Kan. 633, 657, 546 P.3d 716 (2024); *State v. Macomber*, 309 Kan. 907, 921, 441 P.3d 479 (2019).

"To constitute error, the excluded evidence supporting the defense theory must be relevant, noncumulative, and admissible. We review this type of alleged error de novo.

"Unless barred by statute, constitutional provision, or caselaw, 'all relevant evidence is admissible.' For relevancy, there are two elements: materiality and probativity. We review the former de novo and the latter for abuse of discretion. A court abuses its discretion when no reasonable person could agree with its decision or if its exercise of discretion is based on a factual or legal error. [Citations omitted.]" *Waldschmidt*, 318 Kan. at 657.

But we review a district court's decision to exclude evidence based on the third-party evidence rule for abuse of discretion based on the "'totality of facts and circumstances in a given case.'" *State v. Tahah*, 293 Kan. 267, 274, 262 P.3d 1045 (2011) (quoting *State v. Adams,* 280 Kan. 494, 505, 124 P.3d 19 [2005]). See also *State v. Carr*, 300 Kan. 1, 197, 331 P.3d 544 (2014) ("[T]he appellate standard of review for a district judge's ruling on a motion in limine invoking the third-party evidence rule is abuse of discretion."), *rev'd and remanded* 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016).

Preservation

The parties litigated both sub-issues below. But the State now argues that Smith failed to preserve his claim as to King because the "defendant never proffered the exact manner in which he wanted to 'argue' or 'suggest' King's guilt to the jury." The State

rhetorically asks, "Did counsel plan to make this suggestion in opening statement or closing argument, or through his cross-examination of King or other witnesses?" But we reject this framing, which requires far more specificity than we have historically required.

"When a motion in limine has been granted, the party being limited by the motion has the responsibility of proffering sufficient evidence to the trial court in order to preserve the issue for appeal. The purpose of a proffer is to make an adequate record of the evidence to be introduced.

"The proponent of excluded evidence has the duty of making known the 'substance' of the expected evidence in a proffer. A formal offer of proof in question and answer form is not required if an adequate record is made in a manner that discloses the evidence sought to be introduced. Failure to make a proffer of excluded evidence precludes appellate review because there is no basis to consider whether the trial court abused its discretion. [Citations omitted.]" *Evans*, 275 Kan. at 99-100.

See also *State v. Burnett*, 300 Kan. 419, 431-33, 329 P.3d 1169 (2014) (distinguishing adequate proffer that another person committed the crime from inadequate proffer that the house was a "drug house" or that police found weapons there).

Here, defense counsel proffered the following facts:

- Smith and King "look an awful lot alike," have "similar builds," "their weights are similar, their heights are similar, their facial features are similar. They're both bald black men. They both fit the description given by the eyewitness to 911."
- Donna was killed by a .25 caliber bullet, and King had admitted to an earlier possession of a .25 caliber handgun.
- King had lived in the same apartment complex as Donna, was friends with Donna, and knew that Donna sold drugs.
- King learned Donna had been killed the next day "when I came to work."
- The police "came and got [King] from work" to ask him about the tip he gave to Donna about Smith's planned robbery.

- King was the one to tell Clifford that Smith had previously threatened Donna.

The defense also explained its proposed theory: that King, who ostensibly resembled Smith, committed the crime and attempted to deflect blame by accusing Smith. And while the defense was ultimately able to present some of this evidence to the jurors, the court's ruling still prevented them from tying it all together—which is the core of Smith's complaint. We thus reject the State's position that, to obtain appellate review, defense counsel had to lay out its exact strategy in exhaustive detail. It suffices that the defense explained its theory with reasonable clarity and showed the court sufficient evidence they intended to present in good faith support of that theory, which is the case here.

The district court's exclusion of third-party evidence as to King.

Regrettably, "our caselaw on the admissibility of third-party evidence has not always been a model of clarity." *State v. Cox*, 297 Kan. 648, 660, 304 P.3d 327 (2013). But, at a minimum, third-party evidence "must 'effectively connect the third party to the crime charged'" and "must reveal more than motive to be relevant." *Tahah*, 293 Kan. at 274 (quoting *Adams*, 280 Kan. at 505). "Mere speculation" and "baseless innuendo" are insufficient. *Cox*, 297 Kan. at 660-61; *Brown*, 285 Kan. at 305. Conversely, evidence linking another person directly to the commission of a crime is relevant and generally should not be excluded. See generally *State v. Marsh*, 278 Kan. 520, 529-33, 102 P.3d 445 (2004), *rev'd and remanded on other grounds* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006), *and vacated in part on other grounds* 282 Kan. 38, 144 P.3d 48 (2006); *Evans*, 275 Kan. at 99-100.

The State's pretrial motion in limine asked the court to prevent the defense from "presenting evidence, arguing or otherwise discussing" the theory that King was Donna's killer. After reviewing the proffered facts and noting that nothing suggested King was "there" on the night of the murder, the district court ultimately concluded that "I just don't believe there's sufficient evidence. I just think based on the third party rule that the evidence that I've heard that the defense wants to put forward is not relevant." And

although defense counsel complained that the court's ruling left him "at a loss" and with no defense, the district court was unmoved. The district court later reaffirmed its rulings as to the proposed defense regarding King at the retrial.

Smith argues that his theory hinged on King's "intimate" connection to the case and thus "went much further than" mere resemblance. But none of the facts proffered remotely suggest that King shot Donna—particularly since Clifford, who saw the shooter *and* sought out King for information later, both (1) never asserted that King was the culprit *and* (2) claimed that he had met King before Donna's death. In contrast, at the second trial, Clifford testified that he "had never seen [the killer]" before, and at both trials he testified that he did not know Donna's killer, but that Donna seemed to. This key failure undermines the defense's claim that Smith and King apparently resembled one another. Even so, nothing shows King was near Donna's apartment on the night of the murder; on the contrary, King's testimony suggests he was living in a different apartment at the time, after having parted ways with his old friend Black in August, two months before Donna's murder. And no DNA evidence implicated King, either.

While Smith's proffered facts show King's roundabout connection *to* the crime, they do not show his involvement *in* it—and, thus, are irrelevant to show King's identity as Donna's true killer, since there is no evidence that the killer acted with an accomplice. Instead, the purported connection here consists of "baseless innuendo" that would merely confuse and distract the jury with "'speculations on collateral matters wholly devoid of probative value relative to who committed the [crime].'" *Brown*, 285 Kan. at 303, 305 (quoting *Marsh*, 278 Kan. at 530-31). We find no error in the district court's decision.

The district court's exclusion of Smith's probation violation warrant.

Additional facts

During an interview with detectives on the afternoon of October 10, 2016—a day and a half after Donna's murder—Smith's then girlfriend, Johnson, reported phone conversations with Smith

beginning October 9 and running into the morning before the interview. Johnson reported that, on the evening of the murder itself and even through 5 p.m. on October 9, when he left the apartment, Smith was calm and acted like nothing happened. But after police raided Johnson's sister's house, Johnson called Smith and asked why the police were at her sister's house; Smith called Johnson back, and when Johnson again brought up the raid, Smith kept saying, "I'm sorry, I'm sorry, I fucked up, I'm sorry." Johnson told detectives Smith called her again later that night, saying, "I fucked up, I'm sorry . . . I'm going to have to go turn myself in." The two had a similar exchange on the morning of October 10.

But Smith never told Johnson exactly what happened. During at least one of the conversations, Johnson asked Smith what he had done; Smith only responded that he had fucked up and would turn himself in. The police told Johnson's sister that Smith had shot somebody; Johnson told Smith "they said that you shot somebody" and Smith responded, "I fucked up, I fucked up, I'm sorry." Johnson agreed with a detective's question that he seemed to be acknowledging her statement "you shot somebody" with his answer. And during one of the calls, Smith accused Johnson of being with the police and trying to set him up; Johnson said that she was trying to get Smith to understand what the police said he had done, and asked why he kept calling her when there was nothing she could do.

The State played Johnson's recorded interview for the jury during the second trial. On the stand, Johnson testified that, over multiple conversations, Smith said "he was sorry for ruining my life" and that "he didn't mean to F up my life." Johnson also testified that Smith never told her what had happened; he just said he was sorry for ruining her life and hurting her family.

Defense counsel asked if Johnson knew Smith was on probation, that he had not kept up on his fines, and that he had had a "bad UA"; she testified that she did. But Johnson did not know that there was a warrant out for Smith's arrest until after the shooting. The defense brought up a warrant for Smith's arrest based on a probation violation during Johnson's testimony, but was unable to introduce it. The defense tried again during Detective Palmer's testimony, but the district court held that the defense had not

shown it was relevant because there was no evidence Smith knew about it when he made the statements to Johnson. Regardless, during closing, defense counsel discussed the probation violation as the basis for Smith's "turning himself in" comment.

Discussion

Smith argues that the probation revocation warrant explained what he meant when he told Johnson that he had "fucked up" and apologized for "ruining [her] life," which the State later argued was a confession. Smith claims the warrant was central to his claim of innocence and that the district court violated his right to a fair trial by concluding that, because the defense failed to show Smith was aware of it when he made the statements to Johnson, it was irrelevant.

We are unpersuaded. When a district court permits a defendant to present a defense but "simply exclude[s] one piece of [relevant] evidence," "a constitutional issue is not at stake," and this court thus reviews for abuse of discretion. *State v. Alderson*, 260 Kan. 445, 461, 922 P.2d 435 (1996). Instead, a district court only "violates a criminal defendant's fundamental right to a fair trial if the court excludes relevant, admissible, and noncumulative evidence *that is an integral part of the theory of the defense*." (Emphasis added.) *State v. Banks*, 306 Kan. 854, 865, 397 P.3d 1195 (2017); *State v. King*, 293 Kan. 1057, 1063, 274 P.3d 599 (2012). Moreover, "To constitute error, the excluded evidence supporting the defense theory must be relevant, noncumulative, and admissible." *Waldschmidt*, 318 Kan. at 657.

The warrant (which the district court admitted for appeal) was hardly integral to Smith's defense. It was issued in March 2016 based on various probation failures, including positive UAs and a failure to report in person. But the defense introduced nothing to show that Smith knew that the warrant had been issued, much less to explain why he would suddenly bring it up to Johnson seven months after its issuance in the context of police searching her sister's home. Thus, we find merit in the district court's explanation that Smith would have to show he *knew* of the warrant for it to be relevant.

Further, Johnson testified that she knew Smith was on probation at the time, knew Smith had not paid his fines, and knew that he had a "bad UA." Johnson did not know there was a probation violation warrant for Smith's arrest at the time, though she later learned of it.

Because the warrant was not integral to the defense's case, the district court's refusal to admit it becomes a matter of discretion. And without evidence that Smith was specifically aware of *this* warrant—or why he would suddenly bring it up seven months after its issuance—it is unclear how the warrant would either be material (i.e., have "'a legitimate and effective bearing on the decision of the case and is in dispute'") or probative (i.e. have "'any tendency in reason to prove a fact'"). *State v. Boleyn*, 297 Kan. 610, 622, 303 P.3d 680 (2013). We find no error here.

Even if the district court erred in permitting the State to amend its information before the case was submitted to the jury on retrial, any error was harmless.

Smith next challenges the district court's decision to allow the State to amend its information during the retrial "to allege a different elemental version of a criminal possession of a weapon offense" than previously charged. Smith preserved this issue for appeal.

Standard of review

Under K.S.A. 22-3201(e), "The court may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced." Appellate courts review a district court's decision to allow an amended information for abuse of discretion. *State v. Donaldson*, 279 Kan. 694, 712, 112 P.3d 99 (2005). Further, to the extent Smith's argument requires statutory interpretation, the court's review is de novo. *State v. Lamia-Beck*, 318 Kan. 884, 886, 549 P.3d 1103 (2024).

Discussion

"A two-part analysis determines whether an amendment prior to submission of the case to the jury may be permitted: (1) Does

the amendment charge an additional or different crime? (2) Are the substantial rights of the defendant prejudiced by the amendment?" *State v. Matson*, 260 Kan. 366, 370, 921 P.2d 790 (1996). Smith focuses on the first part of the analysis, maintaining that count six of the second amended information charged a new crime because the elements were different than that of the previous count six. Smith further argues that, because the district court permitted the amendment, it forced the defense to enter an unnecessary stipulation that would have made it difficult for the jury to "cabin[] their consideration of an accused's prior crime for strictly proper purposes" and was thus "highly prejudicial." But Smith makes no argument under the second half of the analysis, i.e., that the *amendment* prejudiced his substantial rights; he merely claims any error was not harmless because of the stipulation rendered necessary *by* the court's decision allowing the amendment.

As the defense highlighted below, the distinction between the amended information and the second amended information lies in the final lines of count six:

"[T]o-wit: Possession of Marijuana with Intent to Sell, pursuant to KSA 65-4163(a)(3) on the 23rd day of January, 2012, in the Eighteenth Judicial District Court, under Case No. 2009CR3371, *and was found to have been in possession of a firearm at the time of the commission of the crime*." (Emphasis added.)

"[T]o-wit: Possession of Marijuana with Intent to Sell, pursuant to KSA 65-4163(a)(3), on the 23rd day of January, 2012, in the Eighteenth Judicial District Court, under Case No. 2009CR3371, *and was found not to have been in possession of a firearm at the time of the commission of the offense*, and has not had the conviction expunged or been pardoned for such crime." (Emphasis added.)

The first amended information listed the statutory basis for the charge as K.S.A. 21-6304(a)(1); the second amended information listed K.S.A. 21-6304(a)(3)(A).

Smith argues that, because the elements of the two charges are different, they constitute different crimes. While Smith cites no authority mandating this approach in the context of mid-trial amendments to charging documents, he argues the *Mathis v. United States*, 579 U.S. 500, 511-12, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), definition of "'crime' ought to apply" to K.S.A. 22-3201(e). But see *State v. Lowe*, No. 110,103,

2015 WL 423664, at *3 (Kan. App. 2015) (unpublished opinion) (although amendment changed the elements the State was required to prove, the amendment did not charge a new crime because it "only changed the *theory* that would support the charge for trafficking in contraband in a correctional institution") (citing *State v. Starr*, 259 Kan. 713, 720, 915 P.2d 72 [1996]).

We assume without deciding that Smith has shown that the elements of the two count sixes are different. We further assume without deciding that this makes the new count six a "different crime." Smith argues that, at a minimum, a finding of error here would require reversal of Smith's conviction for criminal possession of a weapon, and at most requires reversal of all his convictions. We disagree.

We have not previously considered whether an error under K.S.A. 22-3201(e) can be harmless when a mid-trial amendment to an information or complaint charges a new or different crime. Our older caselaw suggests that it cannot. See, e.g., *State v. Wilson*, 240 Kan. 606, 608-09, 731 P.2d 306 (1987), *overruled by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Scherer*, 11 Kan. App. 2d 362, 369, 721 P.2d 743 (1986); *State v. Hoover*, No. 65,888, 1991 WL 12018514, at *2 (Kan. App. 1991) (unpublished opinion). But this caselaw turned on a point we have since repudiated: the notion that a charging document confers subject matter jurisdiction on a court. As we have clarified, district courts do not draw their subject matter jurisdiction from charging documents. *Dunn*, 304 Kan. at 811.

Rather than the older focus on subject matter jurisdiction, our concern with a mid-trial amendment under K.S.A. 22-3201(e) turns on due process notions of notice and fundamental fairness, along with double jeopardy. Cf. *State v. Rasch*, 243 Kan. 495, 497, 758 P.2d 214 (1988). In many cases, these concerns would be fatal to a mid-trial amendment. But not so here. Cf. *Lowe*, 2015 WL 423664, at *3 (noting circumstances in which an amendment to an information does not interfere with a defendant's ability to defend against the charge, including "when the evidence is the same under the original information and the amendment," "when the defendant has always been aware of the evidence supporting the amendment," and "when the defendant can keep the same defense

under the amendment"). Here, the State's amendment to count six merely charged the underlying theory of criminal possession of a firearm to comport with evidence that both parties had access to all along—including throughout Smith's *first* trial, where neither of them apparently caught the discrepancy. Further, Smith did not argue below—and does not argue now—that the amendment prejudiced his substantial rights. He has thus waived any such argument. E.g., *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018).

Consequently, we find any error harmless. While Smith complains that the amendment forced him into an unnecessary stipulation—a distinct claim from the statutory test of prejudice to his substantial rights owing to the amendment itself—we conclude that the stipulated conviction could have had little impact on the jury's assessment of the evidence before it. True, Smith's prior crime involved drugs, and the State's theory of his current crimes centered on an attempted drug-related robbery. But Smith's prior conviction—possession of marijuana with intent to distribute—was not one involving violence and would not have suggested to the jury that Smith was particularly likely to commit the charged crimes here, particularly because the parties' *new* stipulation expressly noted that Smith "was not found to be in possession of a firearm at the time of the prior crime." This stipulation would have had even less impact on the jury's assessment of the evidence than the stipulation the parties entered at the first trial, which said, among other things, "the defendant *was* found to be in possession of a firearm at the time of the prior crime." (Emphasis added.) Thus, even assuming error, any error was harmless.

Cumulative error did not deprive Smith of a fair trial.

Smith briefly argues that cumulative error deprived him of a fair trial.

"Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. The cumulative error rule does not apply if there are no errors or only a single error. [Citations omitted.]" *State v. Lowry*, 317 Kan. 89, 100, 524 P.3d 416 (2023).

Here, we have only assumed without deciding that one error occurred. The cumulative error rule thus does not apply to afford Smith relief.

The district court erred in counting Smith's 2003 criminal threat conviction as part of Smith's criminal history score.

Finally, Smith claims that the district court erred by including his prior criminal threat conviction in his overall criminal history score and, thus, his sentence is illegal. We agree.

Standard of review

Smith's challenge to his sentence requires us to interpret K.S.A. 21-6810(d)(9). We exercise unlimited review over both interpretation of statutes and claims involving illegal sentences. E.g., *State v. Daniels*, 319 Kan. 340, 342, 554 P.3d 629 (2024).

When a defendant challenges their criminal history score at sentencing, the State bears the burden of proving that score by a preponderance of the evidence. K.S.A. 21-6814(a)-(c); *Daniels*, 319 Kan. at 347-48. In the face of such a challenge, the presentence investigation (PSI) report is no longer sufficient to carry the State's evidentiary burden. 319 Kan. at 347.

Discussion

K.S.A. 21-6810(d)(9) provides that "[p]rior convictions of a crime defined by a statute that has since been determined unconstitutional by an appellate court shall not be used for criminal history scoring purposes." As the majority recognized in *State v. Phipps*, 63 Kan. App. 2d 698, 711, 539 P.3d 227 (2023), *rev. granted* 318 Kan. 1089 (2024), a "literal reading" of K.S.A. 21-6810(d)(9) implies that reckless criminal threat convictions can never be included in a criminal history score "because at one point in time, the Kansas Supreme Court determined that the reckless criminal threat statute violated the First Amendment."

We now acknowledge as correct this "literal reading." In matters of statutory interpretation, our prime directive requires us to give effect to the Legislature's intent, if we can discern it. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). Where the Legislature's language is plain and unambiguous, our analysis ends—regardless of public policy considerations or canons of construction. E.g., *Woessner v. Labor Max*

Staffing, 312 Kan. 36, 44-45, 471 P.3d 1 (2020). But see *Bruce*, 316 Kan. at 224 ("even when the language of the statute is clear, we must still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible").

Our Legislature's direction was clear. If a prior conviction arose under a statute "that has since been determined unconstitutional by an appellate court," it cannot be counted in a criminal history score. Nothing in the plain language of the statute qualifies this limitation by considering *subsequent repudiations* of an appellate court's holding that a statute is unconstitutional.

As applied here, *Boettger*, 310 Kan. at 822, held that the portion of K.S.A. 2018 Supp. 21-5415 criminalizing reckless criminal threat is unconstitutional. This holding further invalidated the corresponding portion of K.S.A. 2003 Supp. 21-3419, under which Smith's 2003 conviction arose. And while the parties argue at length as to whether *Counterman v. Colorado*, 600 U.S. 66, 81-82, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023), effectively overruled *Boettger*, this consideration is irrelevant under the plain language of K.S.A. 21-6810(d)(9), which asks *only* whether an appellate court "has since" ruled the statute unconstitutional—not whether that holding remains good law.

Because Smith raised this issue before sentencing, the State bore the burden of proving that Smith's conviction arose under the portion of the statute that had not been previously declared unconstitutional. K.S.A. 21-6814(c). The State presented no evidence to carry this burden, instead focusing on whether *Counterman* overruled *Boettger*. Because the State failed to carry its evidentiary burden that Smith's 2003 conviction arose under a portion of the statute that remained constitutional after *Boettger*, the district court erred in including Smith's 2003 conviction in his criminal history score. We thus vacate Smith's sentences and remand to the district court for resentencing, with directions not to include Smith's 2003 criminal threat conviction in Smith's criminal history score.

CONCLUSION

We affirm Smith's convictions, vacate his sentence, and remand the case for resentencing.

No. 126,950

In the Matter of the Wrongful Conviction of SHARMARKE WARSAME.

(563 P.3d 1281)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Compensation for Wrongful Conviction—Claimant Required to Prove Actual Innocence.* To receive compensation for a wrongful conviction, a claimant is required to prove actual innocence by a preponderance of the evidence under the statutory elements of the charged crime.

2. SAME—*Statute Defines Crime of Conviction*. The crime of conviction is defined by statute and is not limited to the specific facts of the charging document.

Appeal from Johnson District Court; JAMES F. VANO, judge. Oral argument held October 30, 2024. Opinion filed February 14, 2025. Affirmed.

Michael T. Crabb, of Kuckelman Torline Kirkland, of Overland Park, argued the cause, and *Daniel P. Meany*, of the same firm, was with him on the briefs for appellant/cross-appellee.

Kurtis K. Wiard, special assistant attorney general, argued the cause, and *Kris W. Kobach*, attorney general, was with him on the briefs for appellee/cross-appellant.

The opinion of the court was delivered by

STEGALL, J.: Sharmarke Warsame knowingly used stolen credit cards to purchase Target gift cards. He was charged and convicted by a jury of two felony counts of identity theft, two misdemeanor counts of theft, and one misdemeanor count of criminal use of a financial card. On direct appeal, however, the parties jointly moved to have the convictions vacated. The Court of Appeals obliged. Then, the State dismissed the felony charges after remand. Warsame served 564 days in prison for the vacated and dismissed felony convictions.

