No. 21-124205-S

IN THE SUPREME COURT OF THE STATE OF KANSAS

BUTLER, KRISTEN, and BOZARTH, SCOTT
Plaintiffs,

v.

SHAWNEE MISSION SCHOOL DISTRICT BOARD OF EDUCATION,
Defendant-Appellee.

ATTORNEY GENERAL DEREK SCHMIDT,
Intervenor-Appellant.

REPLY BRIEF OF APPELLANT ATTORNEY GENERAL DEREK SCHMIDT

Appeal from the District Court of Johnson County
Honorable David Hauber, District Judge
District Court Case No. 21-CV-2385

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ARGUMENTS AND AUTHORITIES

The Shawnee Mission School District's brief fails to justify the district court's decision declaring SB 40 unconstitutional. Contrary to the school district's claims, the district court improperly raised non-jurisdictional claims *sua sponte* in a moot case where the school district lacked standing to challenge SB 40. The school district's effort to support the district court's constitutional analysis also falls short, and the school district declines to defend the district court's holding on severability.

I. The school district has not provided any authority that would allow a district court to raise non-jurisdictional constitutional claims *sua sponte*.

As an initial matter, the school district is wrong that the district court's decision to *sua sponte* raise a non-jurisdictional issue is reviewed for an abuse of discretion. Appellee Br. at 3. In support of this proposition, the school district cites an unpublished Court of Appeals decision, *State v. Carrasco*, No. 114,918, 2016 WL 5844578 (Kan. App. 2016) (unpublished opinion), which in turn cites another unpublished Court of Appeals decision, *State v. James*, No. 105,768, 2012 WL 402014 (Kan. App. 2012) (unpublished opinion). But *James* cited the standard for reviewing a district court's decision to allow the State to amend a criminal complaint, 2012 WL 402014 at *6, which is not the issue here.

The proposition that a district court cannot *sua sponte* raise non-jurisdictional issues is a straightforward, purely legal rule. Accordingly, this Court owes no deference to the district court. But even if an abuse of discretion standard

did apply, an error of law amounts to an abuse of discretion. And the district court committed legal error by raising constitutional issues here.

On the merits of this issue, the school district attempts to defend the district court's actions by citing cases where *appellate* courts raised new issues *sua sponte*. Appellee's Br. at 4-8 (citing *State v. Puckett*, 230 Kan. 596, 598-601, 640 P.2d 1198 (1982), among other cases). But as the Court of Appeals recently explained, a different standard applies to *district* courts. *See City of Wichita v. Trotter*, ____ Kan. App. 2d ___, 2021 WL 3020731, at *7 (Kan. App. July 16, 2021) ("[I]t is error for a trial court to raise, *sua sponte*, nonjurisdictional issues. Kansas appellate courts, in contrast, may sometimes sua sponte raise a previously unraised issue." (internal citation and quotation marks omitted)). The school district provides no authority that would allow a district court to *sua sponte* raise non-jurisdictional issues.

Even with appellate courts, the authority to *sua sponte* raise non-jurisdictional issues should be exercised only in rare circumstances. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 & n.4, 1582-83 (2020) (listing cases where the U.S. Supreme Court called for supplemental briefing or appointed *amicus curiae* and explaining that none of these situations "bear any resemblance to the redirection ordered by the" lower court). Most often, this will involve considering new "legal arguments bearing upon the issue in question," as opposed to raising an entirely new issue, as the district court did here. *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). It might also be appropriate to *sua sponte* raise

a non-jurisdictional issue when a criminal defendant has a constitutional right to effective assistance of counsel and that counsel has failed to raise a potentially meritorious issue. *See State v. Adams*, 283 Kan. 365, 367, 153 P.3d 512 (2007) (granting relief based on a speedy trial issue raised in the district court but not briefed by appellate counsel). In that situation, raising an issue *sua sponte* heads off a later collateral attack based on ineffective assistance of counsel. But this is a civil case.

This Court should reject the school district's broad suggestion that courts can *sua sponte* raise any constitutional issues "to serve the ends of justice or to prevent the denial of fundamental rights." Appellee's Br. at 5. As explained in the Attorney General's opening brief, that rule would be fundamentally at odds with our system of adjudication. Appellant's Br. at 3-5. In fact, courts should be particularly reluctant to *sua sponte* raise constitutional issues given principles of constitutional avoidance. *Id.*

The school district tries to get around this problem by arguing that the constitutionality of SB 40 is jurisdictional, but this is incorrect. "Jurisdiction over subject matter is the power to decide the general question involved, and not the exercise of that power." *Miller v. Glacier Development Co., L.L.C.*, 293 Kan. 665, 669, 270 P.3d 1065 (2011). The Legislature has clearly provided courts with the power to hear these cases. Determining whether SB 40 is constitutional is an exercise of this power and goes to the merits, not the court's jurisdiction. In addition, the district court only found constitutional problems with the timelines for

a decision and the provision granting the requested relief, not with the power to decide the underlying issue. Those concerns were not jurisdictional.

Finally, the school district's reliance on K.S.A. 75-764(b)(2) is misplaced. That statute requires that either the party disputing the validity of a statute or the court provide the Attorney General with notice of any constitutional challenge. It does not confer any substantive authority to raise constitutional challenges.

II. The entirety of Section 1 of SB 40 expired with the end of the disaster emergency, rendering this case moot.

The school district now correctly concedes that Section 1(a) of SB 40 expired with the end of the state of disaster emergency on June 15, 2021, but claims that the hearing and judicial review procedures in Sections 1(c) and 1(d) continued to be available, at least until July 15, 2021. Appellee's Br. at 10. This makes no sense. The purpose of a hearing under Section 1(c) and a lawsuit under Section 1(d) was to challenge a policy adopted under Section 1(a). Accordingly, as soon as Section 1(a) and any policies adopted under that subsection expired, any request for a hearing or the filing of a lawsuit to challenge policies adopted under that subsection would have been moot. Thus, Sections 1(c) and 1(d) effectively expired with the end of the disaster emergency as well.

The school district claims that a policy enacted under Section 1 of SB 40 might still be in effect. But by its own terms, Section 1(a)(1) of SB 40 only applies "[d]uring the state of disaster emergency." To the extent a pandemic response was adopted under some other source of authority, the hearing and judicial review

provisions in Sections 1(c) and 1(d) of SB 40 would not apply, as they refer back to subsection (a)(1).

The fact that Sections 8 and 12 of SB 40 remain effective does not prevent this case from being moot, as those provisions do not provide a mechanism for challenging actions taken by a school district. Contrary to its claim, the school district is not a "local unit of government" subject to a lawsuit under Section 8(e)(1) of SB 40. That provision applies to "an action taken by a local unit of government *pursuant to this section*." SB 40, § 8(e)(1) (emphasis added). Looking back at Section 8(a), this refers to actions taken by cities and counties, not school districts.

The school district also argues that the district court could have relied on a mootness exception "where the harm is capable of repetition or involves a question of public importance." Appellee's Br. at 8. But this Court's precedents hold that this exception applies to cases "that raise issues that are capable of repetition *and* present concerns of public importance." *See State v. Roat*, 311 Kan. 581, 590, 466 P.3d 439 (2020) (emphasis added). Public importance alone is not enough. Nor is there a question of public importance here given that Section 1 of SB 40 has expired.

III. The school district's lack of standing to challenge SB 40 requires reversal, not dismissal of this appeal.

The school district's response to the Attorney General's standing argument largely falls back on its mootness argument. But the school district also argues that if this Court finds a lack of standing, it should dismiss this appeal and leave the district court's order in place. That is incorrect.

