REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 318, No. 1
Opinions filed in January – February 2024

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IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-007

RE: Rules Relating to Kansas eCourt

The court amends the attached Supreme Court Rule 23, effective the date of this order.

Dated this 2nd day of February 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 23
FILING IN A DISTRICT COURT

(a) **Filing User's Obligations.** When filing a document with the district court, at the efiling interface, a filing user must correctly designate the case and document type and indicate if the document is submitted under subsection (b) or certify that the document complies with Rule 24. The requirement to certify compliance with Rule 24(b) does not apply to those individuals exempted from the definition of "filing user" in Rule 21(l).

(1) A court employee is not required to review a document that a filing user submits to ensure that the filing user appropriately designated a case, document, or information.

(2) If a document does not comply with these rules, the court may order that the document be segregated from public view until a ruling has been made on its noncompliance.

(b) **Filing Under Seal.**

(1) If a filing user submits a document under a pre-existing seal order, the filing user must affirm by certification on the efiling interface that such an order exists.

(2) If at the time of filing a filing user believes that a document not covered by a pre-existing seal order should be sealed, the filing user must submit a motion to seal that includes a general description of the document at issue. The filing user must affirm by certification on the efiling interface that the motion complies with Rule 24.

(3) A filing user may file a motion to seal a document already on file. The motion must specify the document that is proposed to be sealed. When a motion to seal is filed, the identified document will be segregated from public view until the court rules on the motion to seal. A court employee is not required to search for a document that is not identified with specificity in a motion to seal.

(4) A case or document may be sealed only by a court order that is case or document specific or as required by a statute or Supreme Court rule.

(c) **District Court Clerk Processing of an eFiled Document.**

(1) **Document Review.** Upon receipt of a document submitted to a district court using the Kansas Court eFiling System, a clerk of the district court is authorized to return the document only for the following reasons:

(A) the document is illegible or in a format that prevents it from being opened;

(B) the document does not leave a margin sufficient to affix a file stamp, as required by Rule 111;

(C) the document does not have the correct county designation, case number, or case caption; ~~or~~

(D) the applicable fee has not been paid or no poverty affidavit is submitted with the document or already on file in the case; or

(E) the document only sets a hearing date, and the hearing date is a date the court is closed or a date that has already passed and the hearing did not occur on that date.

(2) **Timeline for a Clerk to Process a Document.** A clerk of the district court must process a document for filing as quickly as possible but not more than four business hours after the filing user submits the document for filing.

(3) **Return of Document.** If a clerk determines that a document must be returned for any of the reasons listed in subsection (c)(1), the clerk must designate the reason for its return.

(4) **Quality Review.** If a document is not rejected under subsection (c)(1), a clerk will approve the document for filing in the case management system. The clerk may flag the document for further review as authorized by the standard operating procedures adopted by the judicial administrator.

(5) **File Stamping a Document.** A document submitted through the Kansas Court eFiling System will be marked with the date and time of original submission.

(d) **Inclusion of a Paper Document.** If a clerk is authorized to accept a paper document for filing in a case record under a standard operating procedure adopted by the judicial administrator, the clerk must follow the requirements of that procedure for including the document in the case management system.

Comments

[1] The return reason listed in Rule 23(c)(1)(C) applies to a document filed in an existing case where the clerk must match the county designation, the names of the parties in the case caption, and the case number with those of the existing case.

[2] The return reason listed in Rule 23(c)(1)(E) is not limited to a document labeled "Notice of Hearing." But it does not apply to a document that does more than set a hearing date, such as a document that also asks a court to decide an issue.

[3~~2~~] The Kansas eCourt Rules make clear that the responsibility for correctly filing a document in a court case rests with the person filing the document.

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-004

RE: Rules Relating to Admission of Attorneys

The court amends the attached Supreme Court Rules 707, 708, and 719, effective the date of this order.

Dated this 11th day of January 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 707

APPLICATION PROCESSING FEES

(a) **Fee Amounts.** The Supreme Court establishes the amount of each application processing fee; each fee is subject to change. An applicant must pay any of the following applicable fees:
   (1) legal intern permit under Rule 715: $50;
   (2) admission to the bar by examination under Rule 716: $700;
   (3) late fee for an application submitted during the grace period under Rule 716: $200;
   (4) admission to the bar by Uniform Bar Examination score transfer under Rule 717: $1,250;
   (5) temporary permit to practice law under Rule 718: $100;
   (6) admission to the bar without examination under Rule 719: $1,250;
   (7) military-spouse restricted license to practice law under Rule 720: $1,250;
   (8) single-employer restricted license to practice law under Rule 721: $1,250; and
   (9) reapplication for a person whose application to take the bar examination was previously denied for failure to establish the requisite character and fitness qualifications: $1,250.

(b) **No Waiver or Refund.** Except as described in subsection (c), the Attorney Admissions office cannot waive or refund an application processing fee listed in subsection (a).

(c) **Military Service Exception.** An applicant who is unable to take the bar examination due to active military service may request a refund of the application processing fee.

(d) **Bar Admission Fee Fund.** The Office of Judicial Administration will deposit all application processing fees in a fund known as the bar admission fee fund. Any unused balance in the fund may be applied to an appropriate use determined by the Supreme Court.

[**History:** New rule adopted effective July 1, 2022; Am. (a)(6) effective January 11, 2024.]

Rule 708

ELIGIBILITY

(a) **Requirements.** To apply for admission to the Kansas bar, an applicant must satisfy the following provisions:
   (1) meet the educational qualifications in Rule 711;
   (2) possess the requisite good moral character and current mental and emotional fitness to engage in the active and continuous practice of law under Rule 712; and
   (3) comply with the specific requirements and procedures in any applicable rule under which the applicant seeks admission, including Rules 716 through 721.

(b) **Waiver.** An applicant may request the Supreme Court waive the requirements to satisfy subsections (a)(1) and (a)(3). The applicant must submit a written request to the Attorney Admissions office and state good cause for the requested waiver.

(c) **Preclusion.** An applicant must not be precluded from admission under Rule 709 or Rule 710.

[**History:** New rule adopted effective July 1, 2022; Am. effective January 11, 2024.]

Rule 719

ADMISSION TO THE BAR WITHOUT EXAMINATION

(a) **Eligibility.** An applicant for admission to the Kansas bar is eligible for admission without examination if the applicant meets the following requirements:
   (1) was admitted to the practice of law by examination by the highest court of another state, the District of Columbia, or a United States territory;
   (2) has an active law license from the highest court of another state, the District of Columbia, or a United States territory;
   (3) is eligible under Rule 708;
   (4) has never received professional discipline of suspension, disbarment, or loss of license in any jurisdiction; and
   (5) has lawfully engaged in the active practice of law for five of the seven years immediately preceding the date of the application.

(b) **Active Practice of Law.** For purposes of this rule, the active practice of law includes the following activities:
   (1) representing a client in the practice of law;
   (2) serving as corporate counsel or as an attorney with a local, state, or federal government body;
   (3) teaching at a law school approved by the American Bar Association; and
   (4) serving as a judge or judicial law clerk in a federal, state, or local court, provided that the position required a license to practice law.

(c) **Required Documents and Fee.** An applicant under this rule must submit the following:
   (1) an application submitted and accepted through the Attorney Admissions office's online portal;
   (2) any other information the admissions attorney, the Attorney Admissions Review Committee, or the Board of Law Examiners requests for use in considering the application; and
   (3) the fee under Rule 707(a)(6).

(d) **Application Review Process.** The following rules apply in the application review process:
   (1) Rule 723 and Rule 725 apply to the character and fitness investigation and any hearing;
   (2) Rule 724 applies following an adverse Board ruling; and
   (3) Rule 726 applies if the Board approves an application.

[**History:** New rule adopted effective July 1, 2022; Am. effective January 11, 2024.]

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2024-RL-008

RE: Temporary Rule for Filing in a District Court by a Self-Represented Litigant

The court adopts the attached updated Temporary Rule for Filing in a District Court by a Self-Represented Litigant, effective the date of this order.

This temporary rule supersedes and rescinds 2023-RL-017.

Dated this 2nd day of February 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Temporary Rule

FILING IN A DISTRICT COURT BYA SELF-REPRESENTED LITIGANT

(a) **Purpose.** The following temporary procedures are adopted to increase access to justice by expanding the options for a self-represented litigant to file a document in district court. A self-represented litigant may file a document in person, by mail, or by fax in all district courts. Other filing options may be available depending on local resources.

(b) **Definitions.**

(1) "Clerk" means a clerk of the district court in any Kansas county.
(2) "Document" means any paper filing, including, but not limited to, a petition or the filings necessary to initiate a case.
(3) "Drop box" means a secure, locked container that is accessible to the public for purposes of document delivery and only used for district court business.
(4) "Sealed" means that access to a case or document is limited by statute, Supreme Court rule, or court order.
(5) "Self-represented litigant" means a person not represented by an attorney authorized to practice law before the court.

(c) **Drop Box.** Every district court must have a drop box available to self-represented litigants unless the chief judge receives an exemption from the Office of Judicial Administration. The drop box must be accessible to the public during hours when the clerk's office is closed to the public.

(d) **Ways to File.**

(1) **A self-represented litigant may file a document as follows.**

(A) **In Person.** A self-represented litigant may file a document in person by submitting the document at the district court clerk's office;
(B) **By Mail.** A self-represented litigant may file a document by mailing the document to the district court clerk's office;
(C) **By Fax.** A self-represented litigant may file a document by faxing the document to the district court clerk's office; or
(D) **By Drop Box, if available.** A self-represented litigant may file a document by placing the document in a securely closed envelope and depositing it in a drop box, if available in the county.

(2) **Small Claim.** Under this rule, a self-represented litigant may file a small claim, as defined in K.S.A. 61-2703, using any of the available methods in subsections (d)(1), including by fax.

(e) **Filing Date.**

(1) **In Person or By Mail.** When a self-represented litigant files a document in person or by mail, the clerk's office will consider the document filed with the court on the date the clerk's office receives the document.

(2) **Fax.** When a self-represented litigant files a document by fax, the clerk's office will consider the document filed with the court as provided in Rule 119.

(3) **Drop Box.** When a self-represented litigant deposits a document in a drop box by 4:00 p.m. local time in the county where the document is to be filed, the clerk's office will consider the document filed with the court on that day. If the self-represented litigant deposits the document in the drop box after 4:00 p.m., on a Saturday or Sunday, or on a Supreme Court holiday, the clerk's office will consider the document filed with the court on the next day that is not a Saturday, Sunday, or Supreme Court holiday.

(4) **Clerk's Office Not Open.** If a clerk's office is closed by order of the chief judge of the judicial district on a day that is not a Saturday, Sunday, or a Supreme Court holiday, the clerk's office will consider the document filed with the court on the next day that the clerk's office is open. During the time a clerk's office is considered inaccessible, the requirements of K.S.A. 60-206 and amendments thereto will apply to compute any time period.

(f) **Payment of Fees**. Any filing fee, or other fee required to file a document is due when the document is filed with the court.

(1) **Payment Method.** A self-represented litigant must pay any required fee according to the following provisions.

(A) **Mail and Drop Box**. When filing a document by mail or drop box, the self-represented litigant must pay by check or money order.

(B) **In Person**. When filing the document in person at the clerk's office, the self-represented litigant must pay by check, credit or debit card, money order, or cash.

(C) **By Fax**. When filing the document by fax, the self-represented litigant must pay by credit or debit card as provided in Rule 119. The Rule 119 Fax Transmission Sheet form is available at https://www.kansasjudicialcouncil.org/legal-forms/forms-use-under-supreme-court-rules/forms-use-under-rules-relating-district-courts-16.

(2) **Use of Credit or Debit Card.** When paying by credit or debit card, the self- represented litigant may use only the credit or

debit card systems designated by the judicial administrator.

(3) **Rejected Credit or Debit Card.** If the company that issued the credit or debit card rejects the transaction, the clerk's office will not consider the document filed under K.S.A. 60-203 and amendments thereto or K.S.A. 60- 2001 and amendments thereto.

(4) **Confidential Information.** Credit or debit card information is not subject to disclosure under the Kansas Open Records Act. The information is confidential, must be secured by the clerk until the clerk processes the transaction, must not be retained in the case file, and must be destroyed after the clerk processes the transaction.

(g) **Poverty Affidavit**. A self-represented litigant who cannot afford to pay a required filing fee may file a poverty affidavit to excuse the fee if allowed for the case type. The court may later charge the fee if the judge determines the self-represented litigant's statement of poverty is untrue. If the self-represented litigant is an inmate, the clerk will assess an initial $3 filing fee.

(1) A poverty affidavit form for most civil actions, including small claims and evictions, is available at https://www.kansasjudicialcouncil.org/legal-forms/civil-actions/chapter-60/poverty-affidavit.

(2) A poverty affidavit form for a case filed under K.S.A. 60-1507 is available at https://www.kansasjudicialcouncil.org/legal-forms/forms-use-under-supreme-court-rules/forms-use-under-rules-relating-district-courts-9.

(h) **Service.** A self-represented litigant must serve a copy of any document on any other named party as required by applicable statutes and rules.

(i) **Filing Under Seal; Request to Seal Document.**

(1) If a self-represented litigant files a document under a seal order previously entered by the court, the self-represented litigant must certify that such an order exists.

(2) If at the time of filing a self-represented litigant believes that a document not covered by a seal order should be sealed, the self-represented litigant must file a motion to seal that includes a general description of the document. The self-represented litigant must certify that the motion complies with subsection (j) of this rule, which protects personally identifiable information.

(3) A self-represented litigant may file a motion to seal a document already in the case file. The motion must specify the document that is proposed to be sealed. When a motion to seal is filed, the identified document will be removed from public view until the court rules on the motion to seal. A court employee is not required to search for a document that is not described in detail in a motion to seal.

(j) **Protection of Personally Identifiable Information.**

(1) **Obligation to Redact Personally Identifiable Information.** A self- represented litigant who files a document in a county that is operating under the Kansas eCourt Rules must comply with the requirements of Rule 24 regarding the protection of personally identifiable information and is subject to sanctions for failure to comply under Rule 24(f). All other self-represented litigants must comply with the requirements of Rule 123 regarding the exclusion of personal identifiers when filing a document.

(2) **Administrative Information Required.** When a self-represented litigant files a new case, the self-represented litigant must submit a cover sheet that substantially complies with the form located on the judicial council website, https://www.kansasjudicialcouncil.org/legal-forms/case-filing-cover-sheets. The following rules apply.

(A) Personally identifiable information gathered for administrative purposes using a cover sheet:

(i) must not be retained in the case file;
(ii) is not subject to reproduction and disposition of court records under Rule 108; and
(iii) may be shredded or otherwise destroyed within a reasonable time after the case is entered electronically into the case management system.

(B) In an action for divorce, child custody, child support, or maintenance, the administrative information provided must include, to the extent known, the following information:

(i) the parties' Social Security numbers;
(ii) the parties' birthdates; and
(iii) the parties' child's full name or pseudonym, Social Security number, and birthdate.

(3) **Certification.** Each document a self-represented litigant submits to a court in a county that is operating under the Kansas eCourt Rules must be accompanied by a certification of the following information:

(A) the self-represented litigant has signed the document and provided the self-represented litigant's name, address, email address (if available), telephone number, and fax number (if available); and

(B) the document has been reviewed and is submitted under seal or complies with subsection (j).

A form to assist the self-represented litigant with this certification is available from the Office of Judicial Administration at https://www.kscourts.org/KSCourts/media/KsCourts/Public/Court%20Form s/SelfRepresentedLitigantFormOJA218.pdf.

(4) **Motions Not Restricted.** This rule does not restrict a self-represented litigant's right to request a protective order or to move to file a document under seal or to request the court seal a document.

(5) **Application.** This rule does not affect the application of constitutional provisions, statutes, or rules regarding confidential information or access to public information.

(k) **Clerk Processing.**

(1) **Document Review.** Upon receipt of a document filed by a self-represented litigant, a clerk is authorized to return the document only for the following reasons:

(A) the document is illegible;
(B) the document does not leave a margin large enough to add a file stamp, as required by Rule 111;
(C) the document does not have the correct county designation, case number, or case caption; ~~or~~
(D) the applicable fee has not been paid or no poverty affidavit is submitted with the document or already on file in the case; or
(E) the document only sets a hearing date, and the hearing date is a date the court is closed or a date that has already passed and the hearing did not occur on that date.[1]

(2) **Return of Document.** If a clerk determines that the document must be returned for any of the reasons listed in subsection (k)(1), the clerk must designate the reason for its return.

(3) **Approval of Document.** If the document is not rejected under subsection (k)(1), a clerk must approve the document for filing. The clerk may flag the document for further review as authorized by the standard operating procedures adopted by the judicial administrator.

(4) **Timeline for a Clerk to Process a Document.** A clerk must process a document for filing as quickly as possible

but not more than four business hours after the clerk receives the document for filing.

(l) **Conflict.** This rule should be read in conjunction with other applicable rules and statutes, including the prison mailbox rule.[2] But this rule controls if any provision of a Supreme Court rule or district court rule conflicts with this rule.

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[1] The return reason listed in subsection (k)(1)(E) is not limited to a document labeled "Notice of Hearing." But it does not apply to a document that does more than set a hearing date, such as a document that also asks a court to decide an issue.

[2] See *Wahl v. State*, 301 Kan. 610 (2015).

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

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Elliott v. Kingdom Campground	124,002	Denied	02/02/2024	Unpublished
In re A.S.	125,534	Granted	02/02/2024	Unpublished
In re M.B.	125,841	Denied	01/29/2024	Unpublished
In re S.W.	126,129	Denied	01/29/2024	Unpublished
Karbank Holdings v. Regional Evangelical Alliance of Churches, Inc.	124,892 125,138 125,697	Granted	01/29/2024	Unpublished
Robertson v. Skidmore	126,538	Denied	01/29/2024	Unpublished
State v. Abercrombie	125,077	Denied	02/02/2024	Unpublished
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State v. Harpe	124,732	Denied	02/02/2024	Unpublished
State v. Kelly	125,061	Denied	02/02/2024	Unpublished
State v. Wade	125,049 125,050	Granted; summarily vacated; remanded to Ct. of App.	02/02/2024	Unpublished
State v. Phipps	125,269	Granted	01/29/2024	63 Kan. App. 2d 698
State v. Reynolds	124,238	Denied	02/02/2024	Unpublished
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State v. Walker	124,728	Denied	02/02/2024	Unpublished

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No. 124,046

TIMOTHY TOWNE, on Behalf of Himself and All Others Similarly Situated, *Appellant/Cross-Appellee*, v. UNIFIED SCHOOL DISTRICT NO. 259, D/B/A THE WICHITA PUBLIC SCHOOLS AND UNIFIED SCHOOL DISTRICT NO. 259, D/B/A THE WICHITA PUBLIC SCHOOLS BASE PLAN, *Appellees/Cross-Appellants.*

(540 P.3d 1014)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Motion to Dismiss for Failure to State a Claim—Appellate Review.* When reviewing a motion to dismiss for failure to state a claim, courts do not evaluate the strength of the plaintiff's position, but rather whether the petition has alleged facts that may support a claim on either the petition's stated theory or any other possible theory.

2. INSURANCE—*Self-Insured School Districts Not Exempt from Regulation under Insurance Code.* K.S.A. 40-202(b) exempts the "*employees* of a particular person, firm, or corporation" from regulation under the Insurance Code of the state of Kansas, K.S.A. 40-101 et seq. This provision does not exempt self-insured school districts from regulation under the Code. The holding of *U.S.D. No. 259 v. Sloan*, 19 Kan. App. 2d 445, 871 P.2d 861 (1994), to the contrary is overruled.

3. SAME—*Medical Benefit Plan Offered by Self-Insured School District Is a Health Benefit Plan under Statute.* Under the facts of this case, the medical benefit plan offered by U.S.D. No. 259 is a "health benefit plan" under K.S.A. 40-4602(c) because it is a "hospital or medical expense policy." An entity that chooses to self-insure under K.S.A. 72-1891 can still be said to offer a "health benefit plan," as that statute plainly contemplates a self-insurer will "provide health care services."

4. SAME—*Self-Insured School District Is a Health Insurer under Facts of this Case.* Under the facts of this case, U.S.D. No. 259 is a "health insurer" under K.S.A. 40-4602(d) because it is an "entity which offers a health benefit plan subject to the Kansas Statutes Annotated."

5. SAME—*Anti-Subrogation Regulation Applies to Self-Funded Plan under Facts of this Case.* Under the facts of this case, K.A.R. 40-1-20 applies to U.S.D. No. 259's self-funded Plan.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 21, 2022. Appeal from Sedgwick District Court; WILLIAM S. WOOLLEY, judge. Oral argument held September 14, 2023. Opinion filed January

5, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded.

Troy H. Gott, of Brennan Gott Law, PA, of Wichita, argued the cause and was on the briefs for appellant.

Ryan K. Meyer, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, argued the cause, and *William P. Tretbar* and *Lyndon W. Vix*, of the same firm, were with him on the briefs for appellees.

James R. Howell and *Jakob Provo*, of Prochaska, Howell & Prochaska LLC, of Wichita, were on the brief for amicus curiae Kansas Trial Lawyers Association.

The opinion of the court was delivered by

STEGALL, J.: Unified School District No. 259 (U.S.D. 259) in Sedgwick County administers a medical benefit plan (the Plan) for its employees. The Plan is a single employer, self-funded plan as authorized by K.S.A. 72-1891, which allows a school district to choose to "act as a self-insurer to provide health care services" for its employees. Meritain Health, Inc., (Aetna) is the third-party administrator for the Plan. The Plan's provider network is through Aetna, and Aetna vets and adjusts claims made by Plan participants. The Plan contains a subrogation clause requiring participants to repay any amounts initially paid by the Plan but later recovered from a third party by the participant.

Timothy Towne, an employee of U.S.D. 259, was injured in a car wreck, and the Plan covered a portion of his medical expenses. Towne then recovered from a third-party and U.S.D. 259 required Towne to reimburse the Plan $1,705.20. Towne acquiesced, then filed a breach of contract claim against U.S.D. 259, arguing that K.A.R. 40-1-20 renders the subrogation clause unenforceable. K.A.R. 40-1-20 provides: "No insurance company or health insurer, as defined in K.S.A. 40-4602 and amendments thereto, may issue any contract or certificate of insurance in Kansas containing a subrogation clause . . . applicable to coverages providing for reimbursement of medical, surgical, hospital, or funeral expenses."

U.S.D. 259 argued below (and reprises these arguments before us) that the lower courts did not have subject matter jurisdiction over Towne's claim because Towne cannot bring a breach of

contract action when U.S.D. 259 was enforcing an express provision in the Plan. It also argued that K.S.A. 40-202(b) exempts the Plan from any regulation under the Kansas Insurance Code. Lastly, it claimed that even if the Plan is not exempted from regulation, U.S.D. 259 is not a "health insurer" nor is the Plan a "health benefit plan" as those terms are defined in K.S.A. 40-4602. Hence, the anti-subrogation regulation does not apply.

The district court dismissed Towne's claim after concluding that K.S.A. 40-202 exempts U.S.D. 259's Plan from regulation by the Kansas Insurance Code, K.S.A. 40-101 et seq., and in any event, that the Plan is not a "health benefit plan" as that term is defined in K.S.A. 40-4602. The Court of Appeals affirmed.

We granted Towne's petition for review and U.S.D. 259's conditional cross-petition and, today, we reverse the lower courts and hold K.S.A. 40-202(b) does not exempt self-funded plans from regulation by the Insurance Code. Moreover, we find the Plan is a "health benefit plan" under K.S.A. 40-4602, which makes U.S.D. 259 a "health insurer" subject to the anti-subrogation regulation.

DISCUSSION

Towne styled the sole claim in his petition as one for breach of contract. U.S.D. 259 protests this characterization, insisting Towne's so-called "breach of contract" claim should be dismissed for lack of subject matter jurisdiction because it is in reality a disguised attempt at private enforcement of K.A.R. 40-1-20 where no private right of action exists.

Subject matter jurisdiction establishes a court's power to hear and decide a particular type of action. *Miller v. Glacier Development Co.*, 293 Kan. 665, 669, 270 P.3d 1065 (2011). The existence of subject matter jurisdiction cannot be waived, and its nonexistence may be challenged at any time. *State v. Dunn*, 304 Kan. 773, 784, 375 P.3d 332 (2016). Whether subject matter jurisdiction exists is a question of law over which we exercise unlimited review. *Kansas Fire and Safety Equipment v. City of Topeka*, 317 Kan. 418, 435, 531 P.3d 504 (2023).

U.S.D. 259 relies on *Jahnke v. Blue Cross & Blue Shield of Kansas*, 51 Kan. App. 2d 678, 353 P.3d 455 (2015), to support its

argument. There, Jahnke sued Blue Cross and Blue Shield of Kansas Inc. (BCBS) after it failed to pay for Jahnke's brain tumor surgery. The BCBS policy provided it would not pay benefits for tumors until a 240-day waiting period had passed, and Jahnke's surgery occurred 11 days before the waiting period expired. Jahnke's petition alleged that the BCBS policy violated a Kansas statute that prohibits small employers from having a waiting period longer than 90 days. Notably, Jahnke's petition was not styled as a breach of contract action; rather, it was premised solely on BCBS's violation of the statute.

It was not until the case reached the Court of Appeals and the question of subject matter jurisdiction was raised that Jahnke's estate claimed the petition was actually a simple breach of contract action. The panel examined the pleadings and the record of evidentiary hearings, and observed that at all points Jahnke alleged only a violation of a statute rather than a breach of contract. 51 Kan. App. 2d at 679-97. Because there was no private right of action in the statute, the panel dismissed the case for failure of jurisdiction. 51 Kan. App. 2d at 697 ("[T]he legislature provided no express or implied private cause of action. Because neither this court nor the district court has subject matter jurisdiction over the Jahnkes' direct action in court, we must dismiss this appeal and vacate the judgment entered by the district court.").

The fact that Towne has claimed from the start that U.S.D. 259 breached its contract with him instantly distinguishes *Jahnke*. U.S.D. 259 objects that if we permit Towne's breach of contract claim to go forward, then any contractual provision in violation of the law could become a breach of contract. Perhaps this is so, and if it is, we do not share the school district's sense of dismay at this outcome. But that is not the question before us. Rather, the question is more simply and straightforwardly whether Kansas courts have jurisdiction to hear breach of contract claims. Plainly, we do. See, e.g., *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015) (unlimited review when interpreting and determining the legal effect of contracts); *U.S.D. No. 446 v. Sandoval*, 295 Kan. 278, 282, 286 P.3d 542 (2012) (unlimited review over the existence and terms of an oral contract); *Frazier v. Goudschaal*, 296 Kan. 730, 745, 295 P.3d 542 (2013) ("[A] court may exercise its

jurisdiction over a contractual dispute in order to evaluate the contract's legality.").

Any contract claim may fail for any number of reasons, and the same can be said of the contract claim made in this case. But that does not mean courts do not have jurisdiction to hear them. 296 Kan. at 743 ("Which party should win a lawsuit is an altogether different question from that of whether the court has the power to say who wins."). Indeed, the Plan contains a severability clause which provides that if any section of the contract is held invalid or illegal, it "shall not affect the remaining sections" and the "Plan shall be construed and enforced as if such invalid or illegal sections had never been inserted in the Plan." Should the subrogation clause be held invalid or otherwise unenforceable, the contract itself remains. And Towne argues that requiring him to refund $1,705.20 to U.S.D. 259 for qualified medical expenses puts U.S.D. 259 in breach of its obligations under the Plan. These are the ordinary sorts of contract disputes regularly adjudicated by Kansas courts applying common-law rules. See *David v. Hett*, 293 Kan. 679, 691, 270 P.3d 1102 (2011) ("[A] breach of contract claim is a material failure to perform a duty arising under or imposed by agreement."); see also *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 261 Kan. 806, 831, 934 P.2d 65 (1997) ("When an insurer wrongfully denies coverage, the insurer breaches an express contract provision.").

We turn now to the merits of Towne's appeal. At this stage of the litigation—a motion to dismiss for failure to state a claim in the district court—it is not so much about the strength of Towne's position, but rather whether his petition has alleged facts that may support a claim on either his stated theory "or any other possible theory." *Cohen v. Battaglia*, 296 Kan. 542, 546, 293 P.3d 752 (2013). Crucial to this question is whether the Plan is subject to the Kansas Insurance Code. If it is not, Towne has not stated a breach of contract claim under any theory. If it is, he has.

Article 2 of the Kansas Insurance Code contains "General Provisions" that apply to the entire code. One of these general provisions exempts certain entities and individuals from regulation under the code:

"Nothing contained in this code shall apply to:

"(a) Grand or subordinate lodges of any fraternal benefit society which admits to membership only persons engaged in one or more hazardous occupations in the same or similar line of business or to fraternal benefit societies as defined in and organized

under article 7 of chapter 40 of the Kansas Statutes Annotated, and amendments thereto, unless they be expressly designated;

"(b) the employees of a particular person, firm, or corporation;

"(c) mercantile associations which simply guarantee insurance to each other in the same lines of trade and do not solicit insurance from the general public;

"(d) the Swedish mutual aid association of Rapp, Osage county, Kansas;

"(e) the Scandia mutual protective insurance company, of Chanute, Kansas;

"(f) the Seneca and St. Benedict mutual fire insurance company of Nemaha county, Kansas;

"(g) the mutual insurance system practiced in the Mennonite church, in accordance with an old custom, either by the congregation themselves or by special associations, of its members in Kansas;

"(h) the Kansas state high-school activities association;

"(i) the mutual aid association of the church of the brethren; or

"(j) a voluntary noncontractual mutual aid arrangement whereby the needs of participants are announced and accommodated through subscriptions to a monthly publication." K.S.A. 40-202.

Subsection (b) is at issue here, which exempts "the employees of a particular person, firm, or corporation" from regulation.

We exercise unlimited review when evaluating questions of statutory or regulatory interpretation. "In this endeavor, we must give effect to the intent expressed by the plain language of the text. This means we give common words their ordinary meanings, without adding to or subtracting from the text as it appears. We only resort to textual construction when the language is ambiguous. [Citations omitted.]" *Central Kansas Medical Center v. Hatesohl*, 308 Kan. 992, 1002, 425 P.3d 1253 (2018).

We likewise exercise unlimited review when determining whether the district court erred by granting a motion to dismiss for failure to state a claim. We must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn from them. We "then decide[] whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. If so, the dismissal by the district court must be reversed." *Cohen*, 296 Kan. at 546.

The district court and panel relied on the interpretation of K.S.A. 40-202(b) in *U.S.D. No. 259 v. Sloan*, 19 Kan. App. 2d 445, 454, 871 P.2d 861 (1994), to conclude that K.S.A. 40-202(b) exempts U.S.D. 259 from regulation by the Insurance Code. In *Sloan*, U.S.D. 259 sued Sloan for breach of contract after she set-

tled a wrongful death claim for her husband's death against chemical manufacturers. U.S.D. 259's Plan at that time also contained a subrogation provision, and though it had paid for medical expenses related to Sloan's husband's illness, it had not been reimbursed for those expenses from the settlement funds. The district court granted U.S.D. 259's motion for summary judgment, finding Sloan breached the contract by failing to comply with the subrogation clause.

A panel of the Court of Appeals evaluated whether U.S.D. 259's Plan was subject to regulation by the Kansas Insurance Department. In affirming the district court, the panel first noted that K.S.A. 40-202(b) exempted from regulation "the employees of a particular person, firm, or corporation." 19 Kan. App. 2d at 454. Based on this language, the court concluded that because U.S.D. 259's Plan was "'a single employer self-funded plan,'" K.S.A. 40-202(b) exempted U.S.D. 259's Plan from regulation. 19 Kan. App. 2d at 454. As a result, U.S.D. 259 could enforce the subrogation provision. 19 Kan. App. 2d at 454.

The *Sloan* panel gave the following reasoning for interpreting K.S.A. 40-202(b) in this way:

> "Coverage under the Plan in the present case is afforded to employees of the school district and extends to their eligible dependents. The Plan does not operate for profit. Steve Imber, chief attorney for the Kansas Insurance Department, stated in a letter that U.S.D. No. 259's 'health and dental care plan is *only* available to individuals employed by U.S.D. No. 259. Accordingly, it would appear that based on the information you have provided us, the above plan appears to be a single employer self-funded plan and exempt from our jurisdiction pursuant to K.S.A. 40-202.' The Plan was first instituted in 1981 and has been exempt from regulation since its inception." 19 Kan. App. 2d at 454.

Yet, the plain language of K.S.A. 40-202(b) exempts "employees" from regulation under the code. This exact language has been in this statute for nearly a hundred years, and no other case has attempted to interpret this language. It is not apparent why the *Sloan* panel was so quick to interpret the exemption in (b) for "employees of a particular person, firm, or corporation" to apply to "single employer self-funded" plans. K.S.A. 40-202(b); 19 Kan. App. 2d at 454. Indeed, at oral argument in the instant case even U.S.D. 259's counsel could not offer any reason that would support this interpretation based on the statute's plain language. The

Sloan panel appears to have relied upon the interpretation of the Insurance Department itself. But we have repeatedly and explicitly rejected the doctrine of deferral to agency interpretations of either statutes or regulations. See, e.g., *May v. Cline*, 304 Kan. 671, 675, 372 P.3d 1242 (2016) ("[W]e have recently resoundingly rejected the doctrine of deference to an agency on questions of law."); *Mera-Hernandez v. U.S.D. 233*, 305 Kan. 1182, 1185, 390 P.3d 875 (2017) (appellate courts give "no deference to the administrative board").

Towne is correct to assert that *Sloan* seems to have taken this statute, which plainly says provisions of the Insurance Code do not apply to individual *employees*, and rewritten it to mean that "it does not apply to the *employer* of the employees." (Emphasis added.) Towne offers a plausible alternative meaning and suggests that exempting "employees" is meant to protect individuals whose employers are subject to the Insurance Code. The Insurance Code requires certain actions and prohibits other actions by insurers. And an insurer that acts in violation of these statutory requirements can be penalized in various ways. K.S.A. 40-202(b) seems to protect individual employees of an insurer that has acted in violation of the code. While this is a common-sense understanding of the language in K.S.A. 40-202(b), the question of what meaning, precisely, the statute has is not in front of us. It is sufficient for today to hold simply that this provision does not exempt the Plan from regulation.

Reading the Insurance Code *in pari materia* strengthens our conclusion. For example, K.S.A. 40-2261(a)—a section of the code which permits certain employers to "also offer a premium only cafeteria plan"—states: "The provisions of this subsection shall not apply to any employer who offers health insurance through any self-insured or self-funded group health benefit plan of any type or description." This exemption contained in a specific section of the Code would be unnecessary if the Legislature intended for K.S.A. 40-202(b) to entirely exempt self-funded employer plans from any regulation.

In sum, we find the plain language of K.S.A. 40-202(b) that exempts "employees of a particular person, firm, or corporation" does not include single employer self-funded plans. In other

words, the Plan is regulated by the Code. The contrary holding of *Sloan* is overruled.

U.S.D. 259 also seeks to escape regulation under the Code by claiming its Plan is not a "health benefit plan" and it is not a "health insurer." These terms appear in the Patient Protection Act, K.S.A. 40-4601 et seq. (the Kansas counterpart to HIPAA), and K.A.R. 40-1-20 adopts these definitions. These definitions have also been adopted for general use in the Insurance Code. See K.S.A. 40-2,186(b)-(c).

> "'Health benefit plan' means any hospital or medical expense policy, health, hospital or medical service corporation contract, a plan provided by a municipal group-funded pool, a policy or agreement entered into by a health insurer or a health maintenance organization contract offered by an employer or any certificate issued under any such policies, contracts or plans. . . .
>
> "'Health insurer' means any insurance company, nonprofit medical and hospital service corporation, municipal group-funded pool, fraternal benefit society, health maintenance organization, or any other entity which offers a health benefit plan subject to the Kansas Statutes Annotated." K.S.A. 40-4602(c)-(d).

Because a school district or a self-insured entity is not specifically enumerated in the list of entities that qualify as a "health insurer," Towne relies on the residual clause in that definition—"any other entity which offers a health benefit plan"—to argue that U.S.D. 259 should be considered a health insurer. U.S.D. 259 counters that because the Legislature chose, in its definition of "health insurer" in K.S.A. 40-4602(d), to omit any reference to "self-insurers," the maxim of *expressio unius est exclusio alterius*—i.e., the inclusion of one thing implies the exclusion of another—demonstrates that this omission was intentional. See *Bruce v. Kelly*, 316 Kan. 218, 233, 514 P.3d 1007 (2022).

Yet application of this maxim is not appropriate given that the statute includes a residual clause in subsection (d) which defines "any other entity which offers a health benefit plan subject to the Kansas Statutes Annotated" as a health insurer. It therefore becomes necessary to determine whether the Plan offered by U.S.D. 259 qualifies as a "health benefit plan." If it is, then U.S.D. 259 is a health insurer.

Recall that the statutory language defines a "health benefit plan" as, among other things, a "hospital or medical expense pol-

icy." K.S.A. 40-4602(c). Upon evaluating the Plan document itself, U.S.D. 259's argument that the Plan is not a "health benefit plan" is strained at best. The Plan includes a "Medical Schedule of Benefits" chart showing the amount covered depending on if the service is provided by a participating or non-participating provider. This chart includes the deductible amounts, as well as information on coverage of a laundry list of medical procedures and events, such as inpatient and outpatient hospital expenses, chemotherapy, chiropractic care, mammograms, colonoscopies, X-rays and diagnostic testing, ambulance services, emergency room visits, hospice care, maternity care, and many others.

The Plan document also provides a "General Overview of the Plan" which discusses various features of the Plan. For example, it discusses costs and informs the participant that he or she "must pay for a certain portion of the cost of Covered Expenses under the Plan, including (as applicable) any Copay, Deductible and Coinsurance percentage that is not paid by the Plan, up to the Out-of-Pocket Maximum set by the Plan." It similarly discusses additional details on coinsurance, copay, deductibles, and out-of-pocket maximums. Moreover, the "Plan Description" booklet at times utilizes the defined term "Plan benefits," which the booklet defines as "the medical services, hospital services, and other services and care to which a Plan participant is entitled."

These features of the Plan—particularly the fact that it includes a schedule of medical benefits and acknowledges that the Plan is designed to provide medical and hospital services to participants—easily leads us to conclude that the Plan is a "hospital or medical expense policy" such that it should be considered a "health benefit plan." See K.S.A. 40-4602(c).

U.S.D. 259's main argument that the Plan is not a "health benefit plan" hinges on the fact that the school district has elected to act as a self-insurer under K.S.A. 72-1891. U.S.D. 259 points to the structure of K.S.A. 72-1891, which gives a school district three options for how it may provide health care services to its employees. Under this statute, a school district may:

1. "[P]rocure contracts insuring its certificated employees and other employees or any class or classes thereof under a policy or policies of group life, group health, disability

income, accident, accidental death and dismemberment, and hospital, surgical, and medical expense insurance"; or

2. "[P]rocure contracts with health maintenance organizations;" or
3. "[A]ct as a self-insurer to provide health care services and disability income benefits for such employees." K.S.A. 72-1891.

U.S.D. 259 maintains that because it chose the third option to self-insure—rather than procuring a policy with an insurance company—the Plan is therefore "not a 'hospital or medical expense policy.'" Yet as described above, the Plan document is just that—a policy providing hospital or medical benefits. And though U.S.D. 259 chose to self-insure under K.S.A. 72-1891, that statute still contemplates a self-insurer will "provide health care services."

We thus conclude that U.S.D. 259's Plan is a "health benefit plan" under K.S.A. 40-4602(c) because it is a "hospital or medical expense policy." This in turn makes U.S.D. 259 a "health insurer" because it is an "entity which offers a health benefit plan *subject to the Kansas Statutes Annotated*." (Emphasis added.) K.S.A. 40-4602(d). The latter half of this phrase is certainly broad enough to capture entities like U.S.D. 259 which self-insure but do so under the authority and direction of the governing statutes contained in other sections of the Kansas Statutes Annotated. See, e.g., K.S.A. 72-1893(a) (providing that a self-insured school district "shall make payments for claims, judgments and expenses for health care services . . . from the special reserve fund of the school district."); K.S.A. 72-1894(a) (authorizing a self-insured school district to "transfer moneys from its general fund to the special reserve fund").

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

BILES, J., not participating.

No. 124,254

JASON UNRUH, *Appellant*, v. CITY OF WICHITA, ET AL., *Appellees.*

(540 P.3d 1002)

SYLLABUS BY THE COURT

1. TORT—*Civil Battery and Negligence Actions—Different Elements of Proof.* Civil battery and negligence are discrete concepts in tort with different elements of proof.

2. SAME—*Civil Battery Definition—Elements*. Civil battery is the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact or an apprehension of contact that is harmful or offensive. Intent to inflict such contact or apprehension of such contact is a necessary element for the intentional tort of battery.

3 SAME—*Negligence Claim—Elements*. A negligence claim requires a plaintiff to prove: (a) the defendant owed plaintiff a legally recognized duty; (b) the defendant breached that duty; (c) the defendant's breach caused plaintiff's injuries; and (d) plaintiff suffered damages. None of these concerns the defendant's mental state.

4 CIVIL PROCEDURE—*Applicable Statute of Limitations Period—Court's Considerations.* Substance prevails over form when determining the applicable statute of limitations. A party's labeling of a claim in a civil petition as an action in negligence does not alter the character of that claim when deciding the applicable limitations period. A court must look to the particular facts and circumstances to properly characterize the cause of action.

5 TORTS—*Negligence Claim Alleging Excessive Use of Force by Police Officer—Requirement of Legally Recognized Duty of Care Independent of Excessive Force.* A negligence claim alleging excessive use of force by a police officer requires the plaintiff to show the officer owed that plaintiff a legally recognized duty of care that arose independent of the force the plaintiff alleges to be excessive. A court must be able to analyze the distinct elements of negligence separately from the distinct elements of battery and its associated defense of privilege.

6 SAME—*Language in* Dauffenbach v. City of Wichita *Is Disapproved.* Language in *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 1033, 667 P.2d 380 (1983), suggesting a police officer owes a special duty anytime "there is an affirmative act by the officer causing injury" is disapproved.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 1, 2022. Appeal from Sedgwick District Court; STEPHEN J. TERNES,

judge. Oral argument held March 28, 2023. Opinion filed January 5, 2024. Judgment of the Court of Appeals affirming the district court is affirmed on the issue subject to review. Judgment of the district court is affirmed on the issue subject to review.

Michael T. Jilka, of Graves & Jilka, P.C., of Lawrence, argued the cause and was on the briefs for appellant.

David R. Cooper, of Fisher, Patterson, Sayler & Smith, LLP, of Topeka, argued the cause, and *Sharon L. Dickgrafe*, chief deputy city attorney, and *Jennifer L. Magana*, city attorney, were with him on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: Wichita police forcefully apprehended Jason Unruh after he led them on a nighttime car chase down city streets in a pouring rain. The pursuit ended when his vehicle spun out of control, hopped a curb, and came to rest over a sidewalk. He pulled himself out through the driver's side window holding a bag of methamphetamine and tumbled to the ground. He ignored commands to stop, and officers subdued him as he scooped up drugs that spilled onto the wet pavement. About 23 months later, Unruh sued for personal injuries, claiming officers negligently used excessive force to arrest him. The issue is whether his claim is for common-law civil battery, rather than common-law negligence as he alleges.

Unruh contends the officers misperceived the threat he presented at the scene but agrees they intentionally used force while making a lawful felony arrest. The district court granted defendants summary judgment after construing this claim as an allegation of civil battery. This means the one-year statute of limitations for battery bars Unruh's lawsuit. See K.S.A. 60-514(b). He appealed that ruling, but a Court of Appeals panel agreed with the district court. *Unruh v. City of Wichita*, No. 124,254, 2022 WL 2392657, at *8 (Kan. App. 2022) (unpublished opinion). On review, we affirm.

Civil battery and negligence are discrete concepts with different elements of proof. The law defines civil battery as the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact or an apprehension of contact that is harmful or offensive. *McElhaney v. Thomas*, 307 Kan. 45, 53, 405 P.3d 1214 (2017). In contrast, negligence requires proof that: (1) the defendant owed plaintiff a legally recognized duty; (2) the defendant breached that duty; (3) the defendant's breach of duty caused plaintiff's

injuries; and (4) plaintiff suffered damages. *Reardon v. King*, 310 Kan. 897, 903, 452 P.3d 849 (2019). Intent is not an element when deciding whether a breach of a legal duty occurred. Labeling a claim in a pleading as an action in negligence does not alter its character when deciding the applicable limitations period.

Here, Unruh asserts the officers misunderstood how dangerous he may have been, which in turn, allegedly caused them to use more force than necessary to make his arrest. But he fails to come forward with evidence establishing the officers owed him a legally recognized duty of care that arose independent of the force he alleges to be excessive. Unruh states only a civil battery claim.

Granted, a discrete negligent act *might* arise during an incident involving excessive police force, when the elements of the negligence claim can be separately and distinctly analyzed apart from the elements of common-law battery. See *Unruh,* 2022 WL 2392657, at *8 ("[W]e do not discern any negligent act which was separate from and preceding the application of force, and Unruh does not assert that the officers breached a standard of care beyond that of not using excessive force."). But without something more, Unruh's dispute over the degree of nonlethal force applied when officers made a felony arrest simply invokes civil battery's privilege element, which is tied to a statute in this instance. K.S.A. 2022 Supp. 21-5227(a) declares a police officer is justified in using any force, short of deadly force, the officer reasonably believes necessary to effect an arrest or defend oneself or another officer from bodily harm while making an arrest.

The arresting officers may have committed civil battery if they used more force than is statutorily privileged to make a lawful arrest. But to pursue that question, Unruh should have filed suit within 12 months of the contested application of force. See K.S.A. 60-514(b). Substance prevails over form when a court decides a limitations period. The district court and panel properly concluded Unruh's cause of action was for battery.

FACTUAL AND PROCEDURAL BACKGROUND

Wichita police attempted a traffic stop as Unruh drove down city streets in a rainstorm. He did not stop when police activated their overhead lights. He ran a red light and tried to elude police. Multiple police cars gave chase. Dispatch advised the pursuing officers that Unruh was

known to be a drug dealer and at times armed. His car ran through other red lights and on occasion crossed the center line. He lost control of his vehicle twice. The first time, the car spun out on the wet pavement and struck a tree broadside smashing the driver's side door. Unruh ignored officers' commands to "show your hands" and "put your hands up" and drove away. Resuming the chase, officers saw Unruh throwing handfuls of what appeared to be methamphetamine out the driver's side window.

Several minutes later, Unruh's car spun out again. This time, he drove over another curb and came to a stop straddling a public sidewalk edged by commercial landscaping. He climbed out the driver's side window holding a bag of methamphetamine and fell to the ground—again ignoring officers' commands to stop and put up his hands. Officer Daniel Weidner testified when he approached, he noticed Unruh on the ground, holding something as he reached under the car. This caused Weidner to fear Unruh might have a gun. Unruh now says he was only trying to gather up the drugs that spilled onto the wet sidewalk.

Weidner's police dog attacked Unruh as the officers arrived, although it is unclear whether Weidner directed the dog to do so. At any rate, Weidner commanded the canine to stop and took control of his collar before Unruh could be handcuffed. Unruh claims Weidner kicked him in the shoulder and in the head as other officers tried to subdue him. Unruh also alleges Officer Brett Pearce punched him in the face and struck him in the back as officers rolled him face down to be handcuffed. The entire incident took about 30 seconds from when Unruh's car finally stopped until he was handcuffed.

A search of Unruh's vehicle found drugs, a digital scale, and $19,178 cash. Unruh was charged in federal court with possession with intent to distribute methamphetamine. He pled guilty to that charge.

Unruh later sued Weidner, Pearce, Wichita Police Chief Gordon Ramsay, and the City of Wichita for personal injuries. Among his claims, Unruh alleged Weidner and Pearce negligently used excessive force without a reasonable objective basis to believe he posed a threat of serious physical injury or death to them or others. He also claimed the officers violated the department's use-of-force

policies and procedures. The defendants moved to dismiss, arguing the one-year statute of limitations for civil battery barred his claims because he waited to file his lawsuit until nearly 23 months after the incident. The district court denied the motion, stating "at this stage in the proceedings" the petition asserted valid claims for relief. The court noted Unruh alleged the officers violated "specific WPD regulations and norms," adding, "this is a bit of a gray area of the law in Kansas."

The statute of limitations issue returned when the defendants moved for summary judgment. This time the district court concluded Unruh's lawsuit sounded in common-law civil battery and was time barred. The court relied on *Estate of Randolph v. City of Wichita*, 57 Kan. App. 2d 686, 459 P.3d 802 (2020), to conclude the officers' intentional use of force could not be framed as negligence. It acknowledged the *Randolph* decision said a person injured by police officers' use of force might claim negligence in some cases, but concluded Unruh's allegations did not present those circumstances. It dismissed the remaining defendants, holding the same one-year limitations period barred his derivative claims against the police chief and the city.

Unruh appealed to the Court of Appeals, but the panel rejected his challenge. *Unruh*, 2022 WL 2392657, at *2-11. In doing so, the panel remarked, "Kansas courts should not recognize a tort of negligent use of excessive force." 2022 WL 2392657, at *8. Unruh then asked this court for review, stating his only issue as, "Does Kansas law recognize a claim of negligent use of force by a police officer?" The problem with this less-than-precise issue framing, of course, is that facts and their context typically alter the legal questions that need answering, so it is not as simple as Unruh portrays it.