Warsame then filed this statutory action for wrongful conviction and imprisonment under K.S.A. 2021 Supp. 60-5004 seeking damages, attorney fees and costs, a certificate of innocence, and expungement of all associated convictions. The State moved for summary judgment arguing (1) Warsame's conviction was reversed because of incorrect charging, not because he did not commit the crime, (2) Warsame could not prove by a preponderance of the evidence that he did not

commit identity theft because he admitted that he used someone else's credit card with the intent to defraud to receive a benefit, and (3) Warsame's own conduct brought about his conviction because he testified that using the credit cards was "all my fault."

The district court denied the State's motion for summary judgment reasoning that it needed to hear testimony and make findings concerning the alleged facts under which Warsame was convicted—reasoning that "it doesn't matter what the criminal statute says. It's how he was charged and convicted." A bench trial followed. The assistant district attorney who had jointly moved to vacate the convictions on appeal testified that he did not believe Warsame was actually innocent of the charged crimes. Instead, he believed the felony charging documents and jury instructions had identified the wrong victim, and that this was legally fatal to the convictions. Specifically, the State was concerned that Warsame had been charged with intent to defraud the credit card holders rather than Target, and "then, in turn, Target taking money from the bank."

The district court ultimately ruled against Warsame, holding that he had failed to prove—by a preponderance of the evidence—his actual innocence of the crimes as charged and instructed to the jury. Warsame appealed directly to this court under K.S.A. 2023 Supp. 60-5004(l). The State cross-appealed the denial of summary judgment.

On appeal, Warsame argues that the district court incorrectly concluded that he committed felony identity theft against the alleged victims as charged and instructed to the jury. For its cross-appeal, the State argues that the actual innocence required under our wrongful conviction statute exclusively concerns the *statutory* elements of the charged crime—*not* the specific facts alleged in the filings or trial. We agree with the State. And because this is determinative of the outcome, we affirm the denial of Warsame's claim.

DISCUSSION

A claimant seeking compensation for wrongful conviction must prove:

> "(A) The claimant was convicted of a felony crime and subsequently imprisoned;
>
> "(B) the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty;
>
> "(C) the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the

conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial; and

"(D) the claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction. Neither a confession nor admission later found to be false or a guilty plea shall constitute committing or suborning perjury, fabricating evidence or causing or bringing about the conviction under this subsection." K.S.A. 2023 Supp. 60-5004(c)(1).

There is no dispute in this case that Warsame can easily satisfy the first two elements of proof. Here, Warsame's vacated felonies were for identity theft under K.S.A. 21-6107(a)(1), which criminalizes "obtaining, possessing, transferring, using, selling or purchasing any personal identifying information . . . belonging to or issued to another person, with the intent to: (1) Defraud that person, or anyone else, in order to receive any benefit." Those convictions were imposed with prison time served, and they were later vacated and the charges were dismissed on remand.

This brings us to the third element of statutory proof in our wrongful conviction statute. We recently clarified that provision's meaning. In *In re Wrongful Conviction of Doelz*, 319 Kan. 259, 261, 553 P.3d 969 (2024), we held that K.S.A. 2023 Supp. 60-5004(c)(1)(C) requires a claimant to prove a causal connection between the ultimate dismissal of the charges by the State and the claimant's actual innocence.

"[T]he Legislature intended to require in this subsection that a claimant for compensation must prove three things. First, that he or she did not commit the crime of conviction. Second, that he or she was not an accessory or accomplice to the crime. And third, that by demonstrating the first two requirements, the claimant obtained one of three possible outcomes: (1) the reversal of his or her conviction; *or* (2) dismissal of the charges; *or* (3) a finding of not guilty upon retrial. In other words, that the first two elements 'resulted in' one of three possible outcomes." 319 Kan. at 263-64.

In addition, subsection (C) allows claimants to "present to a fact-finder the motivating reason and underlying facts that sit behind a prosecutor's decision not to continue to pursue charges after a reversal by the appellate courts." 319 Kan. at 265. This case presents us with an opportunity to further clarify what this means. Warsame argues there is a clear causal connection because the State explicitly acknowledged before the Court of Appeals that he was not guilty of the crime as it was charged and tried because he did not intend to defraud the named victims (i.e., the owners of the

stolen credit cards). The State counters that Warsame was not actually innocent of the crime of identity theft as defined by the statutory elements because he did intend to defraud other victims—albeit victims not identified or proven at trial.

While the district court found that the prosecutor did *not* agree to vacate the convictions because Warsame was actually innocent, the lower court did not rely on this holding when making its ruling. Instead, the district court held (1) that no causal link between vacation of the convictions and innocence was necessary, and (2) that Warsame only had to show innocence of the facts alleged in the complaint—that is, innocent as to the specific victims alleged in the complaint. The district court, however, went on to rule against Warsame based on its view that despite the joint motion to vacate the convictions on appeal, Warsame was actually guilty of identity theft as factually charged.

Thus, the dispute between the parties revolves around a legal disagreement between the State and Warsame on the one hand, and the lower court on the other—that is, under these facts, whether Warsame intended to defraud the named victims. The State and Warsame effectively agreed that he was actually innocent of intending to defraud the named victims by jointly moving to vacate the convictions, while the district court went the other way.

We find this legal dispute irrelevant to the ultimate outcome of Warsame's claims. Specifically, we hold that the lower court's two predicate holdings—that no causal link between the dismissal of the charges on remand and actual innocence is required and that Warsame had only to show actual innocence of the facts alleged at trial—were error. And those errors funneled this case into an unnecessary and tangled argument over who, legally, can be a victim of identity theft. We do not weigh in on that dispute because—as explained below—under the proper thresholds of proof demanded by our wrongful conviction statute, resolving that question does not matter to the outcome.

We explained in *Doelz* why the district court's holding as to causation was error. In fact, claimants do have to prove a causal connection between the ultimate dismissal of the charges and actual innocence. But not until today have we had the opportunity to

decide the specific question presented here—"actual innocence" of what? Must a claimant show the causal element related to actual innocence *as charged* or actual innocence of the *statutory elements* of the crime? We hold it is the latter.

Like our decision in *Doelz*, the court is faced with unclear language in K.S.A. 2023 Supp. 60-5004(c)(1)(C). The meaning of "crimes for which the claimant was convicted" is ambiguous. Is a "crime" limited to the facts of the charging document, or is a crime defined by the statutory elements? The plain text does not say, so the court must resort to tools of construction, including an examination of legislative history. 319 Kan. at 262.

We have previously noted that the statutory scheme indicates a requirement of factual innocence of both the crime as charged and its lesser included offenses. *In re Wrongful Conviction of Spangler*, 318 Kan. 697, 706-07, 547 P.3d 516 (2024). We have also examined legislative history and found overwhelming evidence that "the Legislature intended to compensate only individuals who are determined to be actually or factually innocent. It did not intend to compensate every criminal defendant whose conviction was reversed on appeal." *Doelz*, 319 Kan. at 263. We especially noted testimony from The Innocence Project about those who served prison sentences "'for crimes they did not commit.'" 319 Kan. at 262 (citing Hearing on S.B. 336 Before the Kansas Senate Judiciary Committee [Feb. 14, 2018] [testimony of Michelle Feldman]). As applied here, it is clear that the Legislature only intended to award compensation to people who were entirely innocent of the crime of conviction, i.e., the crime as defined in the statute. There is no indication that the Legislature ever conceived of, to use an extreme example, compensating an individual who was convicted for murdering victim A, when the individual was actually guilty of murdering victim B. Thus, the crime of conviction is defined by statute and is not limited to the specific facts of the charging document.

To receive compensation, Warsame was required to prove actual innocence by a preponderance of the evidence under the statutory elements of the charged crime—and that this was the reason the charges were dismissed.

The elements of identity theft found in K.S.A. 21-6107(a)(1) are: "[O]btaining, possessing, transferring, using, selling or purchasing any personal identifying information . . . belonging to or issued to another person, with the intent to: (1) Defraud that person, or anyone else, in order to receive any benefit." Thus, Warsame must show he did not use someone else's personal identifying information with the intent to defraud that person, or anyone else, to receive any benefit. This is what we mean by factual innocence. Warsame was not required to show he was innocent of all crimes. Nor was he only required to show mere innocence as to the specific facts alleged in the complaint to prove he was innocent of the "crimes for which the claimant was convicted." K.S.A. 2023 Supp. 60-5004(c)(1)(C).

Warsame showed that his felony convictions were vacated and dismissed. Warsame did not show that he was actually innocent of identity theft because he admitted facts sufficient to prove he intended to defraud some party to receive a benefit. And the evidence at trial below clearly was insufficient to show that the charges were dismissed because of factual innocence within the meaning of the wrongful conviction statute. Warsame failed to meet his burden of proof under K.S.A. 2023 Supp. 60-5004(c)(1)(C).

The district court was thus ultimately correct in denying relief, albeit for the wrong reason. *Nicholson v. Mercer*, 319 Kan. 712, 717, 559 P.3d 350 (2024) (affirming Court of Appeals as right for the wrong reason).

Affirmed.

MODIFIED OPINION[1]

No. 124,601

STATE OF KANSAS, *Appellee*, v. KIMBERLEY S. YOUNGER, *Appellant*.

(564 P.3d 744)

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.

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[1]**REPORTER'S NOTE**: No. 124,601 was modified by the Kansas Supreme Court on February 21, 2025, in response to appellant's motion for rehearing or modification. See new language at 320 Kan. at 135-36.

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. Original opinion filed October 4, 2024. Modified opinion filed February 21, 2025. 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*, 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

A witness may not express an opinion on the credibility of another witness, and any such evidence must be disallowed. *State v. Elnicki*, 279 Kan. 47, 53-54, 105 P.3d 1222 (2005).

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.

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.

Under *In re Care & Treatment of Sigler*, 310 Kan. 688, 707-08, 448 P.3d 368 (2019), we review the trial court's denial of Younger's motions for mistrial for abuse of discretion. An abuse of discretion occurs when: (1) no reasonable person would take the view adopted by the district court; (2) the ruling is based on an error of law; or (3) the exercise of discretion is based on an error of fact. *State v. Carr*, 314 Kan. 744, 773, 502 P.3d 511 (2022), *cert. denied* 143 S. Ct. 584 (2023).

There is little question that Officer Dugan violated the demand of *Elnicki* that "a witness may not express an opinion on the credibility of another witness." *Elnicki*, 279 Kan. 47, Syl. ¶ 2. He said he arrested Younger because he knew she was lying to him about her name. This was, however, less a comment on her general credibility and more an explanation for why he took the action that he did. It would be quite apparent to the jury that Younger lied

when she said her name was Tiffany Jones; the record had already established her name was Kimberley Younger, and various witnesses testified that she used other pseudonyms, such as Myrna Khan and Jenna Roberts. At least as far as her name was concerned, there was no real question about Younger's credibility: she lied.

The trial court nevertheless gave the jury a corrective instruction that it was the jury's job, not a witness', to determine credibility. We see nothing in Dugan's testimony that would have added to the doubts about Younger's credibility beyond the ones she had herself created.

When Sparky Fox commented that he found Younger to be someone he "couldn't trust," the prosecutor immediately corrected him by saying she did not want Fox to comment on Younger's credibility. Fox did not elaborate on his observation, and it was not brought up again.

The two comments on Younger's credibility occurred against the backdrop of eight days of testimony and arguments. Dugan's statements that Younger "lied" about her name were objectively accurate. He could have characterized the incident differently, as the trial judge noted, by simply saying that she gave a name that was different from her real name, but that is an insignificant difference. Fox's comment was minor and was immediately corrected by the prosecutor.

This is not a situation of a *Ward* "fundamental failure in the proceeding." Furthermore, there is no "reasonable probability that the error will or did affect the outcome of the trial in light of the entire record." See *State v. Ward*, 292 Kan. 541, 551, 569, 256 P.3d 801 (2011). In addition, both the trial court and the prosecutor mitigated any error by a short instruction to the jury and other curative action—correcting the witness. This mitigation further reduces any prejudicial effect the comments may have had. See *Ward*, 292 Kan. at 569-70.

The complained of comments had a de minimis effect on the jury in light of the record as a whole, and the trial court did not abuse its discretion in denying the motions for new trial. See *State v. Alfaro-Valleda*, 314 Kan. 526, 549-50, 502 P.3d 66 (2022) (trial

error of minimal effect in light of entire evidentiary production is not grounds for 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 cloth-

ing 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, including 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*, 320 Kan. at 113-14. 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*, 320 Kan. at 109. 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.

State v. Barnes

No. 125,739

STATE OF KANSAS, *Appellee*, v. CLYDE JAMES BARNES JR., *Appellant*.

(563 P.3d 1255)

SYLLABUS BY THE COURT

1. KANSAS CONSTITUTION—*Subject Matter Jurisdiction of Kansas Courts Flows from Article 3.* A court's subject matter jurisdiction, which is its very power to hear and decide a case, flows from article 3 of the Kansas Constitution and from laws generally expressed through statute.

2. SAME—*Subject Matter Jurisdiction Flows from Article 3—Statute Grants District Courts in Kansas Subject Matter Jurisdiction When Criminal Act Occurs in Kansas.* Article 3 of the Kansas Constitution gives the Legislature the power to define a Kansas district court's subject matter jurisdiction. Consistent with that power, K.S.A. 2020 Supp. 21-5106(b)(3) grants Kansas district courts subject matter jurisdiction over crimes when the proximate result of the criminal act occurs within Kansas. In other words, Kansas district courts have subject matter jurisdiction over crimes where there is a direct connection or nexus between the defendant's act or acts outside Kansas and the result in Kansas.

3. CIVIL PROCEDURE—*Venue—Proper Place for Lawsuit—Venue Can Be Waived.* Venue describes the proper place for a lawsuit to proceed. It is a procedural matter, rather than a jurisdictional one, and it can be waived.

4. SAME—*Subject Matter Jurisdiction of Court Not Dependent on Venue.* A court's subject matter jurisdiction does not depend upon venue considerations.

5. TRIAL—*Vicinage—Jurors Drawn from Vicinage.* Vicinage refers to the place from which the jurors are drawn.

6. KANSAS CONSTITUTION—*Section 10 of Bill of Rights' Right to Impartial Jury Is Vicinage Provision—Personal Privilege Is Waived if not Asserted.* Section 10 of the Kansas Constitution Bill of Rights' right to "an impartial jury of the county or district in which the offense is alleged to have been committed" is a vicinage provision that operates as an indirect venue limitation. The right is a personal privilege and is waived if not asserted at the district court.

7. APPEAL AND ERROR—*Prosecutorial Error—Contemporaneous Objection Not Required—Appellate Review.* A contemporaneous objection is not required to preserve claims of prosecutorial error for appellate review.

8. TRIAL—*Premeditation—PIK Crim. 4th 54.150 Accurately States Law of Premeditation.* PIK Crim. 4th 54.150, without modification, is not misleading and accurately states the law of premeditation.

9. SAME—*Invited Error Issue—Whether Party Induced Court to Make Claimed Error—Appellate Review*. In assessing invited error, the ultimate question is whether the record reflects the party's action in fact induced the court to make the claimed error. But when the record shows that a district court made its decision independent of counsel's comments, invited error does not apply.

Appeal from Johnson District Court; TIMOTHY P. MCCARTHY, judge. Oral argument held September 11, 2024. Opinion filed February 21, 2025. Affirmed.

Samuel D. Schirer, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant, and *Clyde James Barnes Jr.*, appellant, was on a supplemental brief pro se.

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Stephen M. Howe*, district attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: A jury convicted Clyde James Barnes Jr. of first-degree premeditated murder, aggravated burglary, tampering with electronic monitoring equipment, criminal threat, and violation of a protective order. On direct appeal, he asserts many errors. We affirm his convictions and sentence.

FACTS AND PROCEDURAL BACKGROUND

Clyde Barnes Jr. and Jessica Leigh Smith ended a long romantic relationship in November 2019. They had two children together, who were seven and eight years old in July 2020. Smith also had a daughter from a previous relationship, D.S., whom Barnes helped raise from a young age.

After the breakup, "as part of a Johnson County criminal case," Barnes was ordered to have no contact, direct or indirect, with Smith, and also to be on house arrest. By May 2020, Barnes was living in the basement of his father's residence in Kansas City, Missouri. While there, Barnes recorded a video in which a mattock can be seen briefly.

On July 2, Barnes' car—a white Cadillac with a large black racing stripe across the car's hood and roof—ran out of gas heading southbound on K-7. Barnes had been given permission under his bond for house arrest to travel to and from Topeka that day. At the time, Barnes' car did not have any damage to its front end and was not missing a hubcap. According to the officer who stopped to assist Barnes that day, Barnes was at first frustrated about his car troubles, but then he began to talk about Smith. Barnes became "very upset, frustrated, angered," called Smith a "crazy bitch," and blamed Smith for being unable to see his children.

Sometime on or shortly before July 4, 2020, Barnes' son used Serron Nunn's phone to call Barnes about getting some fireworks. For some reason, this made Barnes angry. Barnes then texted Serron—Barnes' biological nephew—to see whether Serron would bring Barnes' children for a visit on July 4. Although Serron said he would drive the children over, Smith vetoed it.

In the evening of July 4, Smith and Serron went to a casino, where they spent several hours and bought fireworks. Shortly after midnight on July 5, Barnes posted a video to Facebook. In the 24-second video, Barnes says:

"I just want to say man before I leave this motherfucker I guarantee you motherfuckers playing games with me right now, you [n-words] is gonna feel my motherfuckin pain, pain that I'm feeling right now, without having my kids around, [n-words] is gonna feel the pain that I'm feeling . . . and it ain't gonna last long."

Barnes called Serron four times between 12:30 a.m. and 12:52 a.m., but Serron did not answer. Barnes also called Michelle Nunn, his older sister, angrily asking "where Serron was because he isn't picking up the phone" and saying "[t]hey can call me about fireworks, but they won't pick up the phone. They playing games, but I am not."

Michelle, who is Serron's mother, began texting Serron around 2:30 a.m., telling him that Barnes was "basically tripping off his kids" and that he "needed to stay out of the way." According to Michelle, Barnes was angry that his son had called him for fireworks and was out for vengeance, and that Serron "need[ed] to stay out of that." Michelle was also concerned because Serron "was the main one that hung out with" Smith and Barnes' two children.

Barnes was required to wear a GPS bracelet as a condition of his house arrest. At 1:15 a.m. on July 5, the "tracker strap" and "proximity tamper" alerts went off on Barnes' bracelet. At 1:17 a.m., the bracelet was reset, but "the proximity tamper did not restore," meaning that there was no ankle in the bracelet. Barnes also placed the external battery on the bracelet at 1:17 a.m.; at 2:19 a.m., the bracelet beeped loudly for two full minutes to tell Barnes that it was fully charged, but nobody turned off the alarm. House arrest personnel did not respond to the alerts at that time. A later inspection confirmed that Barnes' bracelet was working fine, but a hole in the clip and a chipped corner indicated that it had been tampered with.

As Serron and Smith drove back to Smith's residence from the casino, they saw a white Cadillac near the house. Serron could not see the driver, but he did not think it was Barnes' car at first because Barnes was supposed to be on house arrest and because the car now had a racing stripe on top, rather than on the side. A surveillance video from the house across the street from Smith's residence showed Barnes' Cadillac drive by a little before 2:30 a.m. Michelle, who lived nearby and happened to be on her front porch to smoke a cigarette, also reported seeing Barnes' Cadillac driving by around this time, though she could not see the driver because he was wearing all black clothing.

Surveillance cameras from an elementary school one street to the west of Smith's residence recorded Barnes' Cadillac repeatedly circling the area around her residence between about 2:04 a.m. and 2:44 a.m. During this time, Barnes' Cadillac apparently collided with a parked Nissan on Smith's street, which damaged the Cadillac's front quarter panel and left one of the Cadillac's hubcaps in a neighbor's yard.

At 2:44 a.m., the Cadillac drove to a dumpster enclosure at the school, where its taillights turned off. A figure then walked down the street at 2:48 a.m., heading toward Smith's residence.

During this same time, Serron and Smith shot off fireworks briefly after they returned home; a neighbor's surveillance camera documented that they went inside at about 2:45 a.m. and 2:47 a.m. Once inside, Serron fell asleep on the couch while Smith was talking to him.

Serron then woke up "with someone in the kitchen and my auntie basically walking towards that person." The intruder was dressed all in black ("a zipped-up hoodie or a pullover and sweatpants") and wore a black mask and hood; all Serron could see was their eyes, which were brown. Serron thought the eyes looked like Barnes', and that the intruder shared Barnes' posture, size, and height.

Smith started walking towards the intruder "like she knew the person." Serron heard her say, "No," and "Jay" or "June," but by that point he was running because the intruder was holding something that "looked like an ax." (The family sometimes called Barnes "Junior" or "Uncle Junior.")

Serron dropped his cell phone at the front door, stopped to pick it up, and ran out the door. When he stopped to grab his phone, Serron looked back and saw Smith on the floor, screaming for help with the intruder standing over her.

At about 2:57 a.m., the neighbor's camera registered a loud popping noise, and then showed Serron running out the front door.

D.S., who was sleeping in the basement at the time of the break in, woke up a little before 3 a.m. to the sound of a loud boom and her mom, Smith, screaming. She locked the door and called 911. When she went upstairs "to get the cops," she saw her mom lying on the floor. Police arrived minutes later, at 3:04 a.m.

Responding officers found a grisly scene. Smith's body lay on the kitchen floor, which was covered in blood. Bloody footprints—beginning near Smith's body—led out the back door, down the back steps, and onto the patio beyond. The back doorjamb was damaged, with the striking plate on the floor; one investigator testified that this damage would be consistent with the door being kicked in.

Smith was dead. She "basically [had] half a head left," and something that appeared to be brain matter was lying on the floor beside her. "There was severe trauma to [Smith's] head to the point that . . . her face was unrecognizable to a point." Some unidentified weapon had carved at least three gouge marks into the linoleum floor around Smith's body, near where her head and neck had been. A bloodstain pattern analysis suggested that Smith was struck in the head multiple times, at least once while she was on

the floor, and before being moved. An autopsy revealed cuts to Smith's torso, fractures to her left ribs, injuries to the left kidney, large cuts to her neck—one on the left, one on the right—and massive injuries to Smith's head, caused by at least two blows—one to the back of her head, and one to her face. At least three of these wounds would have been independently fatal.