The Attorney General has standing to pursue this appeal because the district court incorrectly found that the school district had standing to challenge SB 40 and declared SB 40 unconstitutional, which causes harm to the State. If the school district lacked standing as the Attorney General has argued, the district court's erroneous standing decision should be reversed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (reversing the lower court's decision after finding that plaintiffs lacked standing).

Unlike in *Baker v. Hayden*, ___ Kan. ___, 490 P.3d 1164 (2021), the school district did not lose standing while this case was on appeal. Rather, the school district lacked standing at the time the district court entered its judgment on July 15, 2021, given that the disaster declaration ended on June 15, 2021. But even if this lack of standing had arisen while the case was on appeal, the proper response would be to vacate the decision below, not to leave it in place and unreviewable. *Cf. United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.").

IV. The school district has failed to demonstrate a constitutional violation.

The Attorney General argued in his opening brief that the school district, as a political subdivision of the State, has no due process rights that might be violated by state law. Appellant's Br. at 13-16. The school district has made no attempt to

respond to this argument, thus conceding it. *See State v. Gonzalez*, 307 Kan. 575, 592, 412 P.3d 968 (2018) ("When a party fails to brief an issue, that issue is deemed waived or abandoned.").

Even if the school district had due process rights, its brief fails to cite any authorities that would establish a constitutional violation. Instead, its brief is focused on policy concerns with SB 40. But these concerns are misguided. For instance, the school district criticizes the relevant legal standard—that the challenged restrictions must be "narrowly tailored to respond to the state of disaster emergency and use[ ] the least restrictive means to achieve such purpose," SB 40, § 1(d)(1)—claiming that this standard should not apply because there is no fundamental right at stake. But the Due Process Clause does not prevent the Legislature from providing more rights under a statute than might be available under the Constitution. *See, e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (providing greater protection for religious freedom than required by *Employment Division v. Smith*, 494 U.S. 872 (1990)); K.S.A. 22-3402 (providing for statutory speedy trial rights more restrictive than the constitutional right to speedy trial). The school district also argues that SB 40 allows plaintiffs to pursue lawsuits with no showing that they were harmed. But SB 40 does not purport to extinguish traditional standing requirements. Standing is always required; there is no need for it to be specified in statute. And, as argued in the Attorney General's opening brief, the time periods for a hearing and decision are reasonable and justified by the interests at stake. *See* Appellant's Br. at 18-20.

The school district's separation of powers argument fails to grapple with the fact that while SB 40 sets a seven-day timeline for the court to issue an order, it does not contain any remedial process to enforce this deadline that might infringe on the judicial power. Rather, the provision stating that relief should be granted in favor of the plaintiff if an order is not issued within seven days of the hearing affects the school district, which does not pose any separation of powers concerns with respect to the judiciary.

The school district engages in hyperbole about "weaponiz[ing] the court system" and using "the judicial system as a sword," Appellee Br. at 29, but this rhetoric is unfounded. Whether or not one agrees with the statute on policy grounds, the purpose of SB 40 was to attempt to balance the rights of individuals with the need to respond to the pandemic. And the timelines were designed to reflect the fact that the law applies in emergency situations while at the same time recognizing that prolonged delay may harm plaintiffs. The Legislature easily could have provided that a request for a hearing or the filing of a lawsuit would automatically stay any challenged restrictions. But instead, given the need to respond to emergencies, the Legislature allowed restrictions under SB 40 to take immediate effect, *see, e.g.*, SB 40, § 1(c)(1) (providing that a request for a hearing "shall not stay or enjoin" the challenged "action, order or policy"), while also providing for a timely adjudication of any challenges. This does not violate the separation of powers.

CONCLUSION

This Court should reverse the district court and order this case dismissed for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 16, 2021, the above brief was electronically filed with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to registered participants, and a copy was electronically mailed to:

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380 P.3d 721 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellant,

v.

Jesus CARRASCO, Appellee.

No. 114,918

Opinion filed September 30, 2016.

Appeal from Seward District Court; CLINT B. PETERSON, judge.

Attorneys and Law Firms

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No appearance for appellee.

Before Pierron, P.J., Green and Buser, JJ.

MEMORANDUM OPINION

Per Curiam:

**1 The State charged Jesus Carrasco with attempted first-degree murder, conspiracy to commit first-degree murder, criminal discharge of a firearm, criminal possession of a firearm, and criminal damage to property. A magistrate judge held a preliminary hearing for Carrasco and his three codefendants, and bound all four codefendants over for trial. Carrasco filed a motion to dismiss with the district court, and the court granted his motion. The State appeals the court's order, arguing there was sufficient evidence to establish probable cause; the court erred in using de novo review in ruling on the motion; and the court erred in raising the issue of evidentiary errors at the preliminary hearing *sua sponte*. We reverse and remand with directions.

On the night of March 28, 2015, James and Jessica Harp were driving in their truck on Cornell Street in Liberal. Another truck crashed into the front of their truck and several gunshots were fired at them. The couple was able to drive away and immediately called the police.

The State eventually charged Carrasco with two counts of attempted first-degree murder, one count of conspiracy to commit first-degree murder, one count of criminal discharge of a firearm, one count of criminal possession of a firearm, and one count of criminal damage to property in connection with the incident. The State also charged codefendants Guadalupe Perez, Mario Sanchez, and Daniel Rios.

At the preliminary hearing before the magistrate judge, the State presented evidence that the Harps had positively identified Carrasco's truck as the truck used in the shooting. Police testified they were able to match some of the damage on Carrasco's truck to some of the damage on the Harps' truck. Jessica testified she saw Carrasco at the scene of the shooting.

The State's theory at the preliminary hearing was that Carrasco, Sanchez, Perez, and Rios—members of a gang known as Sur 13 or South Siders—had intended to kill Mauricio Neal. Neal is in a gang known as the Folks gang. The State presented evidence that Neal lived on Cornell Street, at approximately the spot where the shooting occurred. It also presented testimony that Neal had been involved in an altercation with the mother of Carrasco's child earlier that evening. Carrasco, Sanchez, and Perez had been at a cookout at the time. After hearing about the incident with Neal, all three left in Carrasco's truck shortly before the shooting.

Jessica Vasquez testified that later in the evening Carrasco commented he had a "big ass dent" in his truck. She also stated Sanchez had a "long gun" which he brought back to the cookout. The State presented evidence that Sanchez had taken steps to conceal the long gun and perhaps another gun that evening.

At the end of the hearing, the magistrate judge bound all four codefendants over for trial. Carrasco filed a motion to dismiss for lack of probable cause following the preliminary hearing. He specifically argued the State's witnesses had provided inconsistent testimony. The district court granted the motion. According to the court, it was unable to find probable cause due to numerous evidentiary errors and "the difficulty the Court had in keeping straight who did what, with whom, and when." The State appeals.

**2 To bind a defendant over at a preliminary hearing, the district court must find the evidence is sufficient to cause a

person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *State v. Brown*, 299 Kan. 1021, 1030, 327 P.3d 1002 (2014), *overruled on other grounds by State v. Dunn*, 304 Kan. ----------, 375 P.3d 332 (2016). On appeal from the granting or denial of a motion to dismiss filed after the preliminary hearing, an appellate court reviews the district court's probable cause finding de novo. *State v. Washington*, 293 Kan. 732, 734, 268 P.3d 475 (2012) (denial of motion to dismiss).

In reviewing the evidence in a case like this, the appellate court draws inferences in favor of the State. Moreover, the evidence need only show probable cause, not guilt beyond a reasonable doubt. Even if the evidence is weak, the defendant should be bound over for trial if the evidence tends to establish that the offense was committed and that the defendant committed it. *Washington*, 293 Kan. at 733–34.