We also note Unruh fails in his appellate briefing to identify specific Wichita police department policies he claims created a duty owed to him that the arresting officers violated. This shortcoming creates problems because it is not for us to connect those dots. See *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018) ("Where the appellant fails to brief an issue, that issue is waived or abandoned."). Similarly, Unruh gives us no explana-

tion about contradictory references in his briefing on whether officers deployed the canine, or it engaged without prompt. Again, this is not for us to figure out, so we are left with his assertion that a police officer owes a legally recognized duty that is actionable in negligence anytime there is an "affirmative act" by the officer causing injury.

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

ANALYSIS

Unruh must distinguish his cause of action from battery to avoid its shorter statute of limitations, and he is not the first to face that predicament. See, e.g., *Murray v. Modoc State Bank*, 181 Kan. 642, 647-49, 313 P.2d 304 (1957) (liberally construing petition as an action against employer for negligent hiring and retention of employee with propensities towards violence who struck plaintiff and threw him to the ground); *Hershey v. Peake*, 115 Kan. 562, 565-67, 223 P. 1113 (1924) (construing claim that dentist pulled a healthy tooth as malpractice rather than assault and battery). But Unruh's problem is that the officers' decision to use force was "part and parcel of [their] intent to inflict harmful or offensive contact," which standing alone does not create an applicable duty. See *Ryan v. Napier*, 245 Ariz. 54, 61, 425 P.3d 230 (2018). As the court in *District of Columbia v. Chinn*, 839 A.2d 701, 707 (2003), explained:

> "What is required to justify [a negligence] instruction is at least one distinct element, *involving an independent breach of a standard of care beyond that of not using excessive force in making an arrest*, which may properly be analyzed and considered by the jury on its own terms apart from the intentional tort of battery and the defense of privilege." (Emphasis added.)

Unruh focuses on what he claims is the officers' flawed evaluation regarding the appropriate degree of nonlethal force needed to subdue him because he says he did not pose a threat to anyone. Acknowledging the officers acted intentionally, he characterizes their decision to use force as negligent. His "use of force" expert testified the officers should not have considered Unruh hostile

while he was on the ground outside the car, explaining: "It was very evident that [Unruh] was scooping up the methamphetamine and it was so illuminated by the headlights that there was obviously no sign of any type of firearm or weapon or anything of that nature. It's very evident through the video that Mr. Unruh was more concerned about collecting the narcotics than he is anything else."

For their part, the officers emphasize they applied force purposefully and intentionally to make a lawful felony arrest. In his affidavit, Weidner testified he knew during the chase Unruh was a member of "a violent group that moved large amounts of meth and was often armed." He said that when "[he] saw Unruh climbing out of his car through the driver's window," "Unruh had something in his hands." He "feared Unruh may have dropped a weapon and, because he was not trying to run away and was not immediately surrendering, [he] was afraid Unruh could be trying to arm himself and could then present a risk of harm [to] himself or other officers." Weidner said he intentionally sent his canine to apprehend Unruh when he saw that "Unruh continued to reach to the underside of the car, causing [him] to fear Unruh was armed or trying to reach for a weapon." Weidner conceded his physical contact with Unruh was "intentional, intended to gain compliance." Likewise, Pearce explained his "physical contact with Jason Unruh was intentional, intended to gain compliance, effect an arrest, and to protect [himself] and other officers."

Unruh describes his claim for "negligent use of force" by the officers as a tort centered at all times on the reasonableness of their determination to use force, applicable anytime "there is an affirmative act by the officer causing injury." And he insists the lower courts' rulings categorically abolish any "negligent use of force" claim against police officers. But we do not read their decisions the same way. In fact, both courts agreed "in *some* circumstances" one might be able to bring a negligence claim for injuries when a law enforcement officer makes intentional physical contact. See *Unruh*, 2022 WL 2392657, at *8. The difference, they explain, is that Unruh's claims rest entirely within the elements of common-law battery and do not articulate a legally recognized duty separate

from the officers' application of force with the admitted intent to cause harmful or offensive contact.

The analytical path presented here is not new, although it is confused by judicial dictum from *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 1033, 667 P.2d 380 (1983), suggesting a special duty arises *anytime* "there is an affirmative act by the officer causing injury." But as we explain below, this phrasing oversimplifies how a law enforcement officer might be subject to a special duty of care with an individual member of the public.

Standard of review

The district court decided this case on summary judgment, so the legal standard for our review is no surprise:

> "'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).

Appellate courts apply the same rules. And if the reviewing court determines reasonable minds could differ as to the conclusions to be drawn from the evidence, it must deny summary judgment. *Schreiner*, 315 Kan. at 30. Here, the essential facts are uncontroverted on the issue subject to our review.

Discussion

Some of our earliest caselaw considered the line between civil battery and negligence, although the language used to explain the ruling was fairly terse in reaching a result. For example, in *Laurent v. Bernier*, 1 Kan. 428, 431-32, 1863 WL 306 (1863), the court decided a claim for accidental discharge of a gun was barred by the one-year statute of limitations for civil battery. Citing old English caselaw, the *Laurent* court simply held the injury alleged "may properly be described as a battery." 1 Kan. at 432.

Forty years later, the court similarly held a damages action for an officer's careless shooting of the plaintiff was for battery. *Byrum v. Edwards*, 66 Kan. 96, Syl., 71 P. 250 (1903) ("An action to recover damages for carelessly or negligently shooting another is an action for a battery and is barred in one year."). In *Byrum*, both the plaintiff and an undersheriff searched for a robbery suspect. When the two crossed paths, they mistakenly thought the other was the robber and opened fire. The undersheriff hit the plaintiff, who sued alleging a negligent shooting because the undersheriff incorrectly thought he was the robber. The *Byrum* court, citing *Laurent* as its analog, held the one-year limitations period for battery barred the action. 66 Kan. at 97. Three decades after that, the court described *Byrum* as articulating that one factor differentiating battery from negligence is the defendant's intent to cause a harmful contact. *Hackenberger v. Travelers Mutual Cas. Co.*, 144 Kan. 607, 609, 62 P.2d 545 (1936) ("It is well to note the shooting in the Byrum Case was in fact intentional. The undersheriff intended to shoot and he did shoot. True, the injured party was not the robber as the undersheriff thought, but the act of shooting was nevertheless intentional.").

These cases returned to the court's attention in *Baska v. Scherzer*, 283 Kan. 750, 756-57, 156 P.3d 617 (2007), in which the plaintiff sued for negligence for injuries suffered when she tried to stop a fight between the two defendants, who mistakenly hit her while scuffling with each other. She sued more than a year later, which presented a statute of limitations concern. The *Baska* court observed that simply labeling the claim as an action for negligence could not alter its underlying nature. 283 Kan. at 764-66.

The *Baska* court held the plaintiff's lawsuit fell outside the applicable one-year statute of limitations because the claim's substance could only be for intentional acts to cause harm. It reasoned the evidence showed both defendants intended to hit one another, but missed, so the tort claim was for assault and battery under the transferred-intent doctrine, even though any harm to her was unintentional. It summarized its holding as:

"The defendants' acts of throwing punches in this case were intentional actions. Each defendant intended to strike at the other in order to cause harm. The defendants intended to punch, and they did punch. The fact that the punches in

question hit the plaintiff rather than the defendants is immaterial to the analysis. Because the defendants' actions were intentional, the 'substance' of Baska's action is one for assault and battery. Failure to initiate her action within 1 year of the fight bars her action by reason of the 1-year statute of limitations in K.S.A. 60-514(b)." 283 Kan. at 764.

The *Unruh* panel relied on this line of cases, from *Laurent* through *Baska*, to construe the cause of action here as common-law civil battery. See *Unruh*, 2022 WL 2392657, at *3-4 (citing *Baska* to characterize Unruh's claim). But these earlier cases, as exemplified by *Baska*'s reasoning, seem to oversimplify the distinction between common-law battery and common-law negligence by viewing it from a rudimentary intentional vs. unintentional perspective. *Baska*, 283 Kan. at 756 (describing negligence as an unintentional breach of a legal duty causing damage reasonably foreseeable without which breach the damage would not have occurred); see also 283 Kan. at 764 (describing the lower court's ruling in *Baska* as "contrary to the law of Kansas expressed in *Laurent*, *Byrum*, and *Hackenberger*"). There is more to it than that.

To explain, consider *Hershey* in which a dentist mistakenly extracted the wrong tooth. 115 Kan. at 563-67. The *Hershey* court recognized a valid negligence claim, despite the dentist's intentional act of pulling the tooth, because the dentist failed to exercise the ordinary care and skill owed to a patient when deciding which tooth to pull. 115 Kan. at 565. The *Hershey* court's differentiation between civil battery and negligence more precisely recognizes the two torts as distinct legal constructs with different elements. Compare *McElhaney*, 307 Kan. 45, Syl. ¶ 1 (defining civil battery as "the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact . . . that is harmful or offensive"), with *Reardon*, 310 Kan. at 903 (defining the elements of negligence as: "[1] defendant owed a duty to the plaintiff; [2] defendant breached that duty; [3] plaintiff's injuries were caused by the defendant's breach; and [4] plaintiff suffered damages").

As Dobbs' Law of Torts instructs:

"Intent and negligence are entirely different concepts. Negligence entails unreasonably risky conduct; the emphasis is on risk as it would be perceived by a reasonable person, not on the defendant's purpose or on the certainty required to

show intent. . . . Indeed, negligence does not require a state of mind at all but focuses instead on outward conduct. Even if the defendant recognizes the risk and deliberately decides to chance it without having purpose or certainty required for intent, he is not liable for an intentional tort, only for negligence." Dobbs, The Law of Torts § 31 (2d ed.).

The difference then is not whether the act itself was intentional or accidental; rather, it is whether a claim meets the separate elements of the different causes of action. Battery asks whether the actor intentionally caused contact with the intent to injure. See *McElhaney*, 307 Kan. at 53 (noting the "intent to injure" element of civil battery can be satisfied in alternative ways—either by an intent to cause a harmful bodily contact or by an intent to cause an offensive bodily contact). In contrast, negligence asks whether the actor's action, regardless of mental state, e.g., innocent, intentional, or accidental, breached an applicable duty of care that caused harm. These distinctions cannot be accurately captured in shorthand phrasing like intentional vs. unintentional—the two torts are discrete causes of action.

Unruh argues his claim meets the required elements for negligence, such that it establishes both duty and breach—specifically, he argues the officers owed him a duty to not use excessive force when arresting him and breached that duty by negligently misperceiving the degree of physical force necessary under the circumstances. But that conflates the analytical process. Our first step in any negligence analysis is identifying the duty owed by the defendant to the plaintiff because only then can one examine sequentially the remaining three elements—i.e., breach, causation, and damages.

Broadly speaking, police officers have a general duty to prevent crime and enforce laws. *Hopkins v. State*, 237 Kan. 601, 611, 702 P.2d 311 (1985) ("[T]he duty of a law enforcement officer to preserve the peace is a duty owed to the public at large. Absent some special relationship with or specific duty owed an individual, liability will not lie for damages."); *Dauffenbach*, 233 Kan. at 1033; *Montgomery v. Saleh*, 311 Kan. 649, 653, 466 P.3d 902 (2020). And when acting within the scope of their general duty, officers have immunity. K.S.A. 75-6104(c). This includes the privileged use of force to make a lawful arrest. K.S.A. 2022 Supp. 21-5227(a). But, despite this, liability in negligence may arise

when an officer breaches a specific or special duty owed to an individual. The challenge is determining when an officer's general duty to the public narrows to a special duty to the individual.

In Kansas, *Dauffenbach* shortcuts the first step (identifying the applicable duty) in the negligence analysis. Its questionable passage states:

> "Police officers have immunity from liability on claims arising from performance or nonperformance of an officer's general duties to prevent crime and enforce the laws. Liability arises only where an officer breaches a specific or special duty owed an individual. *Such a special duty arises in two circumstances: (1) where there is an affirmative act by the officer causing injury*; and (2) when a specific promise or representation by the officer is made under circumstances creating justifiable reliance. *McGeorge v. City of Phoenix*, 117 Ariz. 272, 572 P.2d 100 (1977); *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (1979). Examples of situations within the first category are placing an individual under arrest or committing an assault. A line of Kansas cases which recognize that an officer is liable for false arrest or the unnecessary use of force lends support to the existence of a special duty arising from such affirmative acts. *Bradford v. Mahan*, 219 Kan. 450, 548 P.2d 1223 (1976); *Gardner v. McDowell*, 202 Kan. 705, 451 P.2d 501 (1969); *Bukaty v. Berglund*, 179 Kan. 259, 294 P.2d 228 (1956)." (Emphasis added.) *Dauffenbach*, 233 Kan. at 1033.

Some courts have referenced the italicized language to justify imposing a special duty on law enforcement, looking no further than simply deciding whether the officer acted affirmatively. See, e.g., *McHenry v. City of Ottawa*, No. 16-2736-DDC-JPO, 2017 WL 4269903, at *14 (D. Kan. 2017) (unpublished opinion) (characterizing officers' shooting of plaintiff as a potential affirmative act); *Richards v. City of Wichita*, No. 15-1279-EFM-KGG, 2016 WL 5341756, at *8 (D. Kan. 2016) (unpublished opinion) (describing officer's entry into plaintiff's home as an affirmative act); and *Price v. City of Wichita*, No. 12-1432-CM, 2013 WL 6081103, at *4 (D. Kan. 2013) (unpublished opinion) (stating officer affirmatively acted by stomping on plaintiff's leg). The problem with this from a tort law perspective, of course, is that almost all acts can be characterized as affirmative ones. See Black's Law Dictionary 73 (11th ed. 2019) (defining "affirmative" as meaning "[i]nvolving or requiring effort").

It seems obvious more is needed when imposing a special duty on law enforcement than just deciding if an officer's affirmative act caused an injury. After all, most anything requires exertion,

and the separate tort of common-law battery would be swallowed whole by a negligence framing such as this. *Dauffenbach* cannot be reduced to such simplistic shorthand, and the caselaw cited by the *Dauffenbach* court in support of this dubious passage shows something else is required.

Look first at *McGeorge*, an Arizona Court of Appeals decision holding a police officer did not owe a special duty for failing to prevent an irate person from shooting the deceased based solely on the officer's encounter with the killer just 15 minutes earlier. *McGeorge*, 117 Ariz. at 274-75, 277. It reasoned, "[W]e do not think that any duty [the officer] owed to the public generally had narrowed so as to create a duty toward [the deceased]." 117 Ariz. at 277. In citing examples of what would constitute an affirmative act creating a special duty, the *McGeorge* court referenced scenarios such as police taking an assault victim to identify the attackers, one of whom got loose and hurt the victim; a city sewer inspector directing someone to climb into an open trench that collapsed and killed him; and a fire department ordering a company to use carbon dioxide on a damaged ship as a preventative that caused an explosion destroying the ship. 117 Ariz. at 277.

Now consider *Hendricks*, also cited by the *Dauffenbach* court, in which the New Mexico Court of Appeals held no special relationship existed to give rise to a special duty between a sexual assault victim and a police chief, who did not immediately respond to a telephoned tip that the victim had been abducted and was being held in a house. In so holding, it listed the same three examples as the *McGeorge* court from Arizona. *Hendricks*, 92 N.M. at 503.

The circumstances listed in *McGeorge* and *Hendricks* are decidedly different from those asserted by Unruh because they are independent of an officer's use of force. As the *Unruh* panel observed, neither case "provide[s] that the affirmative act giving rise to the duty can be the same act that breaches the duty." *Unruh*, 2022 WL 2392657, at *9. Unruh's claim does not square with these cases' reasoning, as it starts and stops with the officers' use of force.

Similarly, the three Kansas cases referenced in *Dauffenbach* do not fit Unruh's procedural posture or his factual scenario. Both *Bradford* and *Gardner* held the district court erred in granting a

motion to dismiss. In *Bradford*, a defamation claim, the allegations were sufficient to entitle the plaintiff to proceed. *Bradford*, 219 Kan. at 454. And the *Gardner* court reversed a district court's granting a motion to dismiss, stating: "It is alleged they used unlawful and unnecessary force to apprehend the decedent in that they carelessly, negligently, wilfully and wantonly shot the decedent at point blank range of less than five feet"; and "[u]nder the posture of the case as it comes to us *we are not at liberty to consider facts alleged by the officers in the answer*." (Emphasis added.) *Gardner*, 202 Kan. at 711.

Obviously, surviving a motion to dismiss requires less than a motion for summary judgment, as the plaintiff must come forward with facts to demonstrate the claims made to avoid summary judgment. Compare *Sperry v. McKune*, 305 Kan. 469, 480, 384 P.3d 1003 (2016) (stating "a district court, when considering . . . a motion [to dismiss for a failure to state a claim], must decide it 'from the well-pleaded facts of plaintiff's petition'"), with K.S.A. 2022 Supp. 60-256(c)(2) (stating the "judgment sought should be rendered if" evidence shows "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law"); *First Security Bank v. Buehne*, 314 Kan. 507, 510, 501 P.3d 362 (2021) (noting when "'opposing a motion for summary judgment, an adverse party must come forward with evidence'"). And recall in Unruh's case, the district court initially denied the defendants' motion to dismiss the petition before discovery, showing the court recognized the procedural posture at that time. Neither *Bradford* nor *Gardner* help Unruh's argument.

In *Bukaty*, the third and final Kansas case cited by *Dauffenbach*, a mentally ill man was jailed for his own protection and later died after officers injected sulfur dioxide gas into his jail cell to subdue him. The district court granted judgment for the defendants at the close of plaintiff's trial evidence. On appeal, the *Bukaty* court reversed and held "it is not a question of the officers having a right to subdue [the man.] The question is whether the use of such a deadly gas was reasonably necessary under all the surrounding facts and circumstances." *Bukaty*, 179 Kan. at 268. The *Bukaty* court then provided this more detailed explanation for its ruling, which underscores the profound differences between its

facts, the legal duties separately imposed on the jailers, and Unruh's circumstances:

"[W]e have a story of a colored man picked up by an officer under circumstances from which an inference might be drawn that he was at least mentally disturbed. He was taken to the jail as seemed was proper under the circumstances; that he created a disturbance in the jail there can be no doubt; the sheriff as keeper of the jail had a duty under all the surrounding facts and circumstances. Just what his duty was we need not answer. Apparently the officers present had in mind causing him to leave the cell block since that is the usual function of tear gas. It temporarily blinds the one against whom it is used so he may be more easily subdued once he is in the open. This did not work on account of the windows Bush broke out, thus enabling him to get some fresh air.

"Then the deadly sulfur dioxide was used. A reasonable inference is, the purpose of using this gas was to render Bush unconscious, since an officer was detailed to watch him, and come around and tell the officers feeding the gas into the jail when he had 'keeled over.' The drum in which the gas was contained had the label 'sulfa dioxide' on it. There was evidence that one of the defendants called a doctor and asked him about the use of 'refrigerator gas.' There was nothing in the record that anything was said about 'sulfa dioxide' although the drum was so labeled. There is evidence that the man who furnished the gas advised the officers to call a doctor but none was called until Bush was dragged from the jail. There was substantial testimony by a doctor as to the deadly nature of sulfuric acid, which is formed when sulfur dioxide is exposed to the air and comes in contact with moisture in the lungs.

"The statute makes it the duty of the sheriff to treat all prisoners with humanity. See, G.S.1949, 19-1919. It also makes him the keeper of the jail. See, G.S.1949, 19-1903 and G.S.1949, 19-811." 179 Kan. at 266-67.

The *Bukaty* wrongful death claim arose from specific statutory duties, independent of some generic duty to not use excessive force, owed to those already in custody, and constituting a breach, i.e., the gas. Those duties and the surrounding circumstances could be considered by a fact-finder separately from any claim of intentional civil battery. But Unruh's claim cannot, so *Bukaty* also does not advance Unruh's case.

The point to all this is simply to explain *Dauffenbach* should not be literally read to mean a special duty cognizable in negligence is owed *anytime* a police officer affirmatively acts and causes injury. The caselaw the *Dauffenbach* court cites contextualizes its language to require something more is necessary to constitute an actionable negligence claim. Otherwise, a claim for negligent excessive force, without a special duty independent of the

force itself, simply transforms civil battery into negligence, merging distinct legal concepts into one.

Unruh counters that *Dauffenbach* would have been decided differently if negligence was never allowed in excessive force cases. But that misses the point. *Dauffenbach* answered a specific question about the proper burden to overcome a statutory presumption—not how to categorize the claimed cause of action under the facts presented. *Dauffenbach*, 233 Kan. at 1035 ("The key question is whether to continue following the preponderance of evidence standard applied to negligence and tort actions or adopt, as the trial court did, a clear and convincing standard in determining whether the police officers breached a duty."). It should not be read more broadly than the question presented and the caselaw cited to support what it says. Any reading of *Dauffenbach* suggesting a police officer owes a special duty anytime there is an affirmative act by the officer causing injury is disapproved.

Similarly, prior cases construing *Dauffenbach*'s language that did not grapple with the caselaw it cites cannot remain on firm ground. See, e.g., *Price*, 2013 WL 6081103, at *2 (permitting plaintiff to proceed with a negligent excessive force claim at the motion to dismiss stage after defendants argued it was a time barred battery claim). *Price* did not convince the *Unruh* panel, and it similarly does not convince us.

As the *Unruh* panel explained,

> "The *Price* court did not investigate the meaning of the term 'affirmative act' as used in *Dauffenbach*. The *Dauffenbach* court cited two out of state cases—*McGeorge v. City of Phoenix*, 117 Ariz. 272, 572 P.2d 100 (1977), and *Doe v. Hendricks*, 92 N.M. 499, 590 P.2d 647 (1979)—for the proposition that a special duty may arise when there is an affirmative act by the officer causing injury. Neither of these cases provide that the affirmative act giving rise to the duty can be the same act that breaches the duty." *Unruh*, 2022 WL 2392657, at *9.

Unruh also argues a police officer's misperception forms a basis for breach of a special duty in tort, but that rationale exemplifies the problem of using misperception without an accompanying special duty. Generally, one's misperception, misjudgment, or misappraisal alone does not provide grounds for negligence. See Restatement (Second) of Torts § 284 (1965) (stating a negligence claim requires either "an act" or "a failure to do an act"); *Ryan*, 245 Ariz. at 61 ("An actor's internal evaluation about whether to

use force and the decision to do so are not 'acts' and therefore cannot, by themselves, constitute negligence."). An actor's judgment about whether to use intentional force should be considered part of their intent to inflict harmful or offensive contact. See *McElhaney*, 307 Kan. at 53 (defining battery).

Estate of Randolph v. City of Wichita, 57 Kan. App. 2d 686, 459 P.3d 802 (2020), seemingly addresses such a misperception-as-breach argument. In that case, an estate sued police officers for "[n]egligent use of force" alleging the officer incorrectly judged the need to deploy a Taser and then a firearm against a mentally ill person approaching with a knife with a four-inch blade. 57 Kan. App. 2d at 694. The allegation focused on whether the officer correctly perceived whether the deceased was trying to stab him or was just holding the knife. 57 Kan. App. 2d at 692-93. But the *Randolph* panel held that regardless of the answer to that disagreement, the estate's claim could *only* be a common-law civil battery without a special duty breached by the intentional act. It explained:

"[The officer]'s use of force, particularly the fatal shooting of Randolph, virtually defines a civil battery if not otherwise privileged. [The officer] deliberately fired four shots at Randolph's torso—an intentional application of deadly force. The shooting was not the product of negligence or carelessness, and [the officer] understood the likely consequence of his conduct was a grave or fatal injury to Randolph. Liability, therefore, turns on [the officer]'s entitlement to a self-defense privilege. *The shooting was either a privileged use of force or it was an actionable battery.* The same analysis and result controls [the officer]'s use of the Taser whether the estate treats it as a distinct claim for negligent use of force or as a component of a single claim combined with the shooting." (Emphasis added.) 57 Kan. App. 2d at 714.

We see no factual distinction between *Randolph* and Unruh's claim. The legal inquiry is certainly the same, i.e., whether there was an independent special duty breached by the officers' intentional acts. The *Unruh* panel observed:

"While Unruh's appellate brief creatively tries to make a distinction and argue that there was a separate negligent act, as we read the facts here it appears to us that in reality the officers' decision to continue the encounter in a violent way was merely a decision to use intentional force. Thus, we do not discern any negligent act which was separate from and preceding the application of force, and Unruh does not assert that the officers breached a standard of care beyond that

of not using excessive force. For these reasons, this case is like *Estate of Randolph*, and the district court properly construed Unruh's claim as a claim for battery." *Unruh*, 2022 WL 2392657, at *8.

This is not to say, of course, that in some situations an actor's negligent evaluation cannot serve as the foundation for a negligence claim. See, e.g., *Smith v. Welch*, 265 Kan. 868, 881, 967 P.2d 727 (1998) (holding a "physician is obligated to his or her patient to use . . . his or her best judgment" in providing patient care). But here, Unruh falls short in demonstrating any separate and discernible duty beyond not committing the tort of battery as a basis for actionable negligence under the circumstances presented.

Finally, Unruh cites *Beltran-Serrano v. City of Tacoma*, 193 Wash. 2d 537, 442 P.3d 608 (2019), but he is mistaken in believing it helps support his theory. In fact, *Beltran-Serrano* exemplifies the rule we have explained that a police officer may create a legally recognized duty during an encounter, independent of the mere use of force. There, a mentally ill homeless man sued for negligence after a police officer shot him multiple times. The plaintiff argued the officer "unreasonably failed to follow police practices calculated to avoid the use of deadly force," which included the officer's "failure to respond appropriately to clear signs of mental illness or impairment, her decision to continue to engage with [him] in English, and her decision to prevent him from walking away." 193 Wash. 2d at 544. In making these arguments, the plaintiff identified the potential negligence in the officer's actions occurring before the decision to shoot. On appeal, the *Beltran-Serrano* court held the fact the officer's shooting "may constitute assault and battery does not preclude a negligence claim *premised on her alleged failure to use ordinary care to avoid unreasonably escalating the encounter to the use of deadly force*." (Emphasis added.) 193 Wash. 2d at 540. But in so deciding, it explained the negligence claim arose from the officer's interactions with the plaintiff before things deteriorated to the use of deadly force and that those interactions created a "specific tort duty" for the officer to exercise reasonable care. 193 Wash. 2d at 552.

Unlike the *Beltran-Serrano* plaintiff, Unruh fails to support his negligence theory separate and apart from the officers' application of force—something the *Unruh* panel highlighted. *Unruh*, 2022 WL 2392657, at *6. And as the *Chinn* court emphasized, "one incident may give rise to both negligence and intentional tort claims *but . . . plaintiffs must set forth theories meeting the individual requirements of each claim*." (Emphasis added.) *Chinn*, 839 A.2d at 708.

Ultimately, the *Unruh* panel concluded:

> "These examples [from *McGeorge* and *Hendricks*] all involve an affirmative act that established a duty independent of the act that harmed the plaintiff. These examples of affirmative acts giving rise to a special duty do not support the argument that an officer's intentional injury of a person gives rise to a special duty, actionable in negligence, not to use excessive force in intentionally injuring that person. . . . It is also consistent with the suggestions in *Chinn* and *Ryan* that a negligent act must precede the use of force. *Chinn*, 839 A.2d at 711; *Ryan*, 245 Ariz. at 62. For these reasons, we will adhere to the reasoning in *Estate of Randolph* rather than the *Price* court's contrary conclusion." *Unruh*, 2022 WL 2392657, at *10.

We agree and note the *Ryan* court succinctly stated the principle: "Plaintiffs may plead a negligence claim for conduct that is independent of the intentional use of force or plead negligence and battery as alternate theories if the evidence supports each theory," but they "cannot assert a negligence claim based *solely* on an officer's intentional use of physical force." (Emphasis added.) *Ryan*, 245 Ariz. at 57, 62.

CONCLUSION

While it might be possible in some circumstances to have a distinct act of negligence arise during an incident involving excessive police force when making a lawful felony arrest, negligence requires establishing a separate duty owed to an individual beyond the intentional force applied. Unruh's dispute goes to civil battery's privilege element, which in this instance is tied to a statute. See K.S.A. 2022 Supp. 21-5227(a). Unruh fails to "come forward with evidence to establish a dispute as to a material fact," i.e., the arresting officers' conduct creating a special duty to Unruh other than not allegedly applying excessive force. See *Schreiner v. Hodge*, 315 Kan. 25, 30, 504 P.3d 410 (2022). The panel correctly

upheld the district court's grant of the defendants' summary judgment motion.

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

No. 123,559

STATE OF KANSAS, *Appellee,* v. FRANK RAYMOND CRUDO, *Appellant.*

(541 P.3d 67)

SYLLABUS BY THE COURT

1. SEARCH AND SEIZURE—*Probable Cause to Search Vehicle—Extends to Entire Travelling Unit.* Probable cause to search a stopped vehicle does not have to be "localized" and thus limited to one particular area or part of the travelling unit. That is, under the automobile exception, once probable cause to search is established, it extends to the entire travelling unit.

2. TRIAL—*Determining Whether Testimony Properly Admitted as Lay Opinion—Based on Nature of Testimony.* The determination of whether testimony is properly admitted as lay opinion is based upon the nature of the testimony, not whether the witness could be qualified as an expert. A careful case-by-case review must be made of evidentiary questions which come before a district court.

3. CRIMINAL LAW—*Lesser Included Offense—Consider Whether Charges Based on Separate Acts.* Just because one offense can technically be a lesser included offense of another does not always require such a finding if the charges are based on separate acts.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 464, 517 P.3d 857 (2022). Appeal from Geary District Court; BENJAMIN J. SEXTON, judge. Oral argument held April 11, 2023. Opinion filed January 12, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

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

Tony Cruz, assistant county attorney, argued the cause, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Frank Raymond Crudo was driving his truck and attached fifth-wheel camper east along Interstate 70 in January 2014 when he was pulled over by Lieutenant Christopher Ricard. Lt. Ricard had observed that Crudo's license tag light on the camper was not working. As Lt. Ricard approached the truck, he smelled a strong odor of raw marijuana and called for backup. The

officers then told Crudo they planned to search the truck. Crudo became combative and was ultimately handcuffed and placed inside a patrol car.

In the cab of the truck, officers found a small piece of marijuana between the seats. They then searched the camper and found more marijuana. Underneath the bathtub, officers found 19 vacuum-sealed bags, each containing approximately one pound of marijuana, and labeled by strain. Officers also found a small amount of marijuana under the stairs, along with rolling papers and a grinder.

The State charged Crudo with: (1) possession of marijuana with intent to distribute in violation of K.S.A. 2013 Supp. 21-5705(a)(4) and (a)(7), a drug severity level 2, nonperson felony; (2) no drug tax stamp in violation of K.S.A. 79-5204(a) and 79-5208, a severity level 10, nonperson felony; (3) possession of marijuana in violation of K.S.A. 2013 Supp. 21-5706(b)(3) and/or (b)(7), a class A nonperson misdemeanor; and (4) conspiracy to possess marijuana with the intent to distribute in violation of K.S.A. 2013 Supp. 21-5302(a), a severity level 2, nonperson felony.

Prior to trial, Crudo filed a motion to suppress the marijuana found in the camper. He argued that the officers lacked constitutional authority to execute a warrantless search of the camper. Specifically, he suggested that whatever legal justification existed for the warrantless search of the truck did not and could not—as a matter of law—be extended to include the fifth-wheel trailer. Ultimately, Crudo's motion was denied.

During the first jury trial Crudo moved for a directed verdict on all counts. The district court denied the motion with respect to all but the conspiracy to distribute charge, dismissing that charge by holding that the State had not shown the required meeting of the minds or mutual understanding. The jury then convicted Crudo of possession of marijuana and possession of marijuana with no drug tax stamp but was hung on the distribution charge. The district court declared a mistrial on that charge alone and Crudo was retried. Before his second trial, Crudo raised a double jeopardy argument claiming that because his conviction for simple possession of marijuana was a lesser included offense of the distribution

charge, he could not be retried on the greater offense. The district court disagreed, and the charge went to trial.

At the second jury trial, Crudo was convicted of possession with intent to distribute. Crudo was then sentenced on all convictions to 36 months' probation with an underlying 108-month prison term. He appealed and the Court of Appeals affirmed his convictions. *State v. Crudo*, 62 Kan. App. 2d 464, 517 P.3d 857 (2022). Now Crudo seeks review of that decision. Specifically, he makes five arguments to us: (1) that the legal rationale permitting a warrantless search of his truck did not "extend" to the fifth-wheel trailer; (2) that testimony at his second trial from Lt. Ricard was expert testimony permitted by the trial court in violation of K.S.A. 2022 Supp. 22-3212(b)(2); (3) that the erroneous use of a permissive inference instruction amounted to reversible error; (4) that his second trial violated double jeopardy; and (5) cumulative error. We address each in turn and, finding no error, we affirm.

Search of the Fifth-Wheel Trailer Was Proper

Our standard of review governing this issue is well established:

> "Our review of an evidence suppression issue is bifurcated. Without reweighing the evidence, the appellate court first examines the district court's findings to determine whether they are supported by substantial competent evidence. The district court's legal conclusions are then reviewed de novo. *If there are no disputed material facts, the issue* [*of whether to suppress evidence*] *is a question of law over which the appellate court has unlimited review.* [Citations omitted.]" (Emphasis added.) *State v. Karson*, 297 Kan. 634, 639, 304 P.3d 317 (2013).

As in this case, when the material facts are not in dispute, the remaining question is one of law. Accordingly, we exercise unlimited review. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). The undisputed facts relevant to the specific legal challenge Crudo mounts are as follows. The trailer was engaged as a tow unit onto Crudo's truck, and it was in fact being towed down the highway. The trailer was of a sort—a fifth-wheel—that while in operation, the occupants of the truck would have no access to the trailer. The stop was legitimate and is not questioned here. During the stop, officers noticed the smell of raw marijuana coming from the cab of the truck. Probable cause in support of this

search is conceded by Crudo. Officers did not observe any smell of marijuana coming from the fifth-wheel trailer, and the State has conceded that the officers did not have "localized" probable cause specific to the trailer. Nonetheless, the officers did search the trailer.

So, the question now comes to us—given these specific undisputed facts, was the search of the trailer legally justified as a warrantless search under the Fourth Amendment to the United States Constitution? We conclude it was. The Fourth Amendment prohibits unreasonable searches and seizures, and warrantless searches are per se unreasonable unless they fall within one of the exceptions to the warrant requirement. *State v. Heim*, 312 Kan. 420, 422-23, 475 P.3d 1248 (2020). One such exception involves the existence of probable cause plus exigent circumstances. *State v. Howard*, 305 Kan. 984, 989, 389 P.3d 1280 (2017). A sub-species of this exception allows the State to satisfy proof of exigency simply by showing that the object of the search was a vehicle travelling on the road. 305 Kan. at 990; see also *State v. Doelz*, 309 Kan. 133, 143, 432 P.3d 669 (2019). Thus, the so-called "automobile exception" permits the State to conduct a warrantless search of a vehicle travelling on the road anytime probable cause is present. *State v. Conn*, 278 Kan. 387, 395, 99 P.3d 1108 (2004) ("[T]he 'automobile exception' . . . allows the warrantless search of a vehicle when probable cause has been established to justify a search.").

As described above, Crudo does not contest the search of the truck under the automobile exception. He argues instead that the automobile exception does not extend to include his trailer. To resolve this claim, we must examine two distinct and specific questions. First, is the fact that the trailer was being towed down the highway sufficient to establish exigency? And second, does the probable cause that gives rise to a legitimate search under the automobile exception have to be "localized"—and thus limited—to a specific area of search, or does the existence of probable cause extend as a matter of law to the entire travelling unit?

The answer to the first question is straightforward. The trailer was being towed down the highway and was sufficiently mobile to satisfy the exigency requirement. The fact the trailer had the

capacity to be parked and used as a residence—as Crudo argues—is irrelevant. At the time of the stop, it was indisputably not being used that way. The United States Supreme Court has extended the automobile exception to motor homes in *California v. Carney*, 471 U.S. 386, 393, 105 S. Ct. 2066, 85 L. Ed. 2d 406 (1985). The Court refused to distinguish vehicles based on their mere capability of functioning as a home, noting:

"In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, *i.e.*, as a 'home' or 'residence.' . . .

"[The automobile exception] has never turned on the other uses to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation." 471 U.S. at 393-94.

Now we answer the second question. We conclude that probable cause to search a stopped vehicle does not have to be "localized" and thus limited to one particular area or part of the travelling unit. That is, under the automobile exception, once probable cause to search is established, it extends "bumper-to-bumper" to the entire travelling unit. See *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982) (The scope of a search under the automobile exception is identical to what a magistrate issuing a warrant could authorize—the proper scope therefore is not defined by the nature of the container but by the places in which probable cause exists to believe that the object of a search may be found.). Today's case is the first time we have considered this question in Kansas. Our sister courts, however, have routinely and consistently found that for probable cause purposes, a trailer hitched to a vehicle is considered together with the vehicle as one unit. See *Aviles v. Burgos*, 783 F.2d 270, 276 [1st Cir. 1986]); *United States v. Ortega-Ramos*, No. 94-3803, 1995 WL 314889, at *3 (6th Cir. 1995) (unpublished opinion); *United States v. Torres*, No. 3-:05-CR-051, 2005 WL 3546677, at *7-8 (S.D. Ohio 2005) (unpublished opinion) (citing *United States v. Ervin*, 907 F.2d 1534, 1537-38 [5th Cir. 1990]; see also *State v. Overbey*, 790 N.W.2d 35, 42 (S.D. 2010) ("The fifth-wheel camper was being towed by the pickup in the same fashion in which a semi-tractor tows a trailer. The camper was a part of the pickup and subject to

search as long as the motor vehicle exception was satisfied as to any part of the pickup or camper."); *United States v. Millar*, 543 F.2d 1280, 1283 (10th Cir. 1976) ("The automobile and the trailer constituted a unit."); *State v. Finlay*, 257 Or. App. 581, 593, 307 P.3d 518 (2013) ("'quality of mobility is as true for the trailer attached to defendant's pickup as for the pickup itself'"); *State v. Specht*, No. 106,272, 2012 WL 1970108, at *7 (Kan. App. 2012) (unpublished opinion) ("[O]nce a police officer lawfully discovers contraband in the passenger compartment of a vehicle, probable cause exists to search the remainder of the vehicle, including a trunk or camper shell, for additional evidence of contraband.").

The logic and weight of these authorities convinces us to adopt the "one unit" rule. Thus, when executing a warrantless search under the automobile exception to the warrant requirement, the existence of probable cause with respect to any part of the vehicle is sufficient to establish probable cause to search the entire travelling unit. Therefore, the search of Crudo's trailer was supported by both exigency and probable cause and was not done in violation of Crudo's Fourth Amendment rights.

The District Court Did Not Abuse Its Discretion by Permitting Lt. Ricard to Testify as a Lay Witness

We know that the State did not comply with K.S.A. 2022 Supp. 22-3212(b)(2) (disclosure of expert opinions) with respect to Lt. Ricard's testimony because that testimony was admitted as a lay opinion. "Whether a witness—expert or layperson—is qualified to testify as to an opinion is to be determined by the trial court in the exercise of its discretion." *State v. Hubbard*, 309 Kan. 22, 43, 430 P.3d 956 (2018). Under this standard, """[a] trial court abuses its discretion when the act complained of '(1) is arbitrary, fanciful or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact.""" 309 Kan. at 43 (quoting *State v. Sasser*, 305 Kan. 1231, 1243, 391 P.3d 698 [2017]). Crudo argues on appeal that the district court acted unreasonably and outside its discretion when it determined that Lt. Ricard was not relying on knowledge that was scientific, technical, or specialized during his testimony at Crudo's second trial (and therefore did not have to be qualified as an expert witness). See K.S.A. 2022 Supp. 60-456(a).

Crudo contends that three specific aspects of Lt. Ricard's testimony were improper as lay opinion and should have required Lt. Ricard and the State to satisfy the more rigorous requirements of expert testimony—both procedural and substantive. First, the testimony about the packaging and quantity of marijuana found in the camper and inferences about distribution. Second, testimony about the wholesale price of marijuana. And finally, testimony describing the behavioral patterns of marijuana traffickers—specifically, that the product is purchased in the western states and travels east on "short trips" in order to decrease the likelihood of encounters with law enforcement.

Before we examine the substance of Crudo's argument, we note that the Court of Appeals invoked a preservation bar to consideration of at least part of this aspect of the case. As a procedural bar to appellate review, K.S.A. 60-404 requires a party to make a contemporaneous objection to issues involving the erroneous admission or exclusion of evidence. *State v. Hillard*, 313 Kan. 830, 839, 491 P.3d 1223 (2021). A pretrial objection to the admission or exclusion of evidence must be preserved by contemporaneously objecting at trial, which can be accomplished through a standing objection. See *State v. Richard*, 300 Kan. 715, 721, 333 P.3d 179 (2014). Contrary to the Court of Appeals, we find Crudo substantially satisfied his burden under the contemporaneous objection rule. Thus, we will consider the merits of his claim.

The statute governing opinion testimony, K.S.A. 2022 Supp. 60-456(a), provides in relevant part:

> "If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b)."

K.S.A. 2022 Supp. 22-3212(b)(2) requires the prosecuting attorney to provide a summary of anything an expert witness intends to testify to on direct examination prior to trial. Subsection (i) of that statute authorizes the district court to exclude any expert witness testimony not properly disclosed. It is undisputed that the State did not disclose Lt. Ricard's testimony in the second trial

pursuant to K.S.A. 2022 Supp. 22-3212(b)(2). His testimony was permitted as lay opinion evidence. Thus, if the district court abused its discretion in its determination that Lt. Ricard's testimony was not expert opinion evidence, the testimony ought to have been disallowed.

There is no bright line rule or clear precedent on this issue in Kansas—or elsewhere. A review of caselaw from our state, other states, and federal precedent creates a rule that is murky at best. "'The line between expert testimony . . . and lay opinion testimony . . . is not easy to draw.'" *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005). We recently recognized "the difficulty drawing sharp boundaries between lay and expert opinion testimony." *Hubbard*, 309 Kan. at 45; see also *Osbourn v. State*, 92 S.W.3d 531, 537 (Tex. Crim. App. 2002) ("A distinct line cannot be drawn between lay opinion and expert testimony because all perceptions are evaluated based on experiences.").

The subject is further muddled when the individual testifying is a law enforcement officer because they regularly offer evidence based on their training and experience without being qualified as expert witnesses. Nonetheless, we start any analysis of police testimony with basic understanding that "[t]he rule of admissibility of lay opinion testimony is no different when . . . the lay opinion is offered by a police officer." *Warren v. State*, 164 Md. App. 153, 168, 882 A.2d 934 (2005).

"The determination of whether testimony is properly admitted as lay opinion is based upon the nature of the testimony, not whether the witness could be qualified as an expert." *United States v. Moran*, 778 F.3d 942, 967 (11th Cir. 2015). "Experience-derived police testimony concerning criminals' typical *modi operandi* during a drug transaction does not automatically constitute expert testimony." *United States v. Page*, 521 F.3d 101, 105, *as modified by* 542 F.3d 257 (1st Cir. 2008). Stated another way, the bare use of the terms "training" and "experience" does not automatically make someone an expert. See *In re Ondrel M.*, 173 Md. App. 223, 245, 918 A.2d 543 (2007). At the most basic level, "'opinions are formed by evaluating facts based on life experiences including education, background, training, occupation, etc.'" 173 Md. App. at 244.

Given all of this, we must return to the touchstone statutory language of K.S.A. 2022 Supp. 60-456—lay testimony cannot be "based on scientific, technical or other specialized knowledge." And here we are not tasked with deciding—as a matter of law—whether Lt. Ricard's testimony was *in fact* expert or lay testimony. Ultimately, the district court's decision in this matter was an evidentiary one. And we emphasize that we are reviewing it as such. We need only decide whether the trial judge abused its discretion. And based on the factors discussed below, we hold it did not.

As a preliminary matter, we observe that whether this specific testimony is even "opinion" testimony at all is open to doubt. Testimony about patterns of distribution, prices, and even inferences concerning distribution are all arguably observable facts directly within the observation of the testifying witness. The parties, however, seem to concede that the testimony at issue must be analyzed as "opinion" testimony, and that is how the matter comes before us. And we will review it as such.

The district court concluded that testimony about nine uniform, individually wrapped, labelled by strain, and hidden one-pound packages of marijuana and inferences to be drawn from these facts about distribution was not based on "scientific, technical or other specialized knowledge." We cannot find any abuse of discretion in this ruling. Indeed, the facts and inferences seem clearly to be in the purview of an ordinary person's common understanding.

Second, the district court concluded that testimony about the wholesale price of marijuana was not based on "scientific, technical or other specialized knowledge." Again, we see no abuse of discretion in this conclusion. General knowledge about marijuana is growing rapidly as it becomes more accessible across most states. Information about price is discoverable and readily available. Further, comprehending and interpreting that information does not require special training or complex analysis. This testimony just recites the price of an item. The district court did not abuse its discretion.

Finally, the district court allowed testimony about the logistics and patterns of the drug trade as lay opinion evidence. We

acknowledge that this testimony seems intuitively closer to something based on "scientific, technical or other specialized knowledge." That said, the fact that marijuana is commonly grown in the western parts of the country; that as a result product typically moves from west to east along the nation's roadways; and that perhaps criminal traffickers would devise strategies to avoid encounters with law enforcement do not strike us as especially technical or specialized. This testimony certainly is not so obviously outside the scope of lay opinion evidence that the district court abused its discretion in allowing it.

When these claims arise on appeal, an appellate court is bound by an abuse of discretion standard of review. We emphasize that our holding today cannot be read to endorse every form of law enforcement testimony as lay opinion testimony. A careful case-by-case review must be made of any evidentiary question that comes before a district court—and this is perhaps especially true in this area of the law. After such a review here, we hold the district court did not abuse its discretion by admitting Lt. Ricard's testimony as lay opinion testimony.

The Permissive Inference Instruction Was Not Reversible Error

The trial court instructed the jury—using PIK Crim. 4th 57.022—that it could "infer that the defendant had the intent to distribute marijuana, if the defendant possessed more than 450 grams of marijuana." Crudo asserts this instruction violated his constitutional right to a jury trial and his due process rights, because the permissive inference relieved the jury of its duty to find each necessary fact beyond a reasonable doubt. He argues that PIK Crim. 4th 57.022 creates a mandatory presumption which reduced the State's burden of proof to show an intent to distribute. We disagree.

We have recently resolved Crudo's precise claims. See *State v. Holder*, 314 Kan. 799, 801-02, 502 P.3d 1039 (2022); *State v. Strong*, 317 Kan. 197, 202, 527 P.3d 548 (2023); *State v. Slusser*, 317 Kan. 174, 182, 527 P.3d 565 (2023); *State v. Martinez*, 317 Kan. 151, 162-63, 527 P.3d 531 (2023); *State v. Bentley*, 317 Kan. 222, 246-47, 526 P.3d 1060 (2023). In these decisions, this court has held that PIK Crim. 4th 57.022 is a permissive inference instruction

that does not accurately reflect applicable law. We have held that because K.S.A. 2022 Supp. 21-5705(e) actually creates a rebuttable presumption rather than a permissive inference, it is error to give the PIK Crim. 4th 57.022 instruction.

Therefore, we can easily conclude that the permissive instruction in this case was likewise error. And because Crudo has properly preserved his objection to the use of PIK Crim. 4th 57.022, we apply the constitutional harmless error standard. See *State v. Kleypas*, 305 Kan. 224, 257, 382 P.3d 373 (2016) (The constitutional harmless error standard is defined in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967], under which standard, appellate courts "must be convinced beyond a reasonable doubt that the error complained of did not affect the outcome of the trial in light of the entire record—that is, that there is no reasonable possibility the error affected the jury's verdict of guilt.").

Again, our recent decisions guide us to the conclusion that the use of the permissive inference instruction was harmless in this case. Indeed, it was actually favorable to Crudo when compared to the rebuttable presumption of K.S.A. 2022 Supp. 21-5705(e). Functionally, the given instruction raised the State's burden of proof beyond what is statutorily required, and the jury still chose to convict Crudo. Because of this, there can be no reasonable probability the jury would have come to a different verdict under a lesser standard.

And finally, as in *Holder*, Crudo cannot mount a constitutional challenge to K.S.A. 2022 Supp. 21-5705(e) because his due process rights were never impacted by the statute. The erroneous permissive inference instruction relieved any potential due process problem with the statute. Indeed, we acknowledge this is the whole point behind the PIK Committee's decision to craft a permissive inference instruction in the first instance. Because a rebuttable presumption was never actually applied to Crudo at trial, he suffered no injury and lacks standing to challenge the statute. See *Holder*, 314 Kan. at 807-08.

Crudo's Conviction for Possession with the Intent to Distribute Did Not Violate Double Jeopardy

Next, Crudo argues that double jeopardy principles apply such that his conviction for simple possession at his first trial bars a second prosecution for possession with the intent to distribute. His logic is that at

the first trial, the charge of simple possession was a lesser included offense of possession with intent to distribute. And that the jury's decision to convict him of the lesser included crime functioned as an acquittal of the greater crime of distribution. And that following such a circumstance, the State cannot retry someone for a greater crime of which they have been functionally acquitted.

All of this would be true if the simple possession charge was in fact a lesser included charge of the distribution charge. But the fact that these two charges can, in fact, be charged as greater and lesser crimes does not mean that in this case, they were. To answer that question, we must engage in a multiplicity analysis. Questions involving multiplicity are questions of law subject to unlimited appellate review. *State v. Eckert*, 317 Kan. 21, 25, 522 P.3d 796 (2023); *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48 (2006). Similarly, whether a case presents a "multiple acts" issue is a question of law over which this court has unlimited review. 281 Kan. at 506.