A police K9 picked up a scent from the back yard of the residence immediately to the west of Smith's. The dog followed it through an open gate and onto the street, where the dog lost the scent. A few days later, officers recovered a red-stained mattock beneath the parked camper in a neighbor's driveway, after one of the residents found it and alerted the police. This same neighbor always kept his gate closed, but it was open when the police found it.

Investigators found a black latex glove near where the Cadillac was parked on the night of July 5; they also found another glove near the curb, on the edge of the concrete gutter and blacktop. The gloves had been turned inside out. Testing revealed a high likelihood that the DNA inside the gloves belonged to Barnes, while the DNA from the red stains on the outside of the gloves (along with the mattock) belonged to Smith.

Barnes' Cadillac was later found on the shoulder of eastbound I-435, just east of Roe in Overland Park. Barnes admitted to investigators that he was the last one to drive his Cadillac, and that it overheated and broke down on I-435. In contrast to its appearance on July 2, the front passenger hubcap was missing, and the front passenger quarter panel had been significantly damaged. The car also had a flat tire. Inside, investigators found a black fleece mask, a black baseball cap, and black nitrile gloves. Different stains on the mask likely contained DNA from Smith and Barnes. Additionally, samples taken from a luminol-positive (and thus presumptively blood) stain from the subwoofer inside the Cadillac showed a high likelihood of Smith's DNA. The left front seat cushion and some of the carpeting on the floor were also luminol positive.

Traffic cameras captured a person walking at I-435 and Roe at about 3:18 a.m. Barnes Sr. told police that this figure looked

like Barnes to him. Then, at 4:08 a.m., a south-facing traffic camera at 102nd and Wornall—about 2 miles away from the camera at I-435 and Roe—recorded a similar person walking north, over the bridge spanning Indian Creek. Barnes' brother later identified the figure walking in the videos as Barnes based on his "very distinctive" way of walking and because, in the video from the Indian Creek bridge, "I know what my brother looks like from that angle." At 4:09 a.m., the person stopped at the midway point of the bridge and began to remove articles of clothing and shoes, and then threw them over the side of the bridge and into Indian Creek. After discarding the clothing, the figure continued heading north, shirtless and apparently barefoot.

A subsequent search of the creek below the bridge turned up a pair of shoes, two black socks, and a couple pairs of black shorts. Comparison revealed several associations between these shoes and footprints at the crime scene.

Barnes woke his father at about 5 a.m. to tell him "that people would be calling about his ankle monitor." Barnes had no shirt on. At 5:01 a.m., the ankle bracelet's charger battery was removed; at 5:02 a.m. the bracelet was reset—meaning that, from 1:15 to 5:02 a.m., no ankle was in the bracelet.

At about 11:30 a.m. that morning, Serron's phone received a text message from Barnes: "U NXT." Serron interpreted this to mean, "You're next." Barnes was later arrested, after his friend delivered Barnes to house arrest personnel to answer their questions.

The State charged Barnes with first-degree premeditated murder, aggravated burglary, tampering with electronic monitoring equipment, criminal threat (later clarified to allege Serron as the victim), and violation of a protective order.

The case went to jury trial, which lasted six days. The jury found Barnes guilty on all counts. The district court sentenced Barnes to lifetime imprisonment with a mandatory minimum of 620 months for first-degree premeditated murder, plus additional consecutive sentences of 172, 19, and 7 months for aggravated burglary, tampering with electronic monitoring equipment, and criminal threat, respectively; it sentenced Barnes to a 12-month concurrent sentence for violating a protective order.

Barnes directly appeals. 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).

Additional facts will be discussed below where relevant to the issues.

DISCUSSION

Because Section 10 of the Kansas Constitution Bill of Rights does not govern a district court's subject matter jurisdiction, Barnes' claim that K.S.A. 21-5106(b) violates Section 10 is unpreserved.

Barnes argues the territorial jurisdiction statute under which he was prosecuted for tampering with electronic monitoring equipment violates the Kansas Constitution. We find this argument is unpreserved for review.

Additional Facts

On July 5, 2020, the day of Smith's murder, Barnes was on house arrest ordered by the Johnson County District Court. House arrest is the "confinement of a person who has been accused or convicted of a crime to his or her home, usu[ally] ensuring the person's whereabouts by attaching an electronically monitored bracelet to the person." Black's Law Dictionary 883 (12th ed. 2024). Pursuant to this order of house arrest, Barnes wore a GPS ankle bracelet that enabled the house arrest supervisor to monitor Barnes' physical location at all times, and thus enabled that supervisor to determine whether Barnes was in compliance with the house arrest requirements. At all times pertinent, Barnes was living with his father in Kansas City, Missouri. Testimony at trial indicated the bracelet had been reset and was not in contact with an ankle in the early hours of July 5.

During closing argument, the State explained that even though the act of tampering occurred at Barnes' father's residence in Missouri, a Kansas statute, K.S.A. 21-5106, allowed prosecutors to

charge Barnes with the crime of tampering with electronic monitoring equipment if Barnes' activities in Missouri caused a proximate result in Kansas. The jury convicted Barnes of the charge.

Discussion

On direct appeal, Barnes argues his prosecution under K.S.A. 2020 Supp. 21-5106 violates section 10 of the Kansas Constitution Bill of Rights. This constitutional provision provides:

"In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial *by an impartial jury of the county or district in which the offense is alleged to have been committed.* No person shall be a witness against himself, or be twice put in jeopardy for the same offense." (Emphasis added.)

K.S.A. 2020 Supp. 21-5106(a) provides "[a] person is subject to prosecution and punishment under the law of this state if . . . [t]he person commits a crime wholly or partly within this state."

And K.S.A. 2020 Supp. 21-5106(b) provides:

"(b) A crime is committed partly within this state if:
(1) An act which is a constituent and material element of the offense;
(2) an act which is a substantial and integral part of an overall continuing criminal plan; or
(3) the proximate result of such act, occurs within the state."

We have unlimited review over questions of constitutional and statutory interpretation. *State v. Garcia*, 285 Kan. 1, 7, 169 P.3d 1069 (2007).

Barnes acknowledges he did not raise the constitutionality of K.S.A. 21-5106(b) before the district court. Generally, we only review unpreserved constitutional claims if one of our three prudential exceptions applies, but even the existence of one of these exceptions does not require us to reach the issue. E.g., *State v. Gutierrez-Fuentes*, 315 Kan. 341, 347, 508 P.3d 378 (2022) (noting three discretionary exceptions to the general preservation rules). We decline to review this issue under these exceptions.

Still, despite Barnes' failure to preserve the constitutional challenge to K.S.A. 21-5106(b), he asserts we must consider it anyway because the district court's subject matter jurisdiction over

the tampering charge hinged on the constitutionality of K.S.A. 21-5106(b). See *State v. Clark*, 313 Kan. 556, 560, 486 P.3d 591 (2021) (quoting *State v. Garcia-Garcia*, 309 Kan. 801, 806, 441 P.3d 52 [2019]) ("A jurisdictional question may be raised at any time and may also be raised sua sponte by the appellate court.").

We disagree that his argument implicates subject matter jurisdiction and take this opportunity to clarify and disentangle the concepts of jurisdiction, venue, and vicinage in Kansas. As one commentator has observed, these concepts have "significant (and confusing) overlap." Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 Wash. L. Rev. 271, 276 (2005). Our caselaw has been less than clear regarding these terms, though precision is of the utmost importance regarding these fundamental principles of our law. See, e.g., *Nicholson v. Mercer*, 319 Kan. 712, 715, 559 P.3d 350 (2024) (observing "imprecise language in our historical precedent" regarding subject matter jurisdiction "may have led to confusion by the parties and lower courts").

The Johnson County District Court had subject matter jurisdiction.

"Jurisdiction refers to the adjudicatory power or competency of the court[] and not to the rights of the parties as between themselves." 21 C.J.S. Courts § 12. A district court's legal authority to issue binding orders "requires both subject matter jurisdiction and personal jurisdiction." *Pieren-Abbott v. Kansas Dept. of Revenue*, 279 Kan. 83, 92, 106 P.3d 492 (2005).

"Personal jurisdiction involves a court's power to make an adjudication applicable to a person, contrary to that person's legal interests, and binding the particular person. A court's personal jurisdiction refers to its power to impose judgment on a particular person." 21 C.J.S. Courts § 44. In criminal cases, personal jurisdiction "is based on physical presence, usually obtained through arrest." Perritt, *Jurisdiction in Cyberspace*, 41 Vill. L. Rev. 1, 35 (1996).

"'Subject matter jurisdiction is the power of the court to hear and decide a particular type of action.'" *State v. Dunn*, 304 Kan. 773, 784, 375 P.3d 332 (2016) (quoting *State v. Matzke*, 236 Kan.

833, 835, 696 P.2d 396 [1985]). A Kansas state court's subject matter jurisdiction begins with a general grant of power from the Kansas Constitution, the parameters of which may be set by our Legislature through laws duly enacted. More specifically, subject matter jurisdiction

"derives from Article 3, sections 1, 3, and 6 of the Kansas Constitution. Those provisions grant Kansas courts jurisdiction as provided by law. Statutes serve as the usual mechanism for the law to define jurisdiction. . . . By statute, Kansas district courts 'have general original jurisdiction of all matters, both civil and criminal, unless otherwise provided by law.' [Citations omitted]." *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019).

Because a court's subject matter jurisdiction only arises from our Constitution or statute, the court's subject matter jurisdiction cannot be conferred upon a court "by consent, waiver, or estoppel." *Mercer,* 319 Kan. at 714; 21 C.J.S., Courts § 15. Without subject matter jurisdiction, a court has no power to order anyone to do anything. See *Benchmark Property Remodeling v. Grandmothers, Inc.*, 319 Kan. 227, 228, 553 P.3d 974 (2024) ("After all, a court without jurisdiction is no court at all, but an expensive debate club overseen by a powerless spectator in a black choir robe."). Even if unchallenged, every court has the duty to ensure it has subject matter jurisdiction over the type of the matter it addresses or its only recourse is to cease acting, to dismiss the matter. *Grandmothers*, 319 Kan. at 233.

"Territorial jurisdiction" has "sometimes [been] mentioned as a third jurisdictional requirement, in addition to subject matter and personal jurisdiction." 21 Am. Jur. 2d Criminal Law § 425 (citing *State v. Legg*, 9 S.W.3d 111, 114 [Tenn. 1999]). The general territorial jurisdiction rule is that a state may only prosecute a person for committing a crime within the state's borders. But, even at the common law, an exception existed for instances where a crime was committed outside the state's borders, but the result of the crime happened within the state's territorial limits. 1 Subst. Crim. L. § 4.4(a) (3d ed.); 4 Crim. Proc. § 16.4(c) (4th ed.). Over time, this common law rule was expanded and codified in statute. 1 Subst. Crim. L. § 4.4(b) (3d ed.); 4 Crim. Proc. § 16.4(c) (4th ed.). The early Kansas Territorial Statutes reflected these ideas, and the

various iterations of our post-statehood statutes similarly expanded Kansas' territorial jurisdiction to include certain instances where actions were committed beyond our borders. See, e.g., General Laws of the Territory of Kansas, 1859, ch. 27, sec. 16; K.S.A. 62-401 (Long), K.S.A. 62-404 (Long); K.S.A. 21-3104 (Torrence). K.S.A. 21-5106, the statute relied on by the State to prosecute Barnes for tampering with electronic monitoring equipment, is the current version of our territorial jurisdiction statute. *State v. Rozell*, 315 Kan. 295, 296, 508 P.3d 358 (2022); *State v. Hillard*, 315 Kan. 732, 776, 511 P.3d 883 (2022) ("territorial jurisdiction" refers to "which state has jurisdiction over the criminal proceedings").

Here, the Johnson County District Court had subject matter jurisdiction over Barnes' tampering charge. Article 3 of the Kansas Constitution gives the Legislature the power to define a district court's subject matter jurisdiction. Under that authority, the Legislature enacted K.S.A. 2020 Supp. 21-5106(b)(3), which provides that Kansas courts have jurisdiction over crimes committed partly in Kansas. This occurs when there is "a direct connection or nexus between the defendant's act or acts outside Kansas and the result in Kansas." *Rozell*, 315 Kan. at 301. The proximate result of Barnes tampering with his GPS bracelet occurred in Kansas because that tampering directly affected a Kansas court's ability to monitor Barnes' compliance with a Kansas district court's bond conditions. Therefore, since the prosecution was appropriate under K.S.A. 2020 Supp. 21-5106, the court had subject matter jurisdiction to try the tampering charge.

Barnes' Section 10, venue, and vicinage arguments are unpreserved.

Barnes' claim that the constitutionality of K.S.A. 21-5106(b) impacts the district court's subject matter jurisdiction hinges on an incorrect understanding of the relationship between venue, vicinage, and subject matter jurisdiction. Today we clarify that section 10 of the Kansas Constitution Bill of Rights only involves the former two; it does not impact subject matter jurisdiction.

"[V]enue is not a jurisdictional matter, but a procedural one." *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 546, 567 P.2d 1292

(1977); 21 C.J.S. Courts § 13 ("Venue is a procedural matter and refers not to the power of the court to hear a case but to the geographic location where a given case should be heard."). It describes the "proper or a possible place for a lawsuit to proceed, usu[ally] because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." Black's Law Dictionary 1876 (12th ed. 2024). Venue and subject matter jurisdiction are distinct, and a court's subject matter jurisdiction is not dependent on venue considerations. See 21 C.J.S. Courts § 13 ("Venue requirements are procedural only and have no relation to the question of jurisdiction. Venue does not control jurisdiction and is not a condition precedent to the court's jurisdiction. Proper venue does not establish jurisdiction, and improper venue does not defeat jurisdiction. On the other hand, venue can only be proper where jurisdiction already exists.").

The proper venue for a prosecution is set by the Legislature through statute. See, e.g., K.S.A. 22-2602; K.S.A. 22-2603; K.S.A. 22-2604. But even under these statutes, the venue may be changed in certain circumstances. See, e.g., K.S.A. 22-2616(1) (venue change mandatory upon defendant's motion with sufficient proof).

Unlike subject matter jurisdiction, a defendant's venue challenge may be waived, either by conduct express or implied, or through the failure to assert it timely, though the State still bears the burden of proving proper venue in a prosecution. See *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 453, 63 S. Ct. 1146, 87 L. Ed. 1509 (1943); *In re Estate of Raney*, 63 Kan. App. 2d 43, 51, 525 P.3d 1 (2023); *State v. Hillard*, 315 Kan. 732, 774, 511 P.3d 883 (2022); *State v. Robinson*, 303 Kan. 11, 283, 363 P.3d 875 (2015).

Vicinage, like venue, is similarly related to location, but speaks to "the place from which the jurors are drawn," rather than "the place where the trial is held." Kalt, *Crossing Eight Mile: Juries of the Vicinage and County-Line Criminal Buffer Statutes*, 80 Wash. L. Rev. at 276. Thus, "while the concept of venue does not inherently point to a particular district, but rather requires simply that a district be designated in a venue provision (constitutional or statutory), the concept of vicinage in itself identifies a particular geographical district and arguably limits the territorial scope of

that district." 4 Crim. Proc. § 16.1(b) (4th ed.). The vicinage right allowing a defendant's jury to be drawn from the community where the crime occurred existed in our common law, and was based on the idea that the defendant "may have the benefit of his own good character and standing with his neighbors, if these he has preserved [sic], and also of such knowledge as the jury may possess of the witnesses who give evidence before them." *State v. Bunker*, 38 Kan. 737, 741, 17 P. 651 (1888).

Section 10's right to "an impartial jury of the county or district in which the offense is alleged to have been committed" is a *vicinage* provision, not a *jurisdiction* provision. *Bunker*, 38 Kan. at 741. In *State v. Potter*, 16 Kan. 80, 97, 1876 WL 1000 (1876), we explained the "right is merely a personal privilege, bestowed upon the accused, which he can waive or insist upon at his option." See also *State v. Hayes*, 169 Kan. 505, 508, 219 P.2d 442 (1950) (observing section 10 rights "are mere personal privileges which may be waived at the option of the defendant in a criminal proceeding"). This provision in section 10 allows a defendant to assert their right to be tried in the county where the crime was committed. 16 Kan. at 97. In this way, it "operates indirectly as a limitation on venue." *State v. Criqui*, 105 Kan. 716, 720, 185 P. 1063 (1919). That is, section 10 addresses where the crime can be prosecuted, not whether Kansas courts have subject matter jurisdiction over the crime itself.

We acknowledge our caselaw has imprecisely used the terms venue and jurisdiction. The confusion between proper venue and a court's "jurisdiction" began in *State v. Knapp*, 40 Kan. 148, 19 P. 728 (1888). There, defendants were charged with first-degree murder in Wichita County. They requested a venue change to another county in the same judicial district, but the State objected. Ultimately, the trial was moved to Barton County, in a separate judicial district, over the defendants' objection. The defendants then moved to dismiss the case because the Barton County court did not have "jurisdiction." The court framed the issue as follows: "Did the district court of Barton county have jurisdiction to try the defendants and pronounce judgment in the cause?" *Knapp*, 40 Kan. at 149. The court concluded it did not.

In the intervening years, our court has often repeated this conceptual confusion. See, e.g., *Hillard*, 315 Kan. 732, Syl. ¶ 18 ("Kansas courts treat venue as a jurisdictional matter in criminal cases."); *State v. Kendall*, 300 Kan. 515, 530, 331 P.3d 763 (2014) ("Because venue is jurisdictional and implicates the district court's subject matter jurisdiction, our standard of review is de novo."); *State v. Myatt*, 237 Kan. 17, 30, 697 P.2d 836 (1985) ("The venue of an offense is jurisdictional."); *State v. Moore*, 226 Kan. 747, 750, 602 P.2d 1359 (1979) ("In Kansas, venue of an offense is jurisdictional, but the cases do not require that venue be proved by specific questions and answers that the offense occurred in a particular county."); *State v. Griffin*, 210 Kan. 729, 731, 504 P.2d 150 (1972) ("This court has recognized on many occasions that the venue of an offense is jurisdictional, and it must be proved to establish the jurisdiction of the court.").

But we clarified in *Dunn*, a court's subject matter jurisdiction is set by the Kansas Constitution and refined by the Legislature through statute. Procedural questions of venue, on the other hand, arise through statute and are indirectly limited by section 10's vicinage right. So even if properly raised in the district court, section 10's vicinage right does not undermine a district court's subject matter jurisdiction, which is rooted elsewhere in our founding document. Thus, Barnes' argument that his section 10 vicinage right deprived the court of subject matter jurisdiction is incorrect as a matter of law. Because Barnes' unpreserved argument does not impact subject matter jurisdiction—and because we decline to extend a discretionary exception to our usual preservation requirements—we need not address whether K.S.A. 21-5106(b) violates section 10.

Barnes' pro se subject matter jurisdiction claims are unpersuasive.

Barnes also argues, in his pro se brief, that K.S.A. 2020 Supp. 21-5106 did not apply because the tampering with an electronic monitoring device charge was not committed wholly or partly within Kansas. Because of this, his argument goes, the State failed to invoke the district court's subject matter jurisdiction because the charging document did not state "the essential facts constituting

the crime charged," pursuant to K.S.A. 22-3201(b). See *Dunn*, 304 Kan. at 811-12 ("A Kansas charging document should be regarded as sufficient now . . . when it has alleged facts that would establish the defendant's commission of a crime recognized in Kansas."). But since the prosecution was appropriate under K.S.A. 21-5106, a Kansas district court could try the tampering charge, and the State's charging document properly cited the court's subject matter jurisdiction to do so. *Dunn*, 304 Kan. at 811.

Barnes also argues the district court lost subject matter jurisdiction when it allowed the State to orally amend the complaint at Barnes' preliminary hearing to add a stalking charge. This claim, however, misunderstands subject matter jurisdiction. As we noted in *Dunn*, the Kansas Constitution—not charging documents—confers subject matter jurisdiction. *Dunn*, 304 Kan. at 811. Regardless, the stalking charge was later dismissed.

Barnes further suggests he was prejudiced "because the amendments caused the appellant to be bound over for trial when there was otherwise a lack of probable cause to do so." But the district court still had probable cause to bind Barnes over on the other charges against him. This probable cause decision was based on extensive evidence supporting the charges outlined in the original charging document. See *State v. Washington*, 293 Kan. 732, 734, 268 P.3d 475 (2012) (quoting *State v. Berg,* 270 Kan. 237, 238, 13 P.3d 914 [2000]) ("'Probable cause at a preliminary examination signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.'"). Barnes' pro se jurisdictional arguments are without merit.

The prosecutor's statements in closing argument were not error.

Barnes claims, through counsel, the prosecutor committed prosecutorial error in closing arguments by claiming the premeditation element of its premeditated murder charge was undisputed. In his pro se brief, Barnes also claims the prosecutor erred seven other times in closing by misrepresenting the State's evidence, offering their opinion, and making comments aimed at inflaming the jury's passion.

Preservation is not required—we decline the State's invitation to overrule precedent.

A contemporaneous objection is not required to preserve claims of prosecutorial error for appellate review. *State v. Timley*, 311 Kan. 944, 949, 469 P.3d 54 (2020).

The State asks us to overrule this precedent. But it fails to convince us our "plain error rule" for prosecutorial statements during closing arguments is erroneous or no longer sound. See *State v. Moeller*, 318 Kan. 860, 864, 549 P.3d 1106 (2024) (outlining the stare decisis test). Thus, "we will review a claim of prosecutorial error based on comments made during voir dire, opening statement, or closing argument even in the absence of a contemporaneous objection. We may, however, figure the presence or absence of an objection into our analysis of the alleged error." *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Standard of Review

We apply a two-step framework when reviewing claims of prosecutorial error. First, we consider whether the prosecutor exceeded the wide latitude prosecutors are given to conduct the State's case in a manner that does not offend a defendant's constitutional right to a fair trial. *State v. King*, 308 Kan. 16, 30, 417 P.3d 1073 (2018). We do not consider any statement in isolation, but look to the statement's context to determine whether error occurred. *Timley*, 311 Kan. at 949-50.