At the preliminary hearing, the State presented the testimony of seven witnesses. The evidence presented was sufficient to establish probable cause that Carrasco committed attempted first-degree murder. Evidence on the conspiracy charge was not as strong, but it was still sufficient to support a probable cause finding.

James Harp testified that on the night of March 28, 2015, at approximately 11:30 p.m., he was driving Jessica home from the bowling alley in his black 2013 Chevy Silverado. He was on Cornell Street, where his nephew lives, when Jessica said, "We need to get out of here." He started to speed up and saw headlights in his rearview mirror that were less than 100 yards away and approaching quickly. The headlights belonged to a truck, and as it came up beside him, it hit the front quarter panel of his truck on the driver's side. The collision brought his truck to a stop. The occupants of the other truck began shooting at James' truck. He heard at least four or five shots, but he did not see who fired them. Based on his experience with guns, James testified he thought one of the guns was a pistol based on the sound it made, while the other gun was "a little muffled."

James testified that as soon as he heard gunfire, he "floored it" and pushed past the other truck. After driving off, Jessica called 911, and they met up with the police. James described the suspect vehicle as an older Chevy Silverado pickup truck with a silver extended cab or crew cab. The next morning, the police showed him a photo of a vehicle, and he identified it as the one used in the shooting.

James testified he had driven past the scene of the shooting frequently since it had happened. He stated he had seen a truck almost exactly like his in the area. He speculated the incident was a result of "mistaken identity," and the shooters were looking for someone with a truck very similar to his.

Jessica Harp testified that as she and James drove down Cornell Street, she saw a truck parked in front of her nephew's house, on the right hand side of the street. Two men were in the bed of the truck, and one man was outside of the truck, standing on the sidewalk. She identified all three men as Hispanic.

Jessica testified that the man outside of the truck was wearing a blue bandanna around his face and he looked directly at her as they drove by at about 10 to 15 miles per hour. She thought the men were probably up to no good because one of them had a bandanna on his face, so she told James they needed to get out of there.

****3** Jessica later identified Carrasco as the man in the blue bandanna. She explained she was able to identify him just by his eyes, saying "he just looked at me, it bore into me.... [H]is eyebrows were distinctive. And the slant, the shape of his eyes." She never looked at a line up to make an identification. Instead, she had seen Carrasco's picture on the Liberal Police Department's public Facebook page. She also identified Carrasco in court.

Similar to James, Jessica testified that as they approached the intersection of Harrison Circle Park and Cornell Street, a truck hit them and gunshots were fired. She heard four shots, and saw three bullet holes in the windshield. James drove off and she called 911. She reported they had just been shot at by three Hispanic males in a silver or white Chevy Silverado.

Anthony Owens testified that he is the Harps' nephew and he lives on Cornell Street. He was out driving on the night of the incident. The police originally thought he was involved in the shooting because he drives a four-door Silverado.

Owens testified that Mauricio Neal lives across the street from him. When questioned by police on the night of the incident, he said the shooters may have been there for Neal. He told police he had seen an altercation at Neal's house, and he had seen a truck matching the description of the suspect's truck at Neal's house one time. He also testified, however, that Neal had an older Ford Bronco that did not appear to run.

Ramon Acosta testified he is one of Neal's neighbors. Officer Jared Ratzlaff questioned him after the incident, but he did not tell the officer anything. Acosta testified there had been some problems in his neighborhood, and he had broken up some fights. These fights sometimes involved people from outside the neighborhood. They also sometimes involved Hispanic males, but he did not tell Officer Ratzlaff this. He did tell Officer Ratzlaff he had seen a silver or tan Chevy Silverado pickup outside Neal's house.

Officer Ratzlaff testified he responded to the scene of the shooting. Acosta told him a group of South Siders had been at Neal's house a few days before causing problems. Officer Ratzlaff remembered that Carrasco was a South Sider, and he had a truck that matched the description of the suspect's truck. He went to Carrasco's house to investigate the truck.

Once there, Officer Ratzlaff saw Carrasco's truck in the driveway. He described the truck as gray or silver-colored. The truck had damage to the front quarter panel of the passenger side, which was consistent with what he had been told to look for. He testified that the damage appeared fresh because the truck was covered in dirt but the damaged area was clean.

Officer Ratzlaff testified he took pictures of the truck to show to the Harps for identification purposes. He also took measurements of the damage to Carrasco's truck as well as the size of the tires. He did not try to match the measurements of the damage to the Harps' truck, but he did match the measurements of the tires to tire marks left at the scene.

Officer Ratzlaff returned to Carrasco's house. Carrasco consented to a search of his house. During the search, Officer Ratzlaff found a blue bandanna in what he was told was Carrasco's bedroom.

Officer Dwayne Devellen testified he arranged to have Carrasco's truck towed to the police impoundment lot. As he was waiting for the tow truck, he found a small piece of black plastic tucked into the front passenger wheel of Carrasco's truck. Once the truck was in police impound, he found another piece of black plastic on the passenger side of the truck. Officer Devellen compared the two pieces of plastic he took off of Carrasco's truck to the Harps' truck. The pieces appeared to match two scratches on the Harps' truck. Officer Devellen testified that through his investigation he learned that Sanchez had been with Jessica Vasquez on the night of March 28, so he and Detective Jason Ott questioned Vasquez about the incident.

**4 Vasquez testified that on the day of the shooting, she began drinking at 2 p.m. At approximately 6 p.m., she was in Carrasco's truck, and she saw a handgun in the glove compartment. She was also intoxicated at the time.

Later that night, Vasquez went to a cookout. Carrasco, Sanchez, Rios, and Perez were there. Also at the cookout were Jessica Ortega, who had a child with Carrasco, and Crystal Mendez. At some point, Ortega and Mendez left the party in Carrasco's truck to change clothes. According to Vasquez, they returned 10 minutes later looking scared. Ortega said the Folks gang were attacking Carrasco's truck. They also mentioned that a man named Chito was involved in the attack. Chito is Neal's nickname.

Vasquez originally told police that immediately after Ortega and Mendes returned to the cookout, at 11 p.m., Carrasco, Sanchez, Rios, and Perez got in Carrasco's truck, saying they were going to look for the Folks gang. The four returned 20 minutes later saying they had not found them. On the stand, Vasquez did not remember giving this information to police.

Vasquez testified that Sanchez, Rios, and Carrasco got in Carrasco's truck and left the cookout at 11 p.m. and was the only time they left. She knows they left at 11 p.m. because she happened to check the time on her phone. She also testified, however, that she was drunk at the time, and she had been smoking marijuana that day.

Later, Eloy Chico came to the cookout, but Vasquez does not remember what time he showed up. She and Ortega went with Chico in his car to Carrasco's mother's house to pick up Carrasco, Sanchez, and Rios. Vasquez saw Rios hand Sanchez what she described as a "long gun," one that was different from the gun Carrasco had in his truck earlier. They all got into Chico's car with the gun and went back to the cookout.

Vasquez testified there was no conversation on the way back to the cookout. She did tell one of the detectives that Carrasco said he had a "big ass dent" in his truck. She also told the detective that Sanchez said he was the one who "blasted them." She later testified she remembered Carrasco saying he had a big ass dent in his truck, but she did not remember Sanchez saying anything.

Vasquez stayed at the cookout until 3 a.m. Then, she, Sanchez, and another woman went to Vanessa Barray's house. On the way, Sanchez had something in his lap wrapped in a sweatshirt. Later in her testimony, Vasquez claimed it was the long gun in the sweatshirt. She could not remember how big it was, other than to say it was bigger than a bowling ball. At Barray's house, she asked Sanchez what he had done that night and he said, "Don't worry about it." She also asked him what he did with the gun and he said he got rid of it.