"[M]ultiplicity is the charging of a single offense in several counts of a complaint or information." *State v. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 (2009); *Schoonover*, 281 Kan. at 475. "The principal danger of multiplicity is that it creates the potential for multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights." *Thompson*, 287 Kan. at 244.

Double jeopardy can arise in three ways: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after a conviction; and multiple punishments for the same offense. *Schoonover*, 281 Kan. at 463. In determining whether a situation presents a double jeopardy issue, the overarching inquiry is whether the convictions are for the same offense. 281 Kan. at 496. To answer this, we must ask whether the convictions arise from the same, or unitary, conduct. 281 Kan. at 496.

"[S]ome factors to be considered in determining if conduct is unitary, in other words if it is the 'same conduct,' include: (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 497.

Thus, as mentioned, just because simple possession *can be* a lesser included offense does not always require such a finding if charges for both possession and distribution are based on separate acts. The critical legal question in this case appears to be whether there was a "fresh impulse" motivating some of the conduct. 281 Kan. at 497. The Court of Appeals held there was a distinctly different motive and impulse behind possessing the small amounts of marijuana found under the stairs in the camper and in the pickup (on the one hand) and the 19 individually wrapped single pound bags (on the other). *Crudo*, 62 Kan. App. 2d at 492. This conclusion was supported by sufficient evidence at trial. Lt. Ricard testified as much, and the physical evidence supported such inferences. Crudo's convictions are not multiplicitous and do not raise double jeopardy concerns because each conviction stemmed from separate conduct and distinct evidence.

Cumulative Error Does Not Apply

A single error cannot support reversal by invoking the cumulative error doctrine. *State v. Ballou*, 310 Kan. 591, 617, 448 P.3d 479 (2019). The use of PIK Crim. 4th 57.022 is the only error we found. Cumulative error, by definition, does not apply.

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

* * *

ROSEN, J., concurring: I join most of the court's opinion and concur in its result. I write separately because, consistent with the dissenting opinion and concurring opinion in *State v. Hubbard*, 309 Kan. 22, 430 P.3d 956 (2018), and *State v. Sasser*, 305 Kan. 1231, 391 P.3d 698 (2017), both of which I joined, I would conclude the district court erred when it admitted as lay testimony the officer's statements regarding wholesale prices of marijuana across the country and the patterns and activities of drug trafficking.

A lay witness may testify on "relevant or material matter" in which the witness has "experience, training or education." K.S.A. 60-419. But their testimony is limited to that which is not based

on "scientific, technical or other specialized knowledge." K.S.A. 2022 Supp. 60-456(b). In that case, the witness must qualify as an expert by meeting requirements geared toward ensuring some legitimacy to the special testimony. K.S.A. 2022 Supp. 60-456(b); see *State v. Lyman*, 311 Kan. 1, 21-22, 455 P.3d 393 (2020) (explaining K.S.A. 60-456[b] adopts federal *Daubert* standard for establishing reliability of expert testimony). And the party intending to offer the expert witness must give notice and provide a description prior to trial or risk the court prohibiting its admission. K.S.A. 2022 Supp. 22-3212(i).

In *Sasser*, a majority of this court held that a lay witness was not testifying based on specialized knowledge when he opined on future repair costs of a motorcycle. *Sasser*, 305 Kan. at 1246-47. I disagreed because "the knowledge required to form such an opinion is outside the common experience of laypersons—as compared, for example, to a lay witness' estimate of how fast a vehicle was travelling or whether an individual appeared to be intoxicated." 305 Kan. at 1249 (Biles, J., concurring in part and dissenting in part). The dissenting/concurring opinion explained that "[t]he problem, of course, is that no person—witness or juror—without specialized knowledge of motorcycle repair could conclude from the details, i.e., a visual depiction of the damages, that the value of those damages exceeded $1,000." *Sasser*, 305 Kan. at 1250 (Biles, J., concurring in part and dissenting in part).

In *Hubbard*, the majority held a district court made no error in characterizing as lay testimony officers' statements that they had smelled the odor of raw marijuana upon approaching a house. 309 Kan. at 43. Again, I disagreed because the officers' opinion the odor was raw marijuana stemmed from their exposure to raw marijuana during police training and subsequent casework. The dissent reasoned "[t]his uncontroverted dependency between the officers' training and experience on the one hand and the opinions they expressed on the other hand qualified their testimony about detecting the strong, potent, or overwhelming odor of raw marijuana as expert opinion testimony." *Hubbard*, 309 Kan. at 50 (Beier, J., dissenting).

In this case, Lieutenant Ricard testified that a pound of marijuana grown and sold on the West Coast costs between $1,200 and $1,600.

He further opined that the same marijuana would sell for between $4,500 and $6,000 if transported to the East Coast. The Lieutenant went on to inform the jury that people trafficking drugs purchase marijuana in the western states and attempt to quickly transport it to the East Coast while trying to spend as little time on the roadways as possible. Lieutenant Ricard testified that he knows this information based on his specific training regarding bulk marijuana trafficking. Because this knowledge is based on his training and outside the purview of the average juror, I would conclude it was "specialized" and inadmissible as lay testimony. See *United States v. Figueroa-Lopez,* 125 F.3d 1241, 1245-46 (9th Cir. 1997) (testimony about "techniques employed by drug dealers in their illegal trade" was "specialized knowledge" that could not be admitted as lay testimony because "ordinary juror would most probably be unfamiliar" with the "techniques"); *United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993) ("specialized knowledge" within federal rule upon which Kansas' statute is based is "knowledge beyond the ken of the average juror"); *State v. Rothlisberger*, 147 P.3d 1176, 1185 (Utah 2006) (describing "specialized knowledge" in rule identical to statute in Kansas as "knowledge 'with which lay persons are not familiar'").

A majority of this court disagrees. They acknowledge the Lieutenant formed his opinions based on his training and experience and that "lay testimony cannot be 'based on scientific, technical or other specialized knowledge.'" 318 Kan. at 40 (quoting K.S.A. 2022 Supp. 60-456). But they hold the district court made no error in concluding this was not "specialized knowledge" because a lay person could easily get ahold of that knowledge. The majority reasons that the legalization of marijuana across the country has made "[i]nformation about price . . . discoverable and readily available." 318 Kan. at 40. While this may be true when it comes to the price of *legally* grown and distributed marijuana, I cannot see how that information informs the public about the wholesale price of *illegally* grown marijuana, especially that which is grown on one side of the country and sold on another. The majority also reasons the Lieutenant's testimony that marijuana is purchased in the western part of the country and driven to the east as quickly as possible is "not so obviously outside the scope of lay opinion evidence" to make it specialized knowledge. 318 Kan. at 41. I again disagree. Where

is the average juror getting information about the patterns and tendencies of people illegally trafficking drugs? I do not know, and the majority does not say.

I agree with the majority that knowledge based on training and experience does not, *ipso facto*, elevate a witness' statements to testimony based on specialized knowledge. An officer likely learns some general first aid during their training, but an officer's testimony that they observed a shallow cut on a victim cannot be considered specialized knowledge. Most people suffer shallow cuts throughout their life; the ability to recognize one is not special, even if shallow cuts were covered in one's job training.

But the Lieutenant's ability to opine on the nature of drug trafficking and the cost of illegal drugs across the county is special. The average juror does not partake in this activity or encounter this type of training. I would rule that the district court abused its discretion when it admitted this evidence as lay opinion testimony instead of characterizing it as expert testimony subject to the admission prerequisites in K.SA. 2022 Supp. 60-456 and K.S.A. 2022 Supp. 22-3212(b)(2).

I would, however, affirm the conviction because I believe the admission of the testimony was harmless under any applicable harmlessness inquiry. The weight of the remaining evidence convinces me beyond a reasonable doubt that the court's error did not affect the outcome of the trial. *State v. Gaona*, 293 Kan. 930, 949, 270 P.3d 1165 (2012) (considering whether admission error under K.S.A. 60-456[b] was harmless under statutory harmless error standard, which requires reversal if there is a reasonable probability the error will or did affect outcome of trial); *State v. Ward*, 292 Kan. 541, 569-70, 256 P.3d 801 (2011) (error that infringes upon constitutional right harmless if benefitting party proves no reasonable possibility error affected verdict).

LUCKERT, C.J., joins the foregoing concurrence.

State v. Scheetz

No. 124,054

STATE OF KANSAS, *Appellee*, v. MARK SCHEETZ, *Appellant.*

(541 P.3d 79)

SYLLABUS BY THE COURT

1. EVIDENCE—*Contemporaneous Objection Rule—Timely and Specific Objection Required at Trial to Preserve Challenge.* The contemporaneous objection rule under K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court.

2. SAME—*Contemporaneous Objection at Trial Required to Reverse or Set Aside Judgment.* K.S.A. 60-404 directs that a verdict "shall not" be set aside, or the judgment reversed, based on the erroneous admission of evidence without a contemporaneous objection at trial.

3. APPEAL AND ERROR—*Statute Provides Jurisdiction to Supreme Court to Vacate Act, Order, or Judgment.* K.S.A. 60-2101(b) provides the Kansas Supreme Court with jurisdiction to vacate any act, order, or judgment of a district court or the Court of Appeals to ensure that such act, order, or judgment is "just, legal and free of abuse."

4. EVIDENCE—*Definition of Relevant Evidence—All Relevant Evidence Is Admissible—Exceptions.* Relevant evidence under K.S.A. 60-401(b) means evidence having any tendency in reason to prove any material fact. Relevancy has both a probative element and a materiality element. Evidence is probative if it has any tendency in reason to prove a fact. Evidence is material if it addresses whether a fact has a legitimate and effective bearing on the decision of the case and is disputed. Our well-established law is that all relevant evidence is admissible unless prohibited by statute, constitutional provision, or court decision.

5. SAME—*District Court's Evidentiary Determination—Appellate Review.* An appellate court reviews a district court's evidentiary determination on materiality de novo, while it reviews the decision on probative value for abuse of discretion. A district court abuses its discretion when no reasonable person could agree with its decision or when its exercise of discretion is founded on a factual or legal error.

6. TRIAL—*Prosecutorial Error Claims—Appellate Review—Two-Step Analysis.* An appellate court reviews prosecutorial error claims by employing a two-step analysis: error and prejudice. To decide error, the court must determine whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case in its attempt to

obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. Upon finding error, the court must consider whether that error prejudiced the defendant's due process rights to a fair trial.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 1, 524 P.3d 424 (2023). Appeal from Norton District Court; PRESTON A. PRATT, judge. Oral argument held September 13, 2023. Opinion filed January 12, 2024. Judgment of the Court of Appeals reversing the district court is reversed on the issues subject to review and is vacated in part. Judgment of the district court is affirmed.

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

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

The opinion of the court was delivered by

BILES, J.: K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court. It also directs that a verdict "shall not" be set aside, or a judgment reversed, based on the erroneous admission of evidence without a contemporaneous trial objection. Here, the State argues a Court of Appeals panel untethered itself from these statutory commands when reversing a jury verdict convicting Mark Scheetz of aggravated criminal sodomy, rape, sexual exploitation of a child, and victim intimidation. See *State v. Scheetz*, 63 Kan. App. 2d 1, 524 P.3d 424 (2023). We agree with the State, reverse the panel, vacate a portion of its published opinion, and affirm the convictions.

The panel held the cumulative prejudicial effect of various trial errors, including the admission of propensity evidence about other underage girls, denied Scheetz his constitutional right to a fair trial. 63 Kan. App. 2d at 33-36. But it reached that outcome without individually considering the specific trial objection made to each piece of propensity evidence. Instead, it aggregated the objections and treated the propensity evidence generically as a group, which allowed the panel to adopt a novel perspective of

K.S.A. 2022 Supp. 60-455(g) on the mistaken belief that the question was "not altogether different from what [Scheetz] argued below." 63 Kan. App. 2d at 10.

The panel erred in its preservation analysis, causing it to overstep appellate boundaries to reach questions about K.S.A. 2022 Supp. 60-455(g)'s scope not presented to the district court. Accordingly, we vacate its ruling on those questions. See K.S.A. 60-2101(b). We also reject the panel's relevancy, prosecutorial error, and cumulative error conclusions. We affirm the district court's judgment on the issues subject to our review.

FACTUAL AND PROCEDURAL BACKGROUND

Scheetz lived for about three years with M.C.'s mother beginning around November 2012. In 2019, police met with M.C. as part of another investigation to ask about her interactions with him. She disclosed Scheetz had molested and raped her "[a] lot" when she was 11 to 13 years old. She said the sexual contact occurred "[a]ll the time"—"potentially 75 times."

As a result, the State charged Scheetz with two counts of aggravated criminal sodomy under K.S.A. 2015 Supp. 21-5504(b)(1) (sodomy with a child under 14 years old), two counts of rape under K.S.A. 2015 Supp. 21-5503(a)(3) (sexual intercourse with a child under 14 years old), and sexual exploitation of a child under K.S.A. 2016 Supp. 21-5510(a)(2) (possessing a visual depiction of a child under 18 years old shown engaging in sexually explicit conduct). Later, the State amended its complaint to include a count of intimidating a victim under K.S.A. 2020 Supp. 21-5909(a)(1) (trying to dissuade a victim from testifying at trial with an intent to interfere with the orderly administration of justice) after confiscating a letter Scheetz addressed from jail to M.C.

During an eight-day trial, the State presented 31 witnesses, including M.C., who was 19 by that time. She testified Scheetz was her mother's then boyfriend, and the three lived together for almost three years. She described her mother's frequent drinking, quick temper, and tendency to make her leave the house. She described this as making her life "hell." When the prosecutor asked about her connection with Scheetz at that time, she answered, "He was all I had."

She detailed four separate sexual encounters with Scheetz when she was 11 to 13 years old. First, M.C. had a fight with her mother and ran away one night. Scheetz went looking for her. After he found her, they ended up spending the night at her grandfather's house. The two were in the bedroom, while her grandfather slept in another room. She could not remember specifically what Scheetz told her but remembered he "[j]ust pulled down" his basketball shorts, and she had oral sex with him. Next, she said Scheetz digitally penetrated her vagina on a hunting trip, while he took videos using his iPhone, "probably the [version] 4, maybe the 5." She said Scheetz had a "photo vault" application on his phone, where he stored "all of [their] videos." Third, she testified they had sexual intercourse in the rec room at her mother's house. Finally, she described a time when Scheetz performed oral sex on her in her bedroom.

When she was 13, she moved to her biological father's house in a different city, and never saw Scheetz again. But the two exchanged pictures via Snapchat. Scheetz sent her pictures of his penis, and M.C. sent him naked photos of herself. Years later, when investigators came to her father's house to ask about Scheetz, M.C. told them about the photos on his phone. She also said she would not be surprised "if he still has a pair of [her] panties" because he told her, "He would go down and check [her] panties to see if he could make [her] wet one of those nights."

During a search of Scheetz' residence and vehicle, police seized two phones belonging to Scheetz. His iPhone 5 had an application called "Keepsafe," a password protected vault for storing images separate from where they would normally be on an iPhone. Of those images, M.C. recognized herself in seven sexually explicit photographs using clues like her blanket, pillowcase, navel piercings, and a hand scar. She identified herself in a picture of a female from the belly button to her breast covered by one of the subject's and one of the female's hands; a picture of a topless female with both of her breasts visible; two pictures of a vagina and a hand with the subject's fingers inserted; a picture of an unclothed female lying on her back touching her vagina with one hand, and her breasts viewable; a picture of the same female's pubic area; and a picture of a female's vagina and anus. Police also found a

Crown Royal bag containing six pairs of women's underwear. M.C. did not recognize any as hers, but DNA testing of one sample yielded a major profile consistent with Scheetz and a partial minor profile consistent with M.C., but not consistent with her mother.

M.C. testified about her mother's reaction to Scheetz' and her interactions. She said, "[T]here was a day that Mom was really upset, and she ended upcoming [*sic*] outside and screaming that, 'He's touching my daughter.'" The mother called police and was "scream[ing] at the cops that her boyfriend was raping her daughter." The prosecutor asked what made her mother say that. She responded that one night her mother entered the rec room while M.C. was on top of Scheetz, who saw her mother approaching and immediately threw her off him. The mother asked what they were doing. They said they were in a nipple-pinching game.

To support the victim intimidation charge, the State presented a letter Scheetz addressed to his brother from jail that contained another letter addressed to M.C. Scheetz asked his brother to mail the letter inside to her. This happened while Scheetz awaited trial. The letter to M.C. claimed to be written by an anonymous woman, called "[a] true friend," but appears to be written by Scheetz. It begins with the statement: "I wanted to reach out to you . . . and ask if you were truly aware of the full picture of this situation." Then it discussed the consequences of her testifying and tried to persuade her to drop the case:

"You can be his Superhero . . . . . You alone can save him. Even if something ever did occur . . . .

. . . .

"[T]ell them this didn't happen and you don't want to go through with this . . . . [S]o maybe they can get it dismissed before . . . and nobody has to know. . . . You can prevent both yourself and [Scheetz] from a lot of embarrassment, as well as other witnesses being embarrassed. . . . I don't want you to live with the regret of **[Note: statement redacted]** . . . you were involved with something equally."

Scheetz testified in his own defense. As to M.C.'s first allegation, he recalled the night when the two were in her grandfather's bedroom. He said he was in his blue jeans, not basketball shorts. He admitted talking with M.C. on the bed but denied any sexual activity. He made a general denial for the other three incidents. When asked about the time M.C.'s mother accused him of sexual

contact with M.C., he said only, that "may have been" since "[i]t was not uncommon for [her mother] to get drunk and talk nonsense." He acknowledged playing a nipple-pinching game with M.C., and that her mother saw them doing it.

Scheetz then addressed his collection of women's underwear. He said he started keeping them during his junior high years. He said not every woman he had been involved with contributed, but some had. He believed one pair of underwear belonged to M.C.'s mother. Neither the defense nor the prosecutor asked him about the photos on his phone or his letter to M.C.

Scheetz called four witnesses who had spent time around M.C. and him. Each generally denied seeing anything inappropriate.

The jury convicted Scheetz as charged. The district court sentenced him to life in prison without the possibility of parole for 50 years. He appealed to the Court of Appeals, claiming improperly admitted propensity evidence, prosecutorial error in closing arguments, and cumulative error. The panel reversed his convictions after it found the individually harmless errors had a cumulative effect that deprived him of a fair trial. *Scheetz*, 63 Kan. App. 2d at 33-36.

The State petitioned this court for review, essentially challenging all adverse holdings. Scheetz did not file a cross-petition for review. See Supreme Court Rule 8.03(c)(3) ("The purpose of a cross-petition is to seek review of specific holdings the Court of Appeals decided adversely to the cross-petitioner.") (2023 Kan. S. Ct. R. at 57). Consequently, the panel's determinations against Scheetz are settled. See *State v. Gonzalez*, 307 Kan. 575, 590, 412 P.3d 968 (2018).

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

PROPENSITY EVIDENCE AND ISSUE PRESERVATION

K.S.A. 2022 Supp. 60-455 sets out the rules for admitting evidence relating to a person's past wrongdoing. Subsection (a) generally prohibits evidence of a person's crime or civil wrongs on a

particular occasion from being used as proof of that person's tendency to commit another crime or civil wrong on a separate occasion. Subsections (b) through (d) provide exceptions to subsection (a)'s general prohibition. This case is about subsection (d), which allows evidence of the defendant committing "another act or offense of sexual misconduct" to be admissible and "considered for its bearing on any matter to which it is relevant and probative" in criminal cases involving sex offenses. K.S.A. 2022 Supp. 60-455(d).

We focus first on subsection (d) and how the term "act or offense of sexual misconduct" is defined under subsection (g) because that was the panel's central emphasis. In the Court of Appeals, Scheetz argued for the first time that the State's propensity evidence was inadmissible under subsection (g), which lists 10 specific types of conduct defining what constitutes an "act or offense of sexual misconduct." He asserted the State's evidence did not satisfy subsection (g)'s enumerative listing, which he argued limited its scope to those examples. The State countered that Scheetz never presented this statutory definition-based claim to the district court, so it was not preserved under K.S.A. 60-404 ("A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.").

The panel rejected the State's contention. It held Scheetz' definitional "argument on appeal *is not altogether different* from what he argued below." (Emphasis added.) *Scheetz*, 63 Kan. App. 2d at 10. On review, the State faults the panel's preservation analysis, which presents a critical threshold question because K.S.A. 60-404's legislative mandate is clear:

> "K.S.A. 60-404 dictates that evidentiary errors shall not be reviewed on appeal unless a party has lodged a timely and specific objection to the alleged error at trial. The trial judge must be provided the specific objection, so the judge may consider as fully as possible whether the evidence should be admitted. Thus, appellate review is precluded if a party objects to evidence on one ground at trial but then asserts a different ground on appeal." *State v. Reed*, 300 Kan. 494, Syl. ¶ 6, 332 P.3d 172 (2014).

As another Court of Appeals panel recently observed and correctly understood, "K.S.A. 60-404 directs that the verdict 'shall not' be set aside, nor the judgment reversed, without a timely [and specific] objection." *State v. Clingerman*, 63 Kan. App. 2d 682, 688, 536 P.3d 892 (2023).

Additional factual and procedural background

The State filed a pretrial motion to admit propensity evidence, and the court conducted an evidentiary hearing to consider it. The State sought the testimony from three underage girls, G.H., H.T., and C.K., as well as Scheetz' internet search history from his iPhones 5 and 8. The State argued: "[W]e think it shows a clear pattern of his propensity for sexual contact with underage females, and that it would be relevant for the jury to understand that the charged counts in this case as currently charged aren't isolated incidents with one victim."

G.H.'s testimony demonstrated she knew Scheetz through her father who worked with Scheetz, and that Scheetz was like an uncle to her. One time, Scheetz sent her a picture of his penis. She believed he intended to send the picture to someone else because it came with a text reading something like "waiting for you to come over." Then, he immediately sent another text stating it was an accident and asked her not to tell her father. G.H. said this happened in 2018 when she was 11 or 12 years old.

H.T. testified she knew Scheetz through M.C. He had messaged H.T. on Snapchat and offered to fill up her Jeep with gas and buy her alcohol if she would go over to his hotel and hang out with him. She declined. Later, Scheetz sent her two pictures of his penis via Snapchat. She was 16 at the time.

C.K. testified she met Scheetz when she was 16. At the time, she lived with G.H. and her uncle, G.H.'s father. One day, Scheetz asked her to send him a nude picture, which she refused. He then sent her his nude photo, so she blocked him on Snapchat. He messaged her on Facebook, asking why she had blocked him. A screenshot of this exchange had statements: "You actually blocked me?"; "Like sending me nudes, and . . . you asking me I just don't think it's right!" C.K. reported this to the KBI.

Scheetz' internet search history from his iPhones 5 and 8 displayed search terms he had entered and the titles of the websites he visited. Of those, some were general—e.g., "When to Hunt," "what causes grey hair," "lansing pizza hut." But others were sexually explicit—e.g., "My stepdad finally touched me," "my step dad forced himself inside of me," "Sex At 9 years old," "I Enjoyed Being Molested," "Step Dad started blowing me at age 5," "Why Incest is Best," "Free Little Step Daughter Porn Videos," and "Incest and more incest!!!"

Defense counsel opposed the underage girls' testimony stating:

"[A]s to the information from [G.H.], we would ask the Court to deny the State the opportunity to use that. *The testimony was very non-specific*. There wasn't any detail concerning what she allegedly saw, and there wasn't anything to really back up what they said. Like I said, it was very non-specific, plus there was the statement that it was done by mistake. [. . . Also,] there was no description of what the picture was that she received.

"As to [H.T.], *she also was very non-specific* in her statements about what she supposedly saw. . . . She said that he did offer to give her gas or alcohol going to a hotel, but *it doesn't indicate any kind of sexual content* or any kind of sexual behavior on the part of the defendant or on the part of [H.T.] So I ask the Court to deny any information or any statements from her.

. . . .

"[C.K.] does give specific sexual content, but, . . . again, those incidents she talks about happened . . . after the incidents that the State alleges occurred and that we're going to trial on, *so they're not prior bad acts*." (Emphases added.)

About the internet search exhibits, defense counsel argued:

"[T]he [internet search history] information . . . was after the fact. This isn't like prior bad acts. . . . In fact, they were like 2017 and 2018, where the incidents with [M.C.] happened before that . . . . So these aren't prior bad acts, *these are acts that occurred after the fact of the crimes alleged to have occurred with* [*M.C.*]." (Emphasis added.)

Scheetz' individual grounds for pretrial objection can be summarized as follows: G.H.'s allegation lacked specificity; H.T.'s allegation lacked specificity and sexual content; C.K.'s allegation was not prior bad acts; and the internet search history was not a prior act. C.f. *State v. Sieg*, 315 Kan. 526, 533, 509 P.3d 535 (2022) (to qualify as a prior bad act under K.S.A. 60-455, the statute requires "specificity" from the evidence).

The court granted the State's motion to admit this evidence. And while offering a rationale for rejecting Scheetz' argument that the admissible bad acts had to occur before the charged offense, the court dismissed the remaining grounds without explanation. The court said:

"60-455 is often referred to as prior bad acts, but that's just kind of a shorthand way of referring to it. There is nothing in the statute that says they have to occur prior to the charged crime. Actually, the statute says that evidence that a person committed a crime or civil wrong on some specific occasion, and so I did note that the charged crimes are several years ago, 2012, 2013, I don't have the Complaint right in front of me, but they are several years old, whereas the alleged bad acts are after that.

"But regarding [defense counsel's] argument that these alleged bad acts were not prior bad acts, that's not required by statute.

"Also, the statute is fairly clear that if it is a non-sex crime, then pretty tight on not allowing this type of evidence. However, for a sex crime, it's pretty broad on allowing this type of evidence. For a sex offense, then the prior acts or the other evidence of other crimes or other civil wrongs are admissible, if they go to propensity or any other matter which is relative and probative.

"My finding is that the request contained in the State's motion is both relevant and probative to the charged crimes. So the information that is contained within the motion is allowed under 60-455 in this particular case."

At trial, the State presented the propensity evidence to the jury. Scheetz made a series of objections related to the girls' allegations—all were timely but merely renewed the same pretrial objections made earlier without adding new grounds. Sometimes, Scheetz made only general objections, such as, "Objection, Your Honor, 60-455 information."

But as to the search history, defense counsel not only renewed the earlier pretrial objection (not a prior bad act) but added three more: the evidence was irrelevant; it was "more inflammatory than probative"; and it contained nothing illegal, suggesting they did not qualify as an "act or offense of sexual misconduct." As to the inflammatory argument, we note K.S.A. 60-445 allows a trial judge to "exclude evidence if he or she finds that its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party." The court overruled the search history objection, by stating:

"I did notice when I looked through these over the weekend that on [Exhibit] 122, which is excerpts from the iPhone 5, those searches are primarily from October, November of 2017, in that area; and in State's [Exhibit] 123, searches from the iPhone 8, those are from 2019, generally in February of 2019. And some in March, also. So substantially after [M.C.] moved to Wichita in 2015.

"But under 60-455, it doesn't have to be prior conduct, it can be subsequent conduct and can also show propensity. And, of course, relevance is always an issue, whether it's under 60-455 or any other evidentiary rule, and so the evidence has to be relevant.

"But in this case, those searches, I think, are relevant to show that Mr. Scheetz's sexual attraction to young girls, even if they might be websites for girls over the age of 18, but appear young or at least in the title young girls, and his sexual attraction for stepfather-stepdaughter or other type of incestuous sexual contact. So it is relevant to show those issues.

"So I do find that under 60-455, it should be allowed and that it also is relevant, even though it's several years after the alleged conduct in this case. So the objection on both of those are overruled."

Standard of review

"Preservation is a question of law subject to plenary review." *State v. Campbell*, 308 Kan. 763, 770, 423 P.3d 539 (2018).

Discussion

The essential question is whether Scheetz gave the district court an opportunity to rule on his appellate claim that the propensity evidence did not meet subsection (g)'s definition because its listed examples were exhaustive rather than illustrative. See *State v. Alfaro-Valleda*, 314 Kan. 526, 533, 502 P.3d 66 (2022) (for a defendant's appellate argument related to trial evidence's admissibility, the defendant must give the district court an "opportunity to consider the objections and to rule on them"). A review of the record shows the district court never had that chance.

The panel decided Scheetz properly preserved for appeal his new definitional challenges to subsection (g). It reasoned: (1) he "actively litigated the admissibility of this evidence under K.S.A. 2021 Supp. 60-455(d)"; (2) he "disputed the application of that subsection"; and (3) although he did not mention subsection (g), "the general theme underlying his objections" covered his definitional challenge. *Scheetz*, 63 Kan. App. 2d at 10. It then concluded his "argument on appeal is not altogether different from what he

argued below" and proceeded to delve into the merits. 63 Kan. App. 2d at 10.

The panel's rationale commits at least three obvious errors. First, it fails to individually assess each piece of evidence and its associated objection specifically. Instead, the panel improperly considered the evidence collectively for K.S.A. 60-404 purposes. Second, it accepts entirely new legal questions not advanced to the district court, specifically: (1) whether the challenged evidence satisfied the statute's subsection (g) definitional requirements; and (2) what the meaning of the term "includes" is, as used in the statute. Third, the panel did not review the district court's ruling and analysis with particularity; instead, it examined the evidence de novo. See *State v. Freeman*, 195 Kan. 561, 564, 408 P.2d 612 (1965) ("[K.S.A. 60-404] has a legitimate purpose in the appellate court, whose function is that of review rather than trial de novo."). Its approach disregards statutory mandates.

Preserving an evidentiary challenge under K.S.A. 60-404 requires a timely and specific objection. It is not optional. The specificity requirement can be explained this way:

"The Kansas Legislature has established the rule for evidentiary objections by statute. The legislature, not this court, requires that the objection at the trial court to the admission of evidence 'make clear the *specific* ground of objection.' Otherwise, the verdict cannot be set aside. Under the separation of powers doctrine, this court has no constitutional authority to essentially negate the legislature's decision to require a specific ground of objection in the trial court by then allowing a different objection to be argued in the appellate court. [Citations omitted.]" *State v. McCaslin*, 291 Kan. 697, 709-10, 245 P.3d 1030 (2011), *overruled on other grounds by State v. Astorga*, 299 Kan. 395, 324 P.3d 1046 (2014).

To be sure, "Exceptions exist for raising issues on appellate review without expressing an objection to the trial court, *but K.S.A. 60-404 does not allow those exceptions to come into play in the context of the admissibility of evidence*." (Emphasis added.) *State v. Carter*, 312 Kan. 526, 535, 477 P.3d 1004 (2020). If it stands for anything, K.S.A. 60-404 must mean a party cannot object to evidence on one ground at trial and then substitute another ground on appeal or assert a general ground at trial and then specify more particular grounds on appeal. This is well settled. *State v. Garcia-Garcia*, 309 Kan. 801, 808-11, 441 P.3d 52 (2019); *State v. Dukes*, 290 Kan. 485, 489, 231 P.3d 558 (2010).

Here, the trial transcript unambiguously shows Scheetz failed to preserve his subsection (g) definitional issues for appellate review. The panel's "not altogether different" rationalization hopelessly strains the governing statute's plain language and our well-established caselaw. See *State v. Betts*, 316 Kan. 191, 198, 514 P.3d 341 (2022) ("When a statute is plain and unambiguous, the court must give effect to express language."); *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 168, 298 P.3d 1120 (2013) ("[T]he Court of Appeals is duty bound to follow Kansas Supreme Court precedent.").

Campbell is instructive. There, defense counsel attacked a witness' credibility at trial. When the State called a second witness to rehabilitate the first's credibility, defense counsel timely objected on hearsay grounds and of bolstering or vouching for the first witness' credibility. But on appeal, the defendant contested the evidence on the basis that the second witness' testimony impermissibly used specific prior instances. See K.S.A. 60-422(d) (specific prior instances to rehabilitate witness' credibility are inadmissible). The *Campbell* court declined to consider the defendant's rephrased objection. 308 Kan. at 771. Likewise, on appeal, Scheetz fashioned a new argument over sexual misconduct's statutory definition that was never presented to the district court.

Similarly, in *State v. Bryant*, 272 Kan. 1204, 1207-08, 38 P.3d 661 (2002), a defendant raised a hearsay objection at trial but on appeal claimed a Confrontation Clause violation. The *Bryant* court refused to consider the confrontation claim because the defendant failed to make that objection in the district court. And in *State v. McCaslin*, 291 Kan. 697, 708, 245 P.3d 1030 (2011), the court noted "there may be some overlap of objections based upon hearsay and confrontation" because "all statements violating the Confrontation Clause are also necessarily hearsay." But the *McCaslin* court still held "their overlap does not satisfy the specificity requirement of the objection" and reaffirmed *Bryant*'s holding and its rationale. 291 Kan. at 708.

Here, Scheetz did not object to the internet search history on a statutory interpretation ground. Rather, he specifically objected at trial that the internet search history did not qualify as an "act or offense of sexual misconduct" *because* it contained "nothing illegal."

These are not the same thing, and while the trial objection might superficially resemble Scheetz' subsection (g) appellate argument at a quick glance, the precedent set by *Campbell*, *Bryant*, and *McCaslin* uniformly indicate this "nothing illegal" objection is insufficient under K.S.A. 60-404 to allow the panel to engage in the subsection (g) interpretation issue advanced for the first time on appeal. See *City of Overland Park v. Cunningham*, 253 Kan. 765, 772, 861 P.2d 1316 (1993) ("[T]he trial should not be a game, where counsel is forced to guess what the objection is and what the trial court considers is lacking. A balance should be struck. . . . [I]t should be specific enough that the trial judge can rule intelligently upon the objection, and the specific contemporaneous objection must be made known to the opposing counsel when the objection is lodged.").

Similarly, Scheetz never objected to the young girls' testimony on statutory interpretation grounds. At trial, the defense expressly objected to the girls' testimony as lacking specificity, lacking sexual content, and failing to qualify as a prior bad act. These cannot be converted on appeal into the more general subsection (g) argument the panel embraced as to this testimony. See *McCaslin*, 291 Kan. at 708.

Our caselaw sets out the appropriate process for preserving appellate review to the admission of evidence, and that process was not followed here. K.S.A. 60-404 cannot be glossed over by appellate judges lured into exploring uncharted legal frontiers. Left unchecked, the panel's approach "would undermine the language and the purpose of the [60-404] objection rule." *State v. Dukes*, 290 Kan. 485, 489, 231 P.3d 558 (2010).

Finally, we must discuss Scheetz' frequent refrain that K.S.A. 60-404 is a prudential rule rather than a jurisdictional bar, citing *State v. Hart*, 297 Kan. 494, 510, 301 P.3d 1279 (2013). He seems to suggest that absent a jurisdictional bar, appellate judges can ignore these statutory directives when it suits them. But our caselaw shows we have not been so cavalier with this prudential rule. See, e.g., *State v. Spagnola*, 295 Kan. 1098, 1103, 289 P.3d 68 (2012) (timely objection not required during bench trial because same suppression arguments were made to the same judge pretrial); *State v. Breedlove*, 295 Kan. 481, 490-91, 286 P.3d 1123 (2012) (noting record made clear trial judge understood the legal basis for an objection when counsel simply referred to it as an "'earlier objection'" or a "'prior objection'"). Even in

Hart, the court only agreed to proceed with its "unorthodox approach" of reviewing a colorable preservation concern on appeal because both parties agreed to do so, in hopes of gaining "a definitive interpretation" of a recently amended statute. *Hart*, 297 Kan. at 510. That situation is not presented here. We hold the *Scheetz* panel erred in proceeding with the K.S.A. 2022 Supp. 60-455(g) issues as it did.

We also hold that in taking the approach it took, the panel abused its statutory power under K.S.A. 60-2101(a) (Court of Appeals' appellate jurisdiction) to consider the propensity evidence question concerning subsection (g)'s definition. And the panel's first-of-its-kind merits holding that the statutory listings are exhaustive rather than exemplary necessarily leads us to yet another concern because we now must decide how to treat the panel's subsection (g) analysis when it so clearly overstepped appellate boundaries to reach the merits. See *McCaslin*, 291 Kan. at 709 ("Under the separation of powers doctrine, this court has no constitutional authority to essentially negate the legislature's decision to require a specific ground of objection in the trial court by then allowing a different objection to be argued in the appellate court.").

In *Hart*, the court held a panel's failure to follow the rule of applying "'the statutory law on evidence as it was at the time'" "render[ed] all that [the panel] said regarding the interpretation and application of the amended statute erroneous; it has no force or effect as precedent." *Hart*, 297 Kan. at 510. Similarly, K.S.A. 60-2101(b) (Supreme Court's appellate jurisdiction) provides us with "jurisdiction to correct, modify, vacate or reverse any act, order or judgment of a district court or court of appeals in order to assure that any such act, order or judgment is just, legal and free of abuse." Based on this, we vacate the panel's decision on K.S.A. 2022 Supp. 60-455(g) and hold it should have no force or effect as precedent.

RELEVANCE OF THE INTERNET SEARCH HISTORY EVIDENCE

Defense counsel at trial not only renewed the earlier pretrial objection (not a prior bad act) about the internet search history but added three other grounds, including relevancy. These added grounds apparently went unnoticed by the panel because it included the search history evidence in its erroneous "not altogether different" preservation analysis, rather than just directly addressing relevancy because both parties and the district court considered it. *Scheetz*, 63 Kan. App. 2d at 10, 26.

Regardless, the State's challenge to the panel's decision is properly preserved for our review.

Additional factual and procedural background

As noted earlier, the State filed a pretrial motion to admit evidence of Scheetz' internet search history under K.S.A. 2019 Supp. 60-455(d). That motion described how the evidence would demonstrate Scheetz' involvement in "search[ing] for and/or view[ing] child pornography." The court granted the motion.

During trial, when the prosecutor sought to admit this evidence, defense counsel timely objected, asserting it did not "even fall[] within the order of the court on 60-455 order" since the evidence lacked reference to child pornography. Then, the defense argued the evidence was "not relevant." And the district court ruled the evidence relevant to show Mr. Scheetz' sexual attraction to young girls, even if they might be websites for girls over the age of 18 but appear young or show young girls in the title.

The court asked whether defense counsel wanted to redact any irrelevant, general search terms from the excerpts. Counsel responded, "I'm not asking for further redactions." So the court admitted both the general and the sexually explicit search language, and the defense preserved its relevancy objection for appeal.

Standard of review

"[T]here are two elements of relevancy: a materiality element and a probative element. . . . An appellate court reviews a district court's determination that evidence is probative for abuse of discretion whereas the district court's decision regarding materiality is reviewed de novo." *State v. Boleyn*, 297 Kan. 610, Syl. ¶ 1, 303 P.3d 680 (2013). "A district court abuses its discretion if no reasonable person could agree with its decision or if its exercise of discretion is founded on a factual or legal error." *State v. Butler*, 315 Kan. 18, Syl. ¶ 1, 503 P.3d 239 (2022).

Discussion

Our law is well established: "Unless prohibited by statute, constitutional provision, or court decision, all relevant evidence is admissible. K.S.A. 60-407(f)." *State v. Gunby*, 282 Kan. 39, 47, 144 P.3d 647

(2006). "'Relevant evidence' means evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). "Evidence is probative if it has any tendency in reason to prove a fact," and "[m]ateriality addresses whether a fact has a legitimate and effective bearing on the decision of the case and is in dispute." *Boleyn*, 297 Kan. 610, Syl. ¶ 1.

Without conducting a pertinent materiality-and-probative analysis within the specific context of Scheetz' case, the panel instead relied on *Boleyn* and *State v. Smith*, 299 Kan. 962, 327 P.3d 441 (2014), as well as *State v. Ewing*, No. 118,343, 2019 WL 1413962 (Kan. App. 2019) (unpublished opinion)—none of which are on point. So, to revisit the admissibility question, we engage in a materiality-and-probative analysis at the outset and then explain why the cases cited by the panel are inapplicable.

First, we consider materiality. Recall the district court correctly found the evidence relevant to establish Scheetz' sexual attraction towards young girls and a stepfather-stepdaughter theme. It determined the evidence was relevant because sexual exploitation of a child requires the State prove sexual attraction beyond a reasonable doubt. See K.S.A. 2022 Supp. 21-5510(a)(2) ("possess[ed] any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct *with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender* . . . ." [Emphasis added.]). To demonstrate Scheetz' specific intent and sexual attraction to underage girls, the State presented his search history with the terms of "Sex At 9 years old" and "Step Dad started blowing me at age 5." We hold Scheetz' sexual desire for underage girls constituted a material fact in the child exploitation charge.

Second, turning to the probative element, the court in *State v. Willis*, 312 Kan. 127, 142, 475 P.3d 324 (2020), "stressed that relevance is a generally low threshold." There, the *Willis* court discussed *State v. Scott-Herring*, 284 Kan. 172, 175-77, 159 P.3d 1028 (2007) (holding that a photo showing the defendant with a revolver was relevant to establishing his possession of a gun like the possible murder weapon). The *Willis* court emphasized the evidence did not need to prove the gun in the photo was the actual murder weapon to be admissible. It noted that if the testimony sufficiently stated the similarity between a weapon in the defendant's possession and the weapon used in the crime, the lack of positive

identification "'goes to the weight, not the admissibility, of the evidence.'" *Willis*, 312 Kan. at 143 (quoting *Scott-Herring*, 284 Kan. at 177).

The panel erred in holding the search history evidence was irrelevant. The panel reasoned there was "no indication as to how long Scheetz accessed these webpages or whether he even watched the videos they contain" and "no information . . . as to what these videos depicted apart from the titles, leaving the jury to speculate about their actual content." *Scheetz*, 63 Kan. App. 2d at 28. But that is unnecessary for this evidence to be admitted. Scheetz deliberately searched terms such as "Sex," "9 years old," and "age 5." It also does not matter that other irrelevant, general terms could have been redacted, because that failure was the result of defense counsel's refusal to request it when asked.

An appellate court reviews a district court's probative ruling for abuse of discretion, and we conclude a reasonable person could agree with the district court on this matter. Relevancy does not require conclusive proof of a fact—any tendency is sufficient. If evidence has even limited probative value, it should be assessed against its prejudicial effect when an opponent raises an issue under K.S.A. 60-445 (allowing exclusion of evidence if its probative value is substantially outweighed by its undue prejudicial effect) but not under K.S.A. 60-407(f) ("[A]ll relevant evidence is admissible.").

Moving next to the three cases relied on by the panel, they are not on point. In *Boleyn*, the victim was a boy under 14. During direct examination, defense counsel asked the defendant if he was gay, and he said no. After that, the court admitted the parties' stipulation the defendant possessed photographs and video showing pornographic homosexual and heterosexual images under K.S.A. 60-420 (evidence affecting credibility). *Boleyn*, 297 Kan. at 624-25. The *Boleyn* court held the stipulation's admission was error because the evidence demonstrated he could be bisexual, bolstering his claim he was not gay. It reasoned "at the most, the evidence establishes that Boleyn may have had an interest in viewing both homosexual and heterosexual pornography, but this conclusion is a far cry from the inference that Boleyn is exclusively attracted to or sexually active with men." 297 Kan. at 626-27. Admittedly, there is one sentence in *Boleyn* the panel relied on that may

cause misunderstanding: "[W]e hold that evidence of Boleyn merely possessing homosexual pornography would not be probative to rebutting or impeaching his claim of not being gay." 297 Kan. at 626; see *Scheetz*, 63 Kan. App. 2d at 26-27. The problem, of course, is this language must be read in context with the case facts discussed above, not in isolation.

In *Smith*, the defendant unlawfully touched two girls wearing bikini-style bathing suits while photographing them in provocative poses. The State sought to admit photographs showing pornographic magazines and video covers seized from the defendant's house. The defense objected to the photographs' relevance, and the State countered they undermined the defendant's claim "'he was gay' and that 'he/she's or women with penises, is what aroused him.'" *Smith*, 299 Kan. at 973-74. The *Smith* court rejected the State's justification because its rationale was logically inconsistent with *Boleyn*. The court noted, "If possession of homosexual pornography is not relevant to prove a person's sexual practices, then possession of heterosexual pornography is likewise not relevant for that purpose." 299 Kan. at 976.

When it comes to one's real sex life, such evidence could be viewed as irrelevant; but Scheetz was charged with sexual exploitation of a child under K.S.A. 2019 Supp. 21-5510(a)(2), so the question is whether he "possess[ed] any visual depiction of a child under 18 years of age . . . *with intent to arouse or satisfy the sexual desires . . . of the offender*." (Emphasis added.) In this regard, *Smith* is distinguishable. Scheetz' search history had at least some probative value to demonstrate the material fact of the required element of sexual desire for an underage child. As discussed, the search history meets K.S.A. 60-401(b)'s requirement that evidence demonstrate "*any tendency* in reason to prove *any material fact*." (Emphases added.) Cf. *State v. Creitz*, No. 98,852, 2009 WL 596522, at *6 (Kan. App. 2009) (unpublished opinion) ("[W]e view the probative value of this evidence to be somewhat tenuous. Nevertheless, given our standard of review and the low threshold suggested by the 'any tendency' standard for relevance found in K.S.A. 60-401[b], we conclude that the district court did not err in finding that evidence of the wire warning was relevant.").

In *Ewing*, 2019 WL 1413962, at *17-24, another panel's unpublished opinion, evidence of a defendant's internet search history accessing violent pornography was admitted not under K.S.A. 60-455

but simply as relevant evidence. The *Ewing* panel found error, reasoning there was no evidence he had viewed the portions of the videos containing acts like those of which he was charged: rape, aggravated criminal sodomy, and battery. 2019 WL 1413962, at *23. And following *Ewing*, the *Scheetz* panel held the evidence had no probative value because there was no indication "whether he even watched the videos [those webpages] contained" and "what these videos depicted apart from the titles, leaving the jury to speculate about their actual content." *Scheetz*, 63 Kan. App. 2d at 28. But what really mattered here was not whether Scheetz *watched* the videos, but that he *searched* particular terms in his internet searches and visited websites with those titles. The exhibits contained the "Last Visited" information, providing the exact time the websites were viewed. And while the contents of videos or images provided by those websites might have helped the State's theory of its case, they were not necessary to admit the evidence.

In sum, we conclude the panel erred in holding the search history was irrelevant under *Smith*, *Boleyn*, and *Ewing*. Those cases are distinguishable. We also conclude that under a materiality-and-probative analysis, the evidence tended to prove the material fact of sexual desire, which was a criminal element of the sexual exploitation of a child charge. The district court correctly determined it was relevant.

Finally, we note the panel declined to address undue prejudice under K.S.A. 60-445 as it found the evidence irrelevant. Scheetz failed to cross-petition on this matter. See Supreme Court Rule 8.03(c)(3) (if Court of Appeals assumes an outcome on an issue without deciding or does not decide an issue properly presented to it, "the cross-petitioner must raise that issue to preserve it for review") (2023 Kan. S. Ct. R. at 57). Consequently, we do not proceed to the undue prejudice question.

PROSECUTORIAL ERROR

On appeal, Scheetz claimed the prosecutor misstated the facts and law and presented arguments designed to inflame the jury's passions during closing arguments. The panel agreed the prosecutor misstated facts when claiming: (1) G.H. received "a picture of the defendant's erect penis," and (2) B.C. "started to think it wasn't an accident" when referring to Scheetz sending H.T. a naked photo. It concluded these errors were isolated and comparatively minor, so they were individually harmless. *Scheetz*, 63 Kan. App. 2d at 33-34. But it added these

prosecutorial errors to its cumulative error analysis when reversing Scheetz' convictions. 63 Kan. App. 2d at 34-36. The panel rejected Scheetz' other prosecutorial error arguments.

In its petition for review, the State contests the panel's error determinations. Scheetz did not cross-petition on the matters decided against him, so they are settled. See Rule 8.03(c)(3) (2023 Kan. S. Ct. R. at 57) ("The purpose of a cross-petition is to seek review of specific holdings the Court of Appeals decided adversely to the cross-petitioner."). As explained, we agree with the State. The first comment accurately stated the evidence because Scheetz told an interviewing officer he sent G.H. a picture of his erect penis. The second error was a reasonable inference based on the evidence.

Standard of review

An appellate court employs a two-step analysis to review prosecutorial error claims: error and prejudice. To decide error, the court determines whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. *State v. Sieg*, 315 Kan. 526, 535, 509 P.3d 535 (2022). Upon finding an error, the court considers "whether the error prejudiced the defendant's due process rights to a fair trial." 315 Kan. at 535.

Discussion

On appeal to the panel, Scheetz claimed the prosecutor's statement that G.H. received a picture of his "erect penis" was error because there was no evidence his penis was erect in the photo. At that time, the State mistakenly conceded the point but argued it was a reasonable inference because G.H. testified the photo came with a message stating he was waiting for "you to get here." The panel held there were two errors: it was not supported by the evidence, and it was designed to inflame the jury's passions. *Scheetz*, 63 Kan. App. 2d at 31. But the record shows a different reality.

Before this court, the State corrects its earlier mistake by pinpointing the exact location in the record during a police interview when Scheetz said his penis was "erect" on the photo sent to G.H. The interview reflects this exchange:

"[Q (first officer)]: Okay. . . what are we talkin' about here? What was the picture of?
"[A (Scheetz)]: It was a picture of my penis.
"[Q]: Okay . . . paint a picture for me. Were you in bed, were you . . . .
"[A]: Yeah, I was like sittin' in bed . . . .
"[Q]: Okay . . . .
"[A]: It was a message sayin' just waitin' for you to get here.
"[Q]: Okay.
"[Q (second officer)]: Erect? Not erect? Hands . . . .
"[A]: Erect.
"[Q (second officer)]: —involved?
"[A]: Erect, yeah."