Next, if error is found, the State must show beyond a reasonable doubt the error did not affect the outcome in light of the entire record, i.e., "there is no reasonable possibility that the error contributed to the verdict." *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021); *State v. King*, 308 Kan. 16, 30, 417 P.3d 1073 (2018). We may consider the district court's jury instructions and the strength of the evidence against the defendant in determining whether any prosecutorial error is harmless. *Blevins*, 313 Kan. at 437. The strength of the evidence may inform this inquiry but should not be the primary focus; prejudice may be found even in strong cases. *State v. Sherman*, 305 Kan. 88, 111, 378 P.3d 1060 (2016) (citing *United State v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 240, 60 S. Ct. 811, 84 L. Ed. 1129 [1940]).

The prosecutor did not commit error in their comments.

Through counsel, and pro se, Barnes asserts the prosecutor erred in making several comments during closing arguments.

1. Comment that the premeditation element was "undisputed."

Barnes' first claim of prosecutorial error arises from the following remarks:

"The defendant intentionally killed Jessica Leigh Smith, the killing was done with premeditation and it occurred on July 5th of 2020 in Johnson County, Kansas. There are some of these that no one disputes. Jessica Smith was murdered on July 5th of 2020 in Johnson County, Kansas. It was certainly intentional. We know that. And it was definitely premeditated. There is no doubt about that.

"*There is only one element that we are disagreeing with here, the defendant*. So we will talk about that here in just a second.

"Count number 2 is aggravated burglary. The defendant entered or remained in a dwelling. We know [] is a house. That is where she lived. He did so without lawful authority. He kicked in the back door. *Did so with the intent to commit first degree premeditated murder. Yes*. At the time there was a human in the house. There is no dispute that there were three people in the house when the back door was kicked or shouldered in. And it occurred on July 5th, 2020, in Johnson County, Kansas." (Emphases added.)

Barnes argues the prosecutor "misrepresented that the premeditation element . . . was undisputed" because "[Barnes] never stipulated that [Smith's] killing was premeditated." Barnes claims that this misstatement "discouraged jurors from independently assessing whether trial evidence supported a beyond a reasonable doubt finding that [Barnes] committed a *premeditated* killing."

But Barnes takes the prosecutor's statements out of context. Rather than erroneously telling the jury that the matter of premeditation was settled, their remarks instead accurately framed the issue on which the parties would later focus: the killers' *identity* as "the big disagreement in this case."

The State's framing was well-founded. Barnes' trial counsel's entire closing argument centered on the claim that Barnes was not Smith's killer. Even in discussing an alternate suspect, Barnes' counsel never suggested that Smith's killing was not premeditated.

Barnes' counsel's emphasis on identity, not intent, was plainly strategic: the evidence for intentional, premeditated murder was overwhelming, as the prosecutor repeatedly emphasized—and as we will discuss below. Far from simply treating the question of premeditation as a fait accompli, the prosecutor emphasized the preparations necessary for—and the hatred underpinning—Barnes' plan to disregard house arrest and murder Smith while leaving what he thought to be no trace of his identity at the crime scene, and then return home before anyone was the wiser. And to the extent that Barnes' counsel offered *no argument* on premeditation, the prosecutor's comment that they were not "disagreeing" is an accurate framing of the defense's trial strategy. We find no error here.

2. "[W]e know [the GPS ankle bracelet] was tampered with over in Missouri."

Here, Barnes claims, pro se, that because "[n]o one testified to any tampering of the . . . GPS bracelet," the prosecutor's "comment is facts not in evidence." See *State v. Chandler*, 307 Kan. 657, 679-80, 414 P.3d 713 (2018) (error for a prosecutor to argue facts outside the evidence).

Barnes' argument both takes the prosecutor's comment out of context and misunderstands the nature and purpose of closing arguments. First, the prosecutor was not suggesting it was uncontroverted that the bracelet had been tampered with, but that it was uncontroverted the act *occurred in Missouri*:

"There is a lot of disagreement about [the tampering count]. We will come to that here in a moment. When it comes to jurisdiction of tampering, because it says that count occurred in Johnson County, Kansas, that might be a little—sound a little confusing *because we know that was tampered with over in Missouri.* But we have a statute in Kansas that addresses this specifically. It is a crime happens here in Kansas if the crime occurs partly in this state." (Emphasis added.)

Nor did the prosecutor simply leave the assertion that the bracelet "was tampered with" as if it was undisputed. Later in argument, the prosecutor spelled out the evidence supporting the claim that the bracelet was tampered with. In doing so, the prosecutor clarified that:

"[T]he State and the defense completely agree on this one fact. *His House Arrest bracelet is 100 percent at his dad's house in Missouri*. But his ankle isn't in it. That is what that evidence shows. That is what Doug Bell testified to you. The House Arrest bracelet has been tampered with. It has a pry mark in the chip." (Emphasis added.)

Thus, the prosecutor's remarks are fair comments on the evidence. Bell's testimony supports the prosecutor's assertion that the bracelet was tampered with. The prosecutor's remarks were not error.

3. "He is casing her house two days before the murder."

Barnes next claims "the prosecutor prejudicially led the jury to believe that the appellant was in the victim['s] neighborhood two days before she was murdered" by stating "he is [casing] her house two days before the murder." Barnes points out that "there is absolutely no evidence in the record that [Barnes] was ever anywhere near the victim['s] residence on this day."

The prosecutor's comment that Barnes was "casing" Smith's house represents an inference drawn from another inference, sometimes referred to as inference stacking. The evidence did not show that Barnes was *going* to Smith's house when his car broke down, much less that he was heading towards it with intent to "case" it. But inference stacking only matters insofar as a "conviction cannot be sustained by 'a presumption based upon other presumptions.'" *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021). Here, the prosecutor's remarks had little to do with the elements of Barnes' convictions; as Barnes' counsel pointed out, the State did not charge Barnes with stalking.

4. "There is DNA evidence that puts him there."
5. "He has got the murder weapon in his room."
6. Rebuttal comment: "He killed her. . . . He is the one who killed her."
7. Rebuttal comment: "How else do you know that this is Clyde Barnes who did this? Because nobody else . . . had a reason to do this to Jessica Smith. Nobody else hated her this much . . . ."
8. "He thought he could fool you by taking off his house arrest bracelet and leaving it at home."

In comments 4 through 8, Barnes alleges prosecutorial error based on what he describes as the prosecutor misstating evidence, stating facts not in evidence, or expressing an opinion. But in all these instances, we conclude the prosecutor's statements were fair commentary on the evidence. No error.

The district court did not err by admitting one antemortem photograph and five graphic postmortem photographs at trial.

Barnes challenges the district court's decision to admit six photographs at trial. He argues State's Exhibits 14-16, 98, 101, and 118 were unduly prejudicial with little to no probative value. He does not challenge the photographs' relevancy.

Standard of Review

The admission of even relevant evidence may still give rise to error if the evidence's "probative value is substantially outweighed by the risk of undue prejudice." *State v. D.W.*, 318 Kan. 575, 580, 545 P.3d 26 (2024); see K.S.A. 60-445. We review a district court's decision to admit relevant, prejudicial evidence for abuse of discretion. See, e.g., *State v. Thurber*, 308 Kan. 140, 203, 420 P.3d 389 (2018) (antemortem photographs); *State v. Baker*, 287 Kan. 345, 363, 197 P.3d 421 (2008) (postmortem photographs).

A district court abuses its discretion "by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching a legal conclusion not supported by factual findings, or (3) reaching a factual finding not supported by substantial competent evidence." *State v. Alfaro-Valleda*, 314 Kan. 526, 533-34, 502 P.3d 66 (2022). In the context of photographs,

> "'An abuse of discretion has occurred when the admitted photographs were unduly repetitious and cumulative or their introduction was solely for the purpose of prejudice. The admission of photographs in a murder case has rarely been held to be an abuse of discretion.
>
> "'Photographs depicting the extent, nature, and number of wounds inflicted are generally relevant in a murder case. Photographs which are relevant and material in assisting the jury's understanding of medical testimony are admissible. Specifically, photographs which aid a pathologist in explaining the cause of death are admissible. Photographs used to prove the manner of death and the violent nature of the crime are relevant and admissible.' [Citations omitted.]" *State v. Green*, 274 Kan. 145, 147, 48 P.3d 1276 (2002).

The Photographs

Barnes directs us to six photographs: three crime scene photographs, two autopsy photographs, and one identification photograph depicting Smith as she appeared while alive. Specifically:

- Exhibit 14 depicts Smith's body lying on the kitchen floor in a large pool of blood. While some of Smith's injuries can be seen—including what appears to be brain matter on the floor—the photograph is not a closeup.
- Exhibit 15 was taken directly over Smith as she lay on the kitchen floor. The injuries to her head, face, and throat can be seen clearly, as can what appears to be brain matter on the floor behind her.
- Exhibit 16 was taken just above the stairs leading down from the kitchen and depicts the blood leading from Smith's body—which lies in the upper right-hand corner, along with what appears to be brain matter on the floor—toward some stairs.
- Exhibit 98 is an autopsy photograph taken from above and to the right. It depicts Smith's nude body lying on a table in the morgue. Much of the blood that was present in the crime scene photos has been cleaned up. The injuries to Smith's head, face, and throat are clearly visible.
- Exhibit 101 is also an autopsy photograph. It was taken as a closeup on the injuries to Smith's head and face. It also depicts the wounds to her throat in detail.
- Exhibit 118 depicts Smith and D.S. together, as Smith appeared when she was alive. D.S. appears to be a teenager in the photograph, which is undated.

Additional Facts

At a pretrial hearing, Barnes' counsel objected to a proposed photograph of D.S. and Smith together. The prosecutor argued that it was "common practice in every murder case" to show the victim as they appeared in life, "[b]ut it's particularly important in this case because the victim was hideously disfigured" by the wounds that killed her. The district court overruled Barnes' objection. Later, at trial, the court admitted the photograph of D.S. and Smith together over Barnes' renewed objection.

Barnes also objected to various postmortem crime scene photos that showed Smith's body, including the massive, traumatic injuries to her head. In discussing State's exhibits 14—which showed Smith's body as it lay on her kitchen floor—Barnes' counsel argued that the photo was "so prejudicial that it will cause the jury not to be able to listen and to appropriately evaluate the evidence." The district court overruled the objection, opining that "based on the limited number of photographs the prosecutor is going to present, that it is necessary for the jury to see those." Barnes' counsel extended the same objections to exhibits 15 and 16, with the same result.

As to the autopsy photos, Barnes' counsel commented that the State's exhibits "101 and 98 . . . are, in my mind, as gruesome as can be." He suggested the photographs' prejudicial nature outweighed any evidentiary value. The prosecutor responded that exhibit 98 "is an overall body picture . . . which is a standard autopsy picture" and that 101 "is cleaned up and shows a fatal injury." The court ruled that it believed "there is a limited number of photographs, and I believe they may be difficult to view, but I do believe that they assist in showing cause of death." The court thus admitted exhibits 98 and 101.

Preservation

Barnes' counsel objected to the postmortem photos—exhibits 14, 15, 16, 98, and 101—because they were gruesome and unduly prejudicial. Barnes reprises this argument on direct appeal, which is preserved for review.

But the State argues Barnes' challenge to exhibit 118, the antemortem identification photo, is not preserved for review. The State contends Barnes' counsel only objected to the relevancy of the exhibit 118, not its prejudicial effect. See *State v. Robinson*, 306 Kan. 1012, 1028-29, 399 P.3d 194 (2017) ("This court does not allow parties 'to object to the introduction of evidence on one ground at trial and then assert another ground on appeal.'") (quoting *State v. Race*, 293 Kan. 69, 78, 259 P.3d 707 [2011]).

Barnes' counsel argued that the photograph "doesn't serve any legitimate element, evidence, argument, question." In response, the prosecutor argued, in part, that the photograph would not be

prejudicial. The district court, therefore, had prejudice in mind when it overruled Barnes' objection. We find that Barnes' challenge to exhibit 118 is preserved for review.

Antemortem Photograph: State's Exhibit 118

Barnes argues that, by depicting Smith together with D.S., the State's photograph "primarily served the purpose of eliciting sympathy for the deceased's surviving daughter."

The prosecutor introduced exhibit 118 on the morning of the second day of trial—during D.S.'s testimony—and took it down shortly thereafter. It did not come with any inflammatory personal details. The prosecutor only asked D.S. who the picture depicted and whether it was a fair and accurate depiction of Smith while she was alive. This treatment appears well in line with what we have approved in our precedent. See, e.g., *State v. Hebert*, 277 Kan. 61, 103, 82 P.3d 470 (2004) (no error in admitting photograph of victim which "was displayed one time early in the trial and was not accompanied by inflammatory personal details"). We find the court did not abuse its discretion in allowing the antemortem photo into evidence.

Postmortem Photographs: State's Exhibits 14-16, 98, 101

Barnes also argues that five photographs showing Smith's body after death were unduly prejudicial. Barnes acknowledges that it has been nearly 50 years since we found a gruesome photo should not have been admitted at trial. *State v. Boyd*, 216 Kan. 373, 377-78, 532 P.2d 1064 (1975); *State v. Clark*, 218 Kan. 18, 24, 542 P.2d 291 (1975). Still, Barnes claims these five photographs were "just as unspeakably horrific as the one described in" *Boyd.*

But *Boyd* is distinguishable. Unlike this case, the prosecutor in *Boyd* introduced 14 photographs of *just* the autopsy. *Boyd*, 216 Kan. at 377. We acknowledged that "[s]everal of the photographs show the angle at which the deceased's body was penetrated by a sharp instrument and would seem to be reasonably necessary to explain the testimony of the state's medical witness." 216 Kan. at 377. But we focused on one autopsy photograph that "showed the body of the deceased cut open from chin to groin and laid out like

a disemboweled beef in a packing plant. A flap of chest skin partially covers the deceased's face and the chest and abdominal organs of the deceased are presented in full view." 216 Kan. at 377-78. In other words, rather than presenting evidence documenting the victim's wounds as they were—the victim had been stabbed multiple times, but not disemboweled or split open, as the photograph depicted—the prosecution in *Boyd* introduced what was essentially a graphic medical photograph with little probative value. We expressed concern that the State was "offering repetitious exhibits to prove the same point"—especially the "gruesome and repulsive" autopsy photograph mentioned above. 216 Kan. at 377-78. We concluded the district court abused its discretion by allowing some of those photographs into evidence.

In contrast, the five objected-to photos here did not depict the results of a medical procedure. Smith's body had been cleaned of some of the blood in the autopsy photographs, but her injuries did not come from a coroner's knife, as in *Boyd*. See *Green*, 274 Kan. at 148 ("Here, the many injuries to the body depicted in the slides are the result of what the victim's killer did to her.").

And the photographs were not repetitious. The three crime scene photos—exhibits 14-16—were taken from different perspectives, variously illustrating the victim's placement on the kitchen floor, the bloody footprints, blood spatter on walls and appliances, and the severity of her injuries. These photographs helped corroborate witness testimony about the crime scene. See *State v. Verge*, 272 Kan. 501, 515, 34 P.3d 449 (2001) ("The positioning of the bodies, blood stain patterns, and the wounds inflicted all contributed to the State's establishing the element of premeditation."); *State v. Sutton*, 256 Kan. 913, 921, 889 P.2d 755 (1995) ("In the present case, the photographs taken where the body was found were introduced to corroborate the testimony of a law enforcement officer who described the appearance of the body, the clothing, and the surrounding ground.").

One autopsy photo—exhibit 101—focused on the victim's head and neck wounds. The other—exhibit 98—was a full-body photograph that illustrated the victim's wounds from a different angle. Each photograph provided unique information to the jury. See *State v. Showalter*, 318 Kan. 338, 351, 543 P.3d 508 (2024)

("We have long recognized photographs can depict injuries in a way that a coroner's testimony cannot."); *State v. Dupree*, 304 Kan. 43, 65, 371 P.3d 862 (2016) (finding no abuse of discretion regarding multiple autopsy photos because "each of the photographs corroborated the coroner's testimony by showing [victim's] body at different angles and distances").

And the State built the disfiguring, identity-erasing nature of Smith's wounds into its theory that Barnes was Smith's killer. The prosecutor argued that only Barnes "hated her this much" because "[s]he is responsible for everything bad in his life." Thus, only Barnes would keep "swinging and swinging again and again and again" after Smith had already been killed "to destroy her face . . . to disfigure her." The prosecutor thereby wove the nature of the injuries into a proposed narrative of motive: disfigurement and identity erasure based on absolute hatred. And to make that case, the prosecutor would have been hard pressed to rely on testimony alone. Shocking as the photographs of Smith's body may be, their relation to the State's theory was significant. And, as we have often acknowledged, "Gruesome crimes result in gruesome photographs." See *Green*, 274 Kan. at 148 (no abuse of discretion in admission of photographs depicting the results of an "incredibly violent and gruesome homicide" where "[a]t least 11 massive blows to the head were inflicted and did horrific damage to the face and skull" and "near decapitation resulted from multiple sawing motions from a sharp object"—despite a juror fainting during the presentation).

Thus, while the photographs were undoubtedly disturbing, we conclude the district court did not abuse its discretion in admitting the challenged photographs.

Barnes' premeditation jury instruction was not erroneous.

Barnes argues that the PIK's definition of "premeditation" misstates the law and, thus, constitutes clear error.

Standard of Review

We apply a multi-step analysis when presented with a claim of error based on jury instructions.

"(1) First, the appellate court should consider the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; (2) next, the court should use an unlimited review to determine whether the instruction was legally appropriate; (3) then, the court should determine whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and (4) finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in [*State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012)]." *State v. Plummer*, 295 Kan. 156, 163, 283 P.3d 202 (2012).

"The first element of this analysis ultimately affects the last one 'in that whether a party has preserved an issue for review will have an impact on the standard by which we determine whether an error is reversible.'" *State v. Ross*, 310 Kan. 216, 223, 445 P.3d 726 (2019) (quoting *State v. Barber*, 302 Kan. 367, 377, 353 P.3d 1108 [2015]). When a defendant does not object to a jury instruction:

"we apply the clear error standard mandated by K.S.A. 2017 Supp. 22-3414(3). Under that standard, an appellate court assesses whether it is 'firmly convinced that the jury would have reached a different verdict had the instruction error not occurred.' [The defendant] has the burden to establish reversibility, and in examining whether he has met that burden we make a de novo determination based on the entire record. [Citations omitted.]" *State v. Williams*, 308 Kan. 1439, 1451, 430 P.3d 448 (2018).

Discussion

Barnes did not object to the premeditation instruction. We therefore review his claim for clear error. His argument addresses a portion of Instruction No. 11, which read, in relevant part:

"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 requires more than the instantaneous, intentional act of taking another's life. (PIK 4th 54.150)"

Barnes focuses on the phrase "in other words, to have formed the design or intent to kill before the act." Although this language comes from the PIK, he argues it "conveys, wrongly, that premeditation is a *merely* temporal consideration, and that intent formed before an act *necessarily* constitutes premeditation." See *State v. Stanley*, 312 Kan. 557, 573, 478 P.3d 324 (2020) ("In other words,

what distinguishes premeditation from intent is both a temporal element [time] and a cognitive element [consideration].").

Instead, Barnes argues that the PIK should be revised as follows:

"Premeditation means to have thought the matter over beforehand~~, in other words, to have formed the design or intent to kill before the act~~. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life. *Premeditation 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.*"

Barnes takes this language from *Stanley*. 312 Kan. at 574. But since *Stanley*, we have considered whether it is error if a district court does not give this expanded instruction. In these cases, we concluded it was not error because the PIK alone, which Barnes received, was not misleading and accurately explained the law of premeditation. *State v. Dotson*, 319 Kan. 32, 51-52, 551 P.3d 1272 (2024); *State v. Coleman*, 318 Kan. 296, 313-14, 543 P.3d 61 (2024); *State v. Hilyard*, 316 Kan. 326, 335, 515 P.3d 267 (2022). Despite Barnes' urging, we see no reason to depart from these cases. The district court's use of the standard PIK instruction was not error, let alone clear error.

The district court's decision not to instruct the jury on intentional second-degree murder was not clear error.

Barnes next argues the district court committed clear error by not instructing the jury on intentional second-degree murder as a lesser included offense of premeditated first-degree murder.

Invited Error

The State argues Barnes invited any error on this issue. We have explained that "[t]he invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal." *State v. Slusser*, 317 Kan. 174, 179, 527 P.3d 565 (2023). We have unlimited review over whether the invited-error doctrine applies. 317 Kan. at 179.

At the jury instructions conference, Barnes' counsel said the following:

"I do note that when I looked at the instructions, there are lesser-included. Now, I talked with my client about this before. We had a video, Zoom, whatever you call it, conference yesterday. He was at New Century. I was in my office. And we talked quite a bit about whether or not on his behalf I should recommend any lesser-included. We went over why we should, why we shouldn't. We came to the agreement Mr. Barnes doesn't want me to request lessers. I'm not so sure there are anyhow, but he has asked me to not ask for any lesser-included."

After the prosecutor responded, the court commented:

"As far as the lesser-included, the Kansas Supreme Court has put the onus on the Court rather than the lawyers whether or not you request it or not on a lesser-included, but the Court isn't going to give a lesser-included and I don't believe the evidence comports with the giving of a lesser-included in this case."

The district court did not give an intentional second-degree murder instruction.

Based on this exchange, the State argues that since Barnes "affirmatively requested the jury *not* be instructed on any lesser-included offenses," Barnes should be "precluded from claiming any error."

We have repeatedly refined our invited-error analysis in recent years, with several marginal variations in fact pattern. See, e.g., *State v. Martinez,* 317 Kan. 151, 167-69, 527 P.3d 531 (2023); *State v. Roberts*, 314 Kan. 835, 845-47, 503 P.3d 227 (2022); *State v. Douglas*, 313 Kan. 704, 707, 490 P.3d 34 (2021). "The ultimate question is whether the record reflects the defense's action in fact induced the court to make the claimed error." *Douglas*, 313 Kan. at 708.

The comments made by Barnes' counsel are nearly identical to the comments in *Douglas.* There, the court asked defense counsel whether they would be requesting any lesser included offense instructions. Counsel replied: "I know that I am not requesting any lesser included offenses and indeed there may not be any applicable ones either." *Douglas*, 313 Kan. at 707. The court agreed. Here, counsel explained he was not requesting any lesser included instructions, and that he was unsure whether they were even appropriate. The court explained it was not giving a lesser-included offense instruction because doing so was unsupported by the evidence.