Vasquez testified that the next day, Barray called her. Barray told her to tell police she was Sanchez' girlfriend to help provide him with an alibi. Vasquez originally told police she was Sanchez' girlfriend, but she recanted because it was not true.

Vasquez testified the officers who interviewed her told her she could be charged in the case. She agreed to cooperate so she would not be charged. She also did not want to risk having her 3–year–old child taken away. She denied having any agreement with the officers, however, and none of the conversations were recorded.

**5 The evidence presented at the preliminary hearing is sufficient to support a finding of probable cause that Carrasco committed attempted first-degree murder. First-degree murder is the intentional and premeditated killing of a human being. K.S.A. 2015 Supp. 21–5402(a). In Kansas, premeditation is defined as "to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act." *State v. Jones*, 298 Kan. 324, 336, 311 P.3d 1125 (2013). Courts may draw an inference of premeditation from several factors, including: (1) the nature of the weapon used; (2) the lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless. *Jones*, 298 Kan. at 336. A court may reasonably infer premeditation and deliberation from the established circumstances of a crime. 298 Kan. at 336.

Because the State charged Carrasco with attempted first-degree murder, Carrasco does not need to actually have succeeded in killing anyone. Under K.S.A. 2015 Supp. 21–5301(a), "[a]n 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." Thus, to demonstrate probable cause that Carrasco committed attempted first-degree murder, the State only needed to show Carrasco made an intentional overt act toward the killing of a human being.

The evidence demonstrates that Carrasco left the cookout after hearing that Neal had been harassing Ortega and Mendez. Carrasco then waited outside Neal's home with at least two other males until he believed his intended target had arrived. He covered his face with a bandanna, presumably to conceal his identity. Then, Carrasco and those with him shot at the Harps using a pistol and possibly one other gun. From this evidence, one could reasonably infer that Carrasco formed a design to kill Neal, and then carried out an overt act towards this goal.

The State specifically argues that Carrasco is guilty of attempted first-degree murder under the theories of transferred intent and aiding and abetting. Under a theory of transferred intent, a defendant is still criminally responsible for a homicidal act against someone other than the intended victim because " '[i]t is generally held that such a homicide partakes of the quality of original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the assault followed upon the intended victim instead of another.' " *State v. Jones*, 257 Kan. 856, 859, 896 P.2d 1077 (1995) (quoting *State v. Moffitt*, 199 Kan. 514, 535, 431 P.2d 879 [1967], *overruled on other grounds by* *State v. Underwood*, 228 Kan. 294, 615 P.2d 153 [1980]).

In this case, the evidence suggests the intended target of the shooting was Neal. Officer Ratzlaff testified that Acosta told him some members of Carrasco's gang had been at Neal's house a few days before causing problems. Owens testified he had seen an altercation at Neal's house a few days before. Both Owens and Acosta testified they had seen a vehicle similar to Carrasco's truck outside Neal's house before. Vasquez testified that Ortega and Mendez reported Neal had been harassing them shortly before Carrasco left the cookout. The Harps testified they saw a truck similar to Carrasco's parked outside Neal's home immediately before the shooting. This evidence establishes Neal was the intended target, but that intent was transferred to the Harps.

There is no direct evidence that Carrasco himself fired any of the shots or drove the vehicle. The State argues, however, that Carrasco is guilty under a theory of aiding and

abetting. Under the aiding and abetting statute, "[a] person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime." K.S.A. 2015 Supp. 21–5210(a). Despite having its own statute, aiding and abetting is not a separate crime; it merely extends criminal liability to a person other than the principal actor. *State v. Robinson*, 293 Kan. 1002, 1038, 270 P.3d 1183 (2012). " '[T]o establish guilt on the basis of aiding and abetting, the State is required to show that a defendant knowingly associated with the unlawful venture and participated in such a way as to indicate that [the defendant] was facilitating the success of the venture.' " 293 Kan. at 1038. Here, Jessica Harp testified she saw Carrasco at the scene of the shooting. More importantly, the evidence supports a finding that Carrasco's truck was used to carry out the shooting. Carrasco's presence at the shooting and the use of his truck suggest he not only knowingly associated with the act but facilitated its execution with the use of his truck.

**6 Conspiracy consists of two elements: " '(1) an agreement between two or more persons to commit or to assist in committing a crime and (2) an overt act in furtherance of the conspiracy committed by one or more of the conspirators.' " *State v. Moody*, 35 Kan. App. 2d 547, 555, 132 P.3d 985 (2006); see also K.S.A. 2015 Supp. 21–5302(a). Evidence of a formal agreement is not necessary to establish a conspiracy. A tacit agreement regarding the unlawful purpose among the parties is sufficient. *State v. Hernandez*, 24 Kan. App. 2d 285, 291, 944 P.2d 188, *rev. denied* 263 Kan. 888 (1997). Furthermore, " 'the existence of the agreement does not need to be proved directly but may be inferred from other facts proved.' [Citation omitted.]" *Hernandez*, 24 Kan. App. 2d at 291.

In this case, evidence of a conspiracy was slim. Vasquez testified she saw Carrasco, Sanchez, and Rios leave the cookout in Carrasco's truck after Ortega had complained about Neal harassing her. They left at 11 p.m. according to her testimony, which was approximately 30 minutes before the shooting. Later that evening, Vasquez picked up the three men, and Sanchez had a gun. Jessica testified she saw two Hispanic males with Carrasco at the scene of the shooting. Even though this evidence is weak, it does tend to establish that Carrasco had a tacit agreement with Sanchez and Rios, and at least Carrasco carried out an overt act in furtherance of the agreement's unlawful purpose.

Additionally, the State attempted to gain admission of hearsay statements from Sanchez in further support of the conspiracy charge. Known as the coconspirator hearsay exception, hearsay evidence is admissible where the statement was made while "the [defendant] and the declarant were participating in a plan to commit a crime or a civil wrong and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before its complete execution or other termination." K.S.A. 2015 Supp. 60–460(j)(2).There are four requirements for the coconspirator hearsay exception:

> "(1) [T]he person testifying must be a third party; (2) the out-of-court statement ... must have been made by one of the coconspirators; (3) the statement of the coconspirator must have been made while the conspiracy was in progress; and (4) the statement must be relevant to the plan or its subject matter." *State v. Betancourt*, 301 Kan. 282, 298, 342 P.3d 916 (2015).

Sanchez made several statements which are admissible under this exception. Vasquez testified Sanchez told her he had gotten rid of the gun, and told her to lie to provide him an alibi. While Sanchez made these statements after the shooting, statements made during an attempt to conceal a crime are admissible under the coconspirator hearsay exception. *Moody*, 35 Kan. App. 2d at 562 (finding third-party statement that someone told him defendant fled scene of crime was admissible under coconspirator exception). Furthermore, because the conspiracy continued until the next day, Sanchez' statement in the car that he "blasted them" is also admissible against Carrasco. See *Betancourt*, 301 Kan. at 929–30 (finding coconspirators statement "I got him, I got him" made after shooting admissible under coconspirator exception). The other circumstantial evidence, along with Sanchez' statements, are sufficient to support a finding of probable cause that Carrasco was involved in a conspiracy to commit first-degree murder.

In his motion to dismiss, Carrasco argued the State's witnesses provided inconsistent statements about what happened on the night of March 28, 2015. This is not a sufficient reason to dismiss a case for lack of probable cause. When there is conflicting testimony at a preliminary hearing, a question of fact exists for jury determination, and the magistrate must make inferences in favor of the State. *State v. Whittington*,

260 Kan. 873, 875–72, 926 P.2d 237 (1996). This is so even when a single witness' statements are self-contradictory. See *State v. Chairez–Hernandez*, No. 105,174, 2012 WL 223923, at *3–5 (Kan. App. 2012) (unpublished opinion) (drawing inference in favor of State when witness' testimony at hearing differed from statements to police). Here, Officer Ratzlaff and Acosta provided conflicting testimony regarding what Acosta told the officer the night of the shooting. Vasquez also contradicted many of her earlier statements to police. This did not eliminate probable cause, however. These contradictions revealed questions of fact to be resolved at trial, and the district court was obligated to accept the testimony most favorable to the prosecution.