Scheetz argues this correction was "unpreserved" from the Court of Appeals, so it is improper for us to consider it now. We disagree. Informing a reviewing court where to look in the record to establish a fact is not equivalent to raising a new issue. Even so, the question whether the evidence supported the prosecutor's "erect" statement was properly preserved by Scheetz in the Court of Appeals when he claimed the prosecutor fabricated this as fact. And the issue remains properly presented to us by the State because it challenges the panel's ruling that this fact was fabricated and inflammatory. See Rule 8.03(a)-(b).

Besides, it is the parties' duty to supply a statement of the facts in their briefs and "key[] to the record on appeal by volume and page number." Kansas Supreme Court Rule 6.02(a)(4) & 6.03(a)(3) (2023 Kan. S. Ct. R. at 36-37). And a consequence of a party's failure to do so is: "The court may presume that a factual statement made without a reference to volume and page number has no support in the record on appeal." Rule 6.02(a)(4) & 6.03(a)(3). But this circumstance does not implicate any preservation rule. Moreover, as the State correctly notes, the Kansas Rules of Professional Conduct 3.3(a)(1) (2023 Kan. S. Ct. R. at 390) declares: "A lawyer shall not knowingly . . . make a false statement of fact . . . or fail to correct a false statement of material fact . . . previously made to the tribunal by the lawyer." Here, the State is not raising a new issue. Rather, it attempts to correct a misstatement of material fact by the panel relevant to a properly preserved issue.

The panel also held the State misstated the fact to inflame the jury. *Scheetz*, 63 Kan. App. 2d at 31. But since we know from the record it was a correct statement, the prosecutor's closing accurately described the evidence, and the transcript shows the prosecutor did not inflame

the jury when mentioning it. The "erect penis" references occurred only twice, both times within close proximity, and in the context of a factual recitation. The prosecutor simply said:

"And that rings a bell for [B.C.] because [his] 12-year-old daughter has gotten a picture of the defendant's *erect* penis that he sent to her. And she immediately says, 'I've got to block you,' you know. She's sending a text to her parents, 'Oh, my gosh, call me as soon as you get done with the concert. Call me as soon as you can.' But [B.C.] hadn't originally done anything about it because he chalked it up to being an accident. Things happen with cell phones, he just assumed it was intended for somebody else.

"But once [B.C.] had the information that Norton was also investigating the defendant for exactly the same behavior with another girl, he started to think it wasn't an accident. He started to think it's an intentional act on behalf of the defendant, that he's not just accidentally sending pictures of his *erect* penis to random teenagers." (Emphases added.)

What is obvious is that the prosecutor did not sensationalize this evidence, despite its aggravating nature. No error occurred.

The other prosecutorial error the panel found concerned the State's revisiting the inception of the investigation that led officers to M.C. The prosecutor said:

"This actually began with the tip from the defendant. He called [Assistant Chief of Police for the Norton Police Department, Jody Enfield] and said, 'I think [H.T.] is involved with a local officer. You should check into that.' As a result of that, . . . Enfield did go talk to [H.T.], and she said it's not a local officer . . . . That's off base here. But [Enfield] does talk to her about some pictures that she has gotten, and . . . [H.T.] won't tell him who it is, but she says she'll say if he guesses.

"So Assistant Chief Enfield guesses, and he says, 'Is it Mark Scheetz?' And she said yes. It was the defendant that she had gotten naked pictures from.

"So then . . . Enfield takes the next step and talks to [B.C.] . . . . And when he talks to [B.C.], he [asked], you know, 'Is the defendant still working for you?' And [B.C.] says, 'No, he's moved on. But why?' [Enfield] said, 'Well, you know, we've got a case over here where the defendant was sending naked pictures to [H.T.] . . . .'

"And that rings a bell for [B.C.] because [his] 12-year-old daughter has gotten a picture of the defendant's erect penis that he sent to her. . . . *But [B.C.] hadn't originally done anything about it because he chalked it up to being an accident. Things happen with cell phones, he just assumed it was intended for somebody else.*

"But once [B.C.] had the information that Norton was also investigating the defendant for exactly the same behavior with another girl, *he started to think it wasn't an accident. He started to think it's an intentional act on behalf of the defendant, that he's not just accidentally sending pictures of his erect penis to random teenagers.*" (Emphases added.)

Scheetz argues the prosecutor's statement that B.C. "began to think Scheetz sent the photo to G.H. intentionally" was wrong, and the panel

agreed by relying on the testimony of Brian Diercks. *Scheetz*, 63 Kan. App. 2d at 30-31. Diercks testified:

"[W]e kind of took [G.H.] as possibly just . . . an accident because it could have been . . . possibly [Scheetz] was trying to send it to his girlfriend . . . . So we just kind of chalked that up as a possible accident with no intent or anything like that.

"And so when we received that phone call from Officer Enfield, we discussed, talked about, you know, since [G.H.] had sent out a streak off of Snapchat, and so that's how she received that photo, we believe that's how she got it is because on the streak, she became the top of his list. And if what Enfield was telling us, that this 16-year-old girl was receiving . . . Snapchat messages, pictures, then maybe that photograph that was actually sent to [G.H.] was actually supposed to go to the 16-year-old girl."

But a fuller record review tells a more complete story. At trial, B.C. testified Enfield called to inform him he was working on an electronic solicitation case involving Scheetz. After that call, B.C. talked with Dierck. B.C. told the jury: "After discussing what [Enfield] had informed . . . us, *we felt that it was in the best interest to contact the Kansas Bureau of Investigation*." (Emphasis added.) And based on this, we conclude the prosecutor's remark constitutes a reasonable inference. B.C. said he felt "it was in the best interest to contact the Kansas Bureau of Investigation," which contradicts the panel's conclusion because if he honestly believed what happened to his daughter was an accident or innocent mistake, there would be no reason to contact the KBI. No prosecutorial error occurred.

CUMULATIVE ERROR

The panel used a cumulative error analysis to reverse Scheetz' convictions. But we have determined no errors occurred, so this doctrine does not apply. See *Sieg*, 315 Kan. at 536.

Judgment of the Court of Appeals reversing the district court is reversed on the issues subject to review and is vacated in part. Judgment of the district court is affirmed.

No. 125,717

STATE OF KANSAS, *Appellee*, v. KRISTOFFER L. KLESATH, *Appellant.*

(541 P.3d 96)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Specific Intent to Permanently Deprive Person of Property—Not Element of Aggravated Robbery.* Specific intent to permanently deprive a person of their property is not an element of aggravated robbery.

2. SAME—*Self-defense Cannot Be Claimed in Aggravated Robbery.* Self-defense cannot negate aggravated robbery, as the crime of aggravated robbery has no element that could justify the use of force in defense of oneself or another.

3. SAME—*Self-defense May Not Be Claimed if in Commission of Forcible Felony.* A defendant may not assert self-defense if the defendant is attempting to commit, committing, or escaping from the commission of a forcible felony.

Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Oral argument held December 13, 2023. Opinion filed January 12, 2024. Affirmed.

Ryan J. Eddinger, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Carolyn A. Smith, assistant district attorney, argued the cause, and *Michael Kagay*, district attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Kristoffer Klesath directly appeals his convictions of first-degree felony murder, intentional second-degree murder, and aggravated robbery. He argues the State presented insufficient evidence to support the predicate felony of aggravated robbery, and the trial court erred by refusing to instruct the jury on reckless second-degree murder and failing to sua sponte instruct on involuntary manslaughter and its accompanying imperfect self-defense. We affirm.

We hold the evidence was sufficient to support aggravated robbery, and thus felony murder. And based on this, we need not consider his remaining challenges because the trial court merged

his convictions for second-degree murder and felony murder, sentencing Klesath only on felony murder.

FACTUAL AND PROCEDURAL BACKGROUND

Darton Fields was outside a liquor store, along with Xavian Locke and Kendall Young, when Klesath came running past. Klesath slowed down and stopped, walking back with his arm out to Fields.

Both Fields and Klesath carried handguns. The pair grappled briefly, and Fields reached his hand towards his waistband. Klesath responded by pointing his gun at Fields. Klesath fired a shot, and Fields fell. Klesath fired two more shots and started to run away. At some point during the struggle, Fields' gun dropped to the ground. Klesath briefly returned to pick it up before fleeing the scene. Fields died after being struck by two of three shots fired at him.

The State charged Klesath with first-degree felony murder with the predicate felony of aggravated robbery, intentional second-degree murder, and criminal possession of a weapon. He pled guilty to criminal possession of a weapon prior to trial.

Klesath testified in his own defense. He explained he was running to the store because it started raining, and stopped as he passed the group because "that's when [Fields] said he would shoot me." He described the scene:

"I knew he was serious. I just went for my gun. Right then he was actually lifting his shirt up to grab his gun. When I took the step, I grabbed his arm and I was kind of shocked. I just grabbed his arm. I didn't even want to let go, honestly. He had his gun, but it was under the shirt. So it was wrapped under it."

He then heard Fields tell the group: "'Get him. Get him. Get his ass.'" While they were grappling, Klesath said he saw Fields swing around, so he shot twice. He stated:

"I just—I really shot to stop him. And that was my first mind. So when I shot him and I saw that it hit him and he was going down, that was really letting me know that it was done. That's—there wasn't no, you know, try to stand over him or anything like that as it was depicted. I was still holding onto him. It just really kind of got to me, okay, let go, you know."

Klesath testified he fired the third shot because he was scared. He did not know Fields' gun had fallen off his body. He felt he

was in danger and just needed to stop Fields. He explained, "I wasn't stopping and trying to make sure that I got him a certain way or that I stood there and made sure he didn't make it or anything like that."

But his trial testimony that he did not intend to kill Fields contradicted his prior testimony at another hearing. There, he testified he intended to kill Fields. When asked about the discrepancy at trial, Klesath explained he had been nervous about testifying and was not thinking about describing what happened—he should have said yes "a little lighter" than he did and "stop[ped] to try to explain like now."

To support his claim that he acted in self-defense, Klesath described his negative history with Fields before the shooting. They met when Klesath was 16 through his cousin Romeo Armstead. Later, in a seemingly unconnected event, Klesath and his then-girlfriend were shot in 2018 while driving in Topeka. At the time, Klesath did not know who was responsible, and law enforcement never identified a suspect. He believed Fields may have been responsible but said nothing to the police because "I was just kind of scared." At trial, he emphasized he typically does not contact police.

Then, about a month before the killing, when Klesath had gone to Fields' home to discuss problems between Fields and Armstead, Fields said he was the one who shot Klesath, saying "it was an accident, but that it could be on purpose." Klesath perceived that as a threat because Fields had a gun in his lap when they talked.

About two weeks later, Klesath had another run in with Fields. Klesath testified he was going to the liquor store and Fields walked past. They locked eyes and stared at each other. Fields passed and said "he would catch [Klesath] slipping."

Then, a week before the shooting, Klesath went to the liquor store with his mother, and Fields was sitting outside. Klesath did not want to go in because Fields was there. He sat in the car, while his mom walked over to Fields. Klesath described the interaction:

"She had like a look like this on her face. And I just got out. And I went and said something to him. I said, hey, leave my mom out of this. Don't say nothing to my

mom, you know, and he just stared at me real long. He didn't say nothing to me, you know."

A liquor store employee came to unlock the store's door, and Klesath entered with his mom, ending the encounter.

Armstead testified at trial in support of Klesath's history with Fields stating, "I know they had got into an argument and some words and all that before." But he could not recall if Klesath ever told him Fields was responsible for the 2018 shooting.

Consistent with his testimony about their negative history, Klesath made several recorded phone calls from jail that were admitted into evidence. On one, he said a witness "qualified the incident as a robbery, but he felt it was more of a simple altercation." Later that same day, on a different call, he said "he got tired of worrying about whether or not that man was going to shoot him, but he exchanged one problem for another." Finally, on another day, Klesath was recorded, saying "he had seen this man a thousand times and had seen him at the liquor store before and wasn't trying to get into it with him."

Turning back to what happened the night of Fields' death, Locke and Young gave conflicting trial testimony. Locke said he did not see the shooting or the brief interaction between Fields and Klesath just before the shooting. He testified Fields and Klesath exchanged words, but he did not hear "what exact words were said." This differed from what he told police the night of the shooting—"it sounded like normal mug shit." He told the police he heard "the shooter say give me it," which he also testified to at a preliminary hearing. In response to this inconsistent testimony, Locke explained "this isn't exactly what I said though, but I—maybe somebody said just give me the shit." But then, Locke retreated from that statement, saying "the only thing I can tell you I heard is maybe just the gunshots, but that's about it."

Young's testimony followed a similar pattern. He and Fields went to the liquor store after they had been drinking together for a few hours. As they were hanging out, Young listened to music with earbuds, which were still in his ears when the shooting happened. At trial, he testified he did not see the interaction between Fields and Klesath because he had turned around. Meanwhile, the surveillance video shows Young watching what happened. At the

preliminary hearing, he testified he heard someone say "give me everything" but did not know who said it. At trial, he retracted that. He explained his conflicting testimony is "probably what I recalled at that time. You know what I mean. After everything took place and stuff, I tried to forget about that night."

The third and final eyewitness, John Keeling, who was not affiliated with anyone involved in the shooting, was merely walking into the liquor store when the shooting happened. He admitted "it's possible" he had been drinking before going to the store. He testified that "one guy came up to the other guy and he asked him did he have his shit. Dude said he didn't have his shit and he shot him." On cross-examination, he repeated that same story: "The guy who got shot, he said hello to the guy that shot him. And the guy turned around and he shook his hands and asked him does he have his shit and the guy said, no. He shot him."

At the conclusion of evidence, the trial court instructed the jury on self-defense, along with the other charged crimes. The jury found Klesath guilty of felony murder, second-degree intentional murder, and aggravated robbery. The district court merged the felony murder and second-degree murder convictions and sentenced Klesath for only felony murder to life in prison without the possibility of parole for 620 months.

In this direct appeal, Klesath raises the evidence's insufficiency issue and two instructional error claims. Our jurisdiction is proper. See K.S.A. 2022 Supp. 22-3601(b)(3) (life imprisonment), (4) (off-grid crime). We first address the sufficiency of the evidence argument because it disposes of the case.

SUFFICIENCY OF THE EVIDENCE OF AGGRAVATED ROBBERY

Felony murder is "the killing of a human being committed . . . in the commission of . . . any inherently dangerous felony," which includes "aggravated robbery." K.S.A. 2022 Supp. 21-5402(a)(2), (c)(1)(D). To support Klesath's felony murder conviction, the State had to sufficiently prove the predicate felony of aggravated robbery as a required element. Aggravated robbery is "knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person" "committed by a person who . . . [i]s armed with a dangerous weapon; or . . . inflicts bodily harm upon any person in

the course of such robbery." K.S.A. 2022 Supp. 21-5420(a), (b). We hold the State proved each element of aggravated robbery.

Standard of review

When a defendant challenges evidence's sufficiency, this court reviews the record in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). This standard imposes a high bar for a convicted defendant that warrants reversal "only when the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt." *State v. Meggerson*, 312 Kan. 238, 247, 474 P.3d 761 (2020). An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on witnesses' credibility. *Aguirre*, 313 Kan. at 209.

Discussion

Klesath does not dispute that he knowingly took Fields' fallen gun from his presence or that he was armed with a dangerous weapon or inflicted bodily harm while taking the gun. He argues only that he did not intend to take the victim's gun at the incident's outset. But aggravated robbery is a general intent crime, meaning that to commit the crime, a defendant does not need to specifically intend to take another's property. *State v. Edwards*, 299 Kan. 1008, 1013, 327 P.3d 469 (2014). "[*A*]*ny* taking, incidental or intentional, suffices for a robbery conviction." 299 Kan. at 1013. The statute does not require "the taking be the motivation for the crime as opposed to an incident of the crime." 299 Kan. at 1015. The State only needs to prove a defendant took property from a victim or their presence by force or by threat of bodily harm either armed with a dangerous weapon or having inflicted bodily harm, and the State has done so here. See 299 Kan. 1008, Syl. ¶ 2.

Klesath advances two self-defense arguments to negate the State's evidence proving aggravated robbery. First, he asserts he used force to respond to Fields' imminent threat of deadly force. Second, he claims he only took the gun to protect himself from being shot. Neither argument carries the day.

His first argument fails because self-defense cannot negate aggravated robbery, as the crime of aggravated robbery has no element that could justify the use of force in defense of oneself or another. See *State v. Holley*, 315 Kan. 512, Syl. ¶ 3, 509 P.3d 542 (2022). His second argument has a little more to consider because *Holley* leaves the door open to circumstances involving the disarming of an aggressor. 315 Kan. at 520 ("By way of an aside, we note that disarming an aggressor likely falls outside the scope of the statutory meaning of 'taking property' as used in K.S.A. 2020 Supp. 21-5420.").

But the problem with this second argument is that Klesath was not disarming an aggressor, so the narrow exception contemplated in *Holley* does not extend to him. He did not start the interaction by taking Fields' gun. Instead, he waited to take the gun until he was fleeing, as Fields lay on the ground dying. A defendant may not assert self-defense if the defendant is already attempting to commit, committing, or escaping from the commission of a forcible felony. K.S.A. 2022 Supp. 21-5226(a); *State v. Keys*, 315 Kan. 690, Syl. ¶ 17, 510 P.3d 690 (2022).

We hold the evidence sufficiently supports each element of aggravated robbery, and that self-defense cannot defeat Klesath's felony murder conviction. This holding allows us to avoid addressing the remaining instructional issues related to second-degree murder. The district court merged the two murder convictions—first- and second-degree—and sentenced him only for the greater offense.

The judgment of the district court is affirmed.

State v. Flack

No. 115,964

STATE OF KANSAS, *Appellee*, v. KYLE TREVOR FLACK, *Appellant*.

(541 P.3d 717)

SYLLABUS BY THE COURT

1. EVIDENCE—*Motion to Suppress Evidence—No Factual Dispute—Appellate Review.* When the facts material to a decision on a motion to suppress evidence are not in dispute, the inquiry on appeal becomes a question of law.

2. CRIMINAL LAW—*Statements Made During Custodial Interview—Determination Whether Invocation of Right to Remain Silent.* Whether a defendant's repeated statements during a custodial interview to "[t]ake me to jail" constitute an unambiguous invocation of the right to remain silent depends on their context.

3. ATTORNEY AND CLIENT—*Evaluating Ineffective Assistance of Counsel Claim Using ABA Guidelines in Death Penalty Cases.* The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are a relevant guidepost for evaluating an ineffective assistance of counsel claim in a capital case, but they are not coextensive with constitutional requirements.

4. APPEAL AND ERROR—*Continuance Denials Reviewed for Abuse of Discretion—Appellate Review.* Appellate courts review continuance denials for abuse of discretion. A court abuses its discretion when its action is unreasonable or based on an error of law or fact. The party asserting an abuse of discretion must demonstrate it.

5. SAME—*Trial Court's Ruling on Juror Challenge for Cause—Appellate Review.* Appellate courts traditionally accord deference to a trial court's ruling on a juror challenge for cause.

6. CRIMINAL LAW—*Crime of Capital Murder—Killing of More than One Person.* The State may allege the crime of capital murder was committed in a "heinous, atrocious, or cruel" manner with respect to any single victim of a capital murder conviction when the conviction is predicated on the killing of more than one person. There is nothing in the statute suggesting that each individual killing must be shown to have been committed in a heinous manner.

Appeal from Franklin District Court; ERIC W. GODDERZ, judge. Oral argument held January 31, 2022. Opinion filed January 19, 2024. Affirmed.

Clayton J. Perkins, of Capital Appellate Defender Office, argued the cause, and *Meryl Carver-Allmond*, of the same office, and *Debra J. Wilson* and *Reid T.*

Nelson, of Capital Appeals and Conflicts Office, were with him on the briefs for appellant.

Kristafer R. Ailslieger, deputy solicitor general, and *Natalie Chalmers*, assistant solicitor general, argued the cause, and *Jodi Litfin*, assistant solicitor general, and *Derek Schmidt*, attorney general, were with them on the briefs for appellee.

Alice Craig, of Lawrence, was on the brief for amici curiae Midwest Innocence Project, joined by Witness to Innocence and Floyd Bledsoe.

PER CURIAM: A jury convicted Kyle Flack of capital murder, first-degree murder, second-degree murder, and criminal possession of a firearm. In a separate proceeding, it sentenced him to death after finding two aggravating factors that were not outweighed by mitigating circumstances. On direct appeal, Flack raises numerous issues. We affirm his convictions and the sentence.

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, Andrew Stout and two friends, including Steven White, lived at Stout's house in rural Franklin County. Flack, another friend of Stout's, occasionally spent time there. Flack brought a shotgun with him everywhere, usually keeping it in a black duffel bag, and even slept with it nearby. Stout was dating K.B. and intended for the friends to move out by May 1, so she and her 18-month-old daughter, L.B., could move in.

After not hearing from Stout, on May 6, some concerned friends went to his home to look for him. While checking an outbuilding near the house, they discovered a body under a tarp, later identified as White. They called 911. Investigators found two more bodies in the house, later identified as Stout and K.B. The investigators suspected Flack, who they located in Emporia at a friend's apartment. Officers arrested him shortly after midnight on May 8, and read him his *Miranda* rights. They searched the Emporia apartment, finding a black duffel bag. It contained a shotgun cleaning kit, a roll of duct tape, and zip ties.

Flack provided his versions of events to detectives twice after his arrest. His story evolved during those interviews. The first started around 3:30 a.m. on May 8 in Emporia. By that time, officers had identified White's body in the outbuilding but not the

two in the master bedroom. They considered L.B., the child, to be missing.

First interview

In what the State depicts as Flack's first of eight versions of events, he claimed to last see Stout, K.B., and L.B. on April 27 at Stout's house. He said Stout and K.B. planned to go bowling after Flack and Stout bought cigarettes. Flack claimed they separated in Pomona, where his friend, Kenneth Douglas, picked him up and drove him to Emporia.

As details emerged, so did inconsistencies. Flack said he and Stout went to Ottawa before Pomona. Stout dropped him off at the Pomona Dollar General, and Flack then went to a nearby cemetery with two women, who later took him to Ottawa. From there, his stepbrother picked him up, and he slept on the stepbrother's couch that night. He did nothing the next day, April 28, other than walk around Pomona.

Then, Flack said he went to Emporia on April 29. But before going, his stepfather dropped him off at Stout's house, where he played video games for a half hour. At that time, some people stopped by looking for Stout. The stepfather returned and took him to the Pomona Dollar General, where Douglas picked him up to go to Emporia. Flack said he stayed with Douglas while there, and he bought a new cellphone after Douglas' kids broke his old one. He later changed that story, saying he broke the phone himself. He acknowledged speaking to Stout's mother by both phone and text during this time.

Without prompting, Flack mentioned his shotgun, claiming Stout kept Flack's 1300 Remington in his bedroom closet. He also mentioned buying "PDX Defender" shotgun shells from Wal-Mart a few months earlier.

Flack also claimed Stout sold marijuana, and every resident at Stout's house used drugs. When describing White, he said White brought "tweakers" (methamphetamine users) to Stout's and that made Stout nervous. The last time Flack saw him, White "was fuckin' out of his mind, like been up too long, like you could see his eyes all fucking black and sunk in." Flack got along with White, but he would not call him his "best friend."

Flack's second version began after Detective Tammy Alexander confronted him with other witness statements. She told Flack that Douglas denied his kids broke the phone and said he picked up Flack in Emporia, not Pomona. Alexander told Flack the victims were shot with a shotgun, and that "Defender" shotgun shells were at the scene; she noted K.B.'s car was found in Emporia, where Flack had been.

Flack eventually said he was in Emporia to sell drugs. He sold "dope" (methamphetamine) to a group of Mexicans known as the South Side Lobos. He also claimed to work for "Omar," a bald-headed Mexican with a 13 tattooed on his chest, whom he had met in prison. Omar, in turn, introduced Stout to "Chewie," so Chewie could supply Stout with marijuana for dealing. Omar drove him to Emporia, and from there Douglas picked him up. Flack appeared to be explaining why he lied about the place where he met Douglas and attempting to align his story with Douglas'.

Flack then mentioned going to Stout's on April 29 or 30. Finding the door locked and no one home, he walked to the outbuilding, where he noticed something unnatural because the dog's bowl was outside and windows left open. In the outbuilding, he saw a foot hanging out from a tarp. Not knowing what to do, he left the residence.

The conversation returned to Omar, Chewie, and Flack's Emporia business. He described delivering drugs for Omar right after being dropped off in Emporia. He said Omar gave him a car, telling him he could use it if needed. Seeing the car's license plate, Flack told Alexander that in "[t]hat moment I knew it was my ass," because he realized it was K.B.'s car. Even though he did not think it could be proven and did not know why Omar would want to kill Stout, he said, "I guess they did it, but I don't know."

During questioning, Alexander showed Flack a mugshot and asked if he knew the person. His answer was unclear. Alexander later testified the photo was of a long-deceased person named Omar who had been arrested in Emporia but had never been in the Hutchison prison while Flack was there. At the end of the Emporia interview, Alexander asked what happened to L.B. Flack told her "they . . . took the kid," and "the dude could be a child molester." Officers then transported Flack to Ottawa, where he rested and ate.

Second interview

The next day in Ottawa, Flack's interview began his third version. In this iteration, he claimed Omar and Chewie killed Stout and K.B. while Flack was at the house. He did not see L.B. that day. The murders happened a day or two before the people stopped by Stout's and found Flack at the house alone.

On the day of the murders, Flack went to Stout's with Omar and Chewie, who went in, while he stayed outside. Upon hearing a gunshot, he became frightened and fled. Flack saw Omar and Chewie carry duffel bags from the house. Flack contacted his stepfather for transportation. Flack spent time in Ottawa and Pomona before going back to Stout's, getting K.B.'s car, and driving it to Emporia.

Later in the interview, Flack's fourth version emerged, placing himself inside the house during the murders. According to this account, Omar, Chewie, and Flack were at Stout's because Stout owed Omar money. All three went into the house, and, once inside, Omar and Chewie entered Stout's bedroom with Stout and shut the door. Flack heard two gunshots and ran out. Outside, he heard additional gunfire. Seeking cover under the front porch, he witnessed Omar leaving with drugs and a shotgun. After Omar and Chewie left, Flack discovered Stout's lifeless body in the bedroom under a pile of clothes. He then took K.B.'s keys from her purse, walked to the outbuilding, and noticed another body under a tarp. He took K.B.'s car to Ottawa, called Douglas to plan to visit Emporia, and drove K.B.'s car to Emporia a day or two later.

Up to this point, Flack had not described White's death. That changed with his fifth version, in which he claimed a "skinny Mexican" killed White. Based on this version, the day White died, he met with Omar, Chewie, and the Mexican in Ottawa and they all drove to Stout's. Omar and the Mexican went inside where Stout, K.B., and White were. Flack and Chewie stayed outside. When Omar and the other man came back outside, everything seemed fine. Flack thought they would leave, but Omar asked about guns. Flack brought his shotgun outside, and the group took turns shooting it. White came out and joined in.

After White fired the gun, he handed it to the Mexican. While the others chatted, White and the Mexican went to the outbuilding.

Flack heard a gunshot. The Mexican came out and went into the house with Chewie. Three more gunshots were fired. The two men came back out with a duffel bag, keys, and a wallet. They then drove back to Ottawa, leaving Flack with K.B.'s car. Omar told him to get rid of the car.

In his sixth version, Flack told detectives he and Stout shot White in mid-April. He claimed Stout and White argued one day about White living there rent-free. Later that evening, Stout told Flack he did not know what to do about White. Flack told him, "[J]ust shoot him." Stout replied, "[I]f I do that[,] I'll have to bury him." Flack told Detective Jeremi Thompson, "[T]hat's when the joking stopped." The next day, Flack and Stout discussed the situation again. Responding to Stout's worry, Flack told him to "just do whatever you need to do" and that he had Stout's "back."

Not long after that, Stout asked White if he had gotten a job yet, which led to more bickering. White went outside. Stout grabbed Flack's shotgun, and he and Flack followed White. Stout shot White, who was in front of a car in the outbuilding. Stout gave Flack the shotgun. Flack shot White again, which killed him. After hiding the body under a tarp, the two went inside the house and pondered next steps while smoking marijuana.

Flack's seventh version addressed Stout's murder. Flack said after White's murder, he got paranoid. He called Omar to see if Omar could help him leave the area. Omar agreed but insisted on Stout returning the fronted drugs and money first. As a result, Omar and Chewie came to Stout's to settle up. Once there, Omar and Stout began arguing. Eventually, Omar shot Stout twice in the back. Flack claimed Omar shot Stout two more times and then beat him with the shotgun. During the shooting, K.B. laid on the bed with her hands tied behind her back.

Either Omar or Chewie—Flack could not remember who—thought Flack looked stressed by what had happened, so they gave him money to buy marijuana. When he came back, Flack found Stout dead under the clothing pile. He told the detectives Omar gave him the shotgun and said to get rid of it. He said he broke it down and threw it into a dumpster in Emporia.

In his eighth version, Flack described what happened to K.B. and L.B. When Omar killed Stout, K.B. tried to run out of the

room. Chewie told Flack to grab her, so he did. Flack found zip ties in his bag, and Chewie gave him a bandana to silence K.B. Meanwhile, L.B. entered the room. Chewie took K.B. to the living room, where he raped her.

Afterward, Chewie brought K.B. back to the bedroom and forced her to lie face down on the floor. He shot K.B. with the shotgun. Chewie rolled her over next to Stout. He and Omar started throwing clothes on the bodies. Then L.B. walked toward her mother. Chewie shot L.B. in the back and put her into a small suitcase he found in the bedroom. Omar and Chewie took the suitcase, drugs, and money to the car and left. They told Flack it was "his problem" to get rid of K.B.'s car and the shotgun. Sitting on the porch, he called his brother to figure out whether to call the police or run. He drove to Emporia and stayed with Douglas for a few days.

The interview ended when Flack requested an attorney.

Post-interview investigation

Investigators followed up on Flack's claims he met "Omar" in prison. They reviewed lists of inmates overlapping his time in prison, producing a few leads, but none were "Omar." They also reviewed his phone records, identifying most calls and who was on the other end. No calls were connected to "Omar" or "Chewie."

Emporia's city recycling center found a shotgun receiver and magazine in the trash and notified police. Forensic testing showed they were from the same gun that fired the shotgun shells discovered at Stout's.

On May 11, an Osage County sheriff's deputy found debris on a creek bank that led to locating L.B.'s body, which was contained in a partially submerged black suitcase.

Cell tower data for Flack's phone established that from May 1 until the morning of May 3, his phone did not move from the general area of Stout's house. Around 10:40 a.m., May 3, there was a single call attributed to his phone that registered on two towers, showing Flack was about a mile-and-a-half from where police found L.B.'s body. Later on May 3, the phone began using towers around Emporia. While there, Flack bought a new phone, and the data showed him moving around Emporia on May 6 and May 7.

In mid-August, Flack's mother met him in jail, and the visit was recorded. Flack told his mother, "I'm gonna end up gettin' a lotta time outta this" and "I'm not guilty of all of it but I'm guilty." Flack also revealed he lied to police: "[D]own the line they're gonna ask me questions like . . . who else was involved . . . . And unfortunately . . . they didn't believe my fuckin' story. I tried tellin' 'em . . . some bullshit but they didn't—uh, they already had so much evidence I guess."

Criminal proceedings

The State charged Flack with the capital murder of K.B. and L.B. in the same course of conduct, first-degree murder of Stout, first-degree murder of White, criminal possession of a firearm, and misdemeanor sexual battery of K.B. At arraignment, the State filed notice of its intent to seek the death penalty based on five aggravators: (1) Flack was previously convicted of attempted second-degree murder; (2) he knowingly or purposefully killed more than one person; (3) he committed the crime to avoid or prevent lawful arrest or prosecution; (4) he killed K.B. in an especially heinous, atrocious, or cruel manner; and (5) he killed K.B. as a potential witness against him.

During the trial's guilt phase, the State's evidence included what is outlined above. Its theory was that the murders occurred in large part as Flack described, but it was he, rather than "Omar" or "Chewie," who performed the acts. Flack did not testify. The jury found him guilty on all counts except misdemeanor sexual battery. The court accepted the verdicts, and the State moved for a separate sentencing proceeding for the jury to determine whether to impose a death sentence.

During the penalty phase, the State relied on its guilt-phase evidence, as well as additional evidence. To show K.B. suffered additional mental anguish from being unable to see, as she was not wearing her glasses at the time of her murder, the State presented testimony—showing K.B. always needed glasses to see—and surveillance footage of K.B. wearing glasses on the presumed date of her death. The State also introduced evidence demonstrating Flack's previous conviction for attempted second-degree murder, along with the journal entry for his previous conviction.

In mitigation, Flack again did not testify, instead presenting several witnesses, including an expert on how prisoners might acclimate to prison life; a prison work supervisor whom Flack successfully

worked with in prison; Flack's parole officer, who knew of no violations he committed since being paroled; and a supervisor at Ottawa Sanitation, who described Flack as a good employee. He also presented evidence showing Flack's horrific childhood of neglect and abuse. His friends and family testified how their lives would be affected if Flack were to receive a death sentence.

Other witnesses—many of whom were experts in mental illness and its treatment—testified about Flack's mental health struggles, including depression, anxiety, and hallucinations. His diagnoses include major depressive disorder, schizoaffective disorder, anxiety disorder, and antisocial personality disorder. His mental health struggles plagued him in various ways, even to the date of trial, and would likely continue, though less so in a structured prison environment.

The jury found the second and fourth aggravating factors existed: Flack knowingly or purposefully murdered K.B. and L.B, and he killed K.B. in an especially heinous, atrocious, or cruel manner. It unanimously sentenced him to death. The judge found "that the aggravating factors totally outweighed any mitigating factors that were provided and the evidence supports the imposition of the death penalty in this particular case." See K.S.A. 2012 Supp. 21-6617(f). The court imposed the death penalty.

Flack directly appeals to this court. Jurisdiction is proper. K.S.A. 2022 Supp. 21-6619(a) (permitting a death sentence to automatic review by and appeal to Supreme Court).

SUPPRESSION OF FLACK'S POLICE INTERVIEWS

Before both the preliminary hearing and trial, the State sought to admit Flack's custodial statements to police. The defense argued against admission, claiming he invoked his right to *counsel*. The court overruled his objections. Flack now argues he invoked his right to *silence* through his repeated requests to be taken to jail, requiring suppression of anything that followed.

Additional facts

When the State moved to admit Flack's custodial statements for the preliminary hearing, it submitted testimony from the detectives who interviewed Flack. The court found the statements voluntary. It also found his alleged requests for counsel were equivocal and did not

require the detectives to end the interview. It underscored the point by noting Flack knew what he had to do to end the Ottawa interview by plainly stating he wanted to talk to his attorney. This, the court held, was a clear communication the detectives "honored."

At trial, a newly assigned judge took up the renewed motion to admit the custodial statements for trial purposes. The State presented its witnesses again. Detective Alexander testified she advised Flack of his *Miranda* rights at the first interview in Emporia and had him sign a *Miranda* form. The transcript reflects his agreement to speak to the officers:

"[Alexander]: . . . Before you're asked any questions you must be advised and understand your rights. *Number one, you have the right to remain silent.* Number two, anything you say may be used against you in a court of law. Number three, you have the right to talk to a lawyer and have him with you while you've being questioned. Number four, if you cannot afford to hire a lawyer, one will be appointed to represent you before questioning if you wish. *Number five, you can decide at any time to exercise these rights and . . . not answer any questions or make any statements*. . . .

"[Flack]: I have read or had read to me a statement of the rights listed above. I understand what the rights are and I am willing to answer questions before talking to a lawyer. I do not want a lawyer present during questioning. I understand and know what I am doing. No promises nor threats of any kind have been made to me and no pressure or coercion of any kind has been used against me and this statement has been made by me voluntarily.

"[Alexander]: If you agree to that, I'll have you sign it. All right, Kyle, you said

. . . that you were pissed off. You wanna talk to me about that?

"[Flack]: Yeah.

"[Alexander]: What are you pissed off about?

"[Flack]: 'Cause I wanna know what happened to my friend.'" (Emphases added.)

Alexander testified she did not perceive any of his statements during the Emporia interview as invoking his rights. She agreed that a suspect saying, "[T]ake me to jail[.] I'm done, I'm tired of you asking the same questions," was different from asking for a lawyer.

Detective Thompson testified he did not perceive Flack's statement—"'Should I get a lawyer honestly?'"—as a request for an attorney. Instead, he took it as asking Thompson's "opinion on what he should do." Thompson told Flack he "could not give him legal advice." And when Flack told Thompson, "I can't tell you no

more, so either do whatever you do or I need an attorney or something because I can't tell you what I don't fucking know," the detective took it as an "ultimatum" when Flack became frustrated with questioning. He testified that was a consistent pattern throughout questioning: "[A]nytime we began asking questions in regard to [L.B.], he became upset. Visibly his face would turn red. He would clinch his fists, a couple times he hit the table."

Thompson noted the Ottawa interview ended when Flack said he could not talk to the detective anymore and wanted his attorney. This remark, Thompson viewed, was different because Flack's earlier mentions of an attorney were followed up by him quickly saying he wanted to help and wanted to talk to the detectives.

The court admitted the custodial statements over the defense objection, finding them voluntary. It also determined Flack's statements, "'[s]hould I get a lawyer honestly?'" and "either do whatever you do or I need an attorney . . . because I can't tell you what I don't know," were equivocal and did not invoke the right to counsel.

Preservation

Flack now frames his remarks—i.e., demanding to be taken to jail—as an invocation of his right to remain silent rather than the right to counsel. Generally, "[a] party may not object to the introduction of testimony on one ground at trial and assert another ground on appeal." *State v. Green*, 315 Kan. 178, 183, 505 P.3d 377 (2022). But in death penalty cases, K.S.A. 2022 Supp. 21-6619(b) mandates that "we consider any errors the parties raise on appeal, whether preserved for review or not." *State v. Cheever*, 295 Kan. 229, 241, 284 P.3d 1007 (2012), *vacated and remanded on other grounds* 571 U.S. 87, 134 S. Ct. 596, 187 L. Ed. 2d 519 (2013).

Standard of review

We are at a bit of a disadvantage in this appeal. Had Flack argued the right-to-remain-silent issue before the district court, we would apply a bifurcated standard of review. See *State v. Aguirre*, 301 Kan. 950, 954-55, 349 P.3d 1245 (2015) (district court's factual finding reviewed for substantial competent evidence and its

legal conclusion de novo). But he did not, and the district court's factual findings about voluntariness and invocation of his right to counsel minimally assist our appellate review. Regardless, the record includes the interviews' video clips and transcripts, so we can proceed. See *State v. Kleypas*, 272 Kan. 894, Syl. ¶ 5, 40 P.3d 139 (2001) (*Kleypas I*) ("When the facts material to a decision of the court on a motion to suppress evidence are not in dispute, the question of whether to suppress becomes a question of law. An appellate court's scope of review on questions of law is unlimited."), *overruled in part on other grounds by State v. Marsh*, 278 Kan. 520, 102 P.3d 445 (2004), *rev'd on other grounds by* 548 U.S. 163, 169-73, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006); see also *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018) (When the material facts supporting a district court's decision on a motion to suppress evidence are not in dispute, the ultimate question of whether to suppress is a question of law over which an appellate court has unlimited review.).

Discussion

An accused's right to remain silent during a custodial police interview arises under both the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. *Aguirre*, 301 Kan. at 954. A suspect's invocation of the "'right to remain silent must be scrupulously honored and cuts off further interrogation.'" 301 Kan. at 954. But law enforcement officers' duty to "scrupulously honor" a suspect's decision to invoke their right requires the suspect's clear communication without any ambiguity or equivocation. 301 Kan. at 957. Such an invocation requires context, as "an invocation that is ambiguous by itself may be unambiguous when considered in conjunction with the statements or events preceding it." *United States v. Cordier*, 224 F. Supp. 3d 835, 840 (D.S.D. 2016) (relying on *Smith v. Illinois*, 469 U.S. 91, 105 S. Ct. 490, 83 L. Ed. 2d 488 [1984]).

Another difficulty arises because Flack does not rely on any single statement as *the* invocation of his right. Instead, he argues various statements to take him to jail aggregated unambiguously to invoke his right to remain silent. He says his "intention to end the questioning was equally clear as he became progressively

more insistent that the questioning stop and that he be taken to jail." But "it is not his intent that matters; it is whether his statement would have been unambiguous to a reasonable officer." *Lopez v. Janda*, 742 Fed. Appx. 211, 214 (9th Cir. 2018) (unpublished opinion). In other words, the issue is whether his communication was unambiguous to a reasonable officer, not just him. See *Aguirre*, 301 Kan. at 957 (a reasonable officer's understanding matters).

Going back to the record, Flack made his remarks over about 45 minutes, with most falling during an 18-minute span, when he grew increasingly agitated as detectives were hesitant to believe him and countered his story with other evidence. He grew particularly angry when they pressed him about the child's location, despite him denying he knew anything. We address each comment below with its relevant context.

His first remark expresses his frustration at the detectives' refusal to believe him.

"[Alexander]: . . . We have your dad who's sayin' something totally different than what you did.

"[Flack]: . . . What did he supposedly say that's different than me?

. . . .

"[Alexander]: That all the times you're sayin' you were with him is not the case.

"[Flack]: All right, whatever, *so apparently we're at a stalemate so do I put these back on and you take me somewhere or what's the deal?*" (Emphasis added.)

This plainly fails to invoke a right to remain silent. Flack merely acknowledges his version differed from his father's, and the detectives were free to not believe him. His second comment was no different.

"I didn't do it at all. Think I'd kill my fuckin' friends? Kidnapping some fuckin' baby, *take me to jail*. . . . Put these motherfuckers on me, take me where you need to do

. . . . But I didn't kill my fuckin' friends. I didn't kill them fuckin' people and I didn't fuckin' take no baby." (Emphasis added.)

Like the first statement, Flack simply told Alexander she could believe he killed the victims, claiming his innocence. His requests to be taken to jail after an impasse in questioning were too ambiguous to invoke the right to silence. See, e.g., *State v.*

Speed, 265 Kan. 26, 37, 961 P.2d 13 (1998) ("'And since we're not getting anywhere I just ask you guys to go ahead and get this over with and go ahead and lock me up and let me go and deal with Sedgwick County, I'm ready to go to Sedgwick County, let's go.'"); *Bullitt v. Commonwealth*, 595 S.W.3d 106, 116-17 (Ky. 2019) (holding the defendant's statement—"[I]f I'm going to jail, I'm saying, let's go, you know, that's all I'm saying, sir. I'm innocent, I'm innocent."—did not invoke the right to silence).

His next three comments followed that same pattern, and all convey he lacked an answer for the detective.

"[Alexander]: Where would we go to find [L.B.]?
"[Flack]: How the fuck should I know?
"[Alexander]: 'Cause you're the only one that does.
"[Flack]: You know what? [Third comment] *Put these on.*
"[Alexander]: You're the only—
"[Flack]: Hey—no—
"[Alexander]: —one that knows.
"[Flack]: —I ain't. I keep fuckin' tellin' you I don't know where the fuckin' baby is.
. . . .
"[Alexander]: Who do we talk to?
. . . .
"[Flack]: How the—I do not know. . . . I only speak one fuckin' language here. I don't know where that baby is. I don't know what happened at that fuckin' house. But apparently you guys got it all sewed up. So do whatever we're doin'. Because I can keep tellin' ya the same fuckin' thing and you're gonna keep fuckin' the same thing. . . .
"[Alexander]: Where was she left?
"[Flack]: I don't fuckin' know. [Fourth comment] *Goddamn, quit—*
. . . .
"[Alexander]: . . . Who the fuck do we talk to, Kyle?
"[Flack]: I don't fuckin' know. You know what? [Fifth comment] *Wrap these up, take me to fuckin' jail because obviously you're just gonna keep fuckin' goin' so I can't give ya information I don't fuckin' have so do what you do*." (Emphases added.)

Flack got heated and made these comments as Alexander asked about the child's whereabouts. The third remark was a dramatic gesture, not a substantive cutting off of questioning. The fourth was so brief; it was inscrutable. And the fifth appears to be another "take me to jail" statement, "*because* . . . I can't give ya information *I don't fuckin' have so* do what you do." (Emphases

added.) Flack was communicating if the officers keep asking questions he could not answer, they should just charge him. But, taken together or separately, he does not unambiguously invoke his right to remain silent.

A few minutes later, the detectives encountered strong resistance when asking Flack why he was in Emporia. In this context, Flack made his sixth alleged invocation: "You wanna . . . fuckin' take me to jail, charge me, whatever, I—we done sat here and fuckin' talked about it, okay? It's that simple." But again, he did not clearly state to stop the interview. Instead, he expressed frustration the officers were unwilling to trust him.

The final four remarks occurred when Alexander asked for detail about his Emporia business involving "some Mexicans."

"[Alexander]: Who were you selling dope to?
"[Flack]: Some Mexicans.
"[Alexander]: What are their names?
"[Flack]: I don't know their fuckin' names.
"[Alexander]: Where do they live?
"[Flack]: I don't know where they live. I meet 'em on the fuckin' south side, at fuckin' at Saint Pablo Park.
"[Alexander]: Okay what do they drive?
"[Flack]: [Seventh comment] *Take me to jail.*
"[Alexander]: What do they drive?
"[Flack]: Drive—[Eighth comment] *take me to jail man*. . . .
"[Alexander]: What are their phone numbers?
"[Flack]: [Ninth comment] *Take me to jail.*
"[Alexander]: Kyle, this is your opportunity to help yourself.
"[Flack]: How am I helpin' myself? You made your mind up.
"[Detective Bob Moews]: No we haven't. That's why we're tryin' to ask you about these people.
"[Flack]: *What do you want me to tell you?* A bunch of fuckin' Mexicans. They're called SSLs, South Side Lobos. . . .
"[Alexander]: What do you sell them?
"[Flack]: Meth. . . .
"[Alexander]: How much was this time?
"[Flack]: Two pounds.
. . . .
"[Alexander]: Who do you deliver for?
"[Flack]: [Tenth comment] *Take me to jail*. . . .
"[Alexander]: Okay, Kyle let's help yourself, okay?
"[Flack]: There is no help myself. . . .
. . . .
"[Alexander]: All right, then let's—help out, okay?

"[Flack]: *I don't know the fuckin' people*. . . . [T]hey just contact me, tell me to pick it up." (Emphases added.)

Flack's comments here—"What do you want me to tell you?"—and his statement—"I don't know the fuckin' people"—lead to a reasonable inference Flack meant "I don't know," rather than invoking his right to remain silent. As the State correctly argues, his claimed invocations were "amenable to a variety of interpretations" or "an expression of frustration and anger," "a recognition of his difficult predicament," "a hyperbolic effort to bolster his own credibility and convince the detectives that he was telling the truth," and "a negotiating tactic . . . intended to shape the investigator's interrogation more favorably to him." In context, these comments show Flack believed the questioning about what happened at Stout's house was irrelevant, rather than exercising a constitutional right. He simply claimed the detectives had already made up their minds about his involvement in these deaths, including their belief he could help them find the child.

Under the circumstances, Flack's "take me to jail" comments lead to multiple interpretations—rendering his communication unclear. Flack had experience with police interviews; read the *Miranda* form, which stated with particularity "you have the right to remain silent," and "you can decide at any time to exercise these rights and . . . not answer any questions or make any statements"; affirmatively stated he understood his rights; and told the detectives he would answer their questions.

We hold Flack did not invoke his right to remain silent by repeatedly suggesting he be taken to jail. Isolated or combined, his statements did not unambiguously and unequivocally assert his right to silence. See *People v. Davis*, 46 Cal. 4th 539, 587-88, 94 Cal. Rptr. 3d 322, 208 P.3d 78 (2009) (holding defendant's statement—"'Well then book me and let's get a lawyer and let's go for it, you know'"—was a challenge to interrogators that defendant employed as interrogation technique, not a means to invoke right to counsel or silence; contrasting these comments with statements later in interrogation, "'get me a lawyer'" and "'it's over and [he was] done'" answering questions, that constituted a valid invocation); *Ridley v. State*, 290 Ga. 798, 801-02, 725 S.E.2d 223 (2012) (holding "take me on to jail" did not unequivocally invoke the

right to silence); *State v. Waloke*, 835 N.W.2d 105, 112 (S.D. 2013) (rejecting the defendant invoked her right to silence by stating, "officers should just take her to jail" as she did not explicitly say she wanted to remain silent or did not want to speak with police anymore); *State v. Cummings*, 357 Wis. 2d 1, 24, 850 N.W.2d 915 (2014) (holding "'take me to my cell. Why waste your time?'" in context not unequivocal invocation); *Kirk v. Carroll*, 243 F. Supp. 2d 125, 132 (D. Del. 2003) (denying habeas relief, reasoning Delaware state court conclusions that, "'Just take me away, please. Take me away,'" and "'Just take me the fuck away,'" were not clear invocations of right to silence was not contrary to clearly established federal law); *Bird v. Brigano*, 295 Fed. Appx. 36, 38 (6th Cir. 2008) (unpublished opinion) (analyzing two exchanges during interview, first Bird said "'there's no sense me sitting here trying to say what happened with me . . . because as usual, when it comes to Derrick Bird, he's guilty'" and then stood up and said, "'You take me in; get booked, man,'" and second in response to detective explaining this is your chance to talk Bird said, "'Everything's right there in the paper. I'm done talking about it'"; holding neither were unequivocal invocations of right to remain silent when viewed in context).