As in *Douglas*, we find that Barnes' counsel's statement did not induce the district court to omit an intentional second-degree murder instruction. *Douglas*, 313 Kan. at 709. The court's comments instead show it made its decision independent of counsel's statement. Because there was no causal connection between counsel's statement and the court's instruction decision, the invited error doctrine does not apply. See *Martinez,* 317 Kan. at 167-69; *Roberts*, 314 Kan. at 847.

Merits

K.S.A. 22-3414(3) provides: "In cases where there is some evidence which would reasonably justify a conviction of some lesser included crime as provided in subsection (b) of K.S.A. 21-5109, and amendments thereto, the judge shall instruct the jury as to the crime charged and any such lesser included crime." Jury instructions must be both factually and legally appropriate. *State v. Flack*, 318 Kan. 79, 127, 541 P.3d 717 (2024).

Both parties agree that an intentional second-degree murder instruction would have been legally appropriate. *State v. Gray*, 311 Kan. 164, 173, 459 P.3d 165 (2020). Barnes also argues it was factually appropriate. We assume without deciding that the instruction was factually appropriate and turn to the harmless error analysis. *Douglas*, 313 Kan. at 710; *State v. Gray*, 311 Kan. 164, 174, 459 P.3d 165 (2020); *State v. Becker*, 311 Kan. 176, 184, 459 P.3d 173 (2020); *State v. Ross*, 310 Kan. 216, 223, 445 P.3d 726 (2019); *State v. Louis*, 305 Kan. 453, 459, 384 P.3d 1 (2016).

"Premeditation may be shown by circumstantial evidence, provided inferences are reasonable. Our caselaw identifies five factors to consider when deciding whether circumstantial evidence gives rise to an inference of premeditation: '(1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless.' Inferences reasonably drawn are not driven by the number of factors present in a particular case, because in some cases one factor alone may be compelling evidence of premeditation. [Citations omitted.]" *State v. Hilyard*, 316 Kan. 326, 331, 515 P.3d 267 (2022).

The State presented significant evidence supporting premeditation. Barnes' angry, threatening Facebook rant, his deliberate choices in clothing, mask, and gloves to obscure his identity, his

actions in driving both to Smith's residence and then repeatedly circling the block, and the many lethal blows he rained down upon her with a mattock he brought with him—including at least some while she was helpless and on the ground—without provocation, after kicking in her back door at 3 a.m., all strongly support the jury's finding of premeditation.

The State, therefore, presented overwhelming evidence of premeditation at Barnes' trial. Because of this, we conclude failing to provide an intentional second-degree murder instruction was not clear error. See *Douglas*, 313 Kan. at 710 ("When there is overwhelming evidence of premeditation, a defendant will fail to firmly convince an appellate court that a jury would have found the defendant guilty of second-degree intentional murder if the lesser included instruction had been offered.").

Finally, the State asks us to change our analysis for jury instruction errors. But the State provides no compelling argument that our current analysis was originally erroneous or is no longer sound because of changing conditions and more good than harm will come from changing the law. *Moeller*, 318 Kan. at 864. We therefore reject the State's request.

Sufficient evidence supported Barnes' conviction for tampering with electronic monitoring equipment.

Barnes argues there was insufficient evidence to support his conviction of unlawfully tampering with electronic monitoring equipment in violation of K.S.A. 21-6322.

Standard of Review

In a sufficiency analysis, we review all the evidence in a light most favorable to the State and determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022). We generally do not reweigh the evidence or make credibility determinations. 316 Kan. at 350.

"A reviewing court need only look to the evidence in favor of the verdict to determine whether the essential elements of a charge are sustained." *Zeiner*, 316 Kan. at 350. "Sufficient circumstantial

evidence does not need to exclude every other reasonable conclusion to support a conviction." 316 Kan. at 350. And "even the gravest offense can be based entirely on circumstantial evidence." 316 Kan. at 350.

Discussion

The jury convicted Barnes of one count of unlawfully tampering with electronic monitoring equipment. K.S.A. 21-6322(a) defines the crime:

"(a) Unlawfully tampering with electronic monitoring equipment is, knowingly and without authorization, removing, disabling, altering, tampering with, damaging or destroying any electronic monitoring equipment used pursuant to court ordered supervision or as a condition of post-release supervision or parole."

The jury instructions broke the crime into three elements:

"1. The defendant knowingly and without authorization removed or tampered with electronic monitoring equipment.

"2. The electronic monitoring equipment was being used as a condition of court-ordered supervision.

"3. This act occurred on or about the 5th day of July, 2020 in Johnson County, Kansas. (PIK 4th 63.131)."

Barnes argues this charge "consist[s] of layers of assumptions and inferences." He notes that house arrest officers claim the bracelet set off alarms, and from that they assumed the bracelet was removed. This appears to be a challenge of the State's evidence supporting the first element: that Barnes removed or tampered with the bracelet.

At trial, Doug Bell, a house arrest supervisor for the Johnson County Department of Corrections, testified for the State. His testimony provided evidence that: (1) Barnes' bracelet issued a strap tamper alert at 1:15 a.m. on July 5, meaning the strap had been opened; (2) Barnes' bracelet also issued a proximity tamper alert at 1:15 a.m. on July 5, meaning there was no ankle in the bracelet; (3) Barnes' bracelet showed signs of physical tampering; (4) the strap tamper alert ended at 1:17 a.m. but the proximity alert did not; (5) the external battery was placed on the bracelet at 1:17 a.m.; (6) the battery loudly beeped for two minutes at 2:19 a.m. with no response; (7) the battery was removed from the bracelet at 5:01 a.m. and then everything was reset one minute later.

This evidence paints the picture of Barnes physically tampering with the bracelet to remove it at 1:15 a.m., closing the strap without his ankle inside two minutes later, placing the battery on the bracelet, not turning off the two-minute-long beeping alert at 2:19 a.m., and then putting the bracelet back on at 5:02 a.m. In short, the State presented both physical and electronic evidence suggesting Barnes removed his bracelet.

Barnes also argues his conviction required inference stacking, his conviction required impermissible speculation, and his sufficiency argument translates into violations of the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Confrontation Clause. But these claims are only incidentally briefed and are therefore waived. *State v. Gomez*, 290 Kan. 858, 866, 235 P.3d 1203 (2010). Accordingly, we conclude sufficient evidence supported Barnes' conviction.

Cumulative error did not deny Barnes a fair trial.

Finally, Barnes argues cumulative error prevented him from having a fair trial. But we only assumed without deciding that one error existed regarding the intentional second-degree murder instruction. "The cumulative-error doctrine does not apply when only one error has been identified." *Dotson*, 319 Kan. at 54. And at any rate, the omission did not constitute clear error, so we do not consider it when conducting a cumulative error analysis. *State v. Waldschmidt*, 318 Kan. 633, 662, 546 P.3d 716 (2024). The cumulative error doctrine does not provide Barnes with relief. And finding no other errors that require reversal, we affirm Barnes' convictions and sentence.

Affirmed.

No. 124,348

CATHY L. STROUD, *Appellant*, v. OZARK NATIONAL LIFE INSURANCE CO. and STEPHEN I. GUINN, *Appellees.*

(564 P.3d 725)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Action Shall Be Prosecuted in the Name of the Real Party in Interest.* K.S.A. 2024 Supp. 60-217 requires that an action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced. A substantive right to recover in a particular action is neither enlarged nor restricted by the real party in interest statute.

2. NEGLIGENCE—*Claim of Breach of Fiduciary Duty—Three Elements.* To establish a breach of fiduciary duty, a plaintiff must prove: (1) the existence of a duty arising from a fiduciary relationship; (2) a breach of duty; and (3) an injury resulting proximately from the breach of duty.

3. FIDUCIARY RELATIONSHIP—*Defining Characteristics and Duties of Fiduciary Relationship a Question of Law—Question of Fact Whether Facts Establish Essential Characteristics.* Defining the essential characteristics of a fiduciary relationship and the duties that arise from those relationships presents a question of law. Determining whether the facts establish those essential characteristics presents a question of fact that, in the context of a summary judgment dispute, requires courts to resolve all facts and inferences in favor of the party against whom the ruling is sought.

4. SAME—*Determination Whether Fiduciary Duty Established.* A fiduciary duty arises when one party is in a position of peculiar or special confidence that allows the person to have and exercise influence over another. In a fiduciary relationship, the property, interest, or authority of the other is generally entrusted to the fiduciary.

5. SAME— *Fiduciary Duty Arises as Matter of Law or Question of Fact When Implied in Law.* A fiduciary duty may arise as a matter of law or as a question of fact when implied in law based on the factual situation surrounding the parties' transactions and relationships.

6. SAME—*Requirement of Conscious Assumption of Fiduciary Duties by Alleged Fiduciary.* Those who are competent and able to protect their interests may not abandon all caution and responsibility for their own protection and unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the person alleged to be a fiduciary.

7. APPEAL AND ERROR—*Failure to Raise Adverse Rulings or Questions Means Question Is Unpreserved and Not Considered on Appeal.* Under Supreme Court Rule 8.03(b)(6)(C)(i) (2024 Kan. S. Ct. R. at 56), the failure to raise adverse rulings or questions not addressed through a petition, cross-

petition, or conditional cross-petition for review usually means the question is unpreserved and will not be considered. But plain errors may be considered.

8. SAME—*Plain Error—Appellate Court Will Address Even if Parties Fail to Raise Proper Objection at Trial.* Plain error is an error that is so obvious and prejudicial that an appellate court should address it despite the parties' failure to raise a proper objection at trial.

9. SAME—*Plain Error Exception—Supreme Court Will Review Errors Not Preserved if Necessary or Would Lead to Confusing Precedent*. The plain error exception in Supreme Court Rule 8.03(b)(6)(C)(i) may allow the Kansas Supreme Court to review errors not preserved through a petition, cross-petition, or conditional cross-petition for review when the point is a necessary analytical step such that a failure to discuss the question could lead to confusing or misleading precedent.

10. SUMMARY JUDGMENT—*If No Genuine Issue Any Material Fact Exists—Court Will Enter Summary Judgment.* Summary judgment should be rendered forthwith if pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact.

11. NEGLIGENCE—*Elements of Negligent Misrepresentation Defined in Restatement (Second) of Torts § 552.* Kansas has defined the elements of negligent misrepresentation by adopting Restatement (Second) of Torts § 552, which is limited to situations in which a defendant supplies false information. The Restatement and Kansas caselaw distinguish the torts of misrepresentation by affirmative statement and misrepresentation by silence or nondisclosure.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 10, 2022. Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Oral argument held April 11, 2023. Opinion filed February 28, 2025. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Roger K. Wilson, of Arn, Mullins, Unruh, Kuhn & Wilson, LLP, of Wichita, argued the cause and was on the briefs for appellant.

William E. Hanna, of Stinson LLP, of Wichita, argued the cause, and *Christina J. Hanson*, of the same firm, was with him on the briefs for appellees.

The opinion of the court was delivered by

LUCKERT, C.J.: Cathy L. Stroud sued Ozark National Life Insurance Company and its agent and manager Stephen Guinn for negligent misrepresentation and breach of fiduciary duty after her husband, Alan Stroud, converted his term life insurance policy to

a whole life policy that reduced the death benefit provided to her as the sole beneficiary. Her lawsuit ended in the district court when the district court judge granted the insurance company and its agent summary judgment. Cathy appealed to the Court of Appeals, which affirmed the district court's judgment. *Stroud v. Ozark National Life Ins. Co.*, No. 124,348, 2022 WL 2114769, at *5 (Kan. App. 2022) (unpublished opinion).

On review of that decision, we affirm the district court and the Court of Appeals.

FACTS AND PROCEDURAL BACKGROUND

Alan bought a 20-year term life insurance policy with a $60,000 death benefit from Ozark National Life Insurance agent Gene Spoon in 2002. Alan was the owner of the term policy, and he named Cathy as his sole beneficiary.

The policy allowed Alan to convert the term policy to a whole life insurance policy before the end of the 20-year term. If he did not convert the policy, his premium would increase sharply to as much as a specified "guaranteed maximum" amount. At the time of purchase, Ozark National provided Alan with a Statement of Policy Cost and Benefit Information and a Life Insurance Policy Illustration, which he signed and received for his records. Copies of these documents were exhibits attached to Ozark's motion for summary judgment. They listed the maximum premiums throughout the 20-year term, in year 20, and in later years.

About three years before the end of the 20-year term, Alan suffered a hemorrhagic stroke. The stroke affected his coordination, reading, and, in Cathy's words, his ability "to deal with numbers." Doctors discovered Alan needed heart surgery that would require travel to Houston, Texas. The trip and surgery were to occur as soon as Alan recovered sufficiently from his stroke.

While Alan was awaiting the opportunity to go to Houston, Stephen Guinn called the Strouds' home. Cathy answered the phone. Guinn introduced himself as an agent for Ozark National. (We will use Ozark National when referring to the insurance company and Ozark when referring collectively to Ozark National and its agent Guinn.) Guinn explained he was calling because the agent who sold the policy had not called for a while to visit with

Alan about his term life insurance policy. Cathy asked whether the selling agent had retired. Guinn did not answer. Cathy told Guinn about Alan's imminent surgery. She said they would need to meet as soon as possible if they needed to discuss the policy.

The next day, Guinn went to the Stroud home and talked with Alan and Cathy. By the end of the meeting, Alan signed paperwork converting his term life insurance policy with a death benefit of $60,000 to a whole life insurance policy with a $30,000 death benefit. Alan again named Cathy as the sole beneficiary. He made his first payment on the new policy, and Ozark National later confirmed the conversion and informed Alan "[t]he benefits associated with the term coverage are now null and void." It refunded the unearned premium on the term policy.

Alan went to Houston and had surgery but died a few months after the new whole life insurance policy went into effect. After Ozark National paid the $30,000 benefits on the whole life policy, Cathy wrote the Ozark National legal department requesting payment of the $60,000 benefit she would have received if Alan had not converted the policy. Cathy claimed that Alan would not have changed the policy but for Guinn's advice that was contrary to the Strouds' best interests. Ozark National declined Cathy's request.

Cathy then filed suit. After the parties completed discovery, a pretrial order was entered. The order sets out Cathy's contentions and theories of recovery, stating that Guinn, as Ozark's agent, "made negligent misrepresentations and breached his fiduciary duty to Plaintiff and her now deceased husband, Alan C. Stroud, in May of 2019 when he convinced and allowed them to convert the existing $60,000.00 term life insurance policy on Mr. Stroud's life to a $30,000.00 whole life insurance policy." It added that the Strouds placed special trust and confidence in Guinn when he "advised, sold and allowed them to convert" the policy and that, "[i]n equity and good conscience, Defendant Guinn was bound to act in good faith and with due regard to the best interests of the Plaintiff and her husband."

Citing Cathy's contentions in the pretrial order, Ozark moved for summary judgment arguing her claims failed as a matter of law. The district judge granted the motion. Cathy appealed to the

Court of Appeals, which affirmed the district judge's decision as right for the wrong reasons. See *Stroud*, 2022 WL 2114769, at *5.

Cathy timely petitioned for this court's review. We granted her request and have jurisdiction under 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 on petition for review).

ANALYSIS

An appellate court's review of a district judge's decision to grant summary judgment is guided by long-established principles that govern the district judge's consideration of the motion:

> "'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case.'" *Schreiner v. Hodge*, 315 Kan. 25, 30, 504 P.3d 410 (2022) (quoting *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432 [2018]).

Here, Cathy has alleged that Guinn negligently misrepresented information about Alan's life insurance options. "While summary judgment is rarely appropriate in negligence cases, it is proper if a plaintiff fails to establish a prima facie case demonstrating the existence of [the] four elements" of negligence: a duty, a breach of that duty, an injury, and proximate cause. *Montgomery v. Saleh*, 311 Kan. 649, 653, 466 P.3d 902 (2020). A plaintiff establishes a prima facie case by presenting "'evidence which, if left unexplained or uncontradicted, would be sufficient to carry the case to the jury and sustain a verdict in favor of the plaintiff on the issue it supports.'" *Robbins v. City of Wichita,* 285 Kan. 455, 470, 172 P.3d 1187 (2007) (quoting *Baker v. City of Garden City*, 240 Kan. 554, 557, 731 P.2d 278 [1987]). A plaintiff may establish a prima facie case using circumstantial evidence. And a plaintiff need "not exclude every other reasonable conclusion as

long as it forms a basis from which a jury could draw a reasonable inference." *Montgomery,* 311 Kan. at 663.

Appellate courts apply the same rules when reviewing an order granting summary judgment and have unlimited review over a district judge's summary judgment orders. *Schreiner*, 315 Kan. at 30; *Fairfax Portfolio v. Carojoto*, 312 Kan. 92, 94, 472 P.3d 53 (2020).

1. *Defining a Real Party in Interest*

Throughout this litigation, Ozark has asserted that Cathy is not the real party in interest to bring this lawsuit, meaning she is not the right person to bring this case. See K.S.A. 2024 Supp. 60-217. It contends that, if a claim is to be made, it needs to be prosecuted by a representative of Alan's estate or someone else on his behalf because Alan was the person who contracted with Ozark and owned the policy. Ozark asserts Cathy lacks real-party-in-interest status even though she was the sole beneficiary because Ozark National contracted with Alan and thus she was not the policy owner, had no duty to pay the premiums, and lacked control over Alan's choice of a beneficiary.

Despite knowing that Ozark questioned her ability to assert claims on Alan's behalf, Cathy failed to preserve her ability to do so. And in fact, she denied she was asserting any claims on Alan's behalf in her response to Ozark's summary judgment motion. So, as the case is presented, neither Alan nor his estate are a party, and Cathy waived arguments that claims on Alan's behalf are at issue. She thus has not preserved any claims on Alan's behalf and no claims on his behalf are before us in this appeal. See *In re N.E.*, 316 Kan. 391, 407-08, 516 P.3d 586 (2022) (discussing need to preserve arguments); see also Kansas Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 35).

Cathy instead argues she was harmed by Guinn's actions and that duties were owed to her (or to her and Alan jointly) and she thus has a right to proceed as a beneficiary under the contract between Alan and Ozark. To explore whether she does, we begin by examining Kansas statutes and caselaw. Both the interpretation of the real party in interest statute—K.S.A. 2024 Supp. 60-217—and whether Cathy is a real party in interest present questions of law

subject to our unlimited review. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020).

Under K.S.A. 2024 Supp. 60-217, "[a]n action must be prosecuted in the name of the real party in interest." But the statute does not define "real party in interest." It does list some persons who "*may* sue in their own names without joining the person for whose benefit the action is brought." (Emphasis added.) K.S.A. 2024 Supp. 60-217(a)(1). The list includes an executor, an administrator, "a party with whom or in whose name a contract has been made for another's benefit," and "a party authorized by statute." K.S.A. 2024 Supp. 60-217(a)(1).

The Court of Appeals interpreted the list in K.S.A. 2024 Supp. 60-217(a)(1) as exclusive and concluded this means the Legislature intended a party must use an executor or an administrator of the decedent's estate when suing on behalf of a decedent who made a contract for another's benefit. See *Stroud*, 2022 WL 2114769, at *14. But they cite no authority for reading the list as exclusive, and K.S.A. 2024 Supp. 60-217(a)(1)'s wording does not support such a narrow interpretation.

Instead, the word "may" usually implies something is permissive, optional, or discretionary, and it will not be read "'as a word of command unless there is something in context or subject matter of [the statute] to indicate that it was used in such sense.'" *State ex rel. Secretary of SRS v. Jackson*, 249 Kan. 635, 642, 822 P.2d 1033 (1991); Black's Law Dictionary 1169 (12th ed. 2024) (defining "may" as "[t]o be permitted" but acknowledging some courts have held "may" is synonymous with "shall" when necessary to implement legislative intent). This permissive language suggests the listed individuals *may* bring an action on behalf of those who benefit from the action in the sense that doing so is not procedurally objectionable. But the statute does not require them to be the plaintiffs.

Ozark argues, however, that in this situation the Legislature did not intend a permissive use of "may" and thus it should be interpreted as a "shall." It also contends that Alan's estate is the real party in interest because he owned the policy and the plain language of K.S.A. 2024 Supp. 60-217 allows—indeed, requires—the estate to seek the life insurance payment on behalf of

the beneficiary (Cathy). We reject this argument because Kansas caselaw supports our plain language reading of "may" in K.S.A. 2024 Supp. 60-217 as permissive.

We have held that K.S.A. 2024 Supp. 60-217 requires that "'[a]n action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced,'" but that "substantive right to recover in a particular action is neither enlarged nor restricted by the provisions of the real party in interest rule." *Torkelson v. Bank of Horton*, 208 Kan. 267, 270, 491 P.2d 954 (1971). While a third-party representative listed in K.S.A. 2024 Supp. 60-217(a) may bring the action, others may have a substantive right to recover.

We thus must look at the substantive law. When we do, we find at least colorable arguments that Cathy was a real party in interest. See *Pizel v. Zuspann*, 247 Kan. 54, Syl. ¶ 4, 795 P.2d 42, *modified on other grounds* 247 Kan. 699, 803 P.2d 205 (1990) (trust beneficiaries allowed to sue attorney who drafted trust agreement); *In re Hilliard's Est*., 172 Kan. 552, 554, 241 P.2d 729 (1952) (predating adoption of K.S.A. 60-217; holding widow was the real party in interest entitled to sue to enforce alleged oral contract between her deceased husband and her son that obligated deceased husband to leave farm operated by son to widow).

Because the substantive law must be considered, we move to a discussion of Cathy's claims and the law that surrounds those claims. Only if the claims survive summary judgment on substantive grounds will we delve into whether Cathy is the real party in interest.

2. *Breach of Fiduciary Duty*

Turning to Cathy's claim of breach of fiduciary duty, to establish a prima facie case she must prove: (1) the existence of a duty arising from a fiduciary relationship; (2) a breach of duty; and (3) an injury resulting proximately from the breach. *Schneider v. The Kansas Securities Comm'r*, 54 Kan. App. 2d 122, 152, 397 P.3d 1227 (2017). The district judge and the Court of Appeals focused

on the first of these requirements, examining whether Cathy established a duty arising from a fiduciary relationship.