**7 Vasquez and Jessica raise some doubts as to witness credibility and reliability. In determining probable cause, a magistrate must judge the credibility of witnesses called by either party. *State v. Wilson*, 267 Kan. 530, 535, 986 P.2d 365 (1999). However, "[d]oubts about the credibility of a witness do not require a judge, upon a preliminary examination, to discharge the accused as long as the doubts do not obviate the appearance that the accused probably committed the felony with which he or she is charged." 267 Kan. 530, Syl. ¶ 2. Vasquez said she was intoxicated on the day of the shooting, and she frequently contradicted herself. Jessica claimed to be able to make an identification of Carrasco based only on seeing his eyes at 11 p.m. at night while passing by in a car. Jessica was very confident in her identification, however, and there was enough evidence other than Vasquez' testimony that her credibility did not obviate Carrasco's appearance of guilt.

In reviewing the denial or granting of a motion to dismiss, we are concerned with whether there is sufficient evidence to support a finding of probable cause. The evidence at the preliminary hearing was sufficient to establish probable cause that Carrasco committed attempted first-degree murder. The evidence was also sufficient to demonstrate probable cause that Carrasco was involved in a conspiracy to commit first-degree murder. Thus, the district court's order granting the motion to dismiss is reversed.

The State addresses two more issues in its brief. However, there do not appear to be any cases where an appellate court has overturned the granting of a motion to dismiss for a reason other than there was sufficient evidence of probable cause. Thus, this issue appears to be dispositive in this case.

The State also argues the district court erred in applying a de novo standard of review to the preliminary hearing in issuing its order. The State contends that while K.S.A. 22–3610 provides for a de novo hearing of appeals before the district court, this statute does not apply to a magistrate's decision to bind a defendant over for trial. Thus, the district court improperly made a substantive disposition using de novo review, as well as addressing evidentiary issues. Additionally, the State asserts any errors at the preliminary hearing level were harmless.

In support of its argument, the State cites to a number of statutes regulating the appeal of orders to the district court. K.S.A. 2015 Supp. 20–302b grants magistrate judges the authority to conduct preliminary hearings in felony cases. K.S.A. 2015 Supp. 20–302b(a). This statute also provides that the district court must try and determine de novo any appeal from an order or final decision of a district magistrate judge who is not regularly admitted to practice law in Kansas "[i]n accordance with the limitations and procedures prescribed by law." K.S.A. 2015 Supp. 20–302b(c)(2). The Kansas Supreme Court has interpreted this statute to mean the State may appeal a magistrate's dismissal of a complaint to the district court, but it is not entitled to a de novo hearing due to the limitations prescribed by other statutes. *State v. Kleen*, 257 Kan. 911, 914, 896 P.2d 376 (1995).

K.S.A. 22–3610 also states that when a case is appealed to the district court, the district court must try the case de novo. K.S.A. 22–3610(a). This statute, however, only applies to traffic, misdemeanor, and other convictions. *Kleen*, 257 Kan. at 914. It does not apply to a district magistrate judge's order binding or failing to bind a defendant over for trial. 257 Kan. at 914.

Relying on the above statutory authority, the State argues the district court erred in reviewing the magistrate's order de novo. The State's argument fails on numerous grounds. First, this case was not on appeal to the district court following a conviction. Carrasco filed a motion to dismiss pursuant to K.S.A. 2015 Supp. 22–3208. Thus, it was not subject to statutory authority regarding appeals.

**8 Second, the State confuses a de novo review with a de novo hearing. All the previously cited statutory authority provides for de novo hearings at the district court level. There is no reference to a de novo standard of review. In this case, the district court clearly did not have a de novo hearing.

Finally, when the State appeals the dismissal of a complaint to the district court, it is not entitled to a de novo hearing. In

reviewing the dismissal, however, the district court applies a de novo standard of review. *State v. Farmer*, 259 Kan. 157, 161, 909 P.2d 1154 (1996).

The State does not clarify what level of review it believes the district court should have used in ruling on Carrasco's motion to dismiss. As the State notes, however, the controlling legal standard at a preliminary hearing is that the evidence is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. According to Kansas caselaw, " '[a] judge reweighing the preliminary examination evidence after arraignment and prior to trial must follow the standard for weighing the evidence as required for the preliminary examination.' " *State v. Phelps*, 266 Kan. 185, 193, 967 P.2d 304 (1998). Furthermore, when the State appeals the dismissal of a complaint to the district court, the district court must use a de novo standard of review to determine if the evidence is sufficient to support a finding of probable cause. *Farmer*, 259 Kan. at 161. This suggests when a district court rules on a motion to dismiss, it must reweigh the evidence and thus has unlimited review of the preliminary hearing record.

Additionally, the rules of evidence apply at a preliminary hearing, and a district court should only consider evidence admissible at trial in determining if probable cause exists. See *State v. Cremer*, 234 Kan. 594, 599–600, 676 P.2d 59 (1984); *State v. Jones*, 233 Kan. 170, 172, 660 P.2d 965 (1983). It follows that the court may consider whether a magistrate admitted certain evidence at the preliminary hearing that would not have been admissible at trial, at least when a party objected to that evidence. If the court finds the evidence is incompetent, it may then refuse to consider such evidence in making its determination.

In this case, the defendants entered multiple objections to various testimony. The magistrate overruled most of those objections. If the district court determined that the magistrate should have sustained the objections because the evidence was inadmissible, it should be able to disregard that evidence in determining probable cause.

Last, the State argues that any evidentiary errors that may have occurred at the preliminary hearing are harmless. It supports this argument by citing the rule that "[w]here an accused has gone to trial and been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is harmless unless it appears that the error caused prejudice at trial." *State v. Henry*, 263 Kan. 118, Syl. ¶ 9, 947 P.2d 1020 (1997). The State reasons because this case never went to trial, it could not have caused prejudice at trial, therefore any error is harmless.

This is clearly an incorrect application of this rule. As stated in the rule itself, it applies *where a defendant has been found guilty beyond a reasonable doubt.* Since Carrasco has not been found guilty beyond a reasonable doubt, the rule is not applicable.

****9** There is some merit, however, to the State's argument that the district court should have applied a harmless error standard to any evidentiary issues. In other jurisdictions that apply the rules of evidence at preliminary hearings, either in whole or with limited exceptions, erroneous admission of evidence does not lead to an automatic reversal of a bind over. Instead, if there is sufficient admissible evidence to support the bind over standard, the reviewing court will uphold the bind over. See, *e.g.*, *Waugh v. State*, 564 S.W.2d 654, 659 (Tenn. 1978); *State v. Reggio*, 84 S.D. 687, 690, 176 N.W.2d 62 (1970); *Pinizzotto v. Superior Court*, 257 Cal. App. 2d 582, 587–88, 65 Cal. Rptr. 74 (1968). Kansas courts have already applied a similar standard in ruling on motions to dismiss. See *State v. Crawford*, No. 103,524, 2011 WL 135033, at *2 (Kan. App. 2011) (unpublished opinion) (district court not considering evidence presented at preliminary hearing and later suppressed in ruling on motion to dismiss). Additionally, when reviewing evidence erroneously admitted at trial, Kansas courts apply a harmless error standard. *State v. Warrior*, 294 Kan. 484, 513, 277 P.3d 1111 (2012). This suggests if a court is going to review errors at the preliminary hearing level, that court should use a harmless error standard.