The district court properly admitted his custodial statements.

FLACK'S RIGHT TO PRESENT A DEFENSE

Throughout Flack's case, defense counsel expressed concern they would not be prepared for trial. That concern became especially acute after his original counsel withdrew in 2015. In response, the court continued the proceedings until the following spring. Despite that, the defense requested another continuance and repeated such requests through the pretrial proceedings.

Now, on appeal, Flack asserts the district court's scheduling orders violated his Sixth Amendment due process right to present a defense, his corresponding rights under sections 5 and 10 of the Kansas Constitution Bill of Rights, and finally his statutory rights under K.S.A. 22-3406 (reasonable time to prepare for trial) and K.S.A. 22-3401 (continuances for good cause). From this, we discern two lines for analysis. First, he statutorily argues the district

court abused its discretion by denying persistent continuance requests. Second, he constitutionally asserts a due process denial under the federal and state Constitutions. We reject these claims.

Additional facts

Flack's court-appointed defense team changed during pretrial when his initial lead attorney withdrew in July 2015 and had to be replaced. Flack moved to continue the trial, claiming the defense will not be prepared for a September trial and asked to postpone until next year. The court granted the motion and continued the trial to February 22, 2016.

In November 2015, defense counsel filed a second motion to continue trial. Counsel argued the team's difficulty replacing the original attorney created a deficiency that could compromise Flack's right to counsel. The team further noted it lacked sufficient time to review discovery and the complete investigation based on ABA Guidelines. See American Bar Association, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 920 (2003). The team indicated it was still developing its mitigation case. It had identified family members central to Flack's "social history" but had not yet interviewed them; some were out of state, while others were unwilling to meet with defense counsel. It had hired experts in childhood development, forensic psychiatry, and prison adjustment, but the interviews were pending. And it was still collecting school, medical, and psychiatric records. Finally, the team said its heavy caseloads were already hard to manage and would be compounded by the holidays.

The court heard the motion in late November ex parte and in camera. It acknowledged the team's difficulties but pointed out the case had been pending for about two years. Expressing frustration with the apparent lack of progress, it denied the request without the State's input as it was skeptical more time would materially aid the defense.

In January 2016, the defense renewed its motion, which was again heard by the court ex parte, in camera. Defense counsel reiterated the same concerns but highlighted the need for a neuropsychologist to examine Flack and testify during the penalty

phase. The court denied the motion and pushed the defense to retain an expert. It asked the defense to file a new continuance motion "to clarify a little more succinctly the particular issues that prohibit you in proceeding." It said it would revisit the issue the next week.

When voir dire began the following week, the defense filed its third continuance motion. The court heard the motion in camera after that day's questioning. Defense counsel reiterated their concerns and noted the defense team had lost its administrative support. The court systematically worked through the concerns, focusing especially on the efforts to retain experts. It said, "[C]ertain issues . . . should have been taken care of quite [some time] ago." It perceived the defense's concerns as mainly being mitigation preparation and asked the defense to push forward over the two weeks remaining before the scheduled opening statements. It also advised the defense to continue preparing its mitigation case during the guilt phase.

Toward the end of the week, the court returned to the continuance motion. By that time, the defense had retained a neuropsychologist to begin work within a few weeks and would take about a week to finish. The parties discussed a plan to push back the guilt phase to accommodate the expert and proposed the court complete voir dire and conduct jury selection by February 17. The guilt phase would be pushed back to March 7, and the penalty phase to March 28. The court agreed, and the trial proceeded on that schedule. But when the trial began, defense counsel asked for further postponement, saying only "[w]e believe we've litigated this issue thoroughly." The court denied the request.

Statutory challenge—a reasonable time to prepare for trial

We review continuance denials for abuse of discretion. A court abuses its discretion when its action is unreasonable or based on an error of law or fact. The party asserting an abuse of discretion must demonstrate it. *State v. Hillard*, 315 Kan. 732, 760, 511 P.3d 883 (2022). Here, Flack does not claim the district court erred based on an error of law or fact; our focus is whether the district court erred by acting unreasonably.

K.S.A. 22-3401 requires all persons charged with a crime to be tried without unnecessary delay and, at the same time, allows a district court to continue proceedings when good cause is shown. In addition, K.S.A. 22-3406 entitles a defendant to "a reasonable time to prepare for trial." Flack alleges he was denied a reasonable time to prepare his case.

The ABA Guidelines thoroughly outline recommendations for defense counsel's duties in all aspects of death penalty cases. Flack relies almost exclusively on the guidelines and argues those obligations made his case especially time consuming, justifying his requested continuances. Generally, capital cases have "extraordinary complexity and demands" compared to noncapital cases. *ABA Guidelines*, 31 Hofstra L. Rev. at 921. For example, capital cases increase defense counsel's obligations to investigate mitigators. See generally 31 Hofstra L. Rev. at 924-28. In addition, counsel should "at all stages of the case . . . make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client." ABA Guideline 10.5. Counsel also must "conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guideline 10.7(A). And counsel must consider and assert all potential legal claims at both the guilt and penalty phases and each claim's costs and benefits. ABA Guideline 10.8.

The ABA Guidelines are a relevant guidepost for evaluating an ineffective assistance of counsel claim in a capital case, but they are not "coextensive with constitutional requirements." *State v. Cheatham*, 296 Kan. 417, 433, 292 P.3d 318 (2013). The guidelines and their comments are useful to gauge what is "a reasonable time to prepare for trial" under K.S.A. 22-3406, and how a district court should exercise discretion when deciding whether to grant a continuance. The concern is not whether counsel satisfied the guidelines, but rather whether, in considering various circumstances presented in a particular case, including the guidelines, the district court gave the defense reasonable time to prepare for trial. Granted, the guidelines can contextualize the problems facing capital defense counsel, but caselaw ultimately governs whether a continuance denial rises to an abuse of discretion.

In *State v. Robinson*, 303 Kan. 11, 363 P.3d 875 (2015), *disapproved of on other grounds by State v. Cheever*, 306 Kan. 760, 402 P.3d 1126 (2017), for example, we found no abuse of discretion in a district court's denial of continuances in a capital murder case after comparing it to other similar cases. See 303 Kan. at 92-93 (listing cases). There, we acknowledged retained counsel's withdrawal "certainly increased appointed counsel's workload and responsibility" but noted "they were not starting from scratch." 303 Kan. at 92. At the time of the withdrawal, counsel had been working for seven months. And the district judge granted Robinson a continuance, giving newly appointed counsel another seven months to prepare. "Appointed counsel also had the benefit of the preparation [prior counsel] had done over the course of nearly 2 years." 303 Kan. at 92. The *Robinson* court held "the district judge properly exercised his lawful discretion by refusing requests for a second continuance to prepare the guilt phase defense," reasoning a reasonable fact-finder could have agreed with that ruling. 303 Kan. at 93; see also *State v. Green*, 315 Kan. 178, 179-80, 505 P.3d 377 (2022) ("A court abuses its discretion if its action . . . 'is . . . unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial court.'").

In Flack's case, almost two years and 10 months elapsed between his initial counsel entering an appearance and trial. Nearly two years passed between his second counsel entering an appearance and trial, and almost a full year passed between his third counsel entering her appearance and trial. Initial and second counsel worked together for about one year and three months, and the remaining counsel worked together for about 250 days before trial after initial counsel retired in July 2015.

The first continuance request relied on the ABA Guidelines and focused on initial counsel's withdrawal, remaining counsel's other caseload and inexperience in capital cases, the volume of discovery to review, and the need to retain expert witnesses. The court granted the continuance, mostly based on the original counsel's withdrawal.

Flack requested a second continuance so counsel could provide Flack "with the high-quality legal representation contem-

plated under prevailing Constitutional and professional standards." The motion again cited the ABA Guidelines and highlighted defense counsel's independent duty to investigate. The defense noted it had recently received "20,000 pages and 500 discs" of discovery and "more than 100 scientific reports" from the State. They were also waiting on their own experts' reports. The court deferred ruling and asked the defense to push forward and keep it apprised of problems as they arose.

The third continuance remained much the same as the second. The defense filed it at the court's request during voir dire to reflect the previously raised issues' status. The defense was still reviewing and synthesizing discovery and conducting its investigation. But the most pressing issue was securing a neuropsychologist, which the defense did on February 4. The court, with the State's agreement, pushed the trial's start date from February 22 to March 7 to allow the expert to evaluate Flack.

We discern no abuse of discretion in denying the second and third continuance requests. As in *Robinson*, Flack's initial counsel was a single member of a three-counsel team. He left second counsel with over a year on the case and a third counsel who joined the team a few months earlier. Similarly, original counsel's withdrawal did not require the team to start from scratch. Recognizing second counsel could not just pick up where original counsel left off, the court granted a continuance of several months. As to the second request, the court pushed the defense to make progress and pointedly questioned what aspects were challenging. Over the next months, the outstanding tasks narrowed, even as the defense continued to press for postponement. The largest obstacle, needing a neuropsychologist, became clear as trial approached, and the court granted a short continuance.

Throughout this process, the record reflects the court seriously considered the defense's concerns and worked to address them as they arose. It reasonably handled the case and did not abuse its discretion.

Constitutional challenge—right to present a defense

Flack argues the denial of his second and third continuance requests violated his right to present a defense under the Sixth

Amendment to the United States Constitution and under sections 5 and 10 of the Kansas Constitution Bill of Rights. We reject these arguments.

The Sixth Amendment states: "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." Section 5 declares: "The right of trial by jury shall be inviolate." And section 10 "allow[s]" the accused 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 . . . . No person shall be a witness against himself, or be twice put in jeopardy for the same offense."

The phrase "right to present a defense" is a blanket term for a collection of a defendant's rights, including a right to present evidence on his or her own behalf. See *State v. Carr*, 300 Kan. 1, 207-08, 331 P.3d 544 (2014) (*R. Carr I*) (discussing nature of "right to present a defense," focusing on rules for excluding evidence and right to present theory of defense), *rev'd and remanded on other grounds* 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016); *United States v. Markey*, 393 F.3d 1132, 1135 (10th Cir. 2004) (a defendant's "right to present a defense" refers to the collective rights "to testify, present witnesses in his own defense, and to cross-examine witnesses against him" rooted in the Fifth and Sixth Amendments). In some contexts, a continuance denial may implicate rights under the umbrella of "right to present a defense." See *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983) ("[A]rbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel.").

The United States Supreme Court provides a "continuance is traditionally within the discretion of the trial judge." *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). When a request is reasonable, a continuance denial may "myopic[ally] insist[] upon expeditiousness . . . render[ing] the right to defend with counsel an empty formality." 376 U.S. at 589.

The Court conceded, "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate [the accused's constitutional rights]," but it noted, "The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." 376 U.S. at 589.

We review a continuance denial's possible interference with the right to present a defense de novo. See *Robinson*, 303 Kan. at 85. Like the *Ungar* Court found the answer in the circumstances, we examine various factors present in a particular case. In *State v. Anthony*, 257 Kan. 1003, 898 P.2d 1109 (1995), a defendant contended the trial court denied him his right to retain chosen counsel by failing to grant a continuance so that his retained counsel could prepare for his case. When rejecting his constitutional claim, the *Anthony* court considered several factors, including whether other continuances have been granted; whether legitimate reasons were shown to postpone trial; and whether denial of the continuance would prejudice the defendant. The *Anthony* court held the trial court did not abuse its discretion in denying a continuance in which the sole reason for the continuance was to permit new counsel to enter his appearance. 257 Kan. at 1019. Here, the trial began some eight months after his original counsel withdrew, and Flack proceeded with the same appointed counsel team he had all along. Moreover, the district court gave counsel reasonable time to prepare a capital case given the defense team's relative continuity and the total time available.

We hold the district court's handling of continuance requests did not violate Flack's Sixth Amendment right to present a defense or his rights under sections 5 and 10 of the Kansas Constitution Bill of Rights.

DENIAL OF FOR-CAUSE CHALLENGES TO SITTING JURORS

Throughout voir dire, the district court denied several defense for-cause challenges to selected jury members. These challenges questioned prospective jurors' predisposition to the death penalty. Some challenged members joined the 20 jurors and alternates who heard the case, and some of those joined the 12 who convicted Flack and sentenced him to death. On appeal, Flack argues the

district court committed reversible error by denying his challenges. Again, we disagree.

Additional facts

When voir dire began, the court separated prospective jurors into six panels. It questioned two panels per day over nine days to reduce the initial group from which the parties could exercise peremptory challenges. Each party received 20 peremptory challenges to produce a final jury of 20, including eight alternates.

During peremptory challenges, defense counsel asked for "extra strikes" because the court denied so many of the defense's for-cause challenges. The court ruled this was premature since the defense had not yet exhausted all of its peremptory strikes. After exercising its seventeenth peremptory challenge, the defense renewed its request for more strikes. The State opposed this for two reasons. First, the defense still had some peremptory strikes. Second, procedurally it was unclear where the new strikes would come from because alternate jurors were necessary. The court denied the request, reasoning the defense had already struck the only juror who was arguably "automatic death." The defense then formally objected to the 20 selected jurors' composition. The court randomly selected alternate jurors but did not disclose to the jury who it selected until deliberations.

When trial began, the court released three jurors after each raised an issue, bringing the jury down to 17. Before deliberations, the court named the alternates, and the 12 primary jurors deliberated and ultimately entered guilty verdicts.

Prior to the penalty phase, the court conducted a second voir dire at the defense's pretrial request to determine whether any jurors, including the alternates, had reached an opinion on a death sentence. The jurors were questioned individually, outside the presence of the others. The court asked five questions and then allowed follow-up questions by the State and defense.

Juror J.B.'s responses during questioning raised concerns when he expressed reluctance to change his mind about imposing the death penalty. While claiming he would follow the law and consider all mitigating circumstances, his skepticism persisted. After questioning the other jurors, the defense asked to remove

two potential jurors, including J.B. Given J.B.'s role as part of the 12-member jury that convicted Flack, the court removed J.B. But it retained the other juror as being an alternate.

On appeal, Flack lists 18 potential jurors denied a for-cause challenge. But Flack used peremptory challenges to remove 16 of those 18.

Standard of review

We review for-cause juror challenges for an abuse of discretion because the trial judge is better positioned to make the ruling. *Robinson*, 303 Kan. at 154. "Appellate courts have traditionally accorded a great deal of deference to a trial court's ruling on a juror challenge for cause." *State v. Miller*, 308 Kan. 1119, 1138, 427 P.3d 907 (2018).

Discussion

K.S.A. 22-3410(1) permits a party to "challenge any prospective juror for cause." Among the nine grounds listed in K.S.A. 22-3410(2) is: "(i) His state of mind with reference to the case or any of the parties is such that the court determines there is doubt that he can act impartially and without prejudice to the substantial rights of any party." In death penalty cases, prospective jurors may be excluded when their views on the death penalty "would 'prevent or substantially impair the performance of his duties as a juror.'" *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985). This applies whether the challenge is directed at death-leaning or life-leaning jurors. *R. Carr I*, 300 Kan. 1, Syl. ¶ 20. The pertinent question for our appellate review is not whether we agree with the district judge's ruling but, instead, whether the record fairly supports its ruling. *Robinson*, 303 Kan. at 155.

Of the 18 jurors Flack discusses, only M.F. and J.H. ended up as jurors. And as the State correctly notes, the relevant question is whether the seated jurors prejudiced Flack. See *Miller*, 308 Kan. at 1138 (failing to excuse a juror for cause requires conviction reversal only when the defendant demonstrates he or she was prejudiced as a result). Even if a defendant was compelled to use peremptory challenges "to correct erroneous for-cause rulings," it is

a nonissue absent the defendant showing the sitting jury was prejudiced. 308 Kan. at 1139. Flack, as the party asserting the error, bears the burden of establishing the denial of a for-cause challenge constituted an abuse of discretion and resulted in prejudice. 308 Kan. at 1138.

Juror M.F.

During the State's initial voir dire, the prosecutor asked M.F. about her general views on the death penalty. In the past, M.F. strongly supported the death penalty without much knowledge. But after working for a judge who opposed it, she reevaluated her stance. She said the judge told her that "many people are in prison that later they're found not guilty." She then noted, "I need to be open to hearing all of the information and understanding the whole story before I can say strongly one way or the other."

During defense questioning, M.F. said she would consider factors such as the degree of the childhood abuse or the mental illness, as well as a person's adaptability to prison, as potential mitigating circumstances. But she "need[ed] more information to make a decision." Counsel further asked about her shifting death penalty views. She reiterated, "I don't feel strongly one way or the other about the death penalty. But it definitely is going to have to be very clear [that the defendant is guilty.]"

In her questionnaire, M.F. suggested childhood experience "plays a huge role" but should not affect capital sentencing. She believed individuals must take responsibility for their choices and must not blame others. M.F. noted she would consider factors "more serious than [abuse or unloved]" necessary to warrant capital punishment.

The defense challenged M.F. for cause, focusing on her questionnaire response suggesting the death penalty was appropriate in a multiple victim case "if there's absolutely no question about [the] person's guilt." She "equivocate[d]" in her written responses about her beliefs and opinions on the death penalty, which defense counsel claimed made it "hard to draw out any information what her thoughts are." The defense characterized her responses as "it depends." Counsel argued M.F. conveyed believing people must take personal responsibility for their actions created a "mitigation

impairment with her." Ultimately, "there's a doubt that she could be impartial."

The court rejected this, reasoning M.F. appeared to be more favorable to the defense than some jurors the defense previously challenged. M.F. affirmed she had not formed an opinion on Flack's guilt from media or pretrial sources. The court emphasized her evolving beliefs about the death penalty and her "conscientious" approach, expressing faith in her ability to be fair, impartial, and law-abiding at sentencing.

In his brief, Flack argues M.F. dismissed the importance of extreme childhood experiences and said mercy would play no role in her penalty decision. He contends her stance, even after agreeing to follow the law, is "devastating" to a fair penalty trial, as her "willingness to follow the law does not prevent long held *biases* from affecting a verdict."

But contrary to Flack's contention, during voir dire, M.F. consistently expressed she could not definitively answer how various factors would weigh in her decision-making process without knowing more. She clarified her questionnaire response, explaining that while she would not be swayed by typical childhood traumas, she would consider more serious circumstances. The record shows M.F. was open to mitigation evidence, and her reservation about childhood experiences pertains more to their abstract persuasiveness rather than a complete rejection.

Finally, Flack seemingly argues a juror is biased if he or she is unwilling to rely on the nebulous concept of mercy alone for mitigation. But he cites no support for this. As Justice Scalia once noted, "what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained." *Kansas v. Carr*, 577 U.S. 108, 119, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016). So even if M.F. said "mercy"—a concept she equated with "pity" during voir dire—should not be considered on her questionnaire, she remained willing to consider the various circumstances in Flack's case before reaching a decision.

Rather than showing a preformed bias favoring the death penalty, M.F.'s voir dire responses consistently reflected a willingness

to wait and see the evidence before deciding, which is exactly what a juror should do. The court scrutinized her qualifications and outlined its reasons why she was a qualified juror. As it pointed out, given her hesitation about the death penalty, if anything, M.F. was a favorable defense juror. It was neither error nor an abuse of discretion for the court to deny this challenge.

Juror J.H.

During voir dire, J.H. reiterated a neutral view on the death penalty, expressing a commitment to base his decision on the case's facts and the court's instructions. He acknowledged "there's no rehabilitation" for some people but noted sometimes "people get into situations" and there are "so many hypothetical situations out there." J.H. recognized the weighty responsibility of imposing the death penalty, underscoring the need for certainty in such decisions.

On his questionnaire, J.H. indicated a belief that mercy should not play a role in sentencing. And when asked whether he believed in an "eye for an eye," his answer was, "Let the punishment fit the crime." During voir dire, when questioned about his "eye for an eye" response, he explained he could envision "a hypothetical situation" in which a crime is "so horrific" that he could support the death penalty. But he acknowledged the death penalty is not suitable for every murder case, although it is "there for a reason" and there are situations in which it can be used. J.H. admitted that until he learned the juror's role during this process, he had not deeply considered his stance on the death penalty.

Following the conclusion of J.H.'s panel, defense counsel challenged him for cause based on his questionnaire responses. Counsel interpreted J.H.'s "eye for an eye" response as potentially shifting the burden to the defense to "prove . . . that life without the possibility of parole was deserved." The court rejected this challenge, finding J.H.'s responses indicated he has not yet made up his mind one way or the other and characterizing him as "middle of the road" on the death penalty. The court found no reason to doubt his fairness and impartiality during the guilt phase, and that he conveyed a willingness to consider the mitigating circumstances if the case reached the penalty phase.

On appeal, Flack claims the district court abused its discretion by denying his for-cause challenge to J.H., because of his questionnaire responses: "Let the punishment fit the crime," and mercy should not be a factor in his decision-making. Flack continues that J.H. "harbor[ed] an unacceptable bias on a matter crucial for a fair proceeding," even if he agreed to follow the law.

Nevertheless, like M.F., the record establishes J.H. would listen to the evidence and decide the case on the facts and law. And we hold the district court did not abuse its discretion in denying these challenges.

Jurors not challenged for cause

Besides M.F. and J.H., Flack argues three other seated jurors were similarly biased: J.S., C.C., and G.B. He asserts both J.S. and C.C. expressed their belief that childhood experiences and mercy were irrelevant considerations for determining punishment, citing only their questionnaire responses. For J.S. and C.C., Flack adds that although each agreed to consider childhood experiences during voir dire, the prosecution led them to agree only to "consider" mitigators, without committing to "meaningful consideration," potentially prejudicing the defense.

As for J.S., the defense questioning was cursory. When asked about his thoughts on the death penalty, he replied he could impose it in some cases depending on the evidence. Similarly, when asked about his starting position for or against the death penalty, he stated he did not have an opinion until he considered the evidence. Defense counsel asked each juror if they could "consider mercy for that guilty murder"; J.S. simply replied, "Yes." Counsel did not follow up. In fact, his response to most questions was a simple yes or no. And he said he would follow and apply the law. When asked about mitigating factors, he answered he would consider the evidence whether "the person really . . . [was] aware of what he was doing."

The State asked C.C. to elaborate on her questionnaire responses about the effect of childhood experiences. She elucidated upbringing may not always determine the outcome, but "a loving, caring home" increases the likelihood of the individuals "turning out to be better people." Despite this, she acknowledged she had

written that "people are responsible for their actions." The State followed by asking whether she could consider childhood experiences as mitigating factors, C.C. replied people "have to be accountable for [their actions]" but she "would consider aggravating and mitigating" factors and "weigh them up" in her decision-making process.

When questioned by defense counsel, C.C. acknowledged she placed greater importance on the circumstances of killing in the context of aggravating and mitigating considerations. She confirmed "the background of a person" would not matter to her. But she clarified a commitment to fairness and honesty in weighing these factors. After further questioning, C.C. agreed she would give the defense's mitigators weight, consider them, and "truly give [them] meaningful consideration."

As for G.B., Flack contends he "expressed strong biases in favor of the death penalty, writing that he definitely favored the death penalty, if the murder of a mother and child were proven beyond a reasonable doubt." G.B. did not think childhood experiences were relevant to capital punishment, as there was "'no excuse for capital murder.'" Flack claims the "upshot" of G.B.'s agreement to "consider" childhood experiences after saying they were not "relevant" on his questionnaire was "that he would consider them but not give them relevance."

On his questionnaire, G.B. acknowledged the role of upbringing in adult behavior but maintained it did not excuse capital murder. The State asked whether his position changed after he understood the process for imposing the death penalty; G.B. said he would consider any mitigating circumstances he was instructed to consider. Defense counsel gave G.B. a hypothetical of a conviction with various aggravators. Counsel asked how jurors should view the death penalty before factoring in any mitigators. G.B. answered, "You have to look at the mitigators to get it on the scale and the aggravators would have to outweigh the mitigators." Counsel characterized his questionnaire response about the likelihood of imposing the death penalty for the premeditated capital murder of a woman and child as "almost automatic." But G.B. clarified that was not what he had meant, "[i]t depends on all the evidence presented." G.B. also noted that after he learned "how

the system works," he could consider childhood experiences as a mitigating circumstance.

The State, of course, did not have a chance to rehabilitate the jurors because Flack did not challenge them during the trial. Likewise, the court could not make a record for appellate review on each juror's ability to be fair and impartial. Thus, Flack's failure burdens our analysis.

Flack's cursory argument about these jurors' prejudices focuses on their limited responses and matter-of-course agreement to apply the law as instructed. But the record establishes trial counsel never probed deeper into the concerns appellate counsel now raises. Nothing shows these jurors were improperly prejudiced or biased against Flack. The district court conducted voir dire carefully and cautiously, addressing the defense's concerns seriously. The follow-up voir dire questioning either clarified or rehabilitated each juror's positions, so the court could reasonably conclude these jurors would be fair and impartial. We find no error.

GUILT PHASE PROSECUTORIAL ERROR

Flack asserts three instances of guilt-phase prosecutorial error that, individually and collectively, warrant conviction reversal. First, he claims the State's repeated use of the expression "level[ing] the scales" during voir dire to describe the jury's role at sentencing negated the presumption of life in Kansas. Second, he argues the State's mention of Mother's Day during opening statements to describe the discovery of L.B.'s body was inflammatory and meant to provoke juror sympathy. Third, he claims a baseball analogy during the State's closing rebuttal argument gave an incorrect reasonable doubt definition. We disagree.

Standard of review

We review prosecutorial error claims in two steps: error and prejudice. First, we determine whether the alleged acts "'fall outside the wide latitude afforded prosecutors to conduct the State's case.'" *State v. Blansett*, 309 Kan. 401, 412, 435 P.3d 1136 (2019). Second, if we find error, we then "'determine whether the error prejudiced the defendant's due process rights to a fair trial.'" 309

Kan. at 412. In the second step, we apply the constitutional harmlessness standard laid out in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), which demands the State show beyond a reasonable doubt that the prosecutorial error did not affect the trial's outcome in light of the entire record. In other words, the question is whether there is no reasonable possibility that the error contributed to the verdict. *Blansett*, 309 Kan. at 412.

Leveling the scales

Before each voir dire panel, the State consistently described the transition from the guilt phase to the penalty phase by using the colloquialism "level[ing] the scales." In one panel, for example, the prosecutor told jurors they would once again hear the evidence and follow the judge's instructions. And based on the evidence and the law, the jury would determine whether the sentence should be life without the possibility of parole or the death penalty. The prosecutor illustrated the "concept of the process" as: "You have a scale, you level the scale. . . . Then you consider the circumstances."

These included the statutory aggravating circumstances the State had to prove beyond a reasonable doubt on one side and the mitigating circumstances, which need not be proved beyond a reasonable doubt, on the other. The prosecutor told the panel, "The weighing of circumstance is an individual determination" "based upon your own life experiences, and your values." The prosecutor concluded if "[t]he aggravators outweigh the mitigators, imposition of the death penalty. If the mitigators outweigh the aggravators, life without the possibility of parole. If they're equal, imposition of the death penalty." The prosecutor used a similar description with each panel.

In Kansas, our statutory scheme for imposing the death penalty requires a sentencing jury to find beyond a reasonable doubt at least one statutory aggravating circumstance and, "further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." K.S.A. 2022 Supp. 21-6617(e). Under this scheme, if the aggravating circumstances and mitigating circumstances are in "equipoise," as

we have termed it, the sentence is death. *Kansas v. Marsh*, 548 U.S. 163, 179, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

In *Marsh*, the defendant argued the equipoise provision "establishes an unconstitutional presumption in favor of death." 548 U.S. at 166-67. But the Court rejected that argument and held it was constitutionally permissible for an equipoise weighing to result in a death sentence. In reaching that conclusion, the Court stated our "sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction" because it requires a life sentence if the State fails to meet its burden to prove an aggravating circumstance. 548 U.S. at 178. Flack argues the presumption of life the Court found "dominated" our system means the "jury does not start with level scales." He asserts that because "'level scales' is a more colloquial term for equipoise," the prosecutor's language "with every jury panel, and thus with every seated juror," "primed the jury to start from equipoise rather than the proper presumption of life."

We agree with Flack's premise that our capital sentencing scheme includes a presumption of life. But we do not agree with his conclusion that the prosecutor's "level[ing] the scales" phrasing contradicted that presumption or misstated the law. The "default" sentence after a capital conviction is a life sentence without the possibility of parole. And that default continues until the State proves, and the jury finds, an aggravating circumstance beyond a reasonable doubt. It is only at that point the weighing process or "scales" come into play. The prosecutor's analogy did not misinform the jury and imply a presumption of death. Rather, it conveyed just the opposite: that the guilty verdict itself carried no weight in sentencing deliberations.

We hold the prosecutor's description of the deliberative process accurately explained the State's burden to prove an aggravating circumstance and the weighing process that follows. The prosecutor's comments were not error.

Prosecutor's reference to Mother's Day

The State's opening statement made a single reference to Mother's Day before describing law enforcement's discovery of L.B.'s body: "In just a few hours it will be Mother's Day. It's May

11th, 2013. And at this point in the evening the sun has set, darkness has fallen, and there's a group of officers and they're huddled together on a bridge." Flack argues the fact it was almost Mother's Day was immaterial and meant to inflame the jurors' sympathies. We disagree.

Prosecutors have wide latitude when crafting opening and closing statements, so long as their statements "'accurately reflect the evidence, accurately state the law, and cannot be "intended to inflame the passions or prejudices of the jury or to divert the jury from its duty to decide the case based on the evidence and the controlling law."'" *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021). When deciding whether a prosecutor's statement falls outside the wide latitude given, we consider "'the context in which the statement was made, rather than analyzing the statement in isolation.'" 313 Kan. at 407.

In *State v. Henry*, 273 Kan. 608, 640, 44 P.3d 466 (2002), the court determined a prosecutor's comment to "'think about Mother's Day yesterday, and her mom how she must have felt. Now [the victim] will never have a chance to be a mother, this young professional sharp, security conscious woman . . . .'" The *Henry* court noted, "The prosecutor's reference to the mother's grief and the introduction of the mother's testimony was not relevant to whether the defendant was afflicted by mental disease or defect at the time of the alleged crimes. The prosecutor clearly intended to inflame the passion and prejudice of the jury." 273 Kan. at 641; cf. *State v. Chandler*, 307 Kan. 657, 690, 414 P.3d 713 (2018) (prosecutor stated defendant "'robbed her own children of their father'" and elicited sympathy for the children).

But the prosecutor's reference to Mother's Day here is distinguishable from *Henry*. The prosecutor was painting a scene describing law enforcement's discovery of L.B.'s body that included many details not necessary to the case, such as describing the cool spring evening and use of flashlights. The only reference to Mother's Day was followed by 11 days of testimony and evidence, so its alleged appeal to passion seems overblown. The State never mentioned it again. Nor did it ever imply finding L.B.'s body just before Mother's Day was any worse or more tragic than any other

day. The comment was within the wide latitude given to prosecutors in crafting an opening statement and not error.

Baseball analogy

Flack's final guilt-phase prosecutorial error challenge is to a Chicago Cubs analogy the prosecutor used in rebuttal closing argument. The prosecutor stated:

> "We've not asked you to ignore anything. What we've asked you to do is look at the totality, look at all of it. When you consider the defendant's actions before the crime, during the crime, after the crime. When you consider the defendant's words, his statements about what happened. And then you take that and you consider other witness observations, the physical and scientific evidence, when you look at all of that, all of that leads to one conclusion. It's him. It's no one else. It's simply him. No matter how many times, no matter how many ways, the defendant's version that there were other people involved is simply not supported by evidence.
>
> "You know in terms of possibility, every February I'm a happy man. I'm a happy man because on February 15th it's the start of spring training and as a lifelong Chicago Cubs fan, I am filled with hope because it is possible, it is possible that this could be the Cubs year. But inevitably, inevitably sometimes by June, sometimes late August, it is no longer possible that it's going to be the Cubs year. I'll keep my fingers crossed in terms of the season. I'll keep superstitions and I'll have to go spit in the river now or something. But there's always possibilities, but there comes a point, just like in baseball that at some point in the season it's no longer possible that our team is going to win the pennant or our team is going to go to the World Series.
>
> "There comes a point when it is not possible and it's not possible because it's not supported by hard evidence. And the hard evidence, the circumstantial evidence here, all overwhelmingly points to one person and one person alone."

Flack argues this analogy improperly sought to define reasonable doubt akin to the puzzle analogy disapproved of in *State v. Sherman*, 305 Kan. 88, 115-18, 378 P.3d 1060 (2016). Again, we disagree.

In *Sherman*, the State showed a PowerPoint slide depicting Mount Rushmore with Theodore Roosevelt's face removed. The slide contained the question, "'Do you have a REASONABLE DOUBT this is Mt. Rushmore??'" and, "'Even though you can't see all four figures!!'" 305 Kan. at 96. We disapproved because this analogy "improperly equated a juror's prior knowledge about the picture being displayed to his or her 'life experience.'" 305

Kan. at 116. It inappropriately "foster[ed] the illusion that the jurors already know the full picture of the case they are hearing and are simply looking for pieces of evidence to match it." 305 Kan. at 116. Contrary to that implication, "we insist that jurors have minimal to no prior knowledge of a case precisely to prevent them from seeking evidence to confirm a preconceived narrative and conclusion." 305 Kan. at 116.

Flack argues the baseball analogy just substitutes baseball wins and losses for pieces of a puzzle. He argues the prosecutor was telling the jury it did not need to see the full season play out and could turn off the TV and assume the worst "based on their knowledge of how such things usually go." But one obvious problem with his argument is that the analogy does not attempt to describe reasonable doubt, let alone define it. The prosecution does not mention reasonable doubt until later, when it still does not try to define it.

Based on the context, this permissibly appealed to the jury's common sense to evaluate the weaknesses in Flack's case. See *State v. Butler*, 307 Kan. 831, 867-68, 416 P.3d 116 (2018) (permissible for prosecution to say the defendant's version of events was ridiculous, not believable). The prosecutor specifically mentioned Flack's claim that more people were involved and used baseball to argue the evidence does not support that. He seems to have been saying that at some point, based on how a baseball season works, a team might have so many losses it simply cannot win the season—it is not possible to get to the World Series. By analogy, the prosecutor pointed out there was more than enough contrary evidence to show Flack's version was impossible. We hold this was not error.

We find no prosecutorial error during the trial's guilt phase.

PENALTY-PHASE PROSECUTORIAL ERROR

Flack alleges three prosecutorial errors that occurred in the penalty-phase closing arguments. He claims the prosecutor erred by (1) repeatedly asking the jury to consider, "What is justice?" (2) stating facts not in evidence when he implied Flack could access mental health treatment in prison and stated Flack's family would be "healed" regardless of the sentence, and (3) improperly

interjecting opinion into the case by suggesting as a "seasoned prosecutor" he knew the death penalty was appropriate here. We hold no error occurred.

Standard of review

Our standard of review for prosecutorial error claims in the penalty phase largely remains unchanged from the guilt phase, although, in a capital murder trial, a prosecutor has a "'heightened duty'" to refrain from committing error due to "'the life and death nature of the proceedings.'" *State v. Kleypas*, 305 Kan. 224, 315, 382 P.3d 373 (2016) (*Kleypas II*). If there are multiple prosecutorial errors, the inquiry "'is whether the total effect of the cumulative [errors] found to exist, viewed in light of the record as a whole, had little, if any, likelihood [or any reasonable possibility] of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances.'" 305 Kan. at 315.

"What is justice?"

Flack challenges the prosecutor repeatedly asking, "What is justice?" during opening and closing statements. His opening statement began and ended with this theme:

> "The penalty phase, it's a narrow band of cases in Kansas that require this litigation. There has been a capital murder conviction. The elected law enforcement official from this county, Mr. [Prosecutor], has decided that twelve well-vetted jurors from the county where the crime occurred should decide this: *What is justice? What is justice?*
>
> . . . .
>
> "The core issue comes down to this: Once the arguments are over, you're in the jury room, deliberations have begun, the foreperson receives the instructions.
>
> "The question will become: Abiding by the instructions that you're given, considering the facts and the circumstances that you have found to exist, each of you will have to ask yourself, *what is appropriate justice?*
>
> "The evidence will show . . . a twenty-one year old mother that before the trigger was pulled, and the contents of a PDX round tore through her brain, the evidence will show that she was stripped from the waist down. The evidence will show that she's unable to hold those who are around her because her hands are tied, bound behind her back.
>
> "The evidence will show that she is unable to verbalize to those who are around her because her mouth is gagged. The evidence will show that she is unable to clearly see what is around her because her glasses have been taken off.

"The evidence will show that all she's left with is this: She can feel, smell, and hear. She can feel the carpet on her face. She can feel the air on her naked legs and buttocks. She is breathing the air in that master bedroom. And she is hearing the footsteps, the footsteps of those around her. The words and the sounds of those around her. *What is appropriate justice? What is appropriate justice?*

"The evidence will show that [K.B.'s] eighteen month old child, [L.B.], standing by her dead mother's body. The evidence will show that the trigger was pulled and the contents of that PDX round tore through her small torso. *What is appropriate justice? What is appropriate justice?*

"Life without the possibility of parole, imposition of the death penalty? It is for you to decide." (Emphases added.)

At the end of the State's pre-rebuttal closing, the prosecutor briefly returned to this theme:

"The core issue in this case, abiding by the instructions given to you, considering the facts and the circumstance that you have found to exist. Each of you will have to ask . . . yourself this: *What is appropriate justice? What is appropriate justice?* A 21 year old mother shot in the back of the head, followed by her 18 month old child shot in the back. You have to make a decision, *what is appropriate justice? What is appropriate justice?* Imposition of the death penalty? Life without the possibility of parole? That decision is for you to make." (Emphases added.)

Flack compares these comments to disapproved prosecutorial appeals to justice and sympathy. See, e.g., *State v. Holt*, 300 Kan. 985, 996-99, 336 P.3d 312 (2014). Flack argues "the prosecutor was clearly asking, 'What is justice *for them*?'" The State counters he takes the comments out of context—the prosecutor correctly set forth the penalty phase procedures, and he never asked the jury to return a death verdict or argued it would be appropriate. Even so, Flack asserts the comments "distracted the jury" from its duty to decide the case on the facts and the law, as given by the judge.

We disagree. In *Holt*, we determined a prosecutor erred by "stating that the jury has the 'privilege . . . to right a wrong,' and '[y]ou and only you can right the wrong that the defendant has committed in taking a young man's life.'" *Holt*, 300 Kan. at 999. The remarks were "akin to asking the jury to administer justice for the victim" rather than "a general appeal for justice." 300 Kan. at 999. And we noted the prosecutor "'divert[ed] the jury from the evidence so as to obtain a conviction based upon sympathy for the victim.'" 300 Kan. at 998.

Our pre-*Holt* caselaw similarly distinguished between a general appeal for justice and an appeal for a jury to do justice *for the*

criminal victims, although these cases generally declined to draw a bright line. See, e.g., *State v. Britt*, 295 Kan. 1018, 1030-31, 287 P.3d 905 (2012) (prosecutor's request for the jury to "'do the right thing, here, find him guilty'" was "more aptly characterized as a general appeal for justice that was not explicitly tied to the community or the victim"); *State v. Simmons*, 292 Kan. 406, 419, 254 P.3d 97 (2011) ("[A] prosecutor commits misconduct during closing argument when, in effect, he or she asks the jury to base its deliberations on sympathy for the victim or victim's family or to otherwise argue the impact of a crime on a victim or victim's family."); *State v. Martinez*, 290 Kan. 992, 1015, 236 P.3d 481 (2010) (prosecutor's "comment urging the jury to tell A.G. 'she did the right thing' by reporting the incident" was improper "because it appealed to the jurors' parental instincts and diverted their attention from the evidence and the law"); *State v. Nguyen*, 285 Kan. 418, 425-26, 172 P.3d 1165 (2007) (noting a possible "distinction when the argument is asking for justice for the specific victim" but speculating that "[p]erhaps the touchstone is whether the argument seeks to divert the jury from the evidence" with "sympathy for the victim"; in any event, a prosecutorial request for justice is permissible where "the prosecutor's argument was largely evidence based, notwithstanding an underlying promotion of awareness for the victim" "coupled with the admonition against sympathy and prejudice"); *State v. Ruff*, 252 Kan. 625, 631-36, 847 P.2d 1258 (1993) (prosecutorial exhortation for the jury to "'not allow this conduct to be tolerated in our county'" constituted reversible prosecutorial misconduct).

Likewise, the post-*Holt* cases continue to recognize potential prosecutorial error by improperly eliciting sympathy. See, e.g., *State v. Gallegos*, 313 Kan. 262, 276, 485 P.3d 622 (2021) (prosecutor's statements permissible because they did not appeal to jury's sympathy, did not ask the jury to place itself in the victim's position, and did not ask for justice for the victim); *Chandler*, 307 Kan. at 690 (comment urging for conviction because "'she robbed her own children of their father and his fianc[ée]'" erroneous). But here, the prosecutor was not arguing for a conviction; the jury al-

ready returned a guilty verdict. Nor did the prosecutor ever directly ask the jury to return a death sentence or suggest that such a sentence was appropriate.

Indeed, the prosecutor began opening arguments with the facially neutral statement that "twelve well-vetted jurors from the county where the crime occurred should decide this: What is justice?" And the prosecutor concluded his pre-rebuttal closing on a similar open-ended note: "You have to make a decision, what is appropriate justice? What is appropriate justice? Imposition of the death penalty? Life without the possibility of parole? That decision is for you to make." Flack's prosecutor did not ask for justice for the victims—he acceptably told the jurors their job was to determine a just sentence.

Mental health treatment and family healing

Flack next argues the prosecutor erred by commenting on facts outside the evidence when he "implied to the jury" Flack would receive mental health treatment and his family "would be 'healed' if he were sentenced to death." Flack asserts no evidence shows that. But these characterizations are not entirely accurate:

> "Over this time you've seen the sadness. Sadness can also be healing, healing. Because there's something about a case like this that when you expose bad things to the light, there's healing. There's healing.
>
> "You know, for the healing for the Flack family, that can occur whether there's the long journey towards execution or the long journey towards natural death. That healing doesn't stop with whatever your decision is. And during that journey hopefully Mr. Flack will get the treatment that he needs to address his mental health issues."

"A prosecutor is prohibited from arguing facts not in evidence, but generally has wide latitude to make arguments based on reasonable inferences from the evidence presented at trial." *State v. Novotny*, 297 Kan. 1174, 1189, 307 P.3d 1278 (2013). Here, Flack advances little argument beyond pointing to the statements themselves and offering conclusions, and he cites just one case, *Chandler*, 307 Kan. 657. But in *Chandler*, a prosecutor committed reversible error when she told the jury a nonexistent protection from abuse order had been filed against the defendant and repeatedly hammered that fabricated fact during her closing. 307 Kan. at 678-84. That case hardly supports Flack.

Flack's characterizations are overstated. First, the prosecutor's mental health comments presented only hope and desire, not fact, when he said, "[*H*]*opefully* Mr. Flack will get the treatment that he needs to address his mental health." (Emphasis added.) He did not tell the jury Flack *would* receive mental health treatment, nor did he even suggest it was likely. And as the State points out, the record supports a reasonable inference that mental health treatment might be available based on testimony Flack previously received it in jail and prison. Second, the prosecutor's statements about Flack's family did not promise healing, just that whatever healing they may experience would happen during "the long journey towards execution or . . . natural death" and that "healing doesn't stop" no matter the jury's decision. At most, this statement tried to convince the jury that sympathy for Flack's family should not weigh heavily in its deliberations.

We hold neither statement was erroneous. The prosecutor did not impermissibly state facts outside of evidence during closing.

Self-reference as "seasoned prosecutor" and suggesting, "If not this case, what case?"

Finally, Flack claims the prosecutor improperly bolstered himself as a "seasoned prosecutor" and offered his opinion that this case warranted the death penalty. The State counters the prosecutor properly requested jurors determine an appropriate sentence given the facts, instructions, and weight of mitigating and aggravating circumstances. The prosecutor said:

"I ask you to take [Defense]'s argument into consideration. And I hope after all this that the attorneys in this case have represented our professional best.

"At the end of it, it comes down to what is justice? What is justice? Taking into account all of the instructions, abiding by those instructions, looking at all the facts and circumstances you found to exist.

"There is a dead 21 year old mother shot in the back of the head, bound and gagged with her 18 month old daughter in that room. Then there's that 18 month old daughter that is shot in the back. These cases are difficult on everyone. The question is, what is justice for that scenario? For the facts and circumstances that you've seen here, what is justice?

"The State of Kansas, the death penalty. If not this case, what case?"

Our law is clear: In the context of witness credibility, a prosecutor expressing an opinion is a form of unsworn, unchecked testimony rather than commentary on the evidence. *State v. Pabst*, 268 Kan. 501, 510, 996 P.2d 321 (2000). This tracks Rule 3.4(e) of the Kansas Rules of Professional Conduct: "A lawyer shall not . . . state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." KRPC 3.4(e) (2023 Kan. S. Ct. R. at 394).

Flack mischaracterizes the nature and intent of the prosecutor's words. First, while the prosecutor mentioned his experience as a "seasoned prosecutor," he did so during voir dire and penalty-phase closing. During voir dire, the prosecutor asked one of the panels if anyone was nervous. When three of the six raised their hands, he said, "[A]s you can tell by the color of my hair, I'm a seasoned prosecutor and I've handled capital murder death penalty cases before, also homicide cases, but I still get nervous." This statement's purpose was simply to relax nervous jurors.

Second, the prosecutor used the phrase "seasoned prosecutor" during the penalty-phase closing colloquially to remark on his age, not to tell jurors to trust his judgment over their own. After discussing the weighing process instruction, he said, "So you know, at this point as a prosecutor and as you can see I'm a seasoned prosecutor, been around awhile. I usually . . . zoom back in to the key place." Here, the "key place" was the master bedroom where the bodies were found. But the prosecutor really wanted "to zoom in on the courtroom," calling for the jurors to consider the presented facts and law.

Neither statement related to his separate query, "If not this case, what case?" during penalty-phase closing. The logical leap is too large to conclude combining these unrelated statements told the jury the prosecutor had seen a lot of cases and felt this one was deathworthy. His comments were made far apart and separately. Their combined effect was not error.

That said, it is possible the "if not this case" comment alone is error. As Flack points out, at least two other jurisdictions have

held similar comments to be error. The Oklahoma Court of Criminal Appeals disapproved of a problematic prosecutor who had run afoul of the court:

"[T]he prosecutor improperly pleaded with the jury to do justice 'and the only way you can do that is bring back a sentence of death.' He also told the jury *'If this isn't a death penalty case, what is?'* It is error for a prosecutor . . . state his personal opinion as to the appropriateness of the death penalty." (Emphasis added.) *Torres v. State*, 962 P.2d 3, 18 (Okla. Crim. App. 1998).

Although *Torres* does not give more context for the nearly identical statement, the court ultimately ruled the statement along with the prosecutor's other errors were harmless. 962 P.2d at 18.

Flack's second case, stemming from a Missouri habeas corpus petition, required vacating the defendant's death sentence. There, the prosecutor spoke his opinion:

"I've been a prosecutor for ten years and I've never asked a jury for a death penalty, but I can tell you in all candor, I've never seen a man who deserved it more than [the defendant]. By returning your verdict in this case . . . that either means that you believe beyond a reasonable doubt that he pulled the trigger, or that he had the frame of mind that's consistent with pulling the trigger, and I submit to you, that [the defendant] did pull the trigger, and didn't pull it once, but pulled it twice—executed an innocent man in cold blood.

"So, where do we go from there? I say to you that I never saw a man who deserved it more and I say that to you in complete sincerity, and it's my job, as I see it, to tell you that." *Newlon v. Armontrout*, 693 F. Supp. 799, 804 (W.D. Mo. 1988), *aff'd* 885 F.2d 1328 (8th Cir. 1989).

The *Newlon* court held the prosecutor discussing declining to seek the death penalty until this case was improper, especially when the death penalty statutes were unconstitutional for much of that period. *Newlon*, 693 F. Supp. at 804-05. The *Newlon* prosecutor continued that theme but added several more erroneous statements. He emphasized he was the '"top law enforcement officer of the [c]ounty,'" compared the defendant to infamous mass-murderers, personalized analogies to jurors defending their own children, referenced war and courage, insinuated all murder should be punished with death, and reassured jurors appellate review follows any death sentence. 693 F. Supp. at 808. In combination, the jury faced a "relentless, focused, uncorrected argument based on fear, premised on facts not in evidence, and calculated to

remove reason and responsibility from the sentencing process." 693 F. Supp. at 808.

By contrast, the prosecutorial remark here, taken in context, permissibly and simply requested jurors to accurately perform their jobs by following their instructions. The prosecutor did not commit error.

HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE

The State charged Flack with capital murder based on the "intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct." K.S.A. 2012 Supp. 21-5401(a)(6). The instruction for capital murder required the jury to find Flack "purposefully killed [K.B.] and L.B." The State's notice of intent to seek the death penalty included the aggravator: "The defendant, as to [K.B.], committed *the crime* in an especially heinous, atrocious, or cruel manner" following K.S.A. 2012 Supp. 21-6624(f)'s exact language. (Emphasis added.)

Flack argues the heinous manner aggravator is limited to "the crime," while the version of capital murder he was convicted of required multiple killings, so the State had to allege and prove he killed both K.B. and L.B. in a heinous manner. We disagree. The statutory scheme does not require this.