Ozark argued Cathy failed to present facts that gave rise to a fiduciary duty, and the district judge identified two ways Cathy failed to counter this argument. First, the judge cited *Spencer v. Aetna Life and Casualty Ins. Co*., 227 Kan. 914, 611 P.2d 149 (1980), which the judge read as broadly holding that an insured cannot bring a claim against an insurance company and its agents for breach of fiduciary duty. Second, the judge quoted *Linden Place v. Stanley Bank*, 38 Kan. App. 2d 504, Syl. ¶ 5, 167 P.3d 374 (2007), for its holding that a plaintiff cannot "unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary." He then determined that "Plaintiff offers no information that Defendant Guinn made any conscious assumption that he was forming a fiduciary relationship with Mr. Stroud or Plaintiff."

Standard of Review

Our focus is thus also on whether Guinn owed a duty to Cathy. Legal duties can arise by express contractual provision, by statute, or by court-made common law. *Wicina v. Strecker*, 242 Kan. 278, 286, 747 P.2d 167 (1987). Here, Cathy alleges Guinn's duties to the Strouds arose by common-law because a fiduciary relationship arose from the facts and circumstances of their relationship. See *Denison State Bank v. Madeira*, 230 Kan. 684, 691, 640 P.2d 1235 (1982).

Generally, the question of whether a duty arises presents a question of law. *Granados v. Wilson*, 317 Kan. 34, 43, 523 P.3d 501 (2023). But we have recognized that "'[t]he existence or nonexistence of a confidential or fiduciary relationship [that gives rise to the fiduciary duty] is an evidentiary question or finding of fact which must be determined from the facts in each case.'" *Olson v. Harshman*, 233 Kan. 1055, 1057, 668 P.2d 147 (1983). Without more explanation, these statements seem to conflict.

Other courts have resolved the tension inherent in these two general rules by holding that the determination of whether there is a fiduciary duty presents a mixed question of law and fact. See,

e.g., *Clyde v. Hodge*, 460 F.2d 532, 535 (3d Cir. 1972). The questions of law presented relate to defining the essential characteristics of a fiduciary relationship and the duties that arise from those relationships. These questions are answered by the judge. Cf. *Granados*, 317 Kan. at 43-46 (discussing division between legal questions of law and factual questions in context of insured's duty when handling claim against insured). But whether the facts establish the essential characteristics of a fiduciary duty presents a question of fact that, in the context of a summary judgment dispute, requires us to resolve all facts and inferences in favor of the party against whom the ruling is sought. *Schreiner*, 315 Kan. at 30. Here, that means we resolve facts and inferences in Cathy's favor to see whether the uncontroverted facts present a question for a jury to resolve.

As we discuss the parties' arguments, we will note the application of these standards.

First-Party Claim Against Insurance Company

The first reason the district judge used to reject Cathy's position is one that was ruled on as a matter of law by the district judge. The district judge accepted Ozark's argument that *Spencer*, 227 Kan. 914, broadly held an insurer can owe a fiduciary relationship to the insured only in a third-party situation (meaning where a third-party makes a claim against the insured) and never owes such a duty in a first-party situation (meaning where a claim is brought against the insurance company by the insured). The judge thus held that Cathy had no legal basis for her first-party claim against Ozark.

On appeal, the Court of Appeals panel rejected the district judge's ruling that *Spencer* foreclosed Cathy's fiduciary duty claim. The panel held the judge's reading of *Spencer*, which adopted Ozark's argument, was overly broad because *Spencer* involved settling claims and "does not involve procuring insurance for the insured or giving advice to an insured about insurance policies." 2022 WL 2114769, at *8.

Ozark did not cross-petition or conditionally cross-petition for review to ask us to consider this holding even though those filings are necessary to preserve for Supreme Court review any Court of

Appeals' holding adverse to the party's position. See Supreme Court Rule 8.03(c)(3), (c)(4) (2024 Kan. S. Ct. R. at 57); *State v. Cantu*, 318 Kan. 759, 763, 547 P.3d 477 (2024). And issues raised before the Court of Appeals but not decided must also be raised in a petition or cross-petition for review to be considered. See Supreme Court Rule 8.03(c)(3)(B), (c)(4)(B).

"The court, however, may address a plain error not presented." Supreme Court Rule 8.03(b)(6)(C)(i) (2024 Kan. S. Ct. R. at 55); *Quinn v. State*, 317 Kan. 624, 626, 537 P.3d 94 (2023); *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1131, 442 P.3d 509 (2019); 309 Kan. at 1166 (Luckert, J., dissenting) (criticizing majority's application of plain error provision). And we have recognized other limited exceptions. See *State v. Sinnard*, 318 Kan. 261, 543 P.3d 525 (2024) (even though party failed to preserve its lack-of-contemporaneous-objection argument as required under Rule 8.03, K.S.A. 60-404 prevented relief and controlled over the petition for review rule); *Khalil-Alsalaami v. State*, 313 Kan. 472, 520, 525, 486 P.3d 1216 (2021) (where cumulative error issue included consideration of an unpreserved claim of error, unpreserved error considered as part of preserved cumulative error analysis).

Here, Rule 8.03(c)(3) applies without exception, meaning any possible error in the panel's ruling is unpreserved and we take as settled that the district judge erred in granting summary judgment based on *Spencer*. See 318 Kan. at 763 (Court of Appeals holdings not subject to review deemed settled).

Failure to Prove Conscious Assumption of Fiduciary Duties

We next consider whether the district judge erred in holding that Cathy failed to present evidence that Guinn consciously assumed fiduciary duties. See *Linden Place*, 38 Kan. App. 2d 504, Syl. ¶ 5. Before discussing that point, we discuss some general principles about fiduciary duties that relate to the parties' arguments. In doing so, we in essence draw the skeletal requirements for proving the existence of a fiduciary duty; this presents a question of law. Cf. *Granados*, 317 Kan. at 43.

In general,

"[t]he concept of the fiduciary duty is an equitable one and while no precise definition may be given and strict parameters of the relationship cannot be established for use in all cases, there are certain broad general principles which should be considered in making the determination of whether a fiduciary relationship exists in any particular factual situation." *Denison State Bank*, 230 Kan. at 691-92.

A fiduciary duty arises when one party is in "a position of peculiar confidence" that allows the person to have and exercise influence over another. 230 Kan. at 691. "Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary." 230 Kan. at 692. Stated another way, a fiduciary duty "may exist under a variety of circumstances and does exist in cases where there has been a special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Brown v. Foulks*, 232 Kan. 424, 431, 657 P.2d 501 (1983).

Such a relationship can arise in two ways: as a matter of law and as a question of fact when "implied in law due to the factual situation surrounding the involved transactions and the relationship of the parties to each other and to the questioned transactions." *Denison State Bank*, 230 Kan. at 691.

Under the first avenue, the relationship is one in which the law requires one party to act as a fiduciary. Examples of intrinsically fiduciary relationships include those "created by contract such as principal and agent, attorney and client, and trustee and cestui que trust, for example, and those created by formal legal proceedings such as guardian and/or conservator and ward, and executor or administrator of an estate, among others." 230 Kan. at 691. Cathy does not argue an intrinsically fiduciary relationship existed between Guinn and her.

Perhaps that is because courts recognize as a matter of law that an insurance agent who solicits the purchase of an insurance policy does not establish a relationship that the law recognizes as inherently fiduciary. 1 Thomas & Mootz, New Appleman on Insurance Law § 2.05[2][c][ii] (Library ed. 2024); Richmond, *Insurance Agent and Broker Liability*, 40 Tort Trial & Ins. Prac. L.J. 1,

12 (2004). There are three primary reasons the law does not view the traditional relationship between an insured and an insurer and its agents as one with inherent fiduciary duties. We discuss these reasons even though Cathy does not assert such a relationship because they help inform the determination of whether the facts here put Guinn in a special relationship "of peculiar confidence" that gave rise to a fiduciary duty owed to her. *Denison State Bank*, 230 Kan. at 691-92.

The three reasons an insured-agent relationship is not viewed as intrinsically fiduciary when an agent is soliciting the purchase of a policy are that (1) "the agent generally represents the insurer," not the insured—that is, the insurer is the principal of the agent; (2) the "relationship between insurance agents and their clients is an ordinary business relationship"; and (3) a fiduciary duty "is inconsistent with the nature of the transaction. The purchase of insurance is typically an arms-length transaction, and applicants and insureds generally have no reasonable basis to repose special confidence or trust in agents with whom they deal." 1 New Appleman on Insurance Law § 2.05[2][c][ii]; see *Golden Rule Ins. Co. v. Tomlinson*, 300 Kan. 944, 958, 335 P.3d 1178 (2014) ("'Traditionally, an "agent" is the representative of the insurer, while the "broker" is the representative of the insured . . . .'"); 300 Kan. at 955-61 (discussing common-law principles of agency as applied to insurance situations).

But a special relationship can arise if the facts and circumstances reflect "[s]omething more than an ordinary insured/insurer relationship" sufficient "to create a 'special relationship.'" 3 Couch on Ins. § 46:61. Reflecting on the reasons a typical insurance agent-insured relationship is not fiduciary, facts and circumstances could establish a special relationship if the transaction is not an ordinary business relationship conducted at arm's length and Cathy had a reasonable basis to repose special confidence in Guinn and did so. As we explained in *Denison State Bank*, 230 Kan. at 696, those who are competent and able to protect their own interests "may not abandon all caution and responsibility for his own protection and unilaterally impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary."

Cathy contends her and Alan's interactions with Guinn created a special relationship different from the usual sales call by an insurance agent and fit within the second avenue for establishing a fiduciary relationship. She relies on the fact that Guinn voluntarily undertook the task of "advising a present policyholder and the beneficiary regarding an existing term policy." He did so, she contends, by taking

> "it upon himself to call the Stroud's [*sic*], set up an appointment and at that appointment led them to believe the premiums on Mr. Stroud's existing term life insurance policy could increase when Mr. Stroud was summoned to Houston, Texas to undergo life and death surgery and ' . . . advised the Stroud's to convert the $60,000.00 term policy to the $30,000.00 whole life policy.'"

For support, Cathy notes that she and Alan put trust and confidence in Guinn. She also argues the words "trust" and "confidence" track with our statements in Kansas caselaw defining a fiduciary relationship. See, e.g., *Brown*, 232 Kan. at 430-31. But defining a fiduciary duty as one of trust and confidence does not mean "that any relationship or transaction in which one party reposes trust or confidence in another will establish a fiduciary or confidential relationship sufficient to impose an affirmative duty to disclose." 26 Williston on Contracts § 69:23 (4th ed.). Something more is required. See *Denison State Bank*, 230 Kan. at 696 (holding plaintiff's testimony "that he trusted and relied upon the Bank to furnish him complete, honest information" was insufficient to establish fiduciary relationship).

The district judge concluded that Cathy failed to establish the necessary something more and that no fiduciary relationship arose. In doing so, the judge focused on the principle that the nonfiduciary cannot unilaterally impose a fiduciary relationship on another without a conscious assumption of duty by the purported fiduciary. For support, he cited a Court of Appeals decision, *Linden Place*, 38 Kan. App. 2d 504, which in turn recited *Denison State Bank*'s statement of the principle. See *Linden Place*, 38 Kan. App. 2d 504, Syl. ¶ 5; 38 Kan. App. 2d at 510. The judge then concluded no facts supported that a special relationship arose because "Plaintiff offers no information that Defendant Guinn made any conscious assumption that he was forming a fiduciary relationship with Mr. Stroud or Plaintiff."

Cathy points out that the judge's conclusion ignores two statements of fact she presented in her reply to Ozark's summary judgment motion. In those she summarized Guinn's deposition testimony, given over objection not yet resolved. In Guinn's deposition, he answered "always" when asked if he believed he has "an obligation to act in the best interest of the people" he is calling on and he agreed to a question asking whether he thinks the people he calls on place special trust and confidence in his advice. Cathy argues these statements prove—or at least present a jury question about whether—a fiduciary duty arose.

On appeal, the Court of Appeals panel recognized this argument but ultimately determined Cathy had not established a prima facie case for breach of fiduciary duty. It reached this conclusion after holding that Cathy had to show that the Ozark National contract of insurance established a duty for it or its agent to advise the insured. 2022 WL 2114769, at *5-9.

The panel's analytical path to that conclusion began with an explanation that it understood Cathy to be relying on *Marshel Investments, Inc. v. Cohen*, 6 Kan. App. 2d 672, 683, 634 P.2d 133 (1981), for support of her allegation that Guinn owed a fiduciary duty to her. 2022 WL 2114769, at *8. The panel held the duty discussed in *Marshel Investments* did not apply under the facts, but it recognized that "[p]erhaps a liberal reading" of the decision "supports that Guinn formed a fiduciary relationship with Alan and Cathy." The panel declined such a liberal reading, however. 2022 WL 2114769, at *9.

Instead, the panel noted that various Court of Appeals panels had "consistently held" the *Marshel Investments* "holding meant that an insurance agent has a duty to act on explicit insurance requests from their clients" and had "consistently rejected" arguments that the holding meant "insurance agents have a duty to advise clients about their insurance-related choices." 2022 WL 2114769, at *9 (citing *Carpenter v. Bolz*, No. 101,679, 2010 WL 2977937, at *6-7 [Kan. App. 2010] [unpublished opinion] [duty to exercise reasonable care in procuring insurance is limited "to provid(ing) reasonable, prudent coverage *that is requested by the client*" (emphasis added)]; *Duncan v. Janosik, Inc.*, No. 99,459, 2009 WL 743579, at *3 [Kan. App. 2009] [unpublished opinion]

[declining to recognize *ongoing duty* to notify insured of coverage lapse because agent had no duty to advise about insurance choices absent a specific agreement to do so]; *Benskin v. Anderson Insurance Agency, Inc.*, No. 86,976, 2002 WL 35657473, at *5-6 [Kan. App. 2002] [unpublished opinion] [recognizing broker has *no continuing duty* to advise about coverage unless an agreement to do so has been made]).

The panel then discussed *Marshall v. Donnelli*, 14 Kan. App. 2d 150, Syl. ¶ 1, 783 P.2d 1321 (1989), in which a different Court of Appeals panel held that "[*a*]*bsent a specific agreement to do so*, an insurance agent does not have a *continuing duty* to advise, guide, or direct an insured's coverage after the agent has complied with his obligation to obtain insurance coverage on behalf of the insured." (Emphases added.) The *Stroud* panel concluded this holding meant that no duty arose absent a contract to advise, and it went further by stating that contract must be the insurance contract:

> "This [statement that 'absent a specific agreement to do so' in *Marshall*] means that unless the insurance agent is contractually obligated to do so, an insurance agent has no fiduciary duty to advise the insured. See also *Duncan* [v. *Janosik, Inc.*, No. 99,459, 2009 WL 743579, at *4 (Kan. App. 2009) (unpublished opinion)] (discussing *Marshel Investments, Inc.'s* explanation of an insurance agent's duty to advise as being based in contract). Thus, to successfully establish that an insurance agent violated a fiduciary duty by giving bad advice, the insured must prove that the agent was contractually obligated under his or her policy to give reasonable advice." 2022 WL 2114769, at *9.

The panel then observed that Cathy did not rely on Alan's life insurance contracts with Ozark National and, even if she did, his policy did not obligate Ozark National's agents to advise Alan or his beneficiary. And Cathy had no contract with Ozark. The panel thus concluded Guinn owed no fiduciary duty to either Alan or Cathy and the district judge was correct in granting summary judgment. 2022 WL 2114769, at *10.

In urging us to reject that reasoning, Cathy argues the Court of Appeals misconstrued her argument because she is not relying on a continuing duty to advise and *Marshel, Marshall*, and the other cited cases address only that type of duty. 14 Kan. App. 2d 150, Syl. ¶ 1. But see *Granados v. Wilson*, 317 Kan. 34, 43, 523

P.3d 501 (2023) ("This framing of the issue reflects a recent tendency—which we noted in *Reardon v. King*, 310 Kan. 897, 904, 452 P.3d 849 (2019)—to characterize the legal duty in 'ever narrower and more particularized ways.' The problem with that approach is that 'duty rules are not meant to be fact specific. Rather, they are to set broadly applicable guidelines for public behavior.'").

According to Cathy, she presented sufficient evidence that a duty arose here because the uncontroverted facts showed that Guinn called and offered to meet with her and Alan to talk about Alan's current life insurance coverage and, during the ensuing meeting, offered advice that they convert the term policy to a whole life policy. In other words, according to Cathy, Guinn undertook the duty to advise the Strouds. To support her theory that Guinn's actions, combined with the Strouds' reliance on his advice, can create a fiduciary duty, she points to *Marshel Investments*' recognition that an action to recover for a breach of fiduciary duty can sound in either contract or tort. See 6 Kan. App. 2d at 683.

Cathy is correct in stating that *Marshel Investments* panel did note that a fiduciary duty action could be based on contract or tort principles. But it also observed that no Kansas case has engaged in a legal analysis of the source of the ability to bring an action on the alternative theories. The court continued by saying that "it might be said the duty is both an implied contractual term of the undertaking (contract duty) and a part of the fiduciary duty owed the client by reason of the principal-agent relationship arising out of the undertaking (tort duty)." 6 Kan. App. 2d at 683. In essence, the *Marshel Investments* panel held that the fiduciary duty arose either directly or impliedly from contract terms, and it then extended an analysis emanating from contract law that has been used in other areas of insurance law to develop a tort cause of action. See, e.g., *Glenn v. Fleming*, 247 Kan. 296, 313, 799 P.2d 79 (1990) (considering claim of bad faith in settling insurance claim and noting that courts "have adopted, in our development of the substantive case law, the principle that the insurer's duties are contractually based and then approved a tort standard of care for determining when the contract duty has been breached").

The *Stroud* panel thus had a basis for its conclusion requiring some direct or implied basis in the contract for a duty. But, as we have discussed, the general body of law about fiduciary relationships has carved two distinct avenues—one based on relationships that are intrinsically fiduciary, including those based on duties imposed by contract—and the other that arises from assumption of a duty. Cf. Restatement (Second) of Torts, § 324A (recognizing party can assume a duty the breach of which can sound in negligence). The panel thus erred to the extent its holding recognized fiduciary duties between an insured and insurer could arise only if implied by a contract term. 2022 WL 2114769, at *9.

Besides fiduciary duties arising from contract, a fiduciary relationship may also exist between an insured and the insurer if the facts and circumstances create a special relationship of trust and confidence and the purported fiduciary consciously assumes to undertake fiduciary duties. See *Kaercher v. Sater*, 155 P.3d 437, 441-42 (Colo. App. 2006) ("Whether a special relationship has been formed turns on whether there is 'entrustment,' that is, whether the agent or broker assumes additional responsibilities."). Kansas courts and courts from other jurisdictions have recognized this path. See, e.g., *Denison State Bank*, 230 Kan. at 696 (one may not impose "fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary"); *Linden Place*, 38 Kan. App. 2d at 509 (discussing banking relationship, which is not an intrinsically fiduciary relationship, and noting "[t]here is no contract or formal proceedings creating any fiduciary relationship" but holding that if bank official promised to look after the interests a fiduciary duty arose); see also, e.g., *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 10-11, 597 N.W.2d 47 (1999) (under the "special relationship" test, the general rule that an insurer's agent owes no fiduciary duty to insured may change under certain facts and circumstances, including when "the agent assumes an additional duty by either express agreement with or promise to the insured").

This conclusion does not mean, however, that the *Stroud* panel erred when it focused on *Marshall's* language requiring a "specific agreement," 14 Kan. App. 2d 150, Syl. ¶ 1, which can be

found in other cases. That language covers a spectrum from contracts to express agreements that lack all elements of a contract (perhaps for lack of consideration). See *Harts*, 461 Mich. at 10. Regardless of whether an oral promise or a formal contract, our caselaw reveals the importance of an agreement to assume the fiduciary duty. *Linden Place* is one such case.

Linden Place, LLC, was the developer of a residential subdivision. Its representatives started negotiations with a building company for the sale of some lots upon the agreement the builder would construct model homes within a year. During negotiations for the sale, a subdivision representative questioned a bank officer about the reliability and viability of the builder, who was a customer of the bank. The officer assured the subdivision representative that the builder had the capability and funding to complete construction on the lots. The sale proceeded, and the builder used the bank for financing. It informed the bank representative that the subdivision owner had agreed to subordinate its interest in the property.

A few months later, subdivision representatives learned the builder might be using the loan proceeds to pay obligations other than construction costs related to the Linden Place development, jeopardizing the project and, in turn, the developer's subordinated interest. The bank officer said he would investigate. Two days later he called and assured the subdivision representative that he had checked on the matter and was handling it. He also promised that expenditures would be monitored carefully. The facts thus revealed that the bank explicitly informed the representative it was assuming a duty to watch for activities contrary to the subdivision developer's interest. 38 Kan. App. 2d at 510-11.

Drawing conclusions from those facts, the *Linden Place* panel determined no facts supported a conclusion the bank assumed a fiduciary duty during the early stages of these exchanges—that is, during the negotiation period when its officer provided information and even when the subdivision representative made the initial inquiry about possible misappropriation of funds and the officer said he would investigate. The triggering point, the panel concluded, was when the bank officer expressly promised to closely monitor the builder's future expenditures. 38 Kan. App. 2d

at 512. Only then, "from those remarks," could a reasonable person conclude "that the Bank was undertaking to look out for Linden Place's interests." 38 Kan. App. 2d at 512. And only with that promise could reasonable people abandon caution and responsibility for their own protection and rely on someone else to protect their interests. See *Denison State Bank*, 230 Kan. at 696. At that point a fiduciary relationship existed. *Linden Place*, 38 Kan. App. 2d at 512.

Here, Cathy has not presented facts establishing anything other than a normal business transaction between an insured and an insurance company. Guinn's cold call and request to meet is a common exchange in sales relationships, as is an attempt to sell a different product to an existing client. Cathy has never suggested that she lacked the ability to make business decisions or that anything about her conversations with Guinn should have put him on notice that she lacked the ability to competently make decisions. And the evidence that Cathy and Alan placed trust in Guinn along with his acknowledgement that clients place trust in him falls short of creating a special or peculiar relationship or of showing that Guinn consciously accepted special and peculiar duties. Rather, as described by Guinn, that was the circumstance "always." Nothing suggests that Guinn promised to protect the Strouds' interests.