Finally, the State argues the district court erred in raising evidentiary errors from the preliminary hearing *sua sponte* in its ruling on Carrasco's motion to dismiss. Whether a district court erred in raising an issue *sua sponte* is reviewed for abuse of discretion. See *State v. James*, No. 105,768, 2012 WL 402014, at *6–7 (Kan. App. 2012) (unpublished opinion). A judicial action constitutes an abuse of discretion if 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. Mosher*, 299 Kan. 1, 3, 319 P.3d 1253 (2014).

Generally, a district court may not raise an issue *sua sponte* unless that issue is jurisdictional. *Frontier Ditch Co. v. Chief Engineer of Div. of Water Resources*, 237 Kan. 857, 864,

704 P.2d 12 (1985). Admission of hearsay and other similar evidentiary issues at a preliminary hearing are not covered by these statutes, nor do they affect jurisdiction. See *State v. Brown*, 299 Kan. 1021, 1030, 327 P.3d 1002 (2014) (errors in preliminary hearing are not jurisdictional errors), *overruled on other grounds by State v. Dunn*, 304 Kan ——, 375 P.3d 332 (2016).

In this case, Carrasco filed a motion to dismiss for lack of probable cause. As noted above, the legal standard for ruling on a motion to dismiss is whether there was sufficient admissible evidence to support a finding of probable cause. This suggests a district court may disregard evidence that was erroneously admitted at the preliminary hearing in making its probable cause determination. There does not appear to be any precedent, however, to dismiss a case solely because the magistrate committed evidentiary errors, regardless of whether these errors affected the finding of probable cause.

In its order, the district court found a number of facts regarding the incident. As the State points out, these facts are sufficient to support a finding of probable cause on Carrasco's attempted first-degree murder charge, though perhaps not his conspiracy charge. The district court continued by noting two examples of the magistrate's evidentiary errors.

The first is Vasquez' testimony that Carrasco said he had a "big ass dent" in his truck. As the district court admitted, this testimony was admissible against Carrasco. Thus, there does not appear to be any error here in regards to Carrasco.

Next, the district court pointed to another portion of Vasquez' testimony. The State asked her if she had asked Sanchez what he had done with the gun, and she responded "Yeah, but he got rid of it." The State then asked, "He said he got rid of it?" She answered, "Yeah, he said he got rid of it." Sanchez objected to her answer as nonresponsive. The State responded that Sanchez' objection was untimely, and the magistrate overruled the objection. The district court disagreed, noting the objection was timely and the answer should have been stricken from the record.

**10 Neither of these errors appear to have led to the erroneous admission of incompetent evidence against Carrasco. The district court found the first incident was admissible against Carrasco. In the second incident, the district court and the magistrate disagreed over whether Sanchez' objection was timely, but the evidence presented would not clearly be inadmissible at trial. The State could have simply asked another question to elicit the same response.

In its order, the district court went on to note that these are just two examples of defense objections that the magistrate improperly ruled on. The court ultimately concluded that due to the evidentiary errors and the confusing nature of the evidence presented, there was no probable cause. This conclusion, however, conflicts with his factual findings that arguably establish probable cause, at least for Carrasco's murder charge. Nor does the court elaborate on whether the evidentiary rulings had any effect on the probable cause ruling itself.

In focusing on the errors of the magistrate, rather than whether the evidence at issue was admissible at trial and thus should be considered in its probable cause finding, the district court appears to have applied an incorrect legal standard. Furthermore, the district court raised this issue *sua sponte*. Even if one of the parties had raised the issue, the district court likely should have reviewed any errors for harmlessness. Because the court raised this issue *sua sponte* and applied an incorrect legal standard in its review, the court abused its discretion.

In conclusion, there is evidence sufficient for a probable cause finding as to Carrasco's attempted first-degree murder charge and his conspiracy charge. The district court did not err in reviewing the preliminary hearing de novo in order to make its ruling on Carrasco's motion to dismiss, and the court can disregard evidence that would not be admissible at trial in making its probable cause determination. The court abused its discretion in raising the issue of evidentiary errors *sua sponte*, and basing its decision to grant the motion to dismiss partly on the existence of these issues, rather than apply a harmlessness standard.

We therefore reverse and remand with directions to reinstate the complaint.

Reversed and remanded with directions.

All Citations

380 P.3d 721 (Table), 2016 WL 5844578

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268 P.3d 506 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Britany N. JAMES, Appellant.

No. 105,768.
|
Feb. 3, 2012.

Appeal from McPherson District Court; Carl B. Anderson, Jr., Judge.

Attorneys and Law Firms

Ty Kaufman, of McPherson, for appellant.

Jamie L. Karasek, deputy county attorney, and Derek Schmidt, attorney general, for appellee.

Before GREEN, P.J., ARNOLD–BURGER and BRUNS, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Britany N. James claims the district court committed the following errors arising out of her conviction for the crime obstruction of official duty under K.S.A. 21–3808.

(1) The State was required to prove that Britany's actions substantially hindered or increased the burden of the officer in carrying out his official duty. Britany lied to a sheriff's deputy who was attempting to serve a civil bench warrant on her husband Joshua by telling the officer that Joshua was in Georgia, when he was actually standing right behind her. As a result, the deputy returned to the police station and conducted some additional investigation before returning to the home and arresting Joshua on the warrant and Britany for obstruction. Britany maintains that the evidence was insufficient to support a conviction because her actions alone were not the sole reason the officer returned to the station and because the officer testified that he would have done the same thing if she had exercised her right to remain silent. We find the evidence was sufficient to support her conviction.

(2) The court may permit a complaint or information to be amended at any time before the court enters a finding if (1) no additional or different crime is charged and (2) substantial rights of the defendant are not prejudiced. See K.S.A. 22–3201. During closing argument, after questions were raised by the district court judge, the State moved to amend the complaint to remove language that Britany obstructed a deputy in the discharge of an official duty "*in a case of a misdemeanor.*" (Emphasis added.) Britany claims the amendment charged a different crime and prejudiced her substantial rights. We find that the district court did not abuse its discretion in allowing the State to amend the complaint, and, therefore, we affirm Britany's conviction.

FACTUAL AND PROCEDURAL HISTORY

The legal disputes at issue in this appeal arise from undisputed facts

The facts in this case are undisputed. Deputies Froese and Koch went to a home in McPherson to arrest Joshua James on a civil contempt bench warrant for failure to pay child support. While on the front porch of the home, Froese looked through the front door and saw a woman, later identified as Britany James, and a man cuddling on the couch.

When Britany answered Froese's knock at the door and Froese told Britany why he was there, she acknowledged that Joshua was her husband and reported that he had been there 3 weeks ago, but she said he had since gone to Georgia for work. Froese then spoke to the man he had seen Britany with on the couch, who identified himself as Joshua's brother, Eli James, and affirmed Britany's report that Joshua was in Georgia working.

Based on what they had been told, Froese and Koch went back to the police station for further investigation and discovered that the man at the home with Britany matched the driver's license photo of Joshua James, not Eli James. So they returned to the house, where Joshua acknowledged his correct identification and was arrested on the warrant. Britany

was also arrested and ultimately charged with misdemeanor obstruction of official duty in violation of K.S.A. 21–3808 based on the false and misleading information that she provided.

The district court rejected Britany's legal arguments and found her guilty

***2** Prior to trial, Britany filed a motion to dismiss in which she argued that she had not committed the charged crime because she was under no obligation to speak to Froese, her answer was no more obstructive than her silence would have been, and nothing that she did substantially hindered or impeded Froese in performing his lawful duty. After a hearing, a magistrate judge rejected Britany's arguments.