Standard of review

To the extent this issue requires statutory interpretation, it presents a question of law subject to unlimited review. If the statutory language is plain and unambiguous, we apply the language as written. *State v. Dinkel*, 314 Kan. 146, 155, 495 P.3d 402 (2021).

Discussion

Flack equates the State's notice of intent to seek the death penalty with a charging document. He cites *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016), to support his claim the State needed to "charge" the heinous aggravator as to both K.B. and L.B. In *Dunn*,

we identified "three possible types of charging document insufficiency a criminal defendant may challenge." 304 Kan. at 815. First, a charging document must meet "the Kansas constitutional minimums of correct court and correct territory." 304 Kan. at 815. Second, it must allege "facts about the intent and action on the part of the defendant that, if proved beyond a reasonable doubt, would constitute violation of a Kansas criminal statute." 304 Kan. at 815. Third, it must satisfy "federal and state constitutional standards for due process and notice, such that the defendant has an opportunity to meet and answer the State's evidence and prevent double jeopardy." 304 Kan. at 815. The type of deficiency determines the available remedies for each. 304 Kan. at 816-17.

Flack argues his claim falls within the second and third categories: The State "failed to state facts that constitute a Kansas crime" and "the defective charge denied [him] due process." Before discussing *Dunn*, and what it means here, we note the process for pursuing the death penalty differs from charging the underlying crime of capital murder. That distinction is critical to understanding *Dunn*'s limitations.

In setting the second category's framework—charging the underlying crime of capital murder—the *Dunn* court noted K.S.A. 22-3201(b) requires a charging document to "state 'essential facts' constituting the crime charged." 304 Kan. at 811. The statute emphasizes "'facts' rather than 'elements.'" 304 Kan. at 811. "A Kansas charging document should be regarded as sufficient . . . when it has alleged facts that would establish the defendant's commission of a crime recognized in Kansas." 304 Kan. at 811-12.

To determine whether the alleged facts constitute a Kansas crime, we use the crime's statutory definition to determine if the factual allegations, if proved beyond a reasonable doubt, would justify a guilty verdict. 304 Kan. at 812. The State charged Flack under K.S.A. 2012 Supp. 21-5401(a)(6) with the "intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct." The capital murder's definition does not include aggra-

vating circumstances. Those are instead set forth in the death sentence procedure statutes, applicable only after the State obtains a conviction for capital murder.

K.S.A. 2022 Supp. 21-6617(a) governs the State's requirements to give a written notice of its intent to seek the death penalty. If the prosecutor fails to give the notice and the defendant is convicted of capital murder, the sentence will be life imprisonment without the possibility of parole, and death penalty cannot be imposed. K.S.A. 2022 Supp. 21-6617(a).

But the notice of intent is not the State's only obligation. The State must also provide the defendant notice of all aggravating factor evidence it plans to use. See K.S.A. 2022 Supp. 21-6617(c). Notably, the subsection (c) notice does not need to be provided at the same time as the subsection (a) notice. *Kleypas I*, 272 Kan. at 979. The *Kleypas I* court distinguished between the two notice requirements. The notice of intent allows the defendant to begin their preparation for trial as it serves notice that the case will indeed be a death penalty case, thus allowing them to make choices regarding the retention of counsel, plea bargaining, and preparation of mitigating factors. 272 Kan. at 979-80. On the other hand, the subsection (c) notice permits, but does not require, the State to give notice of aggravating circumstances. See K.S.A. 2022 Supp. 21-6617(c) ("Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible."). The State need only give such notice "within a reasonable time prior to trial to allow the defendant an opportunity to prepare to defend against the aggravating circumstances." *Kleypas I*, 272 Kan. at 980.

Flack's claim the State must prove he killed both K.B. and L.B. in a heinous manner does not neatly fit the charging deficiency paradigm under *Dunn*; it more closely resembles an evidence sufficiency claim. The State met both statutory notice requirements about its intent to seek the death penalty and its intended aggravating factor evidence. Neither statutes nor caselaw supports such a claim.

K.S.A. 2022 Supp. 21-6624 sets out the aggravating circumstances available for capital murder:

"(a) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

"(b) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

"(c) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

"(d) The defendant authorized or employed another person to commit the crime.

"(e) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

"(f) The defendant committed *the crime in an especially heinous, atrocious or cruel* manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially heinous, atrocious or cruel. Conduct which is heinous, atrocious or cruel may include, but is not limited to:

(1) Prior stalking of or criminal threats to the victim;

(2) preparation or planning, indicating an intention that the killing was meant to be especially heinous, atrocious or cruel;

(3) infliction of mental anguish or physical abuse before the victim's death;

(4) torture of the victim;

(5) continuous acts of violence begun before or continuing after the killing;

(6) desecration of the victim's body in a manner indicating a particular depravity of mind, either during or following the killing; or

(7) any other conduct the trier of fact expressly finds is especially heinous.

"(g) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

"(h) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding."

Flack correctly states the heinous manner aggravator applies to "the crime," not the crime's elements, but his conclusion that each killing in a multiple-killing capital murder must have been committed heinously does not necessarily follow.

As readily seen, the aggravating circumstances apply to various subjects—such as "the defendant," "the crime," and "the victim"—between subsections. Subsection (f) defines the heinous manner aggravator with both "the crime" and "the victim." It provides a nonexhaustive list of circumstances a jury may find heinous including conduct concurrent with the act of killing or conduct not necessarily concurrent with a killing, such as prior stalking and planning or preparation. K.S.A. 2022 Supp. 21-6624(f)(1)-(2). Finally, subsection (f) encompasses a catchall provision of "any other conduct" the jury "expressly finds is especially heinous." K.S.A. 2022 Supp. 21-6624(f)(7).

So, rather than requiring the heinous manner aggravator apply to each killing, the statute instead focuses on whether "the crime" in total was committed in a heinous manner. Nothing in the statute supports Flack's reading. Under our death penalty scheme, any finding of an aggravating circumstance, not outweighed by mitigating circumstances, is sufficient to sentence the defendant to death. K.S.A. 2022 Supp. 21-6617(e). The scheme does not assign weight to the number of aggravating circumstances; the finding of such a circumstance merely triggers the weighing process.

The State alleged the heinous manner circumstance and gave Flack notice about its intended evidence to prove the circumstance specifically related to Flack killing K.B. Imposing a death sentence here did not deprive Flack of due process.

JURY INSTRUCTIONS: SENTENCING PROCEEDING AND DUTY-TO-REACH-VERDICT

Flack challenges two jury instructions from the penalty phase. He argues the first penalty-phase instruction that informed jurors a guilty verdict would be followed by a separate sentencing proceeding erroneously implied the jury would not be responsible for sentencing. He also contests the verdict form alleging it told jurors they had to reach a unanimous decision to give him a life sentence.

Standard of review

We review jury instructions under a three-step framework. First, we determine if the issue was properly preserved below. Second, we consider the claim's merits to decide whether error occurred below. At this step, we consider if the challenged instruction was legally and factually appropriate. We exercise unlimited review of the entire record and view the evidence in the light most favorable to the requesting party. Finally, if there was error, we examine if the error was harmless. *State v. Gleason*, 305 Kan. 794, 800-01, 388 P.3d 101 (2017); *Kleypas II*, 305 Kan. at 305-06.

Discussion

The first instruction told the jury that "when a defendant has been found guilty of capital murder, a separate sentencing proceeding *shall* be conducted to determine whether the defendant shall be sentenced to

death." (Emphasis added.) At trial, Flack requested to replace "shall" with "may" because it implies "the jury was not ultimately responsible for" sentencing. The court declined, and before us Flack raises the argument again.

There may be a grain of truth to Flack's claim in that a penalty phase is not needed if the State does not seek the death penalty. See K.S.A. 2022 Supp. 21-6617(a) (requiring the State give written notice within seven days of arraignment it intends to seek the death penalty). Otherwise, a person convicted of capital murder receives a life sentence. But his desired language misstates the law because a person can only be sentenced to death if a jury makes the necessary findings. Changing "shall" to "may" could lead the jury to believe the State had another procedural option to obtain a death sentence, and "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger." *Caldwell v. Mississippi*, 472 U.S. 320, 333, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

Whether a separate sentencing proceeding happens in every capital case or only after the State decides to pursue that option, the given instruction here fairly stated the law and did not mislead the jury.

Next, at the penalty phase's conclusion, the court instructed the jury on completing the verdict form, explaining, "[I]f one or more jurors are not persuaded beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, then you shall sign the appropriate alternative verdict form indicating the jury is *unable to* reach a unanimous verdict sentencing the defendant to death." (Emphasis added.) The verdict form provided two options: (1) the standard and necessary findings to impose a death sentence with space to note applicable aggravating factors, and (2) "We, the jury . . . state that we are *unable to* reach a unanimous verdict sentencing the defendant to death." (Emphasis added.) Over Flack's objection the "unable to" language implied jurors must reach a unanimous verdict for or against the death sentence, the court declined to replace "unable" with "did not."

His suggested language advances a novel reading of the death penalty sentencing statutes. K.S.A. 2022 Supp. 21-6617(e) provides:

"If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; *otherwise, the defendant shall be sentenced to life without the possibility of parole.* The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. *If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life without the possibility of parole*." (Emphases added.)

According to Flack, the third sentence conflicts with the first. He argues, "Sentence one says that the inability to agree is a life verdict; sentence three seems to say the inability to agree is not a verdict at all." But even if Flack's suggested conflict exists, his preferred interpretation does not materially differ from the *Kleypas I* court's understanding of the statute. In *Kleypas I*, the court held a sentencing verdict form stating, "'We, the jury . . . *unanimously* determine that a sentence as provided by law be imposed by the Court,'" misled the jury it must reach a unanimous verdict. *Kleypas I*, 272 Kan. at 1062. K.S.A. 2022 Supp. 21-6617's predecessor "does not require the jury to unanimously conclude that a death sentence is unwarranted in order to sentence the defendant to a punishment other than death; rather, the jury must only fail to unanimously conclude beyond a reasonable doubt that a death sentence is warranted." 272 Kan. at 1062.

Flack correctly notes the jury is not under a duty to reach a unanimous verdict, but he fails to establish the given instruction might lead jurors to believe such a duty existed. The instruction and verdict form accurately state the law and could not have misled the jury. See *State v. Sims*, 308 Kan. 1488, 1505, 431 P.3d 288 (2018) (jury instructions reviewed "together as a whole," not in isolation). The instruction informed the jury the sentence would be life without parole if it could not reach a verdict, and the verdict form provided an option to state it could not reach a unanimous verdict of death. Nothing implied it must reach a unanimous decision to impose a life sentence.

EIGHTH AMENDMENT CHALLENGE

Flack raises a categorical Eighth Amendment challenge to his death sentence, even though he acknowledges we recently addressed and rejected nearly identical claims in *Kleypas II*, 305 Kan. at 328, 337, and *State v. Kahler*, 307 Kan. 374, 406, 409, 410 P.3d 105 (2018). In

both cases, counsel compared the mentally ill to intellectually disabled people to establish they are less culpable for their crimes. Flack reiterates those arguments without adding anything materially different from prior cases, so *Kleypas II* controls. We see no reason to revisit its holding.

SECTIONS 1 AND 5 OF THE KANSAS CONSTITUTION BILL OF RIGHTS

Flack challenges the death penalty's constitutionality under section 1 of the Kansas Constitution Bill of Rights. We addressed the same issue in *State v. Carr*, 314 Kan. 615, 625-26, 502 P.3d 546 (2022) (*R. Carr II*), and *State v. Carr*, 314 Kan. 744, 753, 502 P.3d 511 (2022). In those cases, we characterized the argument as contending "section 1 protects the right to life, and Kansas' capital sentencing scheme unconstitutionally infringes upon this right." *R. Carr II*, 314 Kan. at 627. We rejected that argument, holding:

> "The historical record reflects the framers did not intend the term 'inalienable' in section 1 of the Kansas Constitution Bill of Rights to be construed as 'absolute' and 'nonforfeitable.' Instead, a careful reading of section 1, coupled with the transcripts of the convention debate, demonstrates that the term 'inalienable' refers only to one's ability to transfer his or her right or interest to another person. Though inalienable, the framers viewed the natural rights guaranteed within this section to be forfeitable in civil society. So construed, the framers did not intend for section 1 to impede or limit the State's authority to punish individuals for their criminal conduct." 314 Kan. 615, Syl. ¶ 4.

Additionally, Flack attacked the death penalty under section 5 of the Kansas Constitution Bill of Rights. *R. Carr II* also addressed that issue, as a "constitutional challenge to the practice of 'death qualifying' juries in Kansas—the process of removing prospective jurors for cause . . . when their conscientious objection to capital punishment substantially impairs their ability to fulfill the oath and obligations of a juror." 314 Kan. at 645. We rejected that argument, holding:

> "[B]oth the plain meaning and historical record confirm that a 'jury' is defined as a group comprised of persons who will determine issues of fact and return a decision based on the evidence and in accordance with the law as instructed. Death qualification . . . removes only those prospective jurors who cannot fulfill these obligations due to conscientious objection to the death penalty, i.e., the statute authorizes removal of those prospective jurors excluded from the constitutional definition of a 'jury.' Thus, death qualification facilitates the very jury trial right guaranteed by section 5. Moreover, when the Kansas Constitution was adopted in 1859, the common law did not preclude, and in fact authorized, this procedure.

For these reasons, we hold that death qualification under K.S.A. 22-3410 does not violate section 5." 314 Kan. at 653.

Flack offers no new authority or argument warranting revisiting of *R. Carr II*.

CUMULATIVE ERROR

Based on our rulings, the cumulative error doctrine has no application. *State v. Sieg*, 315 Kan. 526, 536, 509 P.3d 535 (2022).

CONCLUSION

We affirm Flack's convictions and sentence. No errors warrant reversal of his convictions or sentence. We conclude "the evidence supports the findings that" one or more aggravating circumstances "existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances." See K.S.A. 2022 Supp. 21-6619(c)(2). We also conclude the jury imposed the death sentence without "the influence of passion, prejudice or any other arbitrary factor." See K.S.A. 2022 Supp. 21-6619(c)(1).

* * *

STEGALL, J., concurring: I concur with the majority's decision to affirm Flack's convictions and sentence. I depart, however, from the majority's application of section 1 of the Kansas Constitution Bill of Rights in the death penalty context. In my view, our court continues to be wrong by declaring that criminal defendants have no protections under section 1. See *State v. Carr*, 314 Kan. 744, 782-83, 502 P.3d 511 (2022) (Stegall, J., concurring) ("[T]he majority makes it explicit that a criminal defendant has no section 1 protections at all. Indeed, according to the majority, 'the state's power to punish' is limited only by 'due process' and 'cruel or unusual' provisions which 'do not arise under section 1.'"), *cert. denied* 143 S. Ct. 584 (2023).

Instead, I have consistently argued that properly understood, section 1 provides a substantive check on the police power of the state—including the power to kill its own citizens. See *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, 742, 440 P.3d 461 (2019) (Stegall, J., dissenting). To effectuate that check on state police power, I articulated the judicial test—rooted in our history

and precedent—courts should apply to any section 1 challenge. 309 Kan. at 767 (Stegall, J., dissenting).

But here, as in *Carr*, "[t]he lower courts have not inquired into the [police power test], the parties have not briefed the issue, and this court has declined to take it up." *Carr*, 314 Kan. at 783 (Stegall, J., concurring). It is true that Flack has at least gestured toward applying the appropriate section 1 police power test I set forth in *Hodes*. But he has not made any substantive argument beyond a few conclusory statements, and the record below is entirely void of any findings that might support his claim. In a future case, I am open to considering the constitutionality of the Kansas death penalty under section 1's limit on state police powers. But doing so would require an actual showing based on something more substantial than Flack has provided to demonstrate that our death penalty is not reasonably related to the furtherance of the common good.

So as before, given "the monumental consequences of the state's exercise of this most final, most irreversible, and most grave use of power—killing a human person—I am left with a profound and unshakable disquiet about our court's blessing upon these procedures." 314 Kan. at 783 (Stegall, J., concurring). And because I cannot "presume our death penalty is not reasonably related to the furtherance or protection of the common good—or that it is otherwise arbitrary, irrational, or discriminatory . . . I am left with no option other than to concur in the judgment." 314 Kan. at 784 (Stegall, J., concurring).

* * *

WILSON, J., concurring in part and dissenting in part: The majority finds ambiguity in Kyle Flack's many attempts to invoke his Fifth Amendment right to silence during his interview with police in the early morning hours of May 8, 2013. I cannot agree. Taken collectively, I would hold Flack's final four statements constitute an unequivocal invocation of his right to silence—an invocation which his interrogators failed to scrupulously honor. Because I view the admission of Flack's post-invocation statements to be prejudicial to his convictions for the murders of Andrew Stout and Steven White, I would reverse those convictions and remand for a

new trial. And while I believe the evidence of Flack's guilt for his capital murder charge was robust enough to prevent reversal of that conviction, I cannot conclude that the admission of Flack's statements was harmless as to his sentence of death. Thus, for the reasons below, I respectfully concur in part in the result and dissent in part.

Our test here is ostensibly an objective one: "whether a reasonable police officer under the circumstances would understand the suspect's statement as an assertion of a *Miranda* right." *State v. Aguirre*, 301 Kan. 950, 957, 349 P.3d 1245 (2015). As the majority notes, despite Flack's failure to frame this issue under the right to silence at trial, we can still consider it under K.S.A. 2022 Supp. 21-6619(b). 318 Kan. at 89. Further, even without testimony on the specifics of Flack's statements, the record before us contains the best evidence available in the form of the interview video. We know the time and place of this interview; we can assess for ourselves Flack's tone and manner, as well as the detectives' varied responses to his at-issue statements.

More importantly, the facts before us also reveal that the investigators' key concern in the interview was "finding [L.B.]," who was still missing then and might—for all they knew then—still have been alive. This concern can be readily divined from interviewers' questions themselves: the first thing Alexander asked Flack was "if he knew where [L.B.] was located."

I mention this not because the officers' subjective understanding of Flack's statements matters to our analysis—it does not—but to provide context for their responses to those statements. To put a finer point on it, their uncertainty over L.B.'s fate quashed all incentive for the detectives to treat *any* statement as an invocation of the right to silence. In other words, the detectives effectively wore blinders of incomprehension when presented with Flack's repeated statements because they wanted to prolong the interview; they *wanted* Flack's statements to be ambiguous.

This is why the detectives' subjective understanding of Flack's invocations is, and must be, irrelevant to whether Flack invoked his right to silence. Anyone can appreciate the detectives' concern for finding L.B. For all they knew at the beginning of the interview, she might still have been alive, and Flack might have been

the key to bringing her to safety. But as an appellate court, we must concentrate on the statements Flack made and on whether a reasonable officer would understand that Flack was exercising his constitutional right to stop the inquiry by invoking his right to remain silent. The officers' understandable concern for L.B. does not lessen their responsibility to Flack. But this concern necessarily colors the detectives' responses to Flack's statements, including the alleged invocations here. Thus, we must consider what Flack said—and the circumstances in which he said it—to conclude whether a reasonable officer *would* have understood him to be invoking his right to silence.

Flack's final four statements, collectively, were clear and unequivocal.

Flack points to several statements as attempted invocations of his right to silence. I agree with the majority that most of Flack's earlier statements were ambiguous for the reasons discussed in the majority opinion. 318 Kan. at 91-92. But I cannot agree that Flack's final four "take me to jail" statements—the ones the majority labels as Flack's seventh through tenth—were ambiguous. 318 Kan. at 94. Among other possible interpretations, the majority suggests that, "In context, these comments show Flack believed the questioning about what happened at Stout's house was irrelevant, rather than exercising a constitutional right." 318 Kan. at 94. It further reads Flack's statements as showing that Flack "simply claimed the detectives had already made up their minds about his involvement in these deaths, including their belief he could help them find the child"—and, thus, Flack was not invoking his right to silence. 318 Kan. at 94.

But while the cold words of the transcript may lend credence to the majority's position that Flack might have meant any number of things, the way Flack *said* them—along with their repetition—clarifies any ambiguity, in my view. And although an appellate opinion cannot entirely convey the nuanced audiovisual information presented in the videos of Flack's interrogation, that information is at least as important in establishing the context and meaning of Flack's words as the words themselves. To clarify the basis for my dissent, then, a bit of additional description is needed.

As the majority notes, Flack made his final four "take me to jail" comments during a portion of questioning about the identities of his violent, drug-related contacts in Emporia. 318 Kan. at 93-95. At first, as the detective began to explore Flack's involvement with these contacts, Flack abruptly said, "Take me to jail," and looked down at his lap. The detective asked a question. Flack did not respond, but only said, "Take me to jail." The detective asked another question. Flack again only said, "Take me to jail." This time, there was silence for several seconds. At this point, I believe Flack's intent to invoke his right to remain silent became clear. Even so, the detectives again asked more questions. After answering a couple of them, Flack again said, "Take me to jail." This time he crossed his arms and put his head down on the table. He clearly wanted to stop the interview.

The worst of Flack's self-incriminating statements followed.

These last four statements of, "Take me to jail," lacked some of the accompanying phrases held elsewhere to render similar statements ambiguous, and their exact repetition in the face of several different questions underscored what was, in my view, a clear intent to cut off the interview. Cf. *People v. Jackson*, 1 Cal. 5th 269, 336-41, 205 Cal. Rptr. 3d 386, 376 P.3d 528 (2016) ("Man just take me to jail man. I don't wanna talk no more," was clear and unambiguous.); *State v. Jang*, 359 N.J. Super. 85, 90, 819 A.2d 9 (App. Div. 2003) (Defendant's statement, "'I don't want to talk anymore. Take me to jail,'" terminated the interview.). Any alternative interpretations of these statements strains credulity, in my view: if Flack meant anything besides "take me to jail," he would have said as much during one of his repetitions of the phrase. That he did not crystalizes the clear and unambiguous meaning of his words and their necessary implication: terminate the interview by taking him to jail. Unlike the majority, I thus believe Flack's statements collectively made his meaning clear. I cannot support the majority's speculation as to Flack's meaning, that is, that he was merely expressing his belief about the irrelevance of the detectives' line of questioning.

The State claims that Flack's earlier, ambiguous responses taint the meaning of his later ones. But we have soundly rejected such arguments in the past, and I would do so again here. Cf. *State*

v. Walker, 304 Kan. 441, 456, 372 P.3d 1147 (2016) (earlier ambiguous statements did not undermine the clarity of a later set of statements that "[c]ollectively . . . would have made it clear to reasonable law enforcement officers" that a suspect was invoking his Fifth Amendment right to silence). As I have written, Flack's words—and, perhaps more critically, how he said them—rendered his meaning perfectly clear to a reasonable officer.

The majority also finds ambiguity in two of Flack's responses—"What do you want me to tell you?" and, "I don't know the fuckin' people"—which, the majority, claims, "lead to a reasonable inference Flack meant 'I don't know,' rather than invoking his right to remain silent." 318 Kan. at 94. But the majority's reliance on these statements is flawed. Flack made the first statement between his ninth and tenth attempted invocations, and he made the second one after his tenth and final attempted invocation. 318 Kan. at 93-94. In my view, Flack had already made his meaning clear, at the very latest, by his ninth overall statement: the penultimate "take me to jail" comment. Statements made after an invocation cannot be used to retroactively "cast doubt on the adequacy" of that invocation, as the majority attempts to do now. E.g., *Smith v. Illinois*, 469 U.S. 91, 98-99, 105 S. Ct. 490, 83 L. Ed. 2d 488 (1984). "In other words, if the interrogators simply ignore the suspect's invocation of rights and continue to ask questions, the suspect's compliance with the further questioning does not invalidate or render equivocal the prior invocation of rights." *Aguirre*, 301 Kan. at 958. Thus, I am troubled by the majority's efforts to retroactively interpret Flack's "take me to jail" statements by relying on his later responses.

In evaluating the clarity of an alleged invocation of the right to silence, words matter. Context matters. Magic words are not required. *Emspak v. United States*, 349 U.S. 190, 194, 75 S. Ct. 687, 99 L. Ed. 997 (1955). When we speak of what a "reasonable officer" would have understood, we are referring to an individual of ordinary intelligence possessed of ordinary linguistic comprehension skills. We are *not* speaking of individuals who, for one reason or another, can apply the principles of arcane philosophies and lexical sophistry to divine ambiguity where, in any ordinary conversation, there would *be* none. A reasonable officer is not one

motivated to find ambiguity no matter where or how his goal finds quarter. This latter category naturally includes professional investigators who may be motivated to remain, and thus do remain in the face of all evidence to the contrary, doggedly "uncertain" about a suspect's meaning—particularly those guided by the best of intentions, such as the urgent need to locate a missing child and bring her safely home. See, e.g., Sadeghi, *Hung Up on Semantics: A Critique of* Davis v. United States, 23 Hastings Const. L.Q. 313, 336 (1995) ("Perhaps the most troubling aspect of the threshold-of-clarity approach is that it leaves the fox guarding the henhouse. The police have little incentive to find that a statement was a clear invocation of rights.").

Yet law enforcement officers, prosecutors, and courts alike have shown over and over their own mastery of speculative mental gymnastics where a suspect *may* be invoking the right to silence or the right to counsel, but not "clearly so." See generally 2 LaFave, Israel, King & Kerr, Criminal Procedure § 6.9(g), n.184-85 (4th ed.) (cataloging many cases finding ambiguity in "even a statement which itself appears to amount to an assertion of the right to remain silent"—including the outright refusal to speak). Nor do courts consider silence *itself*—which a layperson might reasonably view as perhaps the purest indication that a suspect is invoking the right to silence—to be a clear and unambiguous invocation of the right to silence. E.g., *Evans v. Demosthenes*, 902 F. Supp. 1253, 1259-60 (D. Nev. 1995), *aff'd* 98 F.3d 1174 (9th Cir. 1996). Some of these exercises in linguistic contortionism pass beyond the point of parody. See, e.g., *State v. Demesme*, 228 So. 3d 1206, 1206-07 (La. 2017) (Crichton, J., concurring) (finding ambiguity in the phrase "'if y'all, this is how I feel, if y'all think I did it, I know that I didn't do it so why don't you just give me a lawyer dog cause this is not what's up'" because "the defendant's ambiguous and equivocal reference to a 'lawyer dog' does not constitute an invocation of counsel that warrants termination of the interview").

Thus, despite the ostensibly objective, non-talismanic standard we purport to apply, "On the whole, courts have set a high threshold for explicit invocation, but it remains unclear what exactly a suspect must say or do to explicitly invoke silence."

Rushin, *Rethinking* Miranda*: The Post-Arrest Right to Silence*, 99 Cal. L. Rev. 151, 168 (2011). One is forced to wonder, despite a plethora of caselaw to the contrary, whether magic words *are* required, and even whether the magic words must be followed with actual silence before a suspect clearly and unambiguously invokes the right to silence under the Fifth Amendment. See, e.g., Gee, *Invoking the Right to Counsel and Right to Remain Silent: It's Just Not That Clear*, 32 Miss. C. L. Rev. 69, 81-82 (2013) ("As the erosion of *Miranda* continues with each subsequent Supreme Court term, the limitations placed on both ambiguous requests for counsel under *Davis* and the right to silence under *Berghuis* seem destined to remain in place, or perhaps become even more narrow."). The very meaning of the words "clearly and unambiguously" strains, cracks, and sometimes breaks under the burden we place upon it. This case exemplifies this deterioration.

In other areas of police investigation, courts often give weight—if not total deference—to an officer's deductions, instincts, training, and experience. See, e.g., *State v. Cash*, 313 Kan. 121, 133, 483 P.3d 1047 (2021) ("deference" given to officer's testimony that "in her training and experience a Crown Royal bag 'more often than not' contains drug paraphernalia" for purposes of reasonable suspicion); *State v. Jones*, 300 Kan. 630, 647-48, 333 P.3d 886 (2014) (recognizing "some deference" to an officer's training and experience in assessing reasonable suspicion based on suspicious driving, but still agreeing "with the district judge that the officer acted on a hunch, not reasonable suspicion"); *State v. Moore*, 283 Kan. 344, 359-60, 154 P.3d 1 (2007) (giving "appropriate deference to the opinions of a particular law enforcement officer on the scene who, with thousands of traffic stops, is highly experienced in roadside searches and seizures and determinations of reasonable suspicion" while cautioning against "a total, or substantial, deference to law enforcement's opinion concerning the presence of reasonable suspicion"); *State v. Wonders*, 263 Kan. 582, 598, 600, 952 P.2d 1351 (1998) (trial court considered officer's training and experience in finding probable cause to believe a bulge in a suspect's pocket was marijuana, but recognizing "that experienced, knowledgeable law enforcement officers know the 'magic words' to be related when their searches and seizures are

challenged"). Yet in the arena of the Fifth Amendment, courts constructively infantilize officers by imputing to them a basic lack of language comprehension. Moreover, our legal framework provides little incentive for officers to exercise caution in the face of a *possible* invocation—anything besides a precise recitation of some court-approved legal formula. After all, if a court can divine any ambiguity at all in a suspect's statements, it will reward an officer's constructive "uncertainty" over any language that *does not* contain a precise invocation incantation. In other words, we have created a system under which officers have little reason *not* to gamble by refusing to scrupulously honor an invocation—*unless*, that is, it is expressed through a set of specific legal magic words.

Here, a reasonable detective could not have understood Flack's repeated identical "take me to jail" statements to mean anything besides a request to terminate the interview and "take [him] to jail." The majority's alternative view—that Flack's responses *could* be interpreted as merely bemoaning the futility of the detectives' line of questioning—appears strained to me. "We should not seek ambiguity where none exists" to sanction detectives' continued questioning in the face of an invocation of the right to silence. Cf. *U. S. Fid. & Guar. Co. v. W. Cas. & Sur. Co.*, 195 Kan. 603, 605, 408 P.2d 596 (1965) (refusing to invoke the rule of liberal construction when an insurance policy used unambiguous language). Flack repeated his precise request to be taken to jail over and over; I cannot view such exact repetition as anything other than an attempt to terminate the conversation.

Thus, in my view, Flack did what he needed to do to invoke his right to silence under the Fifth Amendment. An invocation need not be perfect—and Flack's was not—but Flack's meaning should have been clear to his interviewers all the same. The detectives failed to scrupulously honor that invocation, and thus the district court erred in failing to suppress his statements.

This failure also extends to the statements Flack made during the second interview, which the prosecution used to develop its theory of the case. As we have said,

"Based on *Miranda* and [*Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975)], if a defendant invokes his or her right to remain silent, the interrogation must stop immediately and the right must be scrupulously honored. This does not mean an interrogation resumed at a later time is invalidated if the defendant knowingly and voluntarily waived the right to be silent at this later time and the defendant's right to

be silent was scrupulously honored while it was invoked." *State v. Robinson*, 261 Kan. 865, 887-88, 934 P.2d 38 (1997).

In *Aguirre*, the court considered "whether the police could obtain a valid *Miranda* rights waiver at a subsequent interrogation after refusing to honor an invocation of those rights at the first interview." 301 Kan. at 961. The *Aguirre* majority found that the defendant attempted to invoke his *Miranda* rights and cease questioning in an initial interview, but that detectives failed to scrupulously honor that invocation. This, the majority concluded, meant that Aguirre's statements in the first interview should have been suppressed. In considering Aguirre's statements at a followup interview, the majority applied a two-part analysis previously set forth in *State v. Matson*, 260 Kan. 366, 374, 921 P.2d 790 (1996), and *State v. Mattox*, 280 Kan. 473, 481, 124 P.3d 6 (2005):

"[T]he validity of a *Miranda* waiver, after a suspect has previously invoked those rights, depends on whether 'the accused (a) initiated further discussions with the police and (b) knowingly and intelligently waived the previously asserted right.' The State failed the *Matson* test by reinitiating the second interrogation. [Citations omitted.]" *Aguirre*, 301 Kan. at 961.

Thus, the court concluded, "Under that circumstance, the police were constrained, if not prohibited, from reinitiating questioning" and "the statements obtained in the second interview should have been suppressed, as well." *Aguirre*, 301 Kan. at 961-62.

Here, detectives did not stop their questioning after Flack's invocation. Instead, they continued to try to convince Flack to "help us find this baby" by zeroing in on the "Mexicans" or "South Side "South Side Lobos" he had mentioned. And while the second interview began about fourteen-and-a-half hours after the first interview ended—an interlude in which Flack was offered three meals and "a place to rest"—and while Flack was given fresh *Miranda* warnings at the outset of the second interview, detectives, not Flack, initiated the second interview. Thus, Flack's statements in the second interview should have also been suppressed.

Harmlessness—Guilt Phase

I turn next to the harmlessness of the district court's error.

"When a defendant's constitutional rights have been violated, the State must 'carry the burden of proving "beyond a reasonable doubt that the error complained of . . . did

not affect the outcome of the trial in light of the entire record, i.e., proves there is no reasonable possibility that the error affected the verdict."'" *Walker*, 304 Kan. at 457.

I begin with the error's effect on the guilt phase of Flack's trial, beginning with his conviction for the killing of White.

White's Killing

During his second interview, Flack admitted that he and Stout killed White together, each of them shooting White once with a shotgun. Flack further admitted to covering White's body with a tarp and leaving it in the outbuilding for more than a week. As the prosecutor emphasized during closing arguments, evidence suggested that White died from two gunshot wounds, each caused by PDX Home Defender shotgun rounds. In his pre-"invocation" statements, Flack admitted purchasing Defender rounds for his shotgun.

The shotgun that was partially recovered from the Emporia recycling center—which contained a mixed DNA profile from at least three people, of whom Flack could not be excluded as the major contributor—fired at least one of the shell casings found in the outbuilding where White was killed. Evidence also suggested that this same weapon fired the five shell casings recovered from the residence's master bedroom, where the bodies of Stout and K.B. were found and where (based on bloodstains) evidence suggested L.B. was shot. The weapon was a 12-gauge "pump action" shotgun that required a discrete action to eject a spent round and chamber a new round before each individual shot could be fired. Evidence suggested that Flack owned a 12-gauge pump action shotgun that he kept at Stout's property, of which he was "proud." One witness noted that Flack "had [the shotgun] with him everywhere he went" and that he had even slept next to it at times. In his pre-"invocation" statements, Flack admitted that he owned a "Remington 1300."

In closing arguments, the prosecutor noted the lack of forensic evidence of a struggle surrounding White's death and highlighted evidence suggesting White was shot in the outbuilding. The prosecutor also emphasized Flack's own statement:

"And consider finally the defendant's own description of that particular incident. I shot him, he dies. He indicated to law enforcement, I shot him and at the time I shot him, he claims Andrew Stout shot him first, but he indicates that

I shot him, he was still alive when I shot him and he dies. Those are the defendant's own words."

But while the evidence suggests that White was killed in the outbuilding on Stout's property, possibly with the shotgun partially recovered from the Emporia dump, major uncertainties exist surrounding the timing and circumstances of White's killing. White was last seen alive on April 20, 2013. As Flack points out, jurors heard testimony that several individuals were at the residence around this time, including Joseph Berger, brothers Andrew and Rocky Helm, Dylan Phillips, Stout, and Flack, among others. Some of these guests fired weapons at Stout's property—a "good shooting spot." Jurors also heard testimony that White and Stout "butted heads often."

The State highlights evidence that Flack "discouraged" his friends from contacting the authorities about White's disappearance. The State highlights circumstantial evidence suggesting that Flack killed Stout, L.B., and K.B., which further implies that Flack also killed White; as the State puts it, Flack "was the only person of that group to walk away from the residence alive." But while this may be a reasonable extrapolation, it does not establish *no* reasonable possibility that Flack's confession *to killing White* affected the jury's verdict. In particular, the killing of White stands apart in both time and place from the killings of Stout, K.B., and L.B., who were all killed several days after White and inside the residence, rather than the outbuilding. In my view, the forensic evidence suggesting Flack's guilt is not overwhelming enough to overcome the prejudicial effect of his direct confession to White's murder. Thus, I would reverse his conviction for White's murder and remand for a new trial.

Stout's Killing

Stout was shot four times with a shotgun, including once in the back. Shell casing evidence suggested that the shotgun that was partially recovered from an Emporia recycling center was used in the killing of White, Stout, K.B., and L.B. While Stout was found in the same bedroom as K.B.'s body (where L.B. was also likely shot), the evidence suggests he was killed at least a few days

before them—between April 28 and 30, 2013, rather than between May 1 and May 5.

Surveillance camera evidence established that Flack accompanied Stout on a trip to Ottawa on April 28. On that trip, Stout wore the same shirt in which he ultimately died. Circumstantial evidence suggests that Flack further accompanied Stout to Emporia, although the surveillance camera evidence is less clear on this point. Yet this evidence still does not directly place Flack at Stout's residence at the time of Stout's killing, although it may suggest that he was still with Stout at that time. Additionally, Flack's fingerprints were present on items in the bedroom where Stout and K.B. were found. Evidence also placed Flack at Stout's residence around and after the time Stout was likely killed, and Flack made false statements to others concerning Stout's whereabouts after Stout's death. For instance, when Phillips stopped by on April 29, he met only Flack, who told him that Stout was running errands before work.

Unlike White's killing, little evidence supported the presence of other individuals at the residence—other than Flack—during the timeframe of Stout's killing. Flack's brief admits that evidence existed to establish Flack's presence at the house after Stout's death, that Flack made false statements about seeing Stout after he would have been dead, and that Flack "disposed of the shotgun used to shoot Mr. Stout." But Flack points out that—other than his statements—there is no evidence he was present at the precise *time* of Stout's death, much less that he was the shooter. While that much could be inferred from his later actions—not the least of which was remaining at the house afterward—any such inferences cannot overcome the prejudicial impact of the admission of his statements, including his admission that he was present at the time of Stout's death. Additionally, while circumstantial evidence could support the inference that Flack was using Stout's phone after his death, that inference could not then support a new inference that, therefore, Flack was Stout's killer. Cf. *State v. Colson*, 312 Kan. 739, 750, 480 P.3d 167 (2021) (inference stacking is prohibited). Moreover, any error resulting from the admission of Flack's statements vis-à-vis the killing of White—to which he admitted—would also infect the jury's (otherwise justifiable) inference that

Flack was, in fact, Stout's killer. That the jury ultimately convicted Flack of second-degree murder for Stout's death further suggests some uncertainty about the circumstances of this killing, though I do not propose to read the tea leaves of the jury's verdict.

Consequently, while the circumstantial evidence supported Flack's conviction for Stout's murder, it is not overwhelming enough to rule out all reasonable possibility that the erroneous admission of Flack's statements affected the jury's verdict. Thus, I would also reverse Flack's conviction for Stout's murder and remand for a new trial.

The Killing of L.B. and K.B.

In closing, the prosecutor focused heavily on forensic evidence to establish that L.B. and K.B. were killed close in time to one another. But the prosecutor asked jurors to "consider his words to law enforcement":

> "He was correctly able to inform law enforcement what the order of death was. Steven White first, Andrew Stout second, [K.B.] third, [L.B.] last. There's only one way that you know that. There's only one way. You were there and you did it.
>
> "He correctly knew the location of the bodies. He knew that Steven White was in the outbuilding. He knew that Andrew Stout was in the corner. He knew that [K.B.] was buried near the bed. Now he claims he didn't know where [L.B.] was, but he did indicate that she was in a suitcase and that she was wrapped in a blanket. He also correctly described the [s]tate of [K.B.]'s body, her clothing or lack thereof.
>
> "Now in the defendant's statements to law enforcement there were at least eight versions and there are significant inconsistencies between each of the versions. It's for you to judge and determine and assess the credibility of all those different versions and what inconsistencies there are.
>
> "But the inconsistencies all have something in common. They are designed to take the focus and responsibility off of the defendant. It's always, you know, Andrew shot Steven White. Oh, Omar and Chewie, they're the ones that shot Andrew Stout and [K.B.] and [L.B.]. I was just there. He puts himself there during the murders but he's always got a little bit less of a responsibility. Yet he has all these details and there's all this evidence that all points to one person and one person alone, the defendant."

In my view, the circumstantial evidence here appears strong enough to eliminate any reasonable possibility that the prosecutor's insinuation that Flack had "all these details" affected the jury's verdict. Unlike the killing of White and Stout, the evidence

surrounding the deaths of L.B. and K.B. effectively rules out any lesser degrees of homicide beyond premeditated first-degree murder. K.B. was gagged, naked from the waist down, and had her hands bound behind her back with zip ties at the time of her death. She was shot in the back of the neck by a shotgun while prone or kneeling on the ground. Her body was later turned face up and she was covered with a pile of clothes. After the clothes were placed atop K.B.'s body, 18-month-old L.B. was shot in the back with a shotgun while facing the direction of her mother's body. Forensic evidence about the contents of K.B.'s and L.B.'s stomachs further suggests that both were killed on the afternoon of May 1, 2013.

Moreover, the circumstantial evidence supporting a finding that Flack was directly involved in the killing of L.B. and K.B. is stronger than that supporting his convictions for the killing of White and Stout. For instance, cell phone data suggested that Flack was likely present at the residence on May 1 and May 2, 2013. On May 3, 2013, cell phone data suggested that Flack began the day at the residence, then moved within a mile-and-a-half from the place where L.B.'s body was found, and then traveled to Emporia, where his phone remained. Flack subsequently got a new phone.

A little after 5 p.m. on May 7, 2013, cameras captured images of an individual driving K.B.'s car to an apartment parking lot near 12th and East streets in Emporia. The driver got out and threw away a bag from the car into a nearby dumpster. The bag contained items belonging to K.B. and L.B., including L.B.'s baby blanket. Douglas picked Flack up from the parking lot of Do-B's restaurant sometime after 5 p.m. on the evening of May 7, 2013; this parking lot would have been very close to the parking lot where K.B.'s car was left. Circumstantial evidence thus suggested that Flack was driving K.B.'s car and was attempting to dispose of her and L.B.'s property.

Like White and Stout, L.B. and K.B. were killed with a shotgun. Beyond the evidence that the shotgun recovered from the Emporia recycling center—which was Flack's—fired several casings recovered from the residence, one of the shot shells fired from the shotgun was found on K.B.'s leg. Finally, perhaps the strongest circumstantial evidence of Flack's involvement in the killings can

be found from the black zip ties in Flack's bag, which were much like the ones used to bind K.B.

Admittedly, the DNA evidence collected from K.B.'s body did not strongly implicate Flack. For instance, the major DNA profile taken from the knot of the bandana used to gag K.B. fit K.B.'s DNA, but Flack could not be excluded as the source of the minor profile contribution—although that minor profile would be consistent with the DNA of one in eight individuals. This evidence further suggested that Flack had touched and, perhaps, even tied the bandana used to gag K.B. Further, although Flack could not be excluded as a contributor to samples containing mixed DNA profiles obtained from K.B.'s left hand fingernail clippings, this match was also weak—about a 1-in-28 chance. Moreover, Flack could be excluded as a contributor to DNA samples collected from under K.B.'s right hand fingernail clippings. No conclusion could be reached as to whether Flack contributed to male DNA recovered from K.B.'s pubic hair.

Despite the somewhat lukewarm DNA evidence, I believe the remaining circumstantial evidence of Flack's guilt is overwhelming enough to render the erroneous admission of his statements harmless as to his conviction for killing L.B. and K.B. These killings occurred close together in time and space and could, realistically, only have resulted from intentional and premeditated conduct. Thus, I concur in the result of the majority's decision to affirm Flack's capital murder conviction.

Harmlessness—Penalty Phase

I turn next to the harmlessness of the error in the penalty phase of Flack's trial. Flack argues that his statements amplified the State's description of K.B.'s last moments, eliminated "residual" doubt, and made him appear unsympathetic and remorseless before the jury.

But even if Flack's statements did not affect the jury's finding about the *existence* of aggravating circumstances, I find it probable that they affected the jury's *weighing* of aggravating and mitigating circumstances. The jury watched Flack give the detectives

several versions of events, as the prosecution repeatedly highlighted. This could have led the jury to conclude that Flack *was* a remorseless killer who deserved to die for his crimes.

Because I find it probable that Flack's statements impacted at least some of the individual jurors' assessment of the mitigating circumstances, I would vacate Flack's verdict of death and remand for a new sentencing phase of the trial.

Conclusion

A "right" to silence which cannot be exercised in practice—even by *actual silence*—is no right at all. Because the majority's analysis undermines the exercise of the constitutional right to silence by implicitly penalizing Flack for failing to utter the proper incantation—despite his repeated, clear requests that the detectives take him to jail, which would necessarily terminate the interview—I respectfully dissent. All the same, I concur in affirming Flack's conviction for capital murder, as I believe the evidence of his guilt to be overwhelming enough to neutralize the prejudicial effect of the erroneous admission of Flack's statements. Likewise, I concur with the majority's analysis about Flack's remaining claims of error.

No. 124,868

In the Matter of BRADLEY A. PISTOTNIK, *Petitioner.*

(541 P.3d 761)

ORDER OF REINSTATEMENT

ATTORNEY AND CLIENT—*Petition for Reinstatement—Reinstatement.*

On July 8, 2022, this court suspended Bradley A. Pistotnik's Kansas law license for one year under Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. R. at 281). The court ordered that Pistotnik undergo a reinstatement hearing pursuant to Supreme Court Rule 232(e) (2023 Kan. S. Ct. R. at 294), before the court would consider any petition for reinstatement. See *In re Pistotnik*, 316 Kan. 96, 512 P.3d 729 (2022).

On July 10, 2023, Pistotnik petitioned the court for reinstatement under Rule 232(b). Upon finding sufficient time had passed for reconsideration of the suspension, the court remanded the matter for further investigation by the Office of the Disciplinary Administrator (ODA) and a reinstatement hearing. See Rule 232(c), (e)(1)(B).

On November 27, 2023, a hearing panel of the Kansas Board for Discipline of Attorneys conducted a hearing on Pistotnik's petition for reinstatement. Shortly thereafter, the court received the hearing panel's Reinstatement Final Hearing Report. In that report, the hearing panel concludes that Pistotnik presented clear and convincing evidence to show the factors in Rule 232(e)(4) weigh in favor of reinstatement. Accordingly, the panel recommends that the court grant Pistotnik's petition and reinstate his law license.

The court accepts and adopts the findings and recommendations of the hearing panel, grants Pistotnik's petition for reinstatement, and reinstates Pistotnik's Kansas law license.

The court further orders Pistotnik to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education requirements. See Supreme Court Rule 812 (2023 Kan. S. Ct. R. at 609) (outlining CLE requirements following reinstatement of law license). The court directs that once OJA receives proof of Pistotnik's completion of these conditions, it add Pistotnik's name to

the roster of attorneys actively engaged in the practice of law in Kansas.

Finally, the court orders the publication of this order in the official Kansas Reports and the assessment of all costs herein to Pistotnik.

Dated this 19th day of January 2024.

No. 125,417

In the Matter of TROY J. LEAVITT,
Respondent.

(541 P.3d 101)

ORDER OF DISCHARGE FROM PROBATION

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

On December 9, 2022, the court suspended Troy J. Leavitt from the practice of law in the state of Kansas for a one-year period. The court then stayed imposition of that discipline and placed Leavitt on probation for a one-year period, subject to specified terms and conditions. See *In re Leavitt*, 316 Kan. 698, 520 P.3d 1287 (2022).

On December 19, 2023, Leavitt filed an "application for order of successful termination of probation." Leavitt attached to this filing his and his supervising attorney's affidavits summarily attesting to Leavitt's compliance with all terms of his probation. See Supreme Court Rule 227(g)(1) (2023 Kan. S. Ct. R. at 284) (outlining process for motion to be discharged from probation). The Office of the Disciplinary Administrator (ODA) responded that Leavitt has complied with his probation, confirmed Leavitt's eligibility to be discharged from probation, and voiced no objection to such discharge.

This court notes the ODA's response, grants Leavitt's application, and orders Leavitt fully discharged from probation. Accordingly, this disciplinary proceeding is closed.

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

Dated this 19th day of January 2024.

Bar Docket No. 25474

In the Matter of ANTHONY R. SMITH, *Respondent.*

(541 P.3d 762)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Voluntary Surrender of License—Disbarment.*

This court admitted Anthony R. Smith to the practice of law in Kansas on September 28, 2012. The court administratively suspended Smith's license on September 27, 2022, due to his noncompliance with registration and continuing legal education requirements. See Supreme Court Rule 206(f) (2022 Kan. S. Ct. R. at 257), as amended effective July 1, 2022 (suspension from the practice of law for failure to comply with annual attorney registration requirements); Supreme Court Rule 810 (2022 Kan. S. Ct. R. at 617), as amended effective July 1, 2022 (suspension from the practice of law for failure to comply with continuing legal education rules).

On December 20, 2023, Smith's request to voluntarily surrender his license was submitted to the Office of Judicial Administration under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). At the time, Smith faced a hearing before the Kansas Board for Discipline of Attorneys on a formal complaint filed by the Disciplinary Administrator. That complaint alleged Smith had violated Kansas Rules of Professional Conduct 1.1 (2023 Kan. S. Ct. R. at 327) (competence), 1.3 (2023 Kan. S. Ct. R. at 331) (diligence), 1.4 (2023 Kan. S. Ct. R. at 332) (communication), 1.16(d) (2023 Kan. S. Ct. R. at 377) (terminating representation), 8.1(b) (2023 Kan. S. Ct. R. at 431) (failing to respond to a lawful demand for information), 8.4(d) (2023 Kan. S. Ct. R. at 433) (conduct prejudicial to the administration of justice), as well as Supreme Court Rule 206(o) (2023 Kan. S. Ct. R. at 260) (duty to update attorney registration information), and Supreme Court Rule 210(b) (2023 Kan. S. Ct. R. at 263) (duty to timely respond to a request for information).