In considering whether the uncontroverted facts presented here present a jury question, we have found numerous cases in other states affirming a summary judgment decision when the summary judgment record did not include evidence of a conscious assumption of duty. For example, in *Kaercher*, 155 P.3d 437, the Colorado Court of Appeals addressed a situation where the plaintiff's petition alleged that an insurance agent "'holds himself to be knowledgeable about selling insurance coverages, and regularly, in the course of his business, informs, counsels and advises clients of their insurance needs,'" which is what Guinn said he does. The court concluded these allegations did "not establish a duty on the part of [the agent] beyond the standard insured-agent relationship and do not set forth factors that would create a special relationship of entrustment." 155 P.3d at 442 (collecting similar cases from other states).

Likewise, in *Weisblatt v. Minnesota Mut. Life Ins. Co*., 4 F. Supp. 2d 371 (E.D. Pa. 1998), an insurance agent offered advice on how to attain the goals of a husband and wife who were seeking life insurance coverage for the husband. The couple twice met with the agent and discussed the possibility of replacing an existing policy insuring the life of the husband with a different policy recommended by the agent. The couple shared information about their finances and made clear they wanted sufficient coverage so the wife would not have to work if the husband died. After the husband's death, the widow realized the policy amount was insufficient to support her and her children. She filed a lawsuit, claiming violations of Pennsylvania statutes and seeking monetary recovery under several common-law tort theories. The insurance company sought summary judgment, and the court considered whether the agent's representations of expertise, his superior knowledge of insurance, his meeting with the clients on two occasions during which they revealed their financial situation, and his voluntary suggestion of a policy were "sufficient to establish a confidential relationship between the parties—or at a minimum to create a jury issue as to the existence of such a relationship." 4 F. Supp. 2d at 381. Even though the insured provided information about his finances and expressed his desire to provide enough insurance so his wife would not have to work, the court concluded a jury issue was not presented.

The *Weisblatt* court cited a definition of a fiduciary or confidential relationship like the definition used in Kansas. See 4 F. Supp. 2d at 381. Viewing the evidence in the light most favorable to the plaintiff, the court reasoned that the plaintiff had not shown a special relationship where the insured's interests were turned over to the agent for protection. 4 F. Supp. 2d at 382. The court noted that having two meetings for the sole purpose of selling insurance is "far from adequate to create a 'relationship of actual closeness' between the two parties to inspire confidence" that the agent "was 'bound to act for the benefit of [the insureds] and (could) take no benefit for himself.' [Citation omitted.]" 4 F. Supp. 2d at 381. The court continued by noting that "[a]s in every other business, an insurance agent's primary enterprise is to sell insurance, a vocation no adult consumer would confuse with a religious

order. Concomitantly, a reasonable buyer of insurance (or any other product) must, at peril of caveat emptor, act as a reasonable consumer, e.g., research her needs from multiple sources and price-shop for policies." 4 F. Supp. 2d at 382.

We also find support for granting summary judgment in two Kansas cases. Both clarify whether judgment as a matter of law may be appropriate even though "[t]he determination of a fiduciary relationship is essentially a factual one." *Dugan v. First Nat'l Bank in Wichita*, 227 Kan. 201, 208, 606 P.2d 1009 (1980).

One is *Denison State Bank*, which we have cited for its discussion of principles about fiduciary relationships. There, this court held that a bank customer failed to establish a fiduciary relationship by testifying that he "trusted and relied upon the Bank to furnish him complete, honest information." 230 Kan. at 696. To recognize a fiduciary relationship would "convert ordinary day-to-day business transactions into fiduciary relationships where none were intended or anticipated." 230 Kan. at 696. The court required the "conscious assumption" of duties by the one sought to be held to the duties of a fiduciary. 230 Kan. at 696. The trial judge thus erred by not granting a directed verdict as a matter of law.

The second case suggesting summary judgment is appropriate here is *Dugan*, which also examined the relationship between a bank and one of its customers. The customer had a long relationship with the bank, as a depositor and borrower. The customer argued a special duty arose from that relationship and the bank had a duty to share information that made a transaction negotiated through the bank contrary to her best interests. Despite the bank customer's invocation of the special relationship exception, we held summary judgment was appropriate. We recognized that a special relationship could arise if the customer sought the advice of the bank and "the bank had knowledge of the reliance and confidence of the customer" and assumed the special duties. 227 Kan. at 208. But those facts were not presented in *Dugan*. Given that, we held as a matter of law that no fiduciary relationship arose and summary judgment against the bank customer was appropriate. 227 Kan. at 209.

Turning to Cathy's arguments, we likewise conclude the district judge here appropriately entered summary judgment because Cathy failed to present evidence, even when considered in the light most favorable to her, that suggests Guinn knew she entrusted him with protecting her interest. Nothing shows he assumed a special or peculiar "duty to act primarily for [her] benefit" rather than for his or Ozark National's benefit.' *Denison State Bank*, 230 Kan. at 692.

Because we reach this conclusion, we do not discuss the alternative rulings of the district judge or the Court of Appeals, including both courts' conclusion that Cathy was not the real party in interest. Doing so would be dictum because it is not necessary to our decision. See Black's Law Dictionary 570 (12th ed. 2024) (defining "judicial dictum" as discussion of issues material to case, and even briefed, but not necessary to decision). Appellate courts generally avoid writing dictum, as it is not binding and can lead to confusion in future cases. See *Schmidt v. Trademark, Inc*., 315 Kan. 196, 206, 506 P.3d 267 (2022); *Law v. Law Company Building Assocs.*, 295 Kan. 551, 564, 289 P.3d 1066 (2012).

In conclusion, although we disagree with some of the rationale for the Court of Appeals decision on the fiduciary duty issue, we agree with its decision that summary judgment on that claim was appropriate, and we affirm the outcome of the Court of Appeals decision. We also affirm the district judge's decision to grant summary judgment on Cathy's fiduciary duty claim.

3. *Negligent Misrepresentation*

We now turn to the specifics of Cathy's claim for negligent misrepresentation.

Additional Facts

Ozark moved for summary judgment on Cathy's negligent misrepresentation claim based on an argument there was no evidence of some elements. It quoted the recitation of those elements found in *Stechschulte v. Jennings*, 297 Kan. 2, 22, 298 P.3d 1083 (2013):

"One who, in the course of any transaction in which he or she has a pecuniary interest, supplies false information for the guidance of another person is liable for damages suffered by such other person caused by reasonable reliance upon the false information if: (1) the person supplying the false information failed to exercise reasonable care or competence in obtaining or communicating the false information; (2) the person who relies upon the information is the person for whose benefit and guidance the information is supplied; and (3) the damages are suffered in a transaction that the person supplying the information intends to influence. See *Mahler v. Keenan Real Estate*, *Inc*., 255 Kan. 593, 604, 876 P.2d 609 (1994); PIK Civ. 4th 127.43."

Stechschulte's delineation of these elements derives from the Restatement (Second) of Torts § 552 (1977), which we adopted in *Mahler v. Keenan Real Estate, Inc.*, 255 Kan. 593, 604, 876 P.2d 609 (1994). See *Rinehart v. Morton Buildings*, *Inc*., 297 Kan. 926, 936-38, 305 P.3d 622 (2013) (citing *Stechschulte*, 297 Kan. at 22).

Ozark, in its motion for summary judgment, emphasized the requirement that the one providing the information must supply "false information" and contended that Guinn made no affirmative misstatement. To support the argument, Ozark quoted Cathy's factual contentions in the pretrial order in which she set out the information Guinn supplied. Ozark then pointed out that the discovery record, including Cathy's admissions, revealed Guinn's statements were accurate. Given that, it contended that Cathy's claim failed for four reasons, including two that relate to our analysis: (1) Cathy provided no evidence of an affirmative misrepresentation of fact and (2) Cathy was adding a claim of fraud by silence that was not claimed in the petition or included in the pretrial order.

Cathy responded to Ozark's statement of facts by acknowledging Ozark's reliance on *Stechschulte* and its statement of elements and stating, "Plaintiff and the facts supporting her cause of action for negligent misrepresentation comport with those elements." Cathy did not controvert Ozark's statements of fact setting out Guinn's representations. Nor did she controvert statements of fact that referred to Cathy's deposition testimony and read that "Plaintiff testified that the statements by Mr. Guinn in [the preceding paragraph] were accurate." For example, for one of Guinn's representations, the uncontroverted facts and Cathy's reply stated:

"18. Mr. Guinn said that the premiums on Mr. Stroud's life insurance policy were going to drastically or dramatically increase and that the Strouds needed to

change Mr. Strouds' term life insurance policy to a whole life policy before that happens.

"Uncontroverted.

"19. Plaintiff testified that the statements by Mr. Guinn in paragraph 18 above were accurate.

"Uncontroverted."

After not controverting the truth or accuracy of any of Guinn's statements, Cathy argued that "her claim for negligent misrepresentation [is] based upon the context of the statements of Defendant Guinn." She added that she and her husband told Guinn they were concerned they would not have enough money in their bank account to cover the withdrawal if the premiums increased while they were in Houston for Alan's "imminent surgery," which could be at any time. Guinn, knowing of their concern and knowing that the premium increase was at least two years in the future, did not remind them of when the premium increases would occur. Instead, he expressed concern "that should that happen and a payment for the term policy was missed, Mr. Stroud might not be able to get replacement life insurance due to his health condition[,] leading [Cathy] and her husband to believe the premiums could increase while they were in Houston." Cathy summarized, stating that "[b]y so doing, Defendant Guinn negligently miscommunicated that Plaintiff and her husband needed to convert the $60,000.00 term life policy to the $30,000.00 whole life policy at that time, when in fact there was no need to do so and that to do so was totally contrary to their best interests." The focus thus was not on a misstatement made by Guinn but rather on his failure to remind them of when the premium increases would occur or to otherwise clarify the premium change was not imminent.

Ozark responded to this by saying that Cathy was "outlining a completely different cause of action than the one that's actually been asserted in this case" and was now asserting fraud by silence. At oral argument before the district judge on the motion for summary judgment, Cathy contended the claim met the elements of a negligent misrepresentation and she clarified that she was "not seeking to amend [to add a claim of] fraud by silence by any means."

The district judge granted Ozark summary judgment. The judge explained that "[w]hile Plaintiff would like the Court to look

at the 'context' of the statements that Defendant Guinn made to Plaintiff, her claim is one of negligent misrepresentation . . . [and she] has made no showing that Defendant Guinn supplied any false information to her." The judge added that Cathy had not provided evidence that Alan relied on false information. The judge thus granted summary judgment on the negligent misrepresentation claim.

The Court of Appeals panel disagreed with the district judge's reasoning. It stated:

"[T]he trial court's actual reasoning for dismissing Cathy's negligent misrepresentation claims was questionable. The trial court found that Cathy failed to produce any evidence that Guinn supplied false information and that Alan relied on the allegedly false information. Regarding the trial court's finding that Cathy failed to produce any evidence that Guinn supplied false information, Ozark and Guinn argue that Cathy's claim is more akin to a fraud by silence claim. Regardless of this argument, a trial court should be hesitant to grant summary judgment on negligence claims. [Citation omitted.] Our Supreme Court has recently explained that to present a prima facie case of negligence to survive summary judgment, a plaintiff does not need to present direct evidence. Instead, a plaintiff may rely on circumstantial evidence that does 'not exclude every other reasonable conclusion as long as it forms a basis from which a jury could draw a reasonable inference.'" *Montgomery v. Saleh*, 311 Kan. 649, 663, 466 P.3d 902 (2020)." *Stroud,* 2022 WL 2114769, at *11.

The Court of Appeals panel then discussed why it felt Guinn's statement to the Strouds was a misrepresentation. It pointed to Guinn's statement to the Strouds, which it summarized as being that Alan "'need[ed]' to convert his term life insurance policy into a whole life insurance policy." The panel concluded a reasonable jury could conclude this was false "[g]iven (1) that Alan had nearly three years left on his term life insurance policy before his premiums would increase again, (2) that Guinn's advice resulted in Alan's annual premium payment increasing immediately, and (3) that Guinn knew of Alan's severe health situation." *Stroud*, 2022 WL 2114769, at *11. The panel also concluded Alan's conversion of his policy demonstrated Alan relied on Guinn's advice. 2022 WL 2114769, at *11.

We note that Guinn's statement, as set out in the uncontroverted facts quoted above (see fact No. 18), was that "the premiums on Mr. Stroud's life insurance policy were going to drastically or dramatically increase and that the Strouds needed to change Mr.

Stroud's term life insurance policy to a whole life policy *before that happens*." (Emphasis added.) In responding to Ozark's summary judgment motion, Cathy agreed that she had testified during her deposition that Guinn's statement was accurate. (See uncontroverted fact No. 19.) And, in responding to the summary judgment motion, she stated, "[I]t is true that the Strouds needed to convert Alan Stroud's term policy to a whole life policy before '. . . the premiums on his term policy were going to drastically or dramatically increase'" and "it is true that if the premiums on the term policy increased while the Strouds were in Houston for the surgery and a premium was missed, Mr. Stroud might not be able to get replacement insurance."

Cathy's complaint was not with the affirmative statements Guinn made, which said they needed to convert the policy before the premiums increased, but with the implication that the premium increase was going to happen while they were in Houston. In essence, the Court of Appeals, not Cathy, controverted whether Guinn made affirmative misrepresentations.

The panel, however, did not discuss the distinction between affirmative misrepresentations and misrepresentation by silence even though it recognized that we had adopted Restatement (Second) of Torts § 552.

Preservation

Ozark did not file a cross-petition or conditional cross-petition for review that (1) raised the issue of whether the Court of Appeals panel erred in finding that a question of fact existed or (2) asked us to reach the question not addressed by the panel of whether Cathy was raising a different tort. Yet, as we have discussed, it had argued to both the district judge and the Court of Appeals that the facts did not meet the elements of negligent misrepresentation and that Cathy was raising the tort of fraud by silence. The district judge's ruling agreed with those arguments.

As we have also noted, the failure to raise adverse rulings or questions not addressed through a petition, cross-petition, or conditional cross-petition for review usually means we treat the question as unpreserved and will not consider the error. See Supreme Court Rule 8.03(b)(6)(C)(i). But we "may address a plain error not

presented." Supreme Court Rule 8.03(b)(6)(C)(i) (2024 Kan. S. Ct. R. at 56); *Quinn*, 317 Kan. at 626. We have recognized this exception can be employed in situations where an issue or argument is a necessary step in our analysis and a failure to discuss the question could lead to confusing or misleading precedent. See, e.g., *State v. Childs*, 275 Kan. 338, 342, 64 P.3d 389 (2003) (considering unpreserved constitutional issue because it would otherwise be "virtually impossible" to decide the merits without considering an unpreserved issue and "'we cannot intelligently dispose of this litigation without considering and discussing'" it). This exception applies here.

No False Statement

We first address whether the Court of Appeals erred in not accepting Cathy's admission that Guinn's statements were accurate and true. We have directed that "[s]ummary judgment should be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." *DeBauge Bros., Inc. v. Whitsitt*, 212 Kan. 758, 762, 512 P.2d 487 (1973); see *Knapp v. Unified School District*, 209 Kan. 237, 240, 496 P.2d 1400 (1972) ("Where no genuine issue of material fact exists, it is proper for the trial court to enter summary judgment.").

Here, Cathy's deposition testimony and her admissions revealed that Guinn supplied true information, although the true information left room for inferring urgency that did not exist. His statements were not false but might have been misleading to the extent Guinn did not supply information about the timeline for the premium increase. But, as we will next discuss, that claim does not fall under the elements discussed in *Stechschulte*.

Supplies False Information

Stechschulte recited the elements of negligent misrepresentation as defined in Restatement (Second) of Torts § 552. The first part of the statement of elements reads: "One who, in the course of any transaction in which he or she has a pecuniary interest, supplies false information for the guidance of another person . . . ." *Stechschulte*, 297 Kan. at 22.

The district judge focused on the phrase "supplies false information" and held that Guinn's statements were not false and thus no evidence established this element. Cathy argues the statements were false because the context implied a false urgency as Guinn withheld information about the timeline for premium increases. But that type of misrepresentation is not covered by § 552, which requires an affirmative misrepresentation. A different section of the Restatement covers negligent nondisclosure (Restatement [Second] of Torts § 551 [1977]). The Restatement also separately defines fraudulent misrepresentation (§ 525), fraud by ambiguous representation (§ 527), fraud by a misrepresentation that is misleading because it is incomplete (§ 529), and fraud by concealment (§ 550). The Restatement thus distinguishes between nondisclosure and affirmative statements. And courts adopting § 552 have thus distinguished the claims. See, e.g., *Outlook Windows P'ship v. York Int'l Corp.*, 112 F. Supp. 2d 877, 896 (D. Neb. 2000) (distinguishing negligent misrepresentation claim from nondisclosure claim and holding that failure to disclose information is governed by Restatement of Torts [Second] § 551); *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 128 (Iowa 2001) ("We begin by recognizing that the tort of negligent misrepresentation does not apply to the failure to provide information, but to the disclosure of information."); *Hawkins Const. v. Intern. Ass'n Local 21*, 3 Neb. App. 238, 243, 525 N.W.2d 637 (1994) (holding allegations regarding defendant's failure to inform plaintiff of certain facts did not constitute a claim for negligent misrepresentation).

These distinctions track with Kansas law which has distinguished between fraud through affirmative statements and fraud through silence. Compare *Broberg v. Boling,* 183 Kan. 627, 634-35, 331 P.2d 570 (1958) (affirmative misrepresentation), with *Wolf v. Brungardt,* 215 Kan. 272, Syl. ¶ 4, 524 P.2d 726 (1974) (fraud by silence); see *Stechschulte*, 297 Kan. at 19-22 (discussing elements of separate and distinct torts of fraudulent inducement, fraud by silence, and negligent misrepresentation under *Mahler*).

Cathy had the opportunity during summary judgment proceedings to argue that her claim fell under a Restatement section other than § 552, that we should apply different elements other than those in *Stechschulte*, or we should abandon use of § 552. But she did not. In-

stead, she argued her claim met those elements. Thus, neither the parties nor any court has had a chance to discuss whether the uncontroverted facts meet the elements of the type of claim Cathy relies on or even what those elements are or should be. Instead, the parties devote pages of their briefs to discussing the irrelevant elements of § 552. This case is thus like *Hanson v. Hackman Corp.*, No. 98,073, 2008 WL 4471679 (Kan. App. 2008) (unpublished opinion).

There, on appeal from a jury verdict about a dispute arising from a real estate sale, the seller argued the trial judge erred in submitting the question of negligent misrepresentation to the jury because there was no evidence the seller provided false information. Rather, the allegation was about nondisclosure. The Court of Appeals panel agreed, holding that under the elements set out in *Mahler* (and repeated in *Stechschulte*) "negligent misrepresentation can never be premised on a claim of nondisclosure because a failure to speak does not satisfy an essential element of the claim: affirmatively supplying false information. Accordingly, we find Hanson's claim for negligent misrepresentation based on nondisclosure is without merit." 2008 WL 4471679, at *6.

The same conclusion applies here, and it is the conclusion reached by the district judge. A pretrial order had been entered, the parties had moved forward on summary judgment, and Cathy had embraced the elements for negligent misrepresentation set out in *Stechschulte*, 297 Kan. at 22, and specifically disclaimed she was relying on other theories. The Court of Appeals thus erred in treating an accurate statement as a misrepresentation because it did not disclose additional information. For us to ignore the error would confuse the law regarding the elements in Restatement (Second) of Torts § 552 and the difference between and it and other Restatement provisions covering other misrepresentation and fraud theories. As a result, unlike the question of how to interpret *Spencer*, which was unpreserved under Rule 8.03, this time, we address the questions raised.

In summary, Cathy has admitted Guinn did not supply false information as that phrase is used in § 552 to mean an affirmative misrepresentation rather than a misrepresentative by silence. She has thus failed to establish that the summary judgment record presents a prima facie case of negligent misrepresentation. The district judge did not err in granting summary judgment on this point. The Court of Appeals,

while disagreeing on this point, affirmed the entry of summary judgment on another ground—that Cathy was not the real party in interest. But, as with Cathy's fiduciary duty claim, we need not address the real party in interest question given our ruling that Cathy failed to advance sufficient evidence to demonstrate the existence of genuine issues of material fact for trial on her claim of negligent misrepresentation.

4. *Vicarious Liability*

Vicarious liability, sometimes called imputed negligence or respondeat superior, generally applies "to legal liability which arises solely because of a relationship and not because of any actual act of negligence by the person held vicariously liable for the act of another." See *Long v. Houser*, 57 Kan. App. 2d 675, 677, 456 P.3d 549 (2020) (quoting *Leiker v. Gafford*, 245 Kan. 325, 355, 778 P.2d 823 [1989]). Cathy's claims against Ozark turn on her claims against Guinn. The district judge and the Court of Appeals granted summary judgment for Ozark on both claims only after determining Cathy's claims failed as a matter of law. Because we agree that summary judgment was appropriate, we affirm the district judge and Court of Appeals rulings that Ozark National was entitled to summary judgment on Cathy's vicarious liability claim.

5. *Punitive Damages*

Cathy sought permission to amend her petition to add a claim for punitive damages based on Ozark's breach of fiduciary duty. When the district judge granted Ozark summary judgment, no claim survived to support the recovery of punitive damages. Because we affirm the district judge's grant of summary judgment on Cathy's breach of fiduciary duty claim, we affirm the district judge's denial of Cathy's motion for punitive damages.

CONCLUSION

We affirm the district court and, although our reasoning at times differs from the Court of Appeals' decision, we affirm the panel's ultimate decision to affirm the district court's grant of summary judgment.

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

State v. Collins

No. 125,761

STATE OF KANSAS, *Appellee*, v. CASINROYIAL DONJE CASZARONE COLLINS, *Appellant*.

(564 P.3d 393)

SYLLABUS BY THE COURT

1. JURISDICTION—*Dismissal of Action if Untimely Notice of Appeal*—Ortiz *Recognized Three Exceptions to Rule.* Kansas appellate courts have jurisdiction only as provided by law, and an untimely notice of appeal usually leads to dismissal of an action. But in *State v. Ortiz*, 230 Kan. 733, 640 P.2d 1255 (1982), we recognized three exceptions to this rule: where a defendant (1) was not informed of the rights to appeal, or (2) was not furnished an attorney to perfect an appeal, or (3) was furnished an attorney for that purpose who failed to perfect and complete an appeal.

2. SAME—*Bases of the Three* Ortiz *Exceptions.* The first *Ortiz* exception is based on procedural due process concerns, whereas the second and third exceptions are based on the right of counsel and effectiveness of counsel.