Britany thereafter waived her right to a jury trial and the parties submitted the case for a bench trial. In support of its case, the State presented Froese's testimony about the events already set forth above and also admitted a copy of the bench warrant he was attempting to serve on Joshua without objection.

During the State's closing argument, the district court questioned how the charge was worded in the complaint. Specifically, the court questioned, "Where is your misdemeanor?" because the complaint stated, in pertinent part, that Britany had knowingly obstructed, resisted, or opposed Froese "in the discharge of an official duty *in a case of a misdemeanor,* to wit: giving false and misleading information while Deputy Froese was attempting to serve a bench warrant on Joshua James for his failure to pay child support as ordered." (Emphasis added.) The State responded that, when read as a whole, the complaint properly charged misdemeanor obstruction of official duty (serving the warrant) and moved to strike the emphasized language if it was misleading or confusing to the court. Britany's counsel objected to the amendment, arguing that not only was it too late because the evidence had been closed, but the emphasized language was an element of the crime that the State failed to prove because the evidence showed Froese was serving a civil process warrant, not a warrant for a misdemeanor as charged in the complaint. Defense counsel then proceeded with the remainder of his closing argument, basically reiterating the arguments made in Britany's motion to dismiss.

The district court ultimately found Britany guilty as charged but took the State's motion to amend the complaint under advisement. The next day, Britany filed a trial brief reiterating all of her arguments.

Two letter rulings from the trial court in favor of the State followed. In the first, the court granted the State's motion to amend the complaint to strike the words "in the case of a misdemeanor" because it was made prior to the verdict and did not result in the charging of a new crime. In the second, the court made extensive findings in support of its denial of the arguments raised by Britany in her trial brief.

After the trial court imposed an underlying 90–day jail sentence and placed Britany on probation for 1 year, she filed this appeal.

THE SUFFICIENCY OF THE EVIDENCE —OBSTRUCTION OF OFFICIAL DUTY

In her first issue on appeal, Britany argues the evidence was insufficient to support the district court's finding that her misstatement about Joshua's whereabouts substantially hindered or increased Deputy Froese's burden in carrying out his official duty.

Standard of Review

***3** The standard under which this court reviews Britany's challenge to the sufficiency of the evidence to support her conviction is well known and oft repeated. We review all of the evidence, in the light most favorable to the prosecution, and determine whether we are convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. See *State v. McCaslin,* 291 Kan. 697, 710, 245 P.3d 1030 (2011).

Our courts have interpreted K.S.A. 21–3808(a) to require a showing that the defendant's actions substantially hindered or increased the burden in the officer's performance of his or her duties

Britany was convicted of violating K.S.A. 21–3808, which defines obstruction of official duty as follows:

> "(a) Obstructing legal process or official duty is knowingly and intentionally obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ,

warrant, process or order of a court, or in the discharge of any official duty.

"(b)(1) Obstructing legal process or official duty in the case of a felony, or resulting from parole or any authorized disposition for a felony, is a severity level 9, nonperson felony.

(2) Obstructing legal process or official duty in a case of misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case is a Class A nonperson misdemeanor."

Kansas courts have construed this statute broadly, holding that "to obstruct is to interpose obstacles or impediments, to hinder, impede or in any manner interrupt or prevent" by direct or indirect means. *State v. Merrifield*, 180 Kan. 267, 270, 303 P.2d 155 (1956).

Britany's challenge to the sufficiency of the evidence is based on our Supreme Court's holding in *State v. Parker*, 236 Kan. 353, 364, 690 P.2d 1353 (1984), that to prove obstruction of official duty in violation of K.S.A. 21–3808, the State must prove, in pertinent part, that a defendant's actions *substantially* hindered or increased the burden of the officer in carrying out his official duty. Thus, to sustain the conviction the State had to prove: (1) the person obstructed was an identified law enforcement officer carrying out an official duty; (2) the defendant knowingly and willingly obstructed or opposed that officer in the performance of that duty; (3) the defendant knew or should have known the person he or she opposed was a law enforcement officer; and (4) the defendant's action substantially hindered or increased the burden of the officer in carrying out his or her official duty. See K.S.A. 21–3808(a); *Parker*, 236 Kan. at 364–65.

Substantial competent evidence supports the district court's finding that Britany's misstatement substantially hindered Froese in carrying out his official duty

Britany claims that her misstatements fell short of substantially hindering Froese in carrying out his official duty primarily based on the fact that her husband also participated in the obstruction. Specifically, she relies on the following exchange at the close of Froese's cross-examination:

***4** "Q. And the actions that you took on this day would have been exactly the same if Mrs. James had not said a word, isn't that true?

"A. Probably.

"Q. Answer is yes, isn't it?

"A. I believe so, I can't—

"Q. So the fact that you've gotten information from Mr. James that you felt was not true, or at least when you got back did not make your job any more difficult than it would have been if Mr. James would have been in that house by himself, correct?

"A. True."

According to Britany, this testimony "does not satisfy a critical element of the crime of obstruction" because it demonstrates that Froese's burden was not increased at all and was "certainly not **substantially** increased." In other words, since her husband lied too, and his lie would have independently hindered the officer's investigation, she gets a free ride.

The district court found Britany's statements that Joshua was in Georgia combined with Joshua's giving of a false identity substantially hindered Froese's attempts to serve the warrant because he had to go back to the police station for further investigation. Froese's testimony supports these findings. While Britany's recitation of Froese's cross-examination testimony is correct, Froese testified on redirect that the misleading information given to him by Britany caused "more work" for him as part of his initial duties. He testified that he "wouldn't have had to speak to Mr. James if she would have initially told me 'this is Mr. James right here.' "

Simply because Joshua lied to Froese too did not prevent the district court from finding that Britany's initial false statement about Joshua's whereabouts also substantially hindered Froese in carrying out that duty. If we were to accept Britany's position, presumably, Joshua could make the same argument in his trial, resulting in both Joshua and Britany avoiding responsibility for their actions. As noted by the State, we must look at what was actually said and done, not whether Froese would have taken different or more burdensome actions if Britany had remained silent or had not been present when Froese arrived to serve the warrant on her husband.

Whether the defendant's actions or false statements hinder or impede an officer in carrying out his assigned duties is

a question of fact. See *State v. Latimer,* 9 Kan.App.2d 728, 733, 687 P.2d 648 (1984). When viewed in a light most favorable to the State, the State presented substantial competent evidence to support the district court's finding that Britany's misstatements to Froese substantially hindered Froese in his attempts to serve the warrant on her husband.

The effect of Britany's lack of a legal duty to respond to the deputy's questions

Next, Britany argues that she is absolved from criminal liability because she was under no legal duty to respond to Froese's inquiry about her husband's whereabouts and her deliberate misstatement was no more obstructive than her silence would have been.

***5** Britany's argument raises a legal, rather than factual dispute. So our review is unlimited. See *Wimbley v. State,* ——Kan.——, ——, ——P.3d ——, 2011 WL 6116450, at *5 (No. 101,595, filed November 23, 2011) (generally recognizing that "[l]egal questions are subject to unlimited review").

Britany's argument is based on the Ohio Supreme Court's decision in *Dayton v. Rogers,* 60 Ohio St.2d 162, 398 N.E.2d 781 (1979), *overruled* *State v. Lazzaro,* 76 Ohio St.3d 261, 264–66, 667 N.E.2d 384 (1996). Rogers involved a traffic stop, during which the driver falsely identified himself, and the passenger likewise gave a false name when she was asked to confirm the driver's identity. As a result, the passenger was charged with violating a municipal ordinance that provided " '[n]o person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.' " 60 Ohio St.2d at 164. In reversing the passenger's conviction of obstruction of official duty, the Supreme Court of Ohio held that the ordinance was not intended to criminalize unsworn oral misstatements to police officers. 60 Ohio St.2d at 164–65.