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

The court orders the Office of Judicial Administration to strike the name of Anthony R. Smith 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. The court further notes that the following fees had accrued and remain unpaid at the time of this order:

- The $200 annual registration fee for the 2022-2023 licensing period under Rule 206(b).
- The $150 late fee due for failure to pay the annual registration fee for the 2022-2023 licensing period under Rule 206(e).
- The $75 fee due for noncompliance with continuing legal education requirements under Rule 809(c) (2022 Kan. S. Ct. R. at 617).

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein be assessed to Smith, and that Smith comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292).

Dated this 25th day of January 2024.

No. 126,247

In the Matter of the Wrongful Conviction of MICHAEL SIMS.

(542 P.3d 1)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Action for Wrongful Conviction and Imprisonment—Two Elements.* K.S.A. 2022 Supp. 60-5004(c)(1)(B) requires a claimant to show two elements: (a) a court's reversal or vacating of a felony conviction; and (b) either the dismissal of charges or a finding of not guilty following a new trial.

2. SAME—*Action for Wrongful Conviction and Imprisonment—Meaning of Statutory Language "the Charges were Dismissed."* The phrase "the charges were dismissed" in K.S.A. 2022 Supp. 60-5004(c)(1)(B) clearly and unambiguously means both terminating the criminal accusation presented in court and relieving the defendant of that accusation's criminal liability.

Appeal from Saline District Court; JACOB E. PETERSON, judge. Submitted without oral argument December 15, 2023. Opinion filed January 26, 2024. Affirmed.

Larry G. Michel, of Kennedy Berkley, of Salina, was on the brief for appellant.

Kurtis K. Wiard, assistant solicitor general, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: In this civil proceeding for wrongful conviction and imprisonment, Michael David Sims seeks monetary damages after the Court of Appeals reversed his felony conviction for interference with law enforcement and he was resentenced to time served on a misdemeanor charge for the same crime. The issue is whether that felony interference charge can be considered "dismissed" as required by K.S.A. 2022 Supp. 60-5004(c)(1)(B). The district court held it was not dismissed and denied the claim. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, a domestic dispute between Sims and his wife led to a 911 call. When the police arrived, Sims physically resisted. A jury convicted him of criminal restraint, battery, assault of a law

enforcement officer, criminal damage to property, and felony interference with law enforcement. See generally *State v. Sims*, No. 120,449, 2021 WL 1228113 (Kan. App. 2021) (unpublished opinion).

On appeal, Sims raised an issue with the conviction for felony interference with law enforcement. Both parties advised the Court of Appeals panel they believed the evidence was insufficient and asked that the conviction be reversed, the sentence vacated, and the case remanded for resentencing on a misdemeanor interference offense. The panel agreed without analyzing how Sims could be convicted of misdemeanor interference when he was charged and convicted only of the felony crime. *Sims*, 2021 WL 1228113, at *2.

On remand, the lower court resentenced Sims, ordered the misdemeanor conviction to run concurrent with all other counts, and found he satisfied his sentence with the time served.

Sims then brought this wrongful conviction lawsuit alleging he spent nearly a year in prison because of an invalid felony conviction. The State answered and moved for judgment on the pleadings. It primarily argued Sims could not prove his interference charge was dismissed or that he was found not guilty on retrial. See K.S.A. 2022 Supp. 60-5004(c)(1)(B). In opposing the motion, Sims urged the court to liberally construe this remedial civil statute to accomplish its purpose. He claimed his "felony charge" was "actually or effectively dismissed" when the Court of Appeals reversed the felony conviction.

In its 16-page decision, the district court agreed with the State that Sims' interference charge was not dismissed as envisioned by the statute. In so ruling, it treated the State's pleading as a motion for summary judgment because the State attached the criminal case's Court of Appeals judgment and the original journal entry of judgment. See K.S.A. 2022 Supp. 60-212(d) ("If, on a motion [for judgment on the pleadings], matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under K.S.A. 60-256 . . . . All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). It also took judicial notice of the criminal case's record.

The district court's factual findings are undisputed:

"1. On or about August 31, 2018, Mr. Sims was convicted of felony interference with a law enforcement officer and related misdemeanors under K.S.A. 21-5904(a)(3) and (b)(5)(A). . . .

"2. Mr. Sims appealed his conviction to the Kansas Court of Appeals.

"3. On appeal he argued and the State conceded that the evidence presented at trial was insufficient to convict him of felony interference. . . .

"4. The Court of Appeals 'reverse[d] [Mr. Sims'] felony conviction, vacate[d] Sims' sentence, and remand[ed] . . . for resentencing consistent with a conviction for the lesser included offense of misdemeanor interference with a law enforcement officer.'

"5. On remand, the district court sentenced Mr. Sims to '12 months in the Saline

County Jail on Count 5 [i.e., the interference count] to run concurrent with all remaining counts.'

"6. The Court further ordered 'that all time served to date is sufficient to fulfill sentence [*sic*].'"

The court held the only question was whether Sims had a viable claim under the wrongful conviction statute. It dismissed the lawsuit based on K.S.A. 2022 Supp. 60-5004's plain language and this court's interpretation of the wrongful conviction statute in *In re M.M.*, 312 Kan. 872, 482 P.3d 583 (2021) (interpreting "conviction") to dismiss Sims' lawsuit.

He directly appeals to this court. Jurisdiction is proper. See K.S.A. 2022 Supp. 60-5004(l) (district court's decisions in civil cases to recover damages for wrongful convictions "may be appealed directly to" Supreme Court).

ANALYSIS

Eligibility for damages under K.S.A. 2022 Supp. 60-5004(c)(1)(B) requires the claimant prove the charge was "*dismissed* or on retrial the claimant was found to be not guilty." (Emphasis added.). Sims primarily contends he did not commit felony interference, for which he was convicted and imprisoned. He argues he was wrongfully incarcerated because the Court of Appeals effectively dismissed his felony conviction upon reversal. The State responds the interference charge was never dismissed because the case was remanded and Sims was convicted of misdemeanor interference—as he specifically requested in the Court of Appeals.

Standard of review

Because the district court dismissed this case on summary judgment and Sims does not allege any genuine issue of any material fact, this appeal presents only a question of law. *Roe v. Phillips County Hospital*, 317 Kan. 1, 5, 522 P.3d 277 (2023) ("When the parties agree that the facts are undisputed, an appellate court reviews a district court's decision to grant summary judgment de novo."). Likewise, the lower court's interpretation of K.S.A. 2022 Supp. 60-5004 is reviewed de novo. *In re Wrongful Conviction of Bell*, 317 Kan. 334, 337, 529 P.3d 153 (2023).

Discussion

We consider first whether the Court of Appeals had the authority to reverse and vacate Sims' felony interference conviction and remand for sentencing on the misdemeanor. This helps contextualize the legal question presented here. K.S.A. 2015 Supp. 21-5904(a), under which Sims was convicted, provides various alternative means for committing interference with law enforcement. See K.S.A. 2015 Supp. 21-5904(a)(1)(A) (falsely reporting a particular person committed a crime); (a)(1)(B) (falsely reporting a law enforcement officer committed a crime); (a)(1)(C) (falsely reporting any information intending to influence officer's duty); (a)(1)(D) (falsely reporting any information about the death or disappearance of child under 13); (a)(2) (concealing, destroying, or altering evidence); (a)(3) (knowingly obstructing, resisting or opposing law enforcement officers). Subsection (b) provides the appropriate classification and severity level for each type of interference with law enforcement outlined in subsection (a).

The State charged Sims with felony interference. The complaint stated:

"COUNT 5

"That on or about the 6th day of April, 2016, in Saline County, Kansas, Michael David Sims, then and there being present did unlawfully, feloniously and knowingly obstruct, resist or oppose Carlos Londono and Edward Addo persons he knew or should have known to be law enforcement officers, to wit: Carlos Londono and Edward Addo, and such law enforcement officers are authorized by law to perform an official duty, and further that such act of Michael David Sims, to wit: resist and oppose, substantially hindered or increased the burden

of Carlos Londono and Edward Addo in the performance of the officer's official duty, *and that such act was committed in the case of a felony, or resulting from parole or an authorized disposition for a felony*.

"Interference with Law Enforcement - Obstruction of Official Duty - In violation of K.S.A. 2015 Supp. 21-5904(a)(3) & (b)(5)(A), *a severity level 9 nonperson felony* (Penalty: from a minimum of 5 months to a maximum of 17 months in prison and a fine of up to $100,000; Postrelease supervision term of 12 months)." (Emphases added.)

K.S.A. 2015 Supp. 21-5904(a)(3) provides:

"(a) Interference with law enforcement is:

. . . .

(3) knowingly 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) Interference with law enforcement as defined in:

. . . .

(5) subsection (a)(3) is a:

(A) Severity level 9, nonperson felony in the case of a felony, or resulting from parole or any authorized disposition for a felony; and

(B) class A nonperson misdemeanor in the case of a misdemeanor, or resulting from any authorized disposition for a misdemeanor, or a civil case." K.S.A. 2015 Supp. 21-5904.

As shown, both felony and misdemeanor obstruction share the same criminal elements outlined in subsection (a)(3), but their classification diverges depending on the case's circumstances, as described in subsection (b).

State v. Hudson, 261 Kan. 535, 931 P.2d 679 (1997), is instructive. There, the defendant faced a felony charge of obstructing official duty, which the district court later reduced to a misdemeanor. The *Hudson* court upheld the reduction, reasoning the classification depends on what the officer believed their duty to be during the incident, not the defendant's actual status. It noted the record showed the officer was performing duties related to a misdemeanor by trying to stop the defendant for a traffic violation, even though he later learned the defendant had outstanding felony warrants. See 261 Kan. at 538-39 ("We conclude that 'official duty' under K.S.A. 21-3808 [currently K.S.A. 2022 Supp. 21-5904] is to be defined in terms of the officer's authority, knowledge, and intent."). But see 261 Kan. at 539-40 (Davis, J., dissenting) (contending classification should be based on the actual status of the

accused at the time of obstruction, not the officer's knowledge and intent).

In Sims' case, the jury instruction only provided the criminal elements under subsection (a)(3):

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

"1. *Carlos Londono was discharging an official duty, namely investigating the report of a crime*.

"2. The defendant knowingly resisted or opposed Carlos Londono in discharging that official duty.

"3. The act of the defendant substantially hindered or increased the burden of the officer in the performance of the officer's official duty.

"4. At the time the defendant knew or should have known that Carlos Londono,was a law enforcement officer." (Emphasis added.)

No element addressed Officer Londono's knowledge or intent. The instruction merely stated the officer was discharging his official duty—"namely investigating the report of a crime" without reference to whether the case was a felony or misdemeanor. And the jury simply found Sims "guilty of Interference with Law Enforcement by Obstructing Official Duty as charged in Count Five." The record remained silent on whether Londono believed he was discharging his official duty "in the case of a felony, or resulting from parole or any authorized disposition for a felony." K.S.A. 2015 Supp. 21-5904(b)(5)(A) (felony obstruction). This explains why the parties jointly agreed the Court of Appeals should reverse the felony conviction and remand for resentencing on misdemeanor obstruction.

The panel in Sims' criminal case appropriately adjusted the classification, just as the district court in *Hudson* properly reduced the charge. Felony and misdemeanor interference's identical elements mean Sims' felony conviction necessarily establishes the misdemeanor's elements, so retrying Sims' case was unnecessary. And the record supported a conviction of misdemeanor obstruction. No party disputed this.

Next, we interpret the wrongful conviction and imprisonment statute, beginning with its text. A court "must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings." *H.B. v. M.J.*, 315 Kan. 310, 320, 508 P.3d 368 (2022).

K.S.A. 2022 Supp. 60-5004(c)(1) lists the conditions a claimant must establish by a preponderance of evidence to bring a wrongful conviction claim within the statutory framework. Our focus is subsection (c)(1)(B).

"(c)(1) The claimant shall establish the following by a preponderance of evidence:

(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." (Emphasis added.) K.S.A. 2022 Supp. 60-5004.

Breaking it down, subsection (c)(1)(B) requires a claimant to show: (1) A court's reversal or vacating of a felony conviction, and (2) either the dismissal of charges or a finding of not guilty following a new trial. The district court and the parties agreed the Court of Appeals reversed the felony conviction, which settles the first element. What is contested is whether the Court of Appeals' reversal dismissed the charge.

The wrongful conviction statute does not define the phrase "the charges were dismissed," and neither do any provisions within the Code of Civil Procedure, K.S.A. 60-101 et seq. But the Kansas Code of Criminal Procedure, K.S.A. 22-2101 et seq., defines "charge"—"a written statement presented to a court *accusing a person of the commission of a crime* and includes a complaint, information or indictment." (Emphasis added.) K.S.A. 2022 Supp. 22-2202(h). It does not explicitly define "dismiss" or "dismissal."

In the civil context, the terms' meaning and effect vary depending on the type of dismissal involved, rendering a meaning less straightforward in Sims' case. See generally K.S.A. 2022 Supp. 60-241 (dismissal of actions; outlining different scenarios

such as voluntary dismissal, which is dismissed without prejudice, dismissal by court order, which is dismissed without prejudice unless a court determines specific terms, involuntary dismissal, which generally operates as an adjudication on the merits, and so forth). But Black's Law Dictionary defines "dismissal" as "[*t*]*ermination of an action, claim, or charge without further hearing*, esp. before a trial; esp., a judge's decision to stop a court case through the entry of an order or judgment that *imposes no civil or criminal liability on the defendant* with respect to that case." (Emphases added.) Black's Law Dictionary 589 (11th ed. 2019).

In this context, the phrase "the charges were dismissed" in K.S.A. 2022 Supp. 60-5004(c)(1)(B) is clear and unambiguous. The phrase signifies both terminating the criminal accusation presented in court and relieving the defendant of that accusation's criminal liability. The district court similarly defined the phrase as: a "termination[] of . . . legal proceedings without the 'not guilty' factual determination associated with an acquittal." And with this understanding, it becomes evident the district court correctly found Sims failed to prove subsection (c)(1)(B). His interference charge was never dismissed because he was convicted of that same charge on remand—even if only the reduced classification, i.e., misdemeanor.

In short, while the panel reversed Sims' felony conviction, the interference accusation in count five remained effective, leading the district court to sentence him based on his criminal liability. Although "[t]he touchstone for the classification of the offense is the reason for the officer's approaching the defendant," it is not a criminal element itself. *Hudson*, 261 Kan. at 538; see also K.S.A. 2015 Supp. 21-5904(a)(3) ("knowingly 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"). Sims' argument the felony conviction's reversal equated to dismissal misses the point and does not align with the legal principles at play.

As the State correctly claims, "if the Court of Appeals had effectively dismissed the charge, there would have been no charge upon which the misdemeanor conviction could rest. The reversal

could not have been a dismissal." In addition, though the complaint specifically charged Sims with the felony by citing K.S.A. 2015 Supp. 21-5904 (b)(5)(A), he can still be convicted of the misdemeanor version, given that both versions share identical criminal elements. Construing this reversal as a dismissal of the charge would collapse subsection (c)(1)(B)'s second element into the first, rendering it meaningless. See *State v. Moler*, 316 Kan. 565, 573, 519 P.3d 794 (2022) ("Courts 'presume the legislature does not intend to enact useless or meaningless legislation.'").

Sims also asks that the statute's purpose be considered, proposing its construction in his favor due to its remedial nature. But we have already rejected a similar claim in *In re M.M.*, a case in which the court was asked to "disregard the Legislature's intent as expressed through the plain language of the statute and instead construe K.S.A. 2019 Supp. 60-5004 as broadly as possible because it is a remedial statute." 312 Kan. at 874. The *M.M.* court explained:

> "[W]e held that 'a *tort statute* may be construed liberally in order to give effect to its remedial purpose.' (Emphasis added.) Unlike tort law—derived from common law—K.S.A. 2019 Supp. 60-5004 was promulgated by the Kansas Legislature. As a result, *we are bound to interpret and apply the provisions of K.S.A. 2019 Supp. 60-5004 as the Legislature intended—not to extend the statute's application when the court sees fit*.
>
> "We reject M.M.'s claim that K.S.A. 2019 Supp. 60-5004 applies to juvenile adjudications because the plain language of the statute unambiguously states otherwise. [Citations omitted.]" (Emphasis added.) 312 Kan. at 874-75.

We hold the district court properly granted the State's motion for summary judgment.

Judgment of the district court is affirmed.

No. 123,097

STATE OF KANSAS, *Appellee*, v. CARDELL TURNER, *Appellant*.

(542 P.3d 304)

SYLLABUS BY THE COURT

1. ATTORNEY AND CLIENT—*Breakdown in Communication between Defendant and Counsel—Disagreement About Trial Strategy.* Disagreements about trial strategy do not show a complete breakdown in communication between a defendant and counsel.

2. SAME—*Defendant Must Show Requisite Justifiable Dissatisfaction for Substitute Appointed Counsel.* If a defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction for substitute appointed counsel.

3. TRIAL—*Determination Whether Counsel's Failure to Advocate for Instruction—Appellate Review.* When determining whether counsel's failure to advocate for an instruction supporting the defendant's only line of defense was prejudicial, a jury verdict that clearly reveals the jury would have rejected that defense and strong evidence cutting directly against that defense can inform the analysis.

4. JUDGES—*Disagreement with Judge's Rulings Not a Basis for Judge's Recusal.* Disagreement with a judge's rulings cannot serve as the basis for a judge's recusal under K.S.A. 20-311d(d).

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 28, 2022. Oral argument held September 14, 2023. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed February 2, 2024. Judgment of the Court of Appeals affirming the district court on the issues subject to review is affirmed. Judgment of the district court is affirmed on the issues subject to review.

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

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett,* district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: On August 14, 2018, Alberto Alfaro and Enrique Umana Somoza were outside a home in Wichita trying to jump

start Alfaro's truck. Cardell Turner pulled up beside them in his car, pointed a gun in the direction of Somoza and Alfaro, and pulled the trigger. The gun did not fire. Turner drove away, and no one was harmed. The State charged Turner with two counts of attempted first-degree murder and one count of conspiracy to commit murder in relation to this incident.

Prior to trial, Turner moved for new appointed counsel, alleging dissatisfaction with his counsel and a complete breakdown in communication. After two hearings, the district court denied the motion, reasoning that much of Turner's dissatisfaction came from Turner's unreasonable expectations and misunderstanding of the law. The case proceeded.

Turner testified in his own defense at trial. He told the jury he worked for a drug cartel in California and had been in Wichita to collect money from Alfaro and a man who worked locally for the cartel named Rogelio Velasquez. Turner collected the money from Velasquez upon his arrival in early August and then set his sights on Alfaro. Turner and Alfaro met in Topeka, but Alfaro did not have the money, so the two planned to meet again in a few days. Alfaro did not show up at the next scheduled meeting, so Velasquez told Turner where he might be able to find Alfaro. Velasquez also gave Turner a gun.

On August 14, Turner located Alfaro and Somozo trying to jump start a truck. Turner was on the phone with Velasquez at this time and reported the scene. Velasquez told Turner "when their heads are under [the hood], go do what you're going to do." Turner testified his plan was to "catch [Alfaro] in the low compromised . . . so [he could] approach him like, hey, what's up, man, like you got the money, you ready." Turner brought the loaded gun from Velasquez "in case something [went] down" but kept it in his lap.

Turner approached the two men in his car with his window rolled down and said, "'what's up." Turner testified Alfaro looked over his shoulder at Turner, turned away, and then spun around holding a gun. Turner then picked up his own gun and pointed it in the direction of Alfaro but "[could not] say it was pointed directly at him." Turner thought Alfaro was going to shoot, so he pulled the trigger on his weapon. Turner's gun malfunctioned and

did not fire. Turner testified that the men began laughing at him and he drove away.

As he drove, Turner called Velasquez and told him the gun had malfunctioned. He also told Velasquez that Somoza had seen him and "might have to go too." Turner explained this was his way of letting Velasquez know the men had seen him and that whatever happened to the men afterwards was "over [his] pay rate." Turner maintained throughout his testimony that he planned on getting the money from Alfaro and leaving, that he never intended to shoot or kill Alfaro, and that he only pulled his gun out of his lap and tried to fire because he thought Alfaro was going to shoot him.

Alfaro testified to a different version of events. He told the jury he never met with Turner and had not seen or heard of him prior to the day he pulled up outside of his house. Alfaro testified he had been trying to jump start his truck with a neighbor, Somoza, when Turner pulled up with his window rolled down. Turner asked, "what's up," Alfaro answered, then Turner asked, "what's right," pulled a gun up, and pointed it at Alfaro. Alfaro testified "what's right" means "bullets are about to start flying." Turner pulled the trigger three or four times, but it did not fire. Alfaro testified he told Turner to "get off" and Turner started screaming that he was going to kill Alfaro. Turner fiddled with the gun in an apparent attempt to get it working. Alfaro testified that, at this point, he thought it was a joke or a misunderstanding, so he started laughing. Turner drove off. Alfaro jump started his truck and tried to follow Turner to "see what's up," but did not catch up with him. Alfaro testified that neither he nor Somoza pointed a gun at Turner during the encounter. Somoza testified to a corroborating version of events.

An FBI agent testified at trial. He revealed that Velasquez had been the subject of a wiretap in August 2018 because he was suspected of engaging in drug distribution and money laundering. On August 12 or 13, the FBI began intercepting calls between Velasquez and Turner and learned that Turner was in Wichita looking for someone. Through testimony from the agent and playback of the recorded calls, the jury learned more about what was said on these calls. During the call that took place when Turner located Alfaro jump starting the truck, Turner told Velasquez he could "do

nothing" because he was driving and there were too many people around. Turner said if he "had somebody who was driving then [he] could hit it . . . or [he] could follow him." The recording confirmed that Velasquez told Turner, when Alfaro's head is under the hood, "do your thing" and then "jump on the motherfuckin' freeway." Turner again said there were too many people out there. The men speculated that once the subject got his truck started, he might go home. Velasquez told Turner that area was "kinda hot" and "too open." Agents interpreted this call to indicate an act of violence was going to occur.

Two minutes later, the FBI intercepted the call between Turner and Velasquez during which Turner said the gun had not worked and that he had been laughed at. About a half hour later, the FBI intercepted another call between the two men. Turner told Velasquez "that fat boy . . . might have to go too . . . cause he seen my face." Velasquez responded "yeah, both of y'all, fuck it."

The jury convicted Turner of one count of attempted first-degree murder for attempting to shoot Alfaro, one count of attempted second-degree murder for attempting to shoot Somoza, and one count of conspiracy to commit murder for conspiring to kill Alfaro. Following trial, Turner's counsel moved to withdraw because Turner claimed he had been ineffective, which led to a conflict of interest. Turner filed pro se a "motion to terminate ineffective counsel with request for new trial." The court granted the motion to withdraw and appointed Turner new counsel. After a hearing, the district court found trial counsel had not been ineffective and denied Turner's motion for new trial. Turner also filed many motions requesting the trial judge recuse himself, two pro se and one through counsel, and an affidavit in support. The court denied the motion submitted through counsel and the supporting affidavit. It sentenced Turner to 653 months' imprisonment for the attempted first-degree murder, 123 months' imprisonment for conspiracy to commit first-degree murder, and 61 months' imprisonment for the attempted second-degree murder, with the sentences to run consecutively.

Turner appealed his convictions and sentence. The Court of Appeals affirmed his convictions but vacated his sentence and remanded for resentencing because the district court miscalculated

his criminal history score. *State v. Turner*, No. 123,097, 2022 WL 15527878, at *19 (Kan. App. 2022) (unpublished opinion). We granted Turner's petition for review of the portion of the panel's opinion affirming his convictions and the State's conditional cross-petition for review of the panel's holdings that a self-defense instruction was factually warranted and that defense counsel rendered deficient performance.

Self-defense Instruction

Turner argued in the Court of Appeals the district court clearly erred when it did not instruct the jury on the affirmative defense of self-defense. He claimed his testimony that he pointed a gun at Alfaro only after Alfaro first pointed one at him from close range permitted a rational fact-finder to find he had a subjective and objective fear for his life. The State argued self-defense was unavailable to Turner under the initial aggressor exception to self-defense in K.S.A. 2022 Supp. 21-5226(c) because even according to Turner's version of events, Turner initially provoked Alfaro by driving up to him with a gun in his lap and then did not exhaust every means of escape before turning to deadly force.

The Court of Appeals held the instruction would have been legally and factually appropriate, but the failure to offer it had not been clear error. The State challenges the conclusion the instruction was factually appropriate, and Turner challenges the conclusion it was not clear error when the court failed to offer the instruction.

We review claims of instructional errors in four steps.

> "First, the court considers the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; next, the court applies an unlimited review to determine whether the instruction was legally appropriate; then, the court determines 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, 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)." *State v. Bentley*, 317 Kan. 222, 242, 526 P.3d 1060 (2023).

If the defendant did not request the instruction below, "the reviewing court applies the clear error standard . . . [and] determines whether it is firmly convinced that the jury would have reached a

different verdict had the instruction error not occurred." *Bentley*, 317 Kan. at 242. It is the defendant's burden to establish reversibility "and, when examining whether the defendant has met that burden, the reviewing court makes a de novo determination based on the entire record." *Bentley*, 317 Kan. at 242.

The parties agree Turner did not request an instruction on self-defense, so we review for clear error.

The panel concluded the instruction would have been legally appropriate because self-defense is an applicable defense to attempted murder. *Turner*, 2022 WL 15527878, at *6. Neither party contests this conclusion. Their disagreements begin with the factual appropriateness of the instruction.

K.S.A. 2022 Supp. 21-5222 describes the right to use self-defense in the following manner:

"(a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.

"(b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person."

This statute sets out a two-part test. The first part is a subjective one "and requires a showing that [the defendant] sincerely and honestly believed it was necessary to kill to defend herself or others." *State v. Qualls*, 309 Kan. 553, 557, 439 P.3d 301 (2019) (quoting *State v. McCullough*, 293 Kan. 970, 975, 270 P.3d 1142 [2012]). The second part of the test is objective "and requires a showing that a reasonable person in [the defendant's] circumstances would have perceived the use of deadly force in self-defense as necessary." *Qualls*, 309 Kan. at 557 (quoting *McCullough*, 293 Kan. at 975).

K.S.A. 2022 Supp. 21-5226 creates some exceptions to using self-defense. Relevant here, the statute makes self-defense unavailable to anyone who

"initially provokes the use of any force against such person or another, unless:

"(1) Such personhas reasonable grounds to believe that such person is in imminent danger of death or great bodily harm, and has exhausted every reasonable means to escape such danger other than the use of deadly force . . . ." K.S.A. 2022 Supp. 21-5226(c).

Turner was entitled to a self-defense instruction so long as there was "'competent evidence'" to support it. *State v. Harris*, 313 Kan. 579, 592, 486 P.3d 576 (2021) (quoting 2020 Supp. K.S.A. 21-5108[c]). Competent evidence is "evidence that could allow a rational fact-finder to reasonably conclude that the defense applies." *Harris*, 313 Kan at 592.

The panel concluded Turner's testimony provided competent evidence Turner subjectively and objectively feared for his life when he raised his weapon and fired. The panel further concluded there was competent evidence that would support a finding the initial aggressor exception did not apply. It reasoned a rational fact-finder could find Turner did not initially provoke Alfaro and that even if he did, Turner had no other means to escape deadly force. 2022 WL 15527878, at *8.

The State argues the panel made two errors in its reasoning. First, it contends the panel erred in considering the evidence in a light most favorable to Turner because Turner did not request the instruction below. The State insists when an instructional error is unpreserved, appellate courts should not look at the evidence in a light most favorable to the defendant when considering the factual appropriateness of an instruction. The State argues this approach conflicts with what this court did in *State v. Williams*, 295 Kan. 506, 286 P.3d 195 (2012), with what it directed in *State v. Pulliam*, 308 Kan. 1354, 430 P.3d 39 (2018), and with the clear error standard in K.S.A. 2022 Supp. 22-3414(3).

We will not address the State's argument because it failed to advance it in the Court of Appeals. It hinted at it when it set out the governing law in its appellate brief by writing "[a] *requested* instruction relating to self-defense is factually appropriate if there is sufficient evidence, when viewed in the light most favorable to the defendant, for a rational factfinder to find for the defendant on that theory." (Emphasis added.) But the State did not ask the panel to review the evidence any differently in the case of an unrequested instruction or depart from the line of caselaw explaining that evidence is reviewed in a light most favorable to the defendant without distinguishing between requested and unrequested instructions. See, e.g., *State v. Lowry*, 317 Kan. 89, 96, 524 P.3d 416 (2023); *State v. Becker*, 311 Kan. 176, 183, 459 P.3d 173 (2020) (quoting *State*

v. Chavez, 310 Kan. 421, 430, 447 P.3d 364 [2019]) (instruction is factually appropriate "if there is 'sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction'"). We recently declined to review the same argument under similar circumstances. See *State v. Berkstresser*, 316 Kan. 597, 602, 520 P.3d 718 (2022) (argument that unrequested instructions should be reviewed in light most favorable to the State unpreserved and thus unreviewable when State only hinted at issue in Court of Appeals).

Next, the State argues the panel erred in concluding that, even when one considers the evidence in a light most favorable to Turner, a self-defense instruction was factually appropriate. It accepts the Court of Appeals conclusion there was competent evidence to support a finding Turner objectively and subjectively feared for his life. But it argues the panel erred in holding there was competent evidence to support a finding Turner was not an initial aggressor. The State reasons that, even according to his own testimony, Turner initially provoked Alfaro by driving up next to him with a gun in his lap and he did not try to escape before turning to deadly force.

The panel rejected this argument. It concluded a rational factfinder could find Turner did not provoke Alfaro because there was evidence Turner's window was only halfway down and tinted very dark, meaning Alfaro could not see the gun in Turner's lap. *Turner,* 2022 WL 15527878, at *8.

The State acknowledges this evidence, but argues the panel erred because it ignored contradictory evidence that would make that an unreasonable finding. The State insists because Turner pulled up close to Alfaro and Somoza on the driver's side, the gun would have been visible to them.

This is unconvincing. The evidence could have supported a finding that Turner had a gun in his lap that was not visible to Alfaro or Somoza. It may have also supported a finding that the gun was visible, but that does not mean the instruction was factually inappropriate. *State v. Holley*, 313 Kan. 249, 255, 485 P.3d 614 (2021), *on reh'g* 315 Kan. 512, 509 P.3d 542 (2022) ("A defendant's testimony, even if contradicted by all other witnesses and physical evidence, satisfies the de-

fendant's burden as long as a rational fact-finder would reasonably conclude the defense applies."). We agree with the panel that the instruction would have been factually appropriate.

When an unrequested instruction would have been legally and factually appropriate, its absence amounts to clear error requiring reversal only if "the reviewing court . . . is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." *Bentley*, 317 Kan. at 242.

The panel concluded that the failure to instruct on self-defense was not clear error because the evidence against Turner was "overwhelming." *Turner*, 2022 WL 15527878, at *10.

Turner argues the panel erred because it did not consider how the weight of the evidence would have changed if the jury had been instructed on self-defense. Turner cites the evidence that Alfaro started laughing after Turner's gun did not fire and that Alfaro tried to follow Turner after he drove away. Turner argues that, had the jury been given the opportunity to consider self-defense, they would have relied on these facts to believe Turner's testimony. He insists the jurors would have also interpreted the phone calls between Turner and Velasquez as discussions about collecting money, not about killing someone, if it had been instructed on self-defense.

We disagree. Alfaro and Somoza testified they had no weapon. Velasquez told Turner, when Alfaro's head is under the hood, do "your thing" and then "jump on the motherfuckin' freeway." When Turner called Velasquez back after the gun misfired, he told Velasquez the gun had malfunctioned, and that Somoza had seen him and "might have to go, too."

Like the Court of Appeals, we are not clearly convinced the result would have been different with a self-defense instruction. The absence of a sua sponte instruction on self-defense was not clear error.

Substitute Counsel

Before trial, Turner moved for new appointed counsel. After two hearings, the district court denied the motion. Turner appealed, and the panel affirmed.

This court reviews a district court's denial of a motion for substitute counsel for an abuse of discretion. The defendant bears the burden

of establishing an abuse of discretion. *State v. Breitenbach*, 313 Kan. 73, 90, 483 P.3d 448, *cert. denied*, 142 S. Ct. 255 (2021).

The state and federal Constitutions guarantee a right to effective assistance of counsel. But they do not guarantee a criminal defendant the right to choose which attorney is appointed to represent them. *Breitenbach*, 313 Kan. at 90. Thus, if a defendant requests substitute appointed counsel, the defendant must show "'justifiable dissatisfaction' with appointed counsel." *Breitenbach*, 313 Kan. at 90 (quoting *State v. Sappington*, 285 Kan. 158, 166, 169 P.3d 1096 [2007]). Instances that may show "[j]ustifiable dissatisfaction include[] a showing of a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between counsel and the defendant." *Breitenbach*, 313 Kan. at 90 (quoting *Sappington*, 285 Kan. at 166). Ultimately, however, the court may refuse to appoint new counsel so long as it has "'a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense.'" *Breitenbach*, 313 Kan. at 90. And, if a "defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction" for substitute appointed counsel. *Breitenbach*, 313 Kan. at 90-91.

In the district court, Turner alleged his counsel was doing a poor job by failing to file certain motions, failing to amend Turner's charges, failing to investigate certain things, and failing to regularly communicate with Turner. Turner argued this had culminated in a breakdown of communication that made it impossible to carry on. Turner's counsel acknowledged he and Turner were no longer able to talk about the case but told the court it was because Turner refused to talk with him. The district court denied the motion and gave a thorough explanation as to why. Summarized, the court concluded Turner had unrealistic expectations of what an attorney did and that he would have the same complaints even with new counsel.

The Court of Appeals affirmed the district court's decision. It observed the district court based its ruling on a finding that coun-

sel's representation was adequate. Thus, even if there was a complete breakdown in communication, that breakdown stemmed from Turner's unreasonable expectations and would not be remedied by new counsel. *Turner*, 2022 WL 15527878, at *4-5.

In his petition for review, Turner fails to discuss the Court of Appeals decision or point to any error in its analysis. He instead argues the district court was wrong when it concluded Turner would have the same complaints with new counsel. He asserts that his complaints and the breakdown in communication stemmed from trial counsel's lack of advocacy and thus, if he had new and zealous counsel, he would not have the same complaints. He reasserts his position that counsel was inadequate because he failed to file motions to dismiss he said he would file, failed to investigate Turner's alibi defense, and failed to show Turner he was properly preparing the case.

We see no error in the panel's analysis. Turner fails to explain why a motion to dismiss was warranted or why counsel should have investigated an alibi defense when Turner admitted to being at the scene and trying to fire his weapon. Without some showing that these actions amounted to inadequate representation, they are fairly described as trial strategy, which is the "'exclusive province of the lawyer.'" *State v. Brown*, 305 Kan. 413, 426, 382 P.3d 852 (2016) (quoting *State v. Banks*, 216 Kan. 390, 395, 532 P.2d 1058 [1975]). And this court has held that disagreements about trial strategy do not "show a complete breakdown in communication." *Brown*, 305 Kan. at 426; see also *State v. Burnett*, 300 Kan. 419, 450-51, 329 P.3d 1169 (2014) (defendant had not shown justifiable dissatisfaction or that complaints would be remedied by new counsel when complaints stemmed from defense counsel's refusal to investigate matters or call witnesses defendant deemed important).

Turner also fails to offer any authority for his position that his attorney needed to "show [Turner] he was working for him and properly preparing the case" to provide effective representation. Moreover, he fails to explain what this would require and why it would be alleviated by a new attorney. We affirm the Court of Appeals decision to affirm the district court's denial of the motion for new appointed counsel.

Ineffective Assistance of Counsel

After the jury convicted Turner, Turner moved pro se for a new trial. He alleged, among other things, he was entitled to a new trial because his counsel had been ineffective when he failed to request a self-defense instruction. Newly appointed counsel submitted a supplemental brief that advanced the same allegation. At a hearing, Turner's new counsel asked trial counsel why he had not requested a self-defense instruction:

"Q: And when you said that you didn't think you'd get a self-defense instruction, I think we're all generally familiar with the difficulty with that issue of self-defense instruction and the case law and how, on many occasions, the defense will argue for it and the Court will determine that it's not appropriate under the circumstances or the facts of the case and the Court just declines to give the instruction. And that was your determination that, based on the facts and circumstances here, it just wasn't gonna happen?

"A: That was my determination. If it was a mistake, it was a mistake."

The district court concluded defense counsel had not been deficient and denied the motion for a new trial. The court reasoned counsel was "very experienced, made decisions, employed a strategy, one that seemed to—in the poker analogy, to be the best one that could be done with the facts and circumstances." The court further ruled even if counsel had been deficient, any deficiencies could not have been prejudicial.

The Court of Appeals disagreed with the district court's reasoning. It held counsel's "failure to request a jury instruction on self-defense was objectively unreasonable." *Turner*, 2022 WL 15527878, at *13. But a majority of the panel affirmed the district court's ultimate ruling after concluding the instruction would not have made a difference given the "overwhelming evidence against [Turner]." 2022 WL 15527878, at *13.

Our standard for reviewing an ineffective assistance of counsel claim is well-known:

"In evaluating a claim of ineffective assistance [of counsel], courts apply a two-step test. First, they consider whether the defendant has shown that 'counsel's representation fell below an objective standard of reasonableness.' *Balbirnie* [*v. State*], 311 Kan. [893,] 897[, 468 P.3d 334 (2020)] (quoting *Strickland* v. *Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). If the defendant succeeds in making this showing, the next step requires the defendant

show 'the deficient performance prejudiced the defense.' *Balbirnie*, 311 Kan. at 897." *State v. Dinkel*, 314 Kan. 146, 148, 495 P.3d 402 (2021).

In assessing prejudice, "'[j]udicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Dinkel*, 314 Kan. at 148 (quoting *State v. Betancourt*, 301 Kan. 282, 306, 342 P.3d 916 [2015]).

An appellate court uses a mixed standard of review in evaluating lower decisions on ineffective assistance of counsel. It "consider[s] whether substantial competent evidence supports the court's factual findings and review[s] the court's conclusions of law de novo." *Dinkel*, 314 Kan. at 148.

The State argues the Court of Appeals erred when it concluded defense counsel's failure to request a self-defense instruction was objectively unreasonable. The State's only argument is that a self-defense instruction was factually inappropriate, so it could not have been unreasonable when counsel did not request such an instruction.

We have concluded an instruction on self-defense was factually appropriate. This defeats the argument on which the State rests its position. We thus affirm the Court of Appeals conclusion defense counsel was deficient in failing to request a self-defense instruction and turn to the prejudice analysis.

The majority of the Court of Appeals concluded the deficient performance was not prejudicial because there was no reasonable possibility the failure to request a self-defense instruction affected the outcome of the trial, given the "overwhelming evidence" against Turner's defense. *Turner*, 2022 WL 15527878, at *13.

Judge Malone dissented on this issue. He opined that the failure to give the jury an avenue to apply Turner's defense was prejudicial, likening this case to *State v. Dinkel*, 314 Kan. 146. *Turner*, 2022 WL 15527878, at *19 (Malone, J., concurring in part and dissenting in part). In *Dinkel*, the State charged Dinkel with rape of a child under 14. Dinkel admitted to sexual intercourse with a child under 14 but argued in defense the alleged victim had initially raped her while she did nothing but lie motionless on a bed.

This court held that defense counsel had been ineffective because they did not request an instruction on the voluntary act requirement, and without such an instruction, the jury had no way to apply Dinkel's defense. This court explained:

> "The failure to give the jury the tools it needed to apply Dinkel's defense against the State's case made it impossible to achieve the fundamental fairness we expect in a criminal trial. The instructions told the jury the State had to prove Dinkel knowingly engaged—meaning she was aware of her conduct—in sexual intercourse with K.H. between November and March while K.H. was less than 14 years old. Dinkel admitted to at least one instance of sexual intercourse with K.H. during this time. She also testified that K.H. forcibly raped her during their first sexual encounter while she just 'lied there' and presented evidence to support this claim. But no instruction told the jury that Dinkel was not guilty if she was forcibly raped. Because we generally presume juries follow instructions, *State v. Race*, 293 Kan. 69, 77, 259 P.3d 707 (2011), the absence of an instruction permitting the jury to apply Dinkel's defense was prejudicial. Without it, Dinkel's testimony secured her conviction for at least one of the charges.
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> . . . .
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> "We conclude that Struble's deficient performance resulted in a 'breakdown in the adversarial process' and that, without this breakdown, the result would likely have been different.' *Strickland*, 466 U.S. at 696." *Dinkel*, 314 Kan. at 154-55.

Here, Judge Malone reasoned that "[a]s in *Dinkel*, Turner's counsel urged the jury to find Turner not guilty but offered them no avenue to do so. While counsel presented Turner's version of events to the jury, nothing in his arguments or the instructions told the jury how it could use that information to acquit him." *Turner*, 2022 WL 15527878, at *21 (Malone, J., concurring in part and dissenting in part).

Turner adopts the dissent's position. He also argues the panel erred in viewing the evidence against him as overwhelming. He contends the panel embraced the State's version of events without considering how else the evidence could have been interpreted.

At first blush, there are some similarities to *Dinkel*. The jury was instructed the State proved the charged crime if it proved Turner committed an overt act in furtherance of the premeditated and intentional killing of Alfaro. Turner admitted to lifting his gun, pointing it in the direction of Alfaro and Somoza, and pulling the trigger because he thought Alfaro was going to shoot him. In so doing, it would appear he effectively admitted to attempted first-degree murder. He argued his actions were justified as an act

of self-defense. But, as in *Dinkel*, the jury here had no way to apply that justification when it was not offered a self-defense instruction.

But there are two distinguishing factors here that indicate the majority of the Court of Appeals was correct in concluding the presence of a self-defense instruction was not reasonably likely to change the outcome of the trial. The first difference lies in the jury verdict. In *Dinkel*, this court opined that a revealing jury verdict might inform the prejudice analysis. *Dinkel*, 314 Kan. at 154 ("We might also be able to conclude there was no prejudice here if the jury's verdict could somehow show that the jury applied Dinkel's defenses even though it was never instructed to do so.").

The verdict in this case is enlightening. The jury convicted Turner of the separate offense of conspiracy to commit murder in the first degree. To find Turner guilty of this charge, the jury had to find:

> 1. The defendant agreed with another person to commit murder in the first degree.
> 2. The defendant did so with the intent that murder in the first degree be committed.
> 3. The defendant or any party to the agreement acted in furtherance of the agreement by sitting off the residence on South Greenwood, watching the victims, and then driving by and drawing a handgun and pulling the trigger multiple times.
> 4. This act occurred on or about the 14th day of August, 2018, in Sedgwick County, Kansas.

Thus, the jury found Turner agreed with another person to commit a murder and acted in furtherance of that agreement by going to Alfaro's, waiting, and pulling the trigger. This is inconsistent with the notion that Turner went to Alfaro's to collect money and only pulled the trigger in self-defense after a gun was pulled on him. If the jury had believed Turner's version of events, it seems likely they would have rejected the conspiracy charge.

Of course, it is difficult to predict what a jury will do. Cf. *State v. Barrett,* 309 Kan. 1029, 1039, 442 P.3d 492 (2019) (observing existence of jury nullification and inconsistent verdicts and their mitigating effect on complex cases). There may be an argument to be made that a robust presentation from defense counsel, coupled with a self-defense jury instruction, could have changed the jurors' minds.

But the second factor that distinguishes this case from *Dinkel* counters any unpredictability. As the Court of Appeals observed, there was a significant amount of evidence weighing directly against Turner's defense. Both Alfaro and Somoza testified that neither of them had a gun. And the calls between Turner and Velasquez suggested Turner was there to commit a murder.

In contrast, in *Dinkel*, there was evidence that supported Dinkel's claim that she did not voluntarily act and minimal evidence countering it. The defendant argued she had hired the alleged victim to do work around her house. She testified that one day, he pushed her down on a bed and held her there while he penetrated her vagina with his penis. She entered a Facebook message into evidence in which K.H. allegedly wrote that he had forced Dinkel into the first sexual encounter. *Dinkel*, 311 Kan. at 555. K.H. testified that he had never raped Dinkel, but no more evidence countered Dinkel's claim that she just lay on the bed while K.H. held her down. *State v. Dinkel*, No. 113,705, 2018 WL 1439992, at *8 (Kan. App. 2018) (unpublished opinion) ("K.H. denied ever raping Dinkel"), *rev'd* 311 Kan. 553, 465 P.3d 166 (2020).

This difference is significant because with evidence in support of Dinkel's testimony and minimal evidence countering it, there was a greater chance the jury would accept it if it had been given the tools to do so. But here, there was significant evidence Turner did not act in self-defense. This makes it less likely a jury would accept his testimony and less challenging for an appellate court to assess possible prejudice.

Turner insists the evidence was not overwhelming. He focuses on the phone calls between himself and Velasquez, arguing that they never discussed homicide and could easily be interpreted as discussions regarding collecting drug money.

Turner is correct that neither party mentioned homicide on the phone calls. But neither party mentioned money, either. They also did not mention any failed attempts to collect money from Alfaro before the attempted shooting. And Turner's phone call to Velasquez immediately after he left Alfaro's never mentioned Alfaro having a weapon or a failed attempt to collect money. Turner told Velasquez only that the gun had not fired, and that Somoza would need to go, too, because he had seen Turner.

When determining whether counsel's failure to advocate for an instruction supporting the defendant's only line of defense was prejudicial, a jury verdict that clearly reveals the jury would have rejected that defense and strong evidence cutting directly against that defense can inform the analysis. Here, the weight of evidence cutting directly against Turner's defense, along with the jury verdict finding Turner guilty of conspiracy to commit first-degree murder, distinguish this case from Dinkel and show there was no reasonable possibility the verdict would have been different had the jury been instructed on self-defense.

We agree with the Court of Appeals that counsel's failure to request a self-defense instruction was not prejudicial.

Motions for District Judge's Recusal

After he was convicted and before sentencing, Turner filed three motions—two pro se and one through counsel—and an affidavit alleging the trial judge was biased against Turner and requesting the judge recuse. The motions were denied. The Court of Appeals affirmed.

This court exercises de novo review over whether a trial judge should have recused and whether the failure to do so warrants setting aside a district court judgment. *State v. Moyer*, 306 Kan. 342, 369, 410 P.3d 71 (2017).

There are "at least three possible bases for litigants to seek recusal of a trial judge: [1] the Kansas Code of Judicial Conduct, Supreme Court Rule 601B, Canon 2, Rule 2.2 (2013 Kan. Ct. R. Annot. 735); [2] K.S.A. 20-311d(c); and [3] the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State v. Moyer*, 306 Kan. at 370.

Turner cited all three bases as authority in seeking Judge Brown's recusal. The Court of Appeals held the district court did not err in denying the motions for recusal. We affirm that decision.

Statutory Analysis

K.S.A. 20-311d(a) permits a party to move for a change of judge. If that motion is denied, the party may file an affidavit alleging one or more of the grounds for disqualification listed in K.S.A. 20-311d(c), including when "[t]he party or the party's attorney . . . has cause to believe and does believe that on account of the personal bias, prejudice

or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies." K.S.A. 20-311d(c)(5). The chief judge or another assigned judge should then determine "the legal sufficiency of the affidavit." K.S.A. 20-311d(b). K.S.A. 20-311d(d) provides that "the recital of previous rulings or decisions by the judge on legal issues . . . shall not be deemed legally sufficient for any belief that bias or prejudice exists."

On review of a judge's decision not to recuse under this statute, an appellate court "'must decide the legal sufficiency of the affidavit and not the truth of the facts alleged.'" *Moyer*, 306 Kan. at 371 (quoting *State v. Sawyer*, 297 Kan. 902, 908, 305 P.3d 608 [2013]). The appellate court decides "'whether the affidavit provides facts and reasons . . . which, if true, give fair support for a well-grounded belief that he or she will not obtain a fair trial.'" *Moyer*, 306 Kan. at 371 (quoting *Sawyer*, 297 Kan. at 908). The court considers "'whether the charges are grounded in facts that would create reasonable doubt concerning the court's impartiality, not in the mind of the court itself, or even necessarily in the mind of the litigant filing the motion, but rather in the mind of a reasonable person with knowledge of all the circumstances.'" *Moyer*, 306 Kan. at 371 (quoting *Sawyer*, 297 Kan. at 908).

After the district court denied Turner's motion for the judge's recusal, Turner filed an affidavit supporting the request for recusal in accordance with K.S.A. 20-311d(a). He argued the judge had been biased and prejudicial against him and this prejudice and its effect was evident in the judge's decisions allowing the State to introduce "fatally tainted" evidence, allowing improper jury instructions, denying the motion for new counsel, and in the judge's habit of cutting Turner off when he was talking in a way that made Turner feel "belittled," "threatened and intimidated."

The district judge assigned to consider the affidavit concluded that disagreement with the judge's rulings and any irritation the judge showed towards Turner could not demonstrate judicial bias or prejudice. It also ruled that the fact the judge required Turner to quit talking and present his defense through trial counsel could not show bias or prejudice. Thus, the district court concluded the affidavit was legally insufficient to force the judge's recusal.

The Court of Appeals agreed with the district court's conclusions that disagreement with a ruling is not legally sufficient to

show bias or prejudice. The panel further concluded that cutting Turner off after asking him to speak could not show bias because a judge has broad discretion in controlling a courtroom. *Turner*, 2022 WL 15527878, at *14.