3. SAME—*First* Ortiz *Exception—Three-Step Burden Shifting Analysis Determining Whether Defendant Received Due Process*. The first *Ortiz* exception involves a three-step burden shifting analysis to determine whether a defendant received the process they were due. First, the defendant bears the burden of showing the district court failed to inform them of their right to appeal, the timeline to file an appeal, and the right to appointed appellate counsel if the defendant is indigent. Second, if the defendant shows they did not receive all three pieces of information from the court, the burden shifts to the State to show the defendant had actual knowledge of all that information. Third, if the State fails to make this showing, then the burden shifts back to the defendant to demonstrate they would have taken a timely appeal had they been properly informed.

4. APPEAL AND ERROR—*First* Ortiz *Exception Satisfied if Absence of Appellate Right Advisories in Transcript.* A defendant satisfies their evidentiary burden in the first phase of the first *Ortiz* exception by showing an absence of the appellate right advisories in the relevant transcript.

5. SAME—*Finding Deficient Performance by Trial Counsel under Third* Ortiz *Exception*. Trial counsel's failure to meet the requirements of K.A.R. 105-3-9(a)(3) is insufficient, without more, to support a finding of deficient performance under the third *Ortiz* exception.

6. SAME—*Burden on Defendant under Third* Ortiz *Exception.* The defendant bears the burden of showing their counsel's deficient performance under the third *Ortiz* exception.

Review of the judgment of the Court of Appeals in an unpublished opinion filed June 7, 2024. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Oral argument held December 10, 2024. Opinion filed February 28, 2025. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

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

Chelsea Anderson, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Casinroyial Donje Caszarone Collins appealed the district court's decision holding that his out-of-time appeal from a probation revocation was not excused by an exception found in *State v. Ortiz*, 230 Kan. 773, 736, 640 P.2d 1255 (1982). A panel of the Court of Appeals affirmed the district court. On petition for review, we affirm in part, reverse in part, and remand to the district court for a proper advisement of Collins' appellate rights and for findings of fact, based on the evidence in the original *Ortiz* hearing, regarding whether Collins would have appealed had he been fully aware of his appellate rights.

FACTS AND PROCEDURAL BACKGROUND

On July 15, 2022, Collins pled guilty to aggravated robbery, kidnapping, and aggravated battery. At sentencing, the district court granted a downward dispositional departure to probation, placing Collins on probation for 36 months with a controlling 161-month sentence.

Around a month after sentencing, Collins' probation officer filed a warrant alleging that Collins had violated his probation by committing several new crimes, among other violations. At the probation violation hearing on October 17, 2022, Collins admitted to the eight alleged violations and waived an evidentiary hearing. The district court revoked Collins' probation and imposed his 161-month underlying sentence. See K.S.A. 22-3716(c)(7)(B) (district court may revoke probation and impose underlying sentence without prior sanction when the original sentence was granted because

of a dispositional departure). The district court said nothing of Collins' right to appeal, of his right to have counsel appointed for his appeal, or of the time limit for his appeal.

Collins' counsel filed a notice of appeal on November 3, 2022, three days past the statutory deadline. See K.S.A. 22-3608(c) (14 days to file notice of appeal after judgment of district court). The Court of Appeals issued a show cause order directing Collins to explain why the appeal should not be dismissed for lack of jurisdiction. In response, Collins argued his failure to appeal within the statutory deadline should be excused based on an exception outlined in *State v. Ortiz*. There, we clarified out-of-time appeals are excused "only in those cases where a defendant either was not informed of his or her rights to appeal or was not furnished an attorney to exercise those rights or was furnished an attorney for that purpose who failed to perfect and complete an appeal." 230 Kan. at 736. The Court of Appeals then remanded Collins' case to the district court to determine whether an *Ortiz* exception applied.

Collins moved to reinstate his appeal, arguing both the first and third *Ortiz* exceptions excused his untimely appeal. Collins argued the district court's failure to advise him of his appellate rights satisfied the first exception, and the third exception was met because his attorney's failure to obtain a "written waiver of [appeal]" created "an ambiguity in the appeal" that prevented "either the complete pursuit of the appeal or a knowingly-executed waiver of the right."

At the *Ortiz* hearing before the district court, both Collins and his previous attorney, Garrett Heath, testified. According to Heath, at the end of the probation revocation hearing he "briefly" told Collins that he had the right to appeal and told him to reach out if he was interested in speaking more. Heath estimated they spoke less than 90 seconds after the hearing. Collins called Heath later that day and told Heath he wished to discuss his right to appeal.

A little over a week later, on October 26, Heath visited Collins in jail. Heath then:

"walked him through his rights to appeal. I had told him that I do believe, based off of my understanding of case law and precedent, that Judge Brown had the authority to do what he did, but that he still was afforded the right to appeal and that there are appellate attorneys that are more versed in appellate law and that if

he wanted to file the appeal, I would file the appeal, it would then be out of my hands and he can talk to an appellate attorney about it."

According to Heath, Collins said, in response, "something to the effect of no, I just wanna get my time started." Heath reminded him that the statutory deadline to appeal was approaching, so Collins needed to alert Heath soon if he changed his mind and chose to appeal. Heath did not obtain a written waiver of appeal at this meeting. Heath testified that he next heard from Collins on November 3, three days after the deadline to file a notice of appeal. During that interaction, Collins expressed his desire to take an appeal, and Heath filed the untimely notice of appeal the same day.

According to Collins, Heath told him on October 17—the day of the probation revocation hearing—that he would come visit later to discuss the appeal. Collins also claimed that he decided to appeal on October 17 or the next day but was unable to speak to Heath. He remembered meeting Heath in jail, though he did not know what day the meeting happened, and he did not remember what they discussed at the meeting. At one point, Collins testified that he did not remember telling Heath he wanted to appeal, but at other points Collins testified he said he wanted to appeal at that time. Collins also testified that he mentioned to Heath he wanted to start his sentence so he could "hurry up and get more time done, too." He called Heath again, on November 3, and told him he wanted to appeal "[b]ecause nobody ever came back to talk to me" and he had "been callin' and callin' since after that court date on October 17th." Collins claimed he left messages with Heath's secretary, but nobody followed up on them.

As to the first *Ortiz* exception, the court acknowledged its failure to inform Collins of his appellate rights at the October 17 probation revocation hearing. But the court found:

"[W]e have Mr. Heath testifying, the attorney, that he informed Mr. Collins immediately after the hearing that he could appeal and that he could help him with the appeal and that he should let him know if he wants to appeal.

"Mr. Heath indicated that when he got back to his office there was a phone message that Mr. Collins wanted to file an appeal and so he went over to talk with him. And at that meeting he discussed the appeal, the 14-day time limit, and his different options. So I do find that the first element, the defendant was informed of his right to appeal, was informed of the 14-day time limit and beyond that, the attorney discussed that with him in depth.

. . . .

"Third, the defendant was furnished an attorney—the third element of Ortiz, the defendant was furnished an attorney, who failed to perfect the appeal. And I do not find this, either. That Mr. Heath, when he knew that Mr. Collins wanted to file an appeal, did so immediately, but that that, when he was informed that he wanted to appeal, was three days after the expiration.

"In fact, he had told him, Mr. Collins had told Mr. Heath that he didn't want to appeal at the earlier meeting that had occurred within the 14-day time to file an appeal.

"One thing I do note about the evidence is Mr. Heath's testimony is detailed and has a lot of recollection. And I'm certainly not faulting in any way Mr. Collins, I mean, he's not an attorney and a lot going on and facing going to prison, but he does not remember, in particular, the meeting at the jail, what was discussed in large portion. Everything in the record confirms and is in agreement with the testimony of Mr. Heath.

"It would make no sense that he was told to file an appeal, didn't, but then when he gets this phone call after the period of time, he immediately files it. Again, no delay there. I would note under the statute, under case law, there is no requirement for a waiver of appeal or a written waiver of appeal. The standard is being informed of it."

On appeal, Collins argued that there was no evidence that his attorney advised him of his right to appointed appellate counsel. He also claimed that his attorney performed deficiently in two ways: by failing to explain that he did not have to choose "between starting his sentence and [pursuing] an appeal" and by failing to secure a written appeal waiver as required by K.A.R. 105-3-9(a)(3). *State v. Collins*, No. 125,761, 2024 WL 2872044, at *2 (Kan. App. 2024).

The panel held that Collins' claim under the first *Ortiz* exception was "entirely new on appeal" and thus unpreserved. *Collins*, 2024 WL 2872044, at *3-5. It also held that he failed to show the third *Ortiz* exception applied and failed to preserve his claim that his attorney gave him incomplete legal advice. 2024 WL 2872044, at *6-7.

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

DISCUSSION

Collins argues the district court and panel erred in finding the first and third *Ortiz* exceptions did not permit him to seek an untimely appeal.

First Ortiz *exception—alleging defendant insufficiently advised of his rights*

Standard of review

Appellate courts apply a bifurcated standard of review when considering a district court's ruling on an *Ortiz* exception. The district court's findings of fact are given deference so long as they are supported by substantial competent evidence. But we have unlimited review of the district court's legal conclusions in determining whether those facts fit the exception. *State v. Smith*, 312 Kan. 876, 887, 482 P.3d 586 (2021).

"Substantial competent evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. In evaluating the sufficiency of the evidence, an appellate court does not weigh witness credibility. [Citation omitted.]" *Smith*, 312 Kan. at 887.

Legal framework

"Kansas appellate courts have jurisdiction only as provided by law, see K.S.A. 22-3608, and an untimely notice of appeal usually leads to dismissal of an action." *State v. Patton*, 287 Kan. 200, 206, 195 P.3d 753 (2008). But in *Ortiz* we recognized three exceptions to this rule: "[(1)] where a defendant either was not informed of the rights to appeal or [(2)] was not furnished an attorney to perfect an appeal or [(3)] was furnished an attorney for that purpose who failed to perfect and complete an appeal." *Ortiz*, 230 Kan. 733, Syl. ¶ 3 (holding modified by *Patton*, 287 Kan. 200).

In *Patton*, we explained the first *Ortiz* exception is based on procedural due process, while the other two exceptions are based on a defendant's right of counsel and effectiveness of counsel. *Patton*, 287 Kan. at 218-19. The first exception involves a three-step, burden shifting analysis to determine whether a defendant received the process they were due. First,

"a district judge must inform a criminal defendant at sentencing, regardless of whether the defendant has entered a plea or gone to trial, that: (1) a right to appeal the severity level of the sentence exists; (2) any such appeal must be taken within [14] days; and (3) if the defendant is indigent, an attorney will be appointed for the purpose of taking any desired appeal." *Patton*, 287 Kan. at 220.

Using the sentencing hearing transcript, the defendant has the burden of demonstrating the district court failed to communicate any of these three pieces of information. *Patton*, 287 Kan. at 221-22.

Second, once the defendant makes this showing, "the State still may prevent a late appeal by proving that the defendant possessed actual knowledge of all of the required information by some means other than the district judge's oral statements at sentencing." *Patton*, 287 Kan. at 221. The State may carry its evidentiary burden by presenting "counsel's advice, the wording of an agreement signed by the defendant, or some other person or document." 287 Kan. at 221-22.

Third, if the State fails to carry its burden, the burden again shifts to the defendant to prove that, had they "been properly informed, a timely appeal would have been sought." *Patton*, 287 Kan. at 222.

Here, a review of the record demonstrates that both the district court and panel misapplied the *Patton* framework when evaluating Collins' claim under the first *Ortiz* exception.

District court and panel errors

During the *Ortiz* hearing, the district court acknowledged it erred by failing to advise Collins of his appellate rights at the probation revocation proceeding. As *Patton* notes, the following three advisements are necessary: "(1) a right to appeal the severity level of the sentence exists; (2) any such appeal must be taken within [14] days; and (3) if the defendant is indigent, an attorney will be appointed for the purpose of taking any desired appeal." *Patton*, 287 Kan. at 220; see K.S.A. 22-3608(c) (14 days to appeal, rather than 10). The probation revocation hearing transcript satisfies Collins' burden of showing the district court failed to advise him of the rights outlined in *Patton*.

The burden next shifted to the State to establish that Collins had actual knowledge of all three pieces of information. This is

where the district court made its second and third errors. At the *Ortiz* hearing, the court found that even though it failed to properly advise Collins of his appellate rights, Collins had actual knowledge of his appellate rights. But under *Patton*, the State bore the burden in this step of proving Collins knew he could appeal, the timeline to appeal, and of his right to be appointed an attorney for appeal if he could not afford to pay for one. The record contains no evidence—and the district court made no findings—that Collins was aware that he could receive appointed appellate counsel. The court *only* found that Collins knew he could appeal and knew how much time he had to appeal. So the district court erroneously ignored a critical and necessary component of Collins' actual knowledge. And the court further erred by failing to place the burden of proving actual knowledge on the State, which provided no evidence that Collins had actual knowledge of his right to appointed appellate counsel if he was indigent.

Collins raised this argument below, but the panel sua sponte deemed it to be "entirely new on appeal" and chastised him for not presenting this "specific argument . . . to the district court to preserve it for appellate review." *Collins*, 2024 WL 2872044, at *3 (citing *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 [2022]). It then criticized Collins' failure to "challenge the sufficiency of Heath's advisement of his appeal rights or even address the State's argument that he had actual knowledge of those rights before the district court." 2024 WL 2872044, at *4. Thus, because "Collins did not give the district court an opportunity to address this issue below" and "we [do not] have a sufficient evidentiary record on which we can decide the issue on appeal," the panel deemed the issue unpreserved. 2024 WL 2872044, at *4. The panel then rejected the application of any exceptions to the normal preservation rules. 2024 WL 2872044, at *4-5.

The panel's analysis missed the mark. As *Patton* made clear, Collins had no responsibility to carry *the State's burden* of proving actual knowledge. Further, the panel's treatment of issue preservation cuts matters too finely. Collins' claim placed the first *Ortiz* exception before the district court. The district court heard testimony and made findings on the evidence, including Collins' actual

knowledge. Not only did Collins' attorney cite *Patton* in his Motion to Reinstate Appeal and list the three required pieces of information discussed in the first *Ortiz* exception, but the *State* even discussed *Patton*'s actual knowledge prong at the *Ortiz* hearing. By treating a claim that the district court erred in its actual knowledge finding—a subcomponent within the framework of the first *Ortiz* exception analysis—as an "entirely new" error, the panel improperly pigeonholed the question of preservation, forming a much higher barrier to appellate review than we have traditionally imposed. Cf., *Smith*, 312 Kan. at 883-87 (defendant precluded from raising new *Ortiz* exception arguments on remand when, previously, litigation had only focused on the third *Ortiz* exception).

Thus, the panel's misapplication of the burden-shifting framework and its overly narrow preservation analysis kept it from considering the merits of Collins' arguments rooted in the first *Ortiz* exception. We will consider those merits.

The State, in its brief before the Court of Appeals, attempts to show Collins' actual knowledge of his right to appellate counsel by pointing to his plea form and his prior experience with appointed counsel. Neither argument is persuasive. If anything, Collins' plea form suggested a *limited* right to appeal, while his prior experience with appointed counsel in other contexts has no bearing on the knowledge of his right to appointed appellate counsel in the context of probation revocations or at the relevant time period here.

We now return to the *Patton* analysis to consider the third step. Once the State has failed to show the defendant has actual knowledge of each of the three necessary pieces of information, then the burden shifts back to the defendant to prove that, had they "been properly informed, a timely appeal would have been sought." *Patton*, 287 Kan. at 222.

Here, the district court found Collins instructed Heath to not file an appeal at the October 26 meeting. But to the extent the district court intended for this finding to stand in for a finding as to what Collins would have done had he been properly advised of his rights, the district court again erred. Without complete, actual knowledge of all components of his appellate rights, Collins could

not make an informed decision on whether he would seek an appeal. The court thus applied an incorrect standard to the extent it was assessing this third step.

Remedy

We acknowledge that Collins sought to appeal shortly after being advised of *some* of his appellate rights. And one could reasonably infer from this fact that Collins would have appealed had he been *fully* informed. But we are not a fact-finding court, so we must remand to the district court to determine whether Collins would have appealed had he been properly advised. Further, prior to this fact-finding, we direct the district court to properly advise Collins of his appellate rights.

We also clarify that this remand does not provide the State an additional opportunity to prove Collins had actual knowledge of his right to appointed appellate counsel. The State had its chance, and it failed. Nor may Collins present new evidence. Collins had the burden of proof below as to the first and third steps of the first *Ortiz* exception analysis. He carried that burden as to the first step, while the State failed to carry its burden as to the second step. But Collins may not present new evidence as to the third step; he has already had his chance to do so. Thus, on remand, concerning the first *Ortiz* exception, the district court's factual findings must be limited only to the third step of the *Patton* analysis, being whether Collins would have appealed had he been *fully* aware of his appellate rights. To this point, the district court may only consider the evidence from the original *Ortiz* hearing, including the evidence that Collins *did* appeal. The court may not consider new evidence.

Third Ortiz *exception—alleging counsel's failure to perfect an appeal*

Collins also argues the third *Ortiz* exception justifies an out-of-time appeal. "The standards of review governing the third *Ortiz* exception are the same as those governing the first." *State v. Shelly*, 303 Kan. 1027, 1041, 371 P.3d 820 (2016).

Ortiz' third "exception allows a late appeal if a defendant was furnished or retained counsel who failed to perform." *Shelly*, 303 Kan. at 1041. To successfully invoke this exception, the defendant

bears the burden of showing: "(1) Whether the defendant told his or her counsel to appeal, but the attorney failed to file or perfect the appeal; and, (2) if so, the defendant will enjoy a presumption of prejudice but must show that he or she would have timely appealed, but for counsel's failure." *State v. Smith*, 304 Kan. 916, 921, 377 P.3d 414 (2016); see also *Patton*, 287 Kan. at 219.

Here, the district court found Collins directed Heath *not* to file a notice of appeal during the October 26 meeting. The district court also found Collins next spoke with Heath on November 3, three days past the statutory deadline. Based on our review of the record, these factual findings are supported by substantial competent evidence. See *State v. Bennett*, 318 Kan. 933, 939, 550 P.3d 315 (2024) ("While Bennett argues that he asked counsel to file a timely appeal, counsel directly refutes that claim. The district court found his counsel's testimony to be credible. We find the court's conclusion is supported by substantial competent evidence.").

From these facts, the district court concluded the third *Ortiz* exception was inapplicable because Heath was simply following Collins' direction. We agree. In *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), the Court explained that "a defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently." Accordingly, the district court and panel were correct that, based on Heath's perception of Collins' wishes, Heath did not perform deficiently, and the *Ortiz* exception does not provide Collins with relief.

Still, Collins presents two arguments suggesting the third *Ortiz* exception justifies an out-of-time appeal. First, Collins argues Heath performed deficiently by failing to secure a written appeal waiver, under K.A.R. 105-3-9(a)(3). But, as Collins acknowledges, we have previously rejected this argument. In *State v. Northern*, 304 Kan. 860, 865, 375 P.3d 363 (2016), Northern argued that counsel's failure to get a signed waiver form under K.A.R. 105-3-9 "would be better evidence of whether the third *Ortiz* exception applies." 304 Kan. at 865. We explained that "[e]ven though a signed waiver would have simplified the factual findings in the present case, the district court heard evidence and

evaluated the credibility of the witnesses and determined that Northern did not ask his attorney for an appeal." 304 Kan. at 865. Here, the district court heard Heath's and Collins' testimony and evaluated their credibility, which led the district court to conclude Collins did not ask Heath to perfect the appeal until after the statutory deadline had passed. As in *Northern*, this evidence is sufficient regardless of Heath's failure to get a signed waiver form.

Second, Collins argues Heath performed deficiently by providing inaccurate legal advice. Collins claims his statement to Heath that he did not want to file an appeal and just get his time started shows a misunderstanding that he had to choose whether to file an appeal *or* begin his sentence. See K.S.A. 21-6615 (defendant receives credit against sentence for time incarcerated, regardless of appeal). He suggests Heath performed deficiently by not clarifying these avenues were not mutually exclusive. Cf. *State v. Perry*, 303 Kan. 1053, 1061, 370 P.3d 754 (2016) ("His failure to advise Perry of the current state of the law so that she could make an informed decision about whether to take an appeal is sufficiently equivalent to a failure to file a direct appeal that Perry . . . qualifies for application of the third *Ortiz* exception.").

Unlike the waiver form argument, Collins did not raise this specific argument before the district court. His motion and argument on the third *Ortiz* exception focused on Heath's failure to follow K.A.R. 105-3-9. Because of this, the panel found this argument was unpreserved and declined to consider it. *Collins*, 2024 WL 2872044, at *6-7.

But we again conclude the panel misapplied our preservation rules. Collins raised the broad issue that his out-of-time appeal should be allowed because counsel failed to perfect the appeal in a timely manner. And "*Patton* makes clear that counsel's effectiveness is part and parcel of the third *Ortiz* exception," meaning Collins properly placed the issue of his counsel's effectiveness before the district court. *Shelly*, 303 Kan. at 1047.

That said, Collins developed no evidence at the *Ortiz* hearing demonstrating the purported misunderstanding or erroneous legal advice. Unlike the first *Ortiz* exception, which places the burden on the State to show the defendant had actual knowledge of all relevant information, the defendant bears the burden of showing

deficient performance when raising a claim under the third *Ortiz* exception. *Smith*, 312 Kan. 876, Syl. ¶ 4.

But rather than proving this claim at the *Ortiz* hearing, Collins asks us to *assume* he had a misunderstanding and that Heath failed to provide the necessary legal advice, simply based on Heath's testimony that Collins said "something to the effect of no, I just wanna get my time started." This testimony fails to support Collins' preferred inferences. And he does not direct us to any other evidence for these conclusions. Accordingly, Collins' argument for deficient performance lacks evidentiary support.

CONCLUSION

We reverse the Court of Appeals panel and the district court as to the first *Ortiz* exception. We remand to the district court for hearing only on the third step in the first *Ortiz* exception's analysis. At such hearing, the district court must first fully inform Collins of his appellate rights. As we have clarified, neither party may present new evidence at this hearing. Then, at the conclusion of the hearing, the district court must make factual findings on whether Collins would have appealed had he been properly advised of his appellate rights.

We affirm the Court of Appeals panel and district court as to the third *Ortiz* exception, albeit on different grounds.

Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.