Britany's argument fails for two reasons. First, the Ohio Supreme Court has since overruled its holding in *Rogers* to conclude that false oral statements to a police officer can constitute the crime of obstruction of an officer in his or her duties under Ohio law. See *Lazzaro,* 76 Ohio St.3d at 264–66. As pointed out in *Lazzaro,* the Ohio Supreme Court had already expressly limited its holding in *Rogers* to its facts in *State v. Bailey,* 71 Ohio St.3d 443, 644 N.E.2d 314 (1994). *Lazzaro,* 76 Ohio St.3d at 264. In *Bailey,* the court found on facts similar to those now before this court that the defendant's attempts to prevent the police from locating someone by declaring that person was not present in the home constituted obstructing justice in violation of Ohio law. 71 Ohio St.3d at 446–48.

Second and more importantly, Kansas law recognizes that false oral statements to an officer can constitute the crime of obstruction of an official duty in violation of K.S.A. 21–3808(a). See, *e.g.,* *Latimer,* 9 Kan.App.2d 728, Syl. ¶ 4. The fact that Britany was under no obligation to speak made no difference here because she did speak, and her statements were false.

THE STATE'S MOTION TO AMEND COMPLAINT

Britany's second issue on appeal concerns the trial court's decision to grant the State's motion to amend the complaint that it made during its closing argument in response to questions from the court.

Law governing the amendment of charging documents

K.S.A. 22–3201 governs the procedure for filing and amending charging documents such as a complaint. Two subsections of that statute are at issue here:

> ***6** "(d) The court may strike surplusage from the complaint, information or indictment.
>
> "(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." K.S.A. 22–3201.

At the time of bench trial, the complaint charged that Britany knowingly obstructed, resisted, or opposed Froese "in the discharge of an official duty *in a case of a misdemeanor,* to wit: giving false and misleading information while Deputy Froese was attempting to serve a bench warrant on Joshua James for his failure to pay child support as ordered." (Emphasis added.) After taking the case under advisement, the district court granted the State's motion to

amend the complaint to strike the words "in the case of a misdemeanor" because the motion was made prior to the verdict and the amendment did not result in the charging of a new crime.

Standard of Review

This court reviews the district court's decision to allow the State to amend the complaint for an abuse of discretion. See *State v. Bischoff*, 281 Kan. 195, 205, 131 P.3d 531 (2006). Our Supreme Court has held that a judicial action constitutes an abuse of discretion if the action: (1) can be deemed arbitrary, fanciful, or unreasonable, meaning that no reasonable person would have taken the district court's view; (2) is based on an error of law, meaning the decision was guided by an erroneous legal conclusion; or (3) is based on an error of fact, meaning substantial competent evidence is lacking to support a factual finding necessary to the district court's legal conclusions or to its exercise of discretion. *State v. Ward*, 292 Kan. 541, Syl. ¶ 3, 256 P.3d 801 (2011).

The amendment did not result in the charging of a new crime

Britany first challenges the district court's conclusion that the amendment would not result in the charging of a different crime because the complaint identified a misdemeanor as the underlying crime or duty that Froese was attempting to carry out, which was obviously not proven because Froese was attempting to serve a civil warrant. See *State v. Hagen*, 242 Kan. 707, 750 P.2d 403 (1988); *State v. Kelley*, 38 Kan.App.2d 224, 225–26, 162 P.3d 832 (2007). The district court found as a matter of law that the complaint identified the underlying crime even absent the language the State moved to strike because it charged that Britany " '[gave] false and misleading information while Deputy Froese was attempting to serve a bench warrant on Joshua James for his failure to pay child support as ordered.' " Britany argues that this was an erroneous legal conclusion.

Though somewhat difficult to follow, the gist of Britany's argument seems to be that the portion of the complaint charging that "Froese was attempting to serve a bench warrant on Joshua James for his failure to pay child support as ordered" does not adequately identify the underlying crime, so the stricken language was not surplusage. In support, Britany argues that the "language could as easily be construed to identify the crime of" felony nonsupport of a child in violation of K.S.A. 21–3605. Britany then suggests that the district court improperly "dispensed" with "the niceties of the law" because it was a bench trial and disregarded the fact that she "has a right to rely on the language of the Complaint and to hold the State to strict proof of its allegations."

*7 Though inclusion of the language "in the case of a misdemeanor" was, no doubt, confusing, the district court properly held it was not an element of the offense to be proven in the State's case-in-chief. Accord PIK Crim.3d 60.09; *cf. State v. Johnson*, 40 Kan.App.2d 196, 200–03, 190 P.3d 995 (2008), *rev. denied* 287 Kan. 767 (2009) (finding that touchstone for classification of offense of obstruction of officer in performance of official duty is reason for officer's approaching the defendant who flees or otherwise resists, not status of defendant). Rather, the complaint already properly charged the required elements, including that Froese was discharging an official duty in a civil case, *i.e.,* he was serving the bench warrant for Joshua's failure to pay child support. So the language it allowed the State to strike from the complaint was mere surplusage because the remaining language in the complaint sufficiently notified Britany that she was being charged with misdemeanor obstruction under K.S.A. 21–3808(b)(2) for obstructing Froese's attempt to serve the bench warrant in a civil case.

The district court did not abuse its discretion in raising this issue sua sponte

In her second challenge to the court's granting of the State's motion to amend the complaint, Britany briefly complains "the trial court should not have taken the lead by inviting the State's Amendment at closing and then accepting the State's invitation to do something about it but only if the Court was confused or bothered." Britany cites no authority for her proposition that the court was prohibited from raising this issue on its own motion, therefore this issue is deemed waived. See *State v. Garza*, 290 Kan. 1021, 1034, 236 P.3d 501 (2010). Even if this issue were properly briefed, the plain language of K.S.A. 22–3201(d) allows a court to strike surplusage from a complaint without invitation of the parties. That is, in effect, what the district court did here.

Britany cannot show prejudice resulting from the amendment to the complaint

In her third and final challenge to the trial court's granting of the State's motion to amend the complaint, Britany restates her argument made in her trial brief that she was prejudiced by the district court's allowance of the amendment because it was

made after she did not object to the introduction of the State's paperwork from Ellis County (the bench warrant for Joshua's arrest), which was "clearly inadmissible." Britany argues that the trial court's allowance of the amendment destroyed the effect of her trial tactic in letting the State admit the warrant because up until the amendment, the State was not going to be able to prove its case since the warrant was for a civil matter, not a misdemeanor.

Though not entirely clear, Britany's complaint seems to be that she was not allowed to adequately prepare her defense because, had she known of the amendment, she would have objected to the admission of the warrant and her objection "if upheld, may very well have put into doubt the nature of the document." Again, Britany provides no authority in support of her suggestion that the warrant would not have ultimately been admitted. Regardless, it is hard to discern how the mere lack of the State's admission of the actual warrant would have somehow changed the direction of Britany's defense, or of the State's case-in-chief. In other words, even if her counsel may have objected to the admission of the actual bench warrant for Joshua's arrest and that objection would have been sustained; there is nothing in the record to suggest that Britany would not have been convicted as a result.

***8** Accordingly, we find Britany has not shown how she was prejudiced by the court's allowance of the State's motion to amend the complaint made prior to the court's finding of her guilt, which was allowed by the plain language of K.S.A. 22-3201(e).

The decision of the district court is affirmed.

All Citations

268 P.3d 506 (Table), 2012 WL 402014