We conclude the panel made no error in affirming the district court's decision that Turner's affidavit was not legally sufficient to warrant the district judge's recusal under K.S.A. 20-311d. The panel's conclusion that disagreement with rulings cannot serve as the basis for recusal is sound. See *Sawyer*, 297 Kan. at 908 (declining to consider disagreements with district court's rulings in recusal analysis because "[a]dverse legal rulings alone cannot form the basis for a recusal") (citing K.S.A. 20-311d[d]).

That leaves only Turner's complaints about the judge cutting him off in a way that made him feel belittled or threatened. But the panel persuasively pointed out that judges have great leeway in controlling a courtroom. See *State v. Kemble*, 291 Kan. 109, 114, 238 P.3d 251 (2010) ("'a trial court must control the proceedings in all hearings and trials and . . . has broad discretion and leeway in doing so'"). Without more details about these incidents or why they went beyond a judge's responsibility to direct parties when to speak, the bare facts provided in the affidavit are legally insufficient to force a judge's recusal under the statute. See *Sawyer*, 297 Kan. at 908 (allegations in affidavit that judge prevented pro se pleadings and ordered defendant transported gag in place were not, without more detail, legally sufficient to force recusal because this is not always unjustified).

Code of Judicial Conduct Analysis

Kansas Supreme Court Rule 601B, Canon 2, Rule 2.2 provides: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." (2023 Kan. S. Ct. R. at 493). Canon 2, Rule 2.11 provides: "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including . . . (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer . . . ." (2023 Kan. S. Ct. R. at 499.)

A motion for recusal under the Judicial Code of Conduct is not constrained by the statutory prohibition on relying on adverse

rulings to move for a judge's recusal under K.S.A. 20-311d. See K.S.A. 20-311d(d) (prohibiting "affidavit filed pursuant to this section" from relying on previous rulings or decisions to show bias). Nonetheless, Turner has failed to show the rulings in this case showed bias or prejudice against him. He complains about the judge's admission of evidence, denial of motion for new counsel, refusal to rule on pro se motions, jury instruction on intent, and imposed sentence. But review of the record suggests there was no bias influencing these decisions. The judge did not rule on pro se pleadings other than ineffective assistance of counsel claims because Turner was continually represented by counsel. And all the rulings, including sentencing, were offered after arguments from both sides and with the judge's consideration of the applicable law. While the judge's decision to run all three sentences consecutively added time to what the State recommended, this was within the court's discretion to do.

Furthermore, the district judge's efforts to stop Turner from speaking do not show a bias or prejudice against Turner. While some of the judge's comments may have showed some irritation, review of the entire record reveals that the comments to which Turner appears to refer were isolated, did not represent the judge's usual or general demeanor, and were precipitated by regular interruptions from Turner. The few comments to which Turner points to would not cause a reasonable person to believe the judge could not act impartially. There are many instances throughout the record during which Judge Brown showed great patience with Turner and his repeated attempts to address the court and discuss his legal arguments. Turner has failed to show that the judge's conduct and rulings would make a reasonable person question his impartiality and require recusal under the Code of Judicial Conduct.

Due Process Analysis

The Due Process Clause of the Fourteenth Amendment "guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 [1955]). Because "bias is easy to attribute to others and difficult to discern in oneself," the Supreme Court applies "an

objective standard that . . . asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."'" *Williams*, 579 U.S. at 8 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 [2009]).

The Supreme Court has identified at least four instances when that would be the case:

"when a judge has a direct, personal, substantial pecuniary interest in the case; when a judge has an indirect financial interest in the case's outcome; when a judge issues a contempt citation in one case and proceeds to try the contempt citation; and, in rare instances, when a litigant donates to a judge's campaign for office." *Sawyer*, 297 Kan. at 909.

The Supreme Court has held that, if the failure to recuse violates due process because the potential for bias was unconstitutionally intolerable, the error was structural and thus not subject to harmless error review. *Williams*, 579 U.S. at 15-16.

This court has previously expressed the test under due process differently, asking "'whether the judge had a duty to recuse from the case because the judge was biased, prejudiced, or partial" and, if so, "whether the judge's failure to recuse resulted in actual bias or prejudice.'" *Moyer*, 306 Kan. at 375-76 (quoting *Sawyer*, 297 Kan. at 909). But it has acknowledged that the accuracy of this test is questionable and may need to be revisited. *Moyer*, 306 Kan. at 376; *Sawyer*, 297 Kan. at 909. In neither case, however, did this court need to revisit the test. In *Sawyer*, the defendant showed an objectively intolerable potential for bias, thus satisfying the Supreme Court's due process standard requiring recusal. 297 Kan. at 911-12. And in *Moyer*, the defendant failed to show recusal was necessary under either test. 306 Kan. at 376.

This case is like *Moyer*. Turner has not alleged that any of the four circumstances identified by the Supreme Court as objectively requiring recusal were present in this case. Nor has he pointed to other facts that would suggest the "objective risk of actual bias" on the part of the judge" rose to an unconstitutional level. See *Caperton* 556 U.S. at 886. He has pointed only to rulings and comments from the judge that he claims showed an actual bias. Even if this court's previously used due process test, which requires

recusal upon a showing of actual bias, is still viable, we have concluded Turner has not shown actual bias. Thus, his due process claim fails.

We affirm the Court of Appeals conclusion there was no error when Judge Brown did not recuse.

Cumulative Error

Turner argues even if the errors he alleges did not individually require reversal, they worked collectively to deny him a fair trial.

"'The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. . . . If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. . . . Where, as here, the State benefitted from the errors, it has the burden of establishing the errors were harmless.' *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020)." *State v. Brown*, 316 Kan. 154, 172-73, 513 P.3d 1207 (2022).

The Court of Appeals identified two errors in its cumulative error analysis: defense counsel's failure to request a self-defense instruction and the trial court's failure to sua sponte instruct the jury on self-defense. Because these both dealt with the failure to get a self-defense instruction in front of the jury, the panel counted this as one error and held the cumulative error doctrine did not apply. It further held the doctrine did not apply because the evidence against Turner was overwhelming, citing *State v. Hilt*, 299 Kan. 176, 200, 322 P. 3d 367 (2014). *Turner*, 2022 WL 15527878, at *15.

Turner does not allege any error with the panel's decision to count its identified errors as one. He argues the panel's analysis is off because there were additional errors to aggregate. But we have rejected Turner's two additional claims of error. Thus, Turner's cumulative error argument fails and we affirm the panel's conclusion.

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

No. 126,012

In the Matter of MARK A. ROY, *Respondent.*

(542 P.3d 321)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Twelve-month Suspension, Stayed Pending Successful Completion of Twelve-month Period of Probation.*

Original proceeding in discipline. Oral argument held September 15, 2023. Opinion filed February 2, 2024. Twelve-month suspension, stayed pending successful completion of twelve-month period of probation.

Alice L. Walker, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with her on the brief for the petitioner.

Christopher M. McHugh, of Joseph, Hollander & Craft, LLC, of Kansas City, Missouri, argued the cause, and *Diane L. Bellquist*, of the same firm, of Topeka, was on the briefs for respondent, and *Mark. A. Roy*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Mark A. Roy, of Kansas City, Missouri, who was admitted to practice law in Kansas in April 1991.

On August 19, 2022, the Disciplinary Administrator's office filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). On August 29, 2022, Diane L. Bellquist entered her appearance on behalf of Roy, and that same day filed a motion to continue the formal hearing. The panel granted Roy's motion to continue formal hearing and rescheduled the hearing for November 29, 2022. The respondent filed an answer to the formal complaint on September 9, 2022. In his answer, Roy admitted many of the factual allegations in the formal complaint. On September 19, 2022, the hearing panel held a prehearing conference by Zoom. The Disciplinary Administrator's office appeared by video through Alice Walker, and Roy appeared in person and through counsel by video. Roy filed a proposed probation plan on November 15, 2022. On November 18, 2022, the parties entered into written stipulations. A panel of the

Kansas Board for Discipline of Attorneys held a hearing on November 29, 2022. The respondent appeared with counsel, Diane L. Bellquist. At the end of the hearing, the panel determined that the respondent violated KRPC 1.15(d)(2)(v) (2023 Kan. S. Ct. R. at 373) (safekeeping property). The panel also acknowledged that Roy entered into stipulations with the Disciplinary Administrator's office where he admitted the facts alleged in the formal complaint, and admitted he violated KRPC 1.1 (2023 Kan. S. Ct. R. at 327) (competence), 1.15 (safekeeping property), 1.3 (2023 Kan. S. Ct. R. at 331) (diligence), 1.5 (2023 Kan. S. Ct. R. at 333) (fees), and 8.4(g) (2023 Kan. S. Ct. R. at 433) (misconduct). The panel set forth its findings of fact and conclusions of law, along with its recommendation on disposition, in a final hearing report, the relevant portions of which are set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant portions of the summary submission agreement follow.

"*Findings of Fact*

. . . .

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

"15. The respondent met F.K. in 2016. At that time, in addition to being a licensed attorney, the respondent was a licensed real estate broker.

"16. F.K. had recently married and F.K.'s spouse owned a house that was purchased prior to the marriage. F.K. asked the respondent to evaluate the house for a possible sale.

"17. The respondent evaluated the house and discussed with F.K. and F.K.'s wife what would need to be fixed in order to sell the house.

"18. F.K.'s spouse also had children from a prior relationship. After discussing the house evaluation, F.K. asked the respondent if the respondent handled adoptions in his law practice. F.K. wished to adopt his wife's children.

"19. The respondent's primary areas of practice up to that point had been bankruptcy law and real estate law. The respondent had no prior experience with adoption proceedings but wanted to help F.K. due to F.K.'s former social relationship with the respondent's father. The respondent agreed to represent F.K. to complete the adoptions.

"20. "F.K. paid the respondent a $2,000.00 flat fee and $200.00 for filing expenses to handle the adoptions. The respondent and F.K. had no written fee agreement.

"21. F.K. understood that in return for his $2,200.00 payment the respondent agreed to complete the adoptions.

"22. During his testimony, the respondent agreed that the $2,000.00 F.K. paid was a flat fee paid to the respondent to complete the adoption by F.K. of his spouse's children. While the flat fee agreement was not reduced to writing, the respondent acknowledged that the fee would not have been earned until the adoption matters concluded.

"23. The respondent testified that he believed he placed these funds from F.K. into his attorney trust account but he could not recall whether he actually did so.

"24. During the disciplinary investigation in this matter, the respondent was unable to produce requested trust account records or documentation showing he deposited F.K.'s fee into his trust account. The respondent was unable to identify what he did with the fee after he received it.

"25. Disciplinary investigator Thomas Mitchelson asked the respondent during a phone call on October 4, 2021, about the fee and also asked the respondent to produce a copy of his trust account records. The respondent told Investigator Mitchelson he was not sure he could produce his trust account records. Ultimately, the respondent did not produce his trust account records.

"26. The respondent did not keep time logs or communication logs regarding his work on F.K.'s adoption matter.

"27. On January 24, 2017, the respondent filed a petition for adoption in Johnson County District Court listing all three children on the same petition. The petition was rejected by the Court, which requires each adoptee to have their own case number and separate petitions.

"28. After the initial petition was rejected, the respondent filed three separate adoption petitions, one for each child, that same day.

"29. K.S.A. 59-2133(a) provides: 'Upon filing the petition, the court shall fix the time and place for the hearing. The time fixed for the hearing may be any time not more than 60 days from the date the petition is filed.'

"30. Tenth Judicial District Court Rules, Rule 1, KS. R. 10 Dist. Probate Rule 1 (Johnson County District Court local rules) states:

'It shall be the duty of the filing attorney (or pro se petitioner) to obtain, at the time of the filing of the petition, a hearing date for the hearing of the petition filed, and to provide an "Order of Hearing" presented to the Court for execution and filing, unless all appropriate documentation, including the entries of appearance, consents and waivers, are filed with the petition.'

"31. KS. R. 10 Dist. Probate Rule 1 further states: 'Commencement of any action requires both the filing of the petition and the obtaining of an "Order for Hearing" (or equivalent). Just filing the petition will not result in the matter being scheduled for hearing and may result in substantial prejudice to the petitioning party.'

"32. The local rule further states that 'cases shall be scheduled for hearing by contacting the Court's Administrative Assistant ("AA") to obtain calendar setting.'

"33. On January 24, 2017, the respondent emailed F.K. regarding the three filed adoption petitions and stated, 'I assume the Court will set some type of hearing date on the petitions.'

"34. On February 14, 2017, the respondent emailed F.K. and indicated that he was 'expecting a hearing date at some point and will call the Court to figure out that part.'

"35. On March 8, 2017, the respondent emailed F.K. stating: 'I just checked the Johnson County website and no Court date has been set on the 3 petitions. I will let you know something the minute the Court lets me know something.'

"36. The respondent said that he spent some time learning rules relating to adoptions, such as how to file the case, filing fees, and work to be done to accomplish the adoptions. However, in his research, he did not find the local rule requiring scheduling a hearing on each adoption petition within 60 days. The respondent acknowledged that he made no efforts to connect with or learn from any attorneys experienced in this area of the law.

"37. The respondent testified that after the adoption petitions were filed, F.K. indicated that one of the children no longer consented to being adopted. The respondent said this created uncertainty for him whether the adoptions were to move forward.

"38. In his response to the initial complaint received by the disciplinary administrator's office, the respondent stated that, '[t]his accounts for why I did not pursue those actions further.' The respondent also stated, '[t]his partially accounts, but does not excuse, delays and inactions on prosecution of this matter on my part.'

"39. After filing the adoption petitions, the respondent took no further action in the adoption matters. The respondent sent an email to F.K. indicating that the respondent assumed the district court would set the matters for hearing.

"40. The Johnson County District Court register of actions in the adoption proceedings shows no reference to the filing of an order for hearing.

"41. On March 14, 2018, the Johnson County District Court dismissed the three adoption petitions citing failure to set a hearing pursuant to K.S.A. 59-2133(a).

"42. No communication occurred between the respondent and F.K. from March 2017, until F.K. contacted the respondent requesting a refund in March 2021.

"43. In March 2021, F.K. hired new counsel, Rachel Reiber, to complete two of the adoptions. The adoptions were completed in June 2021.

"44. When Ms. Reiber reviewed the information from the respondent's representation of F.K., Ms. Reiber noted that the respondent's original petitions did not have proof of service on the biological fathers as required by K.S.A. 59-2136(f).

"45. K.S.A. 59-2136(f) requires:

'Notice of the proceeding shall be given to every person identified as the father or a possible father by personal service, certified mail return receipt requested or in any other manner the court may direct. Notice shall be given at least 10 calendar days before the hearing, unless waived by the person entitled to notice. Proof of notice or waiver of notice shall be filed with the court before the petition or request is heard.'

"46. The respondent refunded $2,200.00 to F.K. in September 2022 via a cashier's check. The respondent testified that the cashier's check was funded by money from the respondent's own personal bank account.

"47. The respondent testified that while he intended to help F.K. by agreeing to handle the adoption matters, the respondent should not have agreed to handle the adoptions. In his response to the disciplinary administrator, the respondent admitted that he should have referred F.K.'s matter to an adoption attorney.

"*Conclusions of Law*

"48. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence), 1.3 (diligence), 1.5 (fees), 1.15 (safekeeping property), and 8.4(g) (misconduct), as detailed below.

"KRPC 1.1

"49. Lawyers must provide competent representation to their clients. KRPC 1.1. 'Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.'

"50. The respondent was not competent to represent F.K. in the adoption matters at issue here. Having no experience in that area of law, and having failed to engage in proper research, training, or consultation, the respondent was unable to competently handle the adoption matters.

"51. The respondent stipulated that he violated KRPC 1.1.

"52. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.1.

"KRPC 1.3

"53. Attorneys must act with reasonable diligence and promptness in representing their clients. *See* KRPC 1.3.

"54. The respondent failed to diligently and promptly represent F.K. in the adoption matters.

"55. The respondent failed to timely contact the Johnson County District Court to set the adoption matters for hearing after the petitions were filed on January 24, 2017.

"56. After March 14, 2018, when the adoption petitions were dismissed for failure to set a hearing pursuant to K.S.A. 59-2133(a), the respondent took no further action on the matters.

"57. The respondent failed to inform F.K. that the adoption petitions had been dismissed.

"58. The respondent stipulated that he violated KRPC 1.3.

"59. Because the respondent failed to act with reasonable diligence and promptness in representing F.K., the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.5(b)

"60. KRPC 1.5(b) provides that, '[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.'

"61. "The respondent did not adequately communicate to F.K. the basis for payment for the adoption matters. The respondent asked F.K. for $2,000.00 plus $200.00 for filing expenses, which F.K. paid. F.K. assumed that the $2,000.00 was a flat fee for the respondent to complete the adoption matters. The evidence showed that the respondent did not properly communicate the basis for the $2,000.00 fee to F.K.

"62. The respondent stipulated that he violated KRPC 1.5.

"63. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.5(b).

"KRPC 1.15(a)

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

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

"65. Properly safeguarding the property of others necessarily requires lawyers to deposit unearned fees into an attorney trust account. Such fees must remain in the attorney trust account until they are earned by the lawyer or properly refunded to the payor.

"66. In this case, the respondent failed to properly safeguard F.K.'s funds.

"67. The respondent acknowledged that the cashier's check used to refund F.K. the $2,200 payment in September 2022 was funded using the respondent's own money from his personal bank account.

"68. The $2,000 F.K. paid was a flat fee paid to the respondent to complete the adoption by F.K. of his spouse's children. While the flat fee agreement was not reduced to writing, the respondent acknowledged that the fee would not have been earned until the adoption matters concluded.

"69. The refund of F.K.'s flat fee with money from the respondent's personal account and the fact that the respondent did not handle the adoption matters to completion establish that the respondent did not properly safeguard F.K.'s funds in the respondent's attorney trust account.

"70. The respondent stipulated that he violated KRPC 1.15.

"71. Accordingly, the hearing panel concludes that the respondent failed to properly safeguard F.K.'s property, in violation of KRPC 1.15(a).

"KRPC 1.15(b)

"72. Lawyers must deal properly with the property of their clients. Specifically, KRPC 1.15(b) provides:

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

"73. F.K. sought a partial refund of the fees paid from the respondent in March 2021. The respondent did not provide a refund to F.K. until September 2022.

"74. When F.K. requested the refund, the respondent had engaged in no work in the adoption matter since early 2017. The adoption petitions were dismissed in March 2018. The respondent failed to provide F.K. a refund until more than four years after the petitions were dismissed.

"75. The respondent violated KRPC 1.15(b) when he failed to promptly deliver F.K.'s unearned fees to F.K.

"76. The respondent stipulated that he violated KRPC 1.15.

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

"KRPC 1.15(d)(2)(v)

"78. KRPC 1.15(d)(2)(v) provides that '[t]he lawyer shall: . . . [p]roduce all trust account records for examination by the Disciplinary Administrator upon request of the Disciplinary Administrator.' Further, lawyers must preserve complete records of trust account funds 'for a period of five years after termination of the representation.' KRPC 1.15(a).

"79. The respondent did not produce trust account records related to his representation of F.K., which began sometime in late 2016 or early 2017, when Disciplinary Investigator Tom Mitchelson requested them in October 2021.

"80. The respondent stipulated that he violated KRPC 1.15.

"81. The respondent failed to produce his attorney trust account records as requested by the Disciplinary Administrator. Therefore, the hearing panel concludes that the respondent violated KRPC 1.15(d)(2)(v).

"KRPC 8.4(g)

"82. 'It is professional misconduct for a lawyer to . . . engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.' KRPC 8.4(g).

"83. The respondent engaged in conduct that adversely reflects on his fitness to practice law when he agreed to represent F.K. in the adoption matters without prior experience in this area of the law and without ensuring he became competent to represent F.K., failed to set a hearing on the adoption petitions, failed to take any action or notify F.K. when the adoption petitions were dismissed, charged an unreasonable fee, failed to properly safeguard F.K.'s funds, failed to promptly deliver F.K.'s funds, and failed to produce proper trust account records upon request of the disciplinary administrator.

"84. The respondent stipulated that he violated KRPC 8.4(g).

"85. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(g).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

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

"87. *Duty Violated*. The respondent violated his duty to his client and to the legal profession.

"88. *Mental State*. The respondent knowingly violated his duty to keep his client's property safe. The respondent's remaining misconduct was committed, at least initially, negligently. Some of this remaining misconduct was sustained to the point where the respondent knew or should have known that he was committing the misconduct.

"89. *Injury*. As a result of the respondent's misconduct, the respondent caused injury to F.K. by depriving F.K. of the $2,000.00 fee paid to the respondent by F.K. for more than four years and by causing unreasonable delay in the adoption matters.

"Aggravating and Mitigating Factors

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

"91. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on one prior occasion. The respondent received a public censure in 1997 for misconduct that involved forging his client's signature on and then filing a bankruptcy petition against his client's wishes, resulting in findings that he violated (precursor to the KRPC) Model Rules of Professional Conduct 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (client communication), 1.5 (fees), 1.16 (terminating representation), 3.1 (meritorious claims), 3.3 (candor toward the tribunal), and 8.4 (misconduct).

"92. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas on April 26, 1991. At the time of the misconduct, the respondent had been practicing law for more than 26 years. The hearing panel concludes that at the time of his misconduct the respondent had substantial experience in the practice of law.

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

"94. *Absence of a Dishonest or Selfish Motive*. The respondent's misconduct does not appear to have been motivated by dishonesty or selfishness.

"95. *Timely Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct*. The respondent argued that the evidence supports consideration of this mitigating factor. While the respondent did eventually provide F.K. with a $2,200.00 refund, this did not occur until September 2022, almost 18 months after F.K. requested a refund in March 2021 and more than four years after the adoption petitions the respondent filed on F.K.'s behalf were dismissed. Therefore, the hearing panel concludes that this mitigating factor does not apply here.

"96. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The hearing panel acknowledges the testimony of investigator Tom Mitchelson that the respondent did not produce trust account records to Mr. Mitchelson when requested during the disciplinary investigation, which contributed to the hearing panel's finding that the respondent violated KRPC 1.15(d)(2)(v). However, the hearing panel also acknowledges that the respondent entered into stipulations with the disciplinary administrator's office where he admitted the facts alleged in the formal complaint and admitted that he violated KRPC 1.1 (competence), 1.3 (diligence), 1.5 (fees), 1.15 (safekeeping property), and 8.4(g) (misconduct). The hearing panel concludes that over the course of the disciplinary matter, the respondent engaged in conduct that was both cooperative and noncooperative. However, the respondent's conduct overall was more cooperative than noncooperative, so the hearing panel considered the respondent's conduct to be mitigating.

"97. *Delay in Disciplinary Proceedings.* The respondent argued that delay in the disciplinary proceedings is a mitigating factor in this case. However, the initial complaint in this matter was received by the disciplinary administrator's office July 20, 2021, an investigation was subsequently completed, and the formal hearing was held November 29, 2022. This is not an inordinate amount of delay. The fact that the formal hearing occurred approximately 4 to 5 years after the misconduct occurred can be attributed in part to the fact that the respondent did not self-report his misconduct as he is obligated to do under Supreme Court Rule 210 (2022 Kan. S. Ct. R. at 263) (Duty to Assist; Duty to Respond; Duty to Report). The fact that the respondent's misconduct was not discovered by the complainant—F.K.'s new counsel hired in 2021—or the disciplinary administrator's office until 2021, when the respondent has a duty to self-report misconduct under Supreme Court Rule 210, is not considered a mitigating factor by the hearing panel under these circumstances.

"98. *Remorse*. The respondent stipulated that his conduct violated the rules of professional conduct and has since taken action to change his practices to prevent similar problems in the future. The hearing panel concludes that the respondent showed that he is remorseful that he committed the misconduct.

"99. *Remoteness of Prior Offenses.* The misconduct which gave rise to the respondent's 1997 published censure is remote in time from the misconduct in this case.

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

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

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

'4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect [and] causes injury or potential injury to a client.

'4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.

'4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

'4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

"*Recommendation of the Parties*

"101. The disciplinary administrator recommended that the respondent be suspended for a period of 12 months with the requirement that the respondent undergo a reinstatement hearing pursuant to Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293).

"102. The respondent recommended that he receive a published censure, or, alternatively, be suspended for an unspecified period of time that is stayed while the respondent is placed on probation according to the terms of his proposed probation plan.

"*Discussion*

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

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

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

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

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

"104. Rule 227(c) requires that the respondent 'establish that the respondent has been complying with each condition in the probation plan for at least 14 days prior to the hearing.'

"105. The hearing panel concludes based on the evidence that the respondent has limited the scope of his law practice, as required by the proposed probation plan.

"106. Moreover, some of the requirements of the probation plan could not have feasibly been met between the time the proposed plan was filed and the formal hearing date, such as preparation of monthly and quarterly reports.

"107. However, a central part of the respondent's proposed probation plan is supervision of his law practice by attorney David B. Anderson, Jr. The respondent's plan proposed an initial in-person meeting between Mr. Anderson and the respondent to review the respondent's cases and law office management and to 'assess processes with specific regard to diligence, client communication, payment of client fees, and handling of trust funds.'

"108. The respondent testified that he first discussed this proposed probation plan with Mr. Anderson approximately one week prior to the formal hearing. The respondent met with Mr. Anderson for the first time regarding the plan the afternoon before the hearing.

"109. The respondent had also not taken any continuing legal education courses as proposed in his probation plan prior to the formal hearing.

"110. Further, the hearing panel is concerned that the respondent's proposed probation plan does not satisfy the requirements of Rule 227(b) because it does not address any structure or procedures the respondent plans to use to ensure he charges reasonable fees, communicates those fees appropriately, and properly safekeeps client property. It was unclear from the respondent's testimony whether he planned in the future to communicate an hourly rate to prospective clients and whether he planned to hold flat fees in his trust account until they are

earned. The proposed probation plan does not address this topic at all other than to state that fees and handling of trust funds will be discussed with and reviewed by the proposed probation supervisor.

"111. The hearing panel unanimously agrees that placing the respondent on probation, with adequate provisions, would be in the best interests of the public, the respondent, and the legal profession. However, under Rule 227(d), the hearing panel 'may not recommend that the respondent be placed on probation unless' the respondent complies with Rule 227(a) and (c) and the plan satisfies the requirements of Rule 227(b).

"112. Because the respondent has not complied with Rule 227(c) and the proposed plan does not meet the requirements of Rule 227(b), the hearing panel is not able to recommend probation.

"113. In reaching the recommendation for discipline below, the hearing panel considered the findings, conclusions, and discipline imposed in several cases involving certain similar rule violations: *In re Lowry*, 316 Kan. 684, 520 P.3d 727 (2022) (ninety-day suspension stayed for imposition of three-year period of probation); *In re Beye*, 315 Kan. 857, 511 P.3d 963 (2022) (published censure); *In re Barker*, 299 Kan. 158, 321 P.3d 767 (2014) (six-month suspension); and *In re McPherson*, 287 Kan. 434, 196 P.3d 921 (2008) (six-month suspension).

"114. While the *Beye* matter involved lack of diligence, failure to safekeep client funds in a trust account, and failure to refund the client's money in a timely manner, there are additional factors here that render published censure an inappropriate discipline. First, the *Beye* hearing panel concluded that Beye's conduct was done negligently, whereas here, some of the respondent's misconduct was done knowingly. *In re Beye*, 315 Kan. at 860. Further, the respondent agreed to take on a matter in an area of law that he was not competent to handle and failed to take any steps to become competent, an issue not implicated in the *Beye* case. Finally, the *Beye* matter did not involve a violation of KRPC 1.15(d)(2)(v) for failure to submit trust account records to the disciplinary administrator's office and the delay in refunding client funds here was several years longer than the delay in the *Beye* matter. *In re Beye*, 315 Kan. 857.

"*Recommendation of the Hearing Panel*

"115. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel recommends that the respondent be suspended for a period of 180 days. The hearing panel does not recommend that the respondent be required to undergo a reinstatement hearing pursuant to Rule 232.

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

DISCUSSION

In a disciplinary proceeding, we consider the evidence and the parties' arguments and determine whether KRPC violations exist and, if

they do, the appropriate discipline. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2023 Kan. S. Ct. R. at 281). "'Clear and convincing evidence is "evidence that causes the factfinder to believe that 'the truth of the facts asserted is highly probable.'"'" 315 Kan. at 147 (quoting *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 [2009]).

Respondent was given adequate notice of the formal complaint, to which he filed an answer. Prior to the hearing before the disciplinary panel, respondent entered into an agreement stipulating to violations of KRPC 1.1 (competence), 1.15 (safekeeping property), 1.3 (diligence), 1.5 (fees), and 8.4(g) (misconduct). No exceptions were filed in the case, and the findings of fact and conclusions of law in the hearing panel's final report are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2023 Kan. S. Ct. R. at 288).

On September 15, 2023, we heard oral arguments in this matter. The deputy disciplinary administrator provided an optimistic assessment of respondent's current fitness to practice law. She reported that he has consistently provided the Disciplinary Administrator's office with monthly updates detailing measures he and his practice supervisor have implemented that reflect compliance with his updated probation plan. In speaking to the probation plan itself, the deputy disciplinary administrator characterized the plan as one that is workable, provides protection for both the public and the legal profession, and is in the best interests of the respondent. Based on these observations, the deputy disciplinary administrator now recommends a 12-month suspension, staying the suspension, and placing the respondent on a 12-month probation plan subject to the conditions as set forth in the modified probation plan.

The respondent agrees with the adoption of the modified probation plan and requests the duration of the suspension be 90 or 180 days.

We adopt the findings and conclusions in the deputy disciplinary administrator's recommendation that was presented in oral arguments, which taken together with the parties' stipulations establish by clear and convincing evidence that Roy's conduct violated KRPC 1.1 (competence), 1.15 (safekeeping property), 1.3

(diligence), 1.5 (fees), and 8.4(g) (misconduct). The remaining issue is discipline.

That said, after review of the stipulated facts, conclusions of law, and considering the position of the parties presented at oral argument, we adopt the deputy disciplinary administrator's recommendation of a 12-month suspension, stayed pending successful completion of a 12-month probation period, the terms of which are in the respondent's modified proposed probation plan, effective from the date this opinion is filed.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Mark A. Roy is hereby suspended for a period of 12 months from the practice of law in the state of Kansas, effective from the date this opinion is filed, with the 12-month suspension stayed pending successful completion of a 12-month probation period, effective the date of this opinion in accordance with Supreme Court Rule 225(a)(2) (2023 Kan. S. Ct. R. at 281) for violating KRPC 1.1, 1.15, 1.3, 1.5, and 8.4(g).

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

No. 126,106

In the Matter of RICHARD K. DAVIS, *Respondent*.

(542 P.3d 339)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Published Censure.*

Original proceeding in discipline. Oral argument held December 15, 2023. Opinion filed February 2, 2024. Published censure.

Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with him on the briefs for the petitioner.

Richard K. Davis, respondent, argued the cause and was on the brief pro se.

PER CURIAM: This is an attorney discipline proceeding against Richard K. Davis, of Lee's Summit, Missouri. Davis received his license to practice law in Kansas in April 2013. Davis also is a licensed attorney in Missouri, admitted in 2016.

On February 25, 2022, the Office of the Disciplinary Administrator (ODA) filed a formal complaint against Davis alleging violations of the Kansas Rules of Professional Conduct (KRPC) related to (1) a complaint filed by Julie Ragsdale, a court reporter who alleged Davis hired her to appear for and transcribe a deposition; (2) a complaint filed by T.R., whose wages were mistakenly garnished by Davis; and (3) a complaint filed by Sedgwick County District Court Judge Eric Commer regarding Davis' conduct at a hearing over which Judge Commer presided. A panel of the Kansas Board for Discipline of Attorneys held a hearing on December 8, 2022, and issued a final hearing report two months later.

In the Ragsdale complaint, the panel concluded Davis violated

- KRPC 1.15(a) (2022 Kan. S. Ct. R. at 372) (safekeeping property);
- KRPC 3.1 (2022 Kan. S. Ct. R. at 390) (meritorious claim in good faith);
- KRPC 4.1(a) (2022 Kan. S. Ct. R. at 403) (truthfulness in statements to others);

- KRPC 4.4(a) (2022 Kan. S. Ct. R. at 406) (respect for rights of third persons);
- KRPC 8.1(a) (2022 Kan. S. Ct. R. at 432) (false statement in disciplinary matters); and
- KRPC 8.4(c) (2022 Kan. S. Ct. R. at 434) (dishonest conduct).

In the Judge Commer complaint, the panel concluded Davis violated

- KRPC 3.5(d) (2022 Kan. S. Ct. R. at 396) (conduct degrading to tribunal); and
- KRPC 8.2(a) (2022 Kan. S. Ct. R. at 432) (false statement about judge's integrity).

In the T.R. complaint, the panel concluded clear and convincing evidence did not support a finding that Davis violated any rules of professional conduct.

The panel set forth its factual findings, legal conclusions, and recommended discipline in a final hearing report. The relevant portions of that report are set forth below.

"*Findings of Fact*

. . . .

"28. During all relevant time periods up until March 13, 2020, the respondent dealt with significant health conditions relating to his heart and on March 13, 2020, underwent heart transplant surgery. Before and after the heart transplant, the respondent was prescribed numerous medications, including steroids and anti-rejection drugs. The respondent's heart condition and medications had a substantial effect on him, such as feelings of weakness, effects on his temperament, confusion, and drowsiness. The medications taken by the respondent also have many other potential serious side effects, including ones that can affect temperament, mental processing, emotional health, behavior, and physical wellbeing.

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"29. Attorney Lynn Russell scheduled a deposition of the respondent's client, L.Y., for January 8, 2018. The deposition was for a lawsuit between L.Y.'s business and C.H. C.H. was represented by Ms. Russell.

"30. Ms. Russell had arranged for the services of court reporter Julie Ragsdale of Ragsdale Court Reporting, LLC. Ms. Ragsdale, in turn, arranged for TBC Video to provide videographer services.

"31. Prior to January 8, 2018, the respondent had not participated in a deposition and had not been responsible for paying court reporter costs for a deposition.

"32. In 2018, the respondent was a solo practitioner with no billing staff. The respondent handled all billing, accounting, and management of his firm at that time.

"33. The January 8, 2018, deposition took place at 1:30 p.m. at the respondent's office. After Ms. Russell concluded deposing L.Y., the respondent asked Ms. Ragsdale if she and the videographer would stay as late as 5:30 p.m. so that the respondent could depose Ms. Russell's client, C.H. Ms. Ragsdale and the videographer agreed to stay, and the respondent deposed C.H. until just prior to 6:00 p.m.

"34. Ms. Ragsdale completed transcription of the depositions. On January 18, 2018, Ms. Ragsdale emailed the respondent an itemized invoice for $714.70. This included an attendance charge of $37.50, which was half of the total amount of the $75.00 attendance fee. Ms. Ragsdale told the respondent that the transcripts would be sent to him once she received payment.

"35. On January 23, 2018, TBC Video mailed an invoice to the respondent for the videographer services in the amount of $591.43.

"36. On February 8, 2018, Ms. Ragsdale emailed the respondent again noting that she was 'leaving town for a few days and wondered if [the respondent] could get this invoice taken care of?' Ms. Ragsdale indicated she had the transcripts prepared and ready to send to the respondent.

"37. A few minutes later, the respondent responded by email stating:

'I am waiting for payment from my client as we didn't have any remaining retainer on this case. She has been a good payer so I hope to have it soon. Also, the case has settled so we do not need the transcript copies any longer. Therefore, you are welcome to shred or otherwise trash those.'

"38. On February 26, 2018, Ms. Ragsdale had not received payment on the invoice, so she emailed the respondent, stating: 'What is the status of my $714.70 invoice?' The respondent responded by email a few hours later, stating: 'I am expecting payment from my client soon. As soon as I have it, I will forward the same to you.'

"39. On February 27, 2018, the respondent sent an email to his client, L.Y., advising her of the status of the case and attaching a final invoice for legal fees L.Y. owed the respondent. The respondent wrote:

'I have attached your final invoice to this email. Unfortunately, it includes the costs of mediation and depositions that I wish we could have avoided if [C.H.] (and/or his attorney) had wised up sooner. For your reference, I have submitted payment to the mediator on your behalf already. I have not paid the deposition fees and will do so once I receive your payment.'

"40. The final invoice attached to the email was dated February 27, 2018, and states a total amount due to respondent as $2,814.70. The invoice was itemized and included an expense of $714.70 for 'Deposition Transcripts,' but did not include a charge for the TBC Video videographer services.

"41. The respondent never billed L.Y. for TBC Video's invoice.

"42. The respondent testified that he would have had to personally type or select 'Deposition Transcripts' from a drop-down menu in his billing software for it to show on the invoice in this manner.

"43. L.Y. sent a check dated March 7, 2018, to respondent for $2,814.70. The respondent deposited this check into his firm's operating account on March 15, 2018.

"44. Around March 19, 2018, Ms. Ragsdale spoke with the respondent on the phone. During this call, the respondent told her that he had received funds from his client and that the respondent had placed a check in the mail to Ms. Ragsdale.

"45. The respondent had not placed a check in the mail to Ms. Ragsdale by the time of this phone call. In fact, the respondent did not provide any payment to Ms. Ragsdale until August 2018, when the respondent paid a small claims court judgment entered against him.

"46. The respondent testified that his reference during the call to a payment was only for Ms. Ragsdale's $37.50 appearance fee. Further, the respondent stated that he used the term 'the check is in the mail' as a turn of phrase that did not necessarily mean that the check had actually been placed in the mail to Ms. Ragsdale but that the respondent intended to send it. The respondent acknowledged that he had not placed a $37.50 check in the mail to Ms. Ragsdale.

"47. By April 3, 2018, Ms. Ragsdale emailed the respondent, stating: 'When we spoke over the phone last week, you said you thought the check was mailed a week ago Friday and I still have not received it. Can you check on it for me, please.' Ms. Ragsdale never received a response from the respondent.

"48. On April 26, 2018, Ms. Ragsdale emailed the respondent another copy of her invoice for $714.70 as well as a copy of a small claims petition. In the email, Ms. Ragsdale told the respondent that if she did not receive payment within seven days, she would file the small claims petition and file a bar complaint. She recounted that four weeks prior, the respondent told her that his client provided the funds to pay her and that he had mailed a check to her. Ms. Ragsdale also stated her belief that the respondent was dishonest about having mailed the payment.

"49. The respondent responded shortly thereafter by email, stating: 'We have no contract or agreement. We had no discussions prior to the deposition. I never agreed to your rates or charges. There is no contract or agreement between

us, and you would be committing perjury if you file the petition that you provided below.'

"50. On May 17, 2018, Ms. Ragsdale filed a small claims petition in Johnson County District Court, case number 18-SC-00210. Ms. Ragsdale and the respondent appeared for trial on July 9, 2018, presided over by Judge Robert Scott. At the trial, the respondent stated that because the deposition was originally scheduled by opposing counsel, he did not owe Ms. Ragsdale the one-half appearance fee ($37.50). Further, the respondent stated that he did not owe Ms. Ragsdale for the transcripts or any other fees.

"51. At that hearing, the respondent stated:

'[Ms. Ragsdale] is trying to receive payment for something that was never delivered and never provided. It is not right to charge my client that fee and it is not right for me to pay it out of my pocket because, again, nothing was provided. Had we needed a transcript, I would have gladly paid for it because, again, that would have been then paying for something being provided.'

"52. Ms. Ragsdale testified that the respondent asked Ms. Ragsdale and the videographer to stay later until 5:30 p.m. so that the respondent could depose C.H. The respondent agreed that he had both defended and taken a deposition that day.

"53. Judge Scott found in favor of Ms. Ragsdale and entered judgment against the respondent for $714.70 plus interest. The court stated:

'I do know how depositions are ordered, I do know how depositions are paid for, and I find [the respondent's] actions to be abhorrent, unethical. And if [Ms. Ragsdale] doesn't file a complaint with the disciplinary committee, I am going to.'

"54. Further, Judge Scott stated:

'If you take a deposition and you tell someone you want them to perform services, they have completed the contract . . . [t]hat is basic contract law . . . . If you ask someone to do a job for you, then they have—it is a quantum meruit. And she performed her services for you.'

"55. The respondent told Judge Scott that although he disagreed with the Court's decision, he would self-report the matter to the disciplinary administrator's office.

"56. The respondent testified at the formal hearing that he now knows that the court's ruling was correct and he chose this defense in the small claims matter due to his inexperience with depositions and how they are billed.

"57. On his way home from the trial, the respondent called then Disciplinary Administrator Stan Hazlett to notify him of the matter.

"58. The respondent paid $848.73 to Ms. Ragsdale and Ms. Ragsdale subsequently filed a satisfaction of judgment with the small claims court.

"59. The disciplinary administrator's office also received a complaint from Ms. Ragsdale.

"60. In his response to Ms. Ragsdale's complaint, the respondent stated that he never requested the transcripts from Ms. Ragsdale, so he believed that he did not owe any money for the transcripts. The respondent did, however, state that he owed Ms. Ragsdale the $37.50 appearance fee.

"61. The respondent further claimed in his response that after his spring 2018 phone call with Ms. Ragsdale, he 'had submitted a check for the half of the appearance fee that was apparently not received by Ms. Ragsdale.' However, the respondent had not mailed a check to Ms. Ragsdale. The only payment the respondent provided her was the $848.73 check to pay the small claims judgment in late summer 2018.

"62. During an interview with the disciplinary investigator, on August 23, 2018, the respondent again stated that he sent a check for the appearance fee to Ms. Ragsdale.

"63. On July 31, 2020, Mr. Hazlett requested a copy of any cover letter that the respondent mailed with the appearance fee check to Ms. Ragsdale as well as the respondent's trust account ledger showing an entry for the check he wrote and a deposit slip for client funds deposited to fund the check.

"64. Later that same day, the respondent replied by email, stating:

'As far as Ms. Ragsdale, the client in question did not have a retainer or trust balance and was billed monthly. As such, she never had funds in trust. The original check to Ms. Ragsdale (for the appearance fee) came directly from the client and was forwarded to her, so no funds were cycled through trust (or any other account). I prefer to do this when I can as it is simpler from my perspective. I did not keep a copy of the check or a cover letter (which in retrospect I should have and this is something I am more meticulous about now). The check that was sent to Ms. Ragsdale following the small claims judgment was entirely my money and paid from my operating account. I did not ask the client to pay for the deposition because her case was closed and I had previously told her that less was owed. As such, it would be bad business to come back and ask for more money. Therefore, I viewed it as a cost I had to eat.'

"65. No check for $37.50 was ever requested from L.Y. or sent to Ms. Ragsdale.

"66. During the time the respondent and Mr. Hazlett exchanged emails, the respondent had just returned to the office following medical leave for a heart transplant. The respondent did not have access to his records from his solo law practice as he was working with a different law firm. The respondent testified that he responded to Mr. Hazlett's emails based off his memory as opposed to review of his records for L.Y.'s matter.

"67. In a March 10, 2022, email to Mr. Vogelsberg, the respondent stated that he had intended to bill L.Y. for the videographer expense for TBC Video

instead of Ms. Ragsdale's deposition transcript expense. The respondent stated that 'up until your complaint that's what I thought I had done.'

"68. Despite receiving payment from L.Y. and depositing that payment into his operating account on March 15, 2018, and despite his assertion that he meant instead to bill L.Y. for the videography services, the respondent did not timely pay TBC Video's invoice. After several attempts to contact the respondent for payment, TBC Video filed a small claims petition in Johnson County District Court on July 12, 2018, to collect the $591.43 owed. The respondent paid TBC Video in late August 2018.

"Case No. DA13,149

"69. The respondent was retained by a residential property management company to collect a judgment against its former tenant, T.R.

"70. After receiving some information about T.R. from his client and conducting a public records search, the respondent determined that a T.R. who worked for the Spring Hill, Kansas School District was the T.R. obligated to pay the judgment. The respondent entered his appearance in the case and caused a request for garnishment to be issued to the school district from T.R.'s earnings.

"71. The garnishment was successful and remained in place for four months. On May 14, 2018, J.R., T.R.'s spouse, contacted the respondent and informed the respondent that he had garnished the wrong person.

"72. The T.R. employed by the Spring Hill School District and married to J.R. had the same first name, middle initial, and last name as the former tenant T.R. who owed the judgment. The respondent did not have a record of the full middle name of the judgment debtor.

"73. The respondent described J.R.'s contacts as profane, angry, and abusive and testified that J.R. contacted the respondent numerous times over a short period of time.

"74. The respondent asked J.R. to provide additional information to verify that his wife was the wrong garnishee. J.R. provided the respondent with a copy of T.R.'s driver's license. The respondent told J.R. that he would review the information and get back with him within a few days.

"75. The respondent emailed the driver's license image to his client the next morning and advised his client that his research showed that the date of birth and driver's license number did not match the information previously provided by the judgment debtor.

"76. The client told the respondent that the signature on the driver's license was comparable to the judgment debtor's signature. Specifically, the client stated, 'if you look at the "R" on her check attached and the Driver's License' they are very similar. The client also stated that T.R.'s occupation matched that of the former tenant. The client further provided photos of the former tenant who owed

the judgment and stated that she believed the driver's license photo provided by J.R. looked similar to the photos of the former tenant.

"77. The respondent's client requested that the garnishment not be dismissed.

"78. The respondent sent a follow up email to his client, advising her that because there was a possibility the wrong person had been garnished, he proposed that the garnished funds be held in his trust account moving forward and that he send a letter to J.R. advising him of this.

"79. At that point, the respondent stopped disbursing funds obtained from the garnishment to his client and held them in his trust account.

"80. J.R. continued calling the respondent's office multiple times per day demanding the garnishment stop and the funds garnished be returned to his wife.

"81. On May 25, 2018, the respondent sent a letter to J.R., noting that he had not received any communications from J.R.'s wife, T.R., directly. The respondent further stated:

'I have reviewed the information you provided and public records related to [T.R.] with my client and was unable to conclusively make a determination with regards to your claims. With that being said, we take your claims very seriously and want to ensure that this matter is handled in the most appropriate manner possible. As such, please be advised that we intend to proceed as follows.

'The check that was received from the Spring Hill School District subsequent to your inquiry and any other checks received during the below-described period shall be held in trust for the next thirty (30) days so as to provide your wife time to file a motion with the court requesting a determination with regards to the garnishment. If the appropriate motion is filed, we shall continue to hold any additional funds received in trust until such time as the Court makes a ruling at which time funds shall be distributed in accordance with the directions from the Court. If a motion is not filed within the next thirty (30) days, my client shall presume the garnishment order to be valid and all funds held in trust will be released to my client. Furthermore, if we receive sufficient information in the interim to make a conclusive determination regarding this matter, we will notify you of the same and release the funds held in trust to your wife.'

"82. No motion was filed on T.R.'s behalf with the district court to release the garnished funds.

"83. J.R., through attorney Mark Logan, provided further information to respondent to help establish that T.R. was not the judgment debtor in the lawsuit.

"84. The respondent recognized he may have erred in identifying the correct garnishee and hired a private investigator, at his own expense, to evaluate whether the T.R. being garnished was the judgment debtor. The respondent communicated to his client that the information provided through Mr. Logan and the private investigator's investigation led the respondent to conclude it was likely

that the wrong T.R. had been garnished and that the correct T.R. worked for Osawatomie State Hospital.

"85. The respondent further advised his client that he planned to return the garnished funds to T.R.

"86. On June 15, 2018, the respondent filed a release of garnishment in the lawsuit, which released the Spring Hill School District garnishment of T.R.'s earnings. The same day the respondent issued a new garnishment for the T.R. who worked at Osawatomie State Hospital.

"87. On June 25, 2018, the respondent mailed a check to T.R. for the collected funds to Mr. Logan. Shortly thereafter, the respondent received an email from Mr. Logan stating he was no longer representing J.R. and T.R. The respondent asked Mr. Logan if he would still receive the payment on behalf of T.R. Mr. Logan did not respond to this email.

"88. J.R. continued to contact the respondent's office demanding immediate return of the funds. J.R. threatened to file a lawsuit against the respondent and his client.

"89. By this point, the respondent had never spoken with or heard directly from T.R. On June 28, 2018, the respondent emailed J.R. a Settlement and Release Agreement that the respondent had prepared. The agreement required T.R. to attest that she was not the proper person whose earnings should be garnished and that she had authorized J.R. to contact the respondent's office regarding this matter.

"90. The respondent stated his primary purpose in creating this document was to confirm that T.R. was the wrong garnishee, that T.R. was the one who would receive the funds, and that if it turned out T.R. was the proper garnishee, his client would be able to reinstitute the garnishment and pursue damages for the misrepresentation.

"91. The Settlement and Release Agreement also provided that the return of the garnished funds to T.R. was contingent upon J.R. and T.R. jointly releasing and discharging the respondent and his client from all claims arising out of the collection lawsuit. The agreement also required that the parties keep all negotiations confidential and to make no disparaging comments about any of the parties. The agreement provided that if J.R. and T.R. breached the agreement, they would be responsible for paying the respondent's attorney fees and investigator costs, which totaled $2,150.00 at the time, and all other damages available to the respondent and his client.

"92. Further, in the recitals of the Settlement and Release Agreement, the respondent included a clause that regarding his own investigation, his hired private investigator's investigation, and correspondence with his client, J.R., Mr. Logan, and the school district, 'the results of the review referenced above were inconsistent.' The respondent testified that he included this clause because there

was evidence collected throughout his investigation that went both ways and although the respondent ultimately reached the conclusion that he had probably garnished the wrong T.R.'s earnings, that was based on a preponderance of the evidence standard, not 100% certainty.

"93. T.R. and J.R. never signed the Settlement and Release Agreement.

"94. On July 28, 2018, T.R. filed a complaint with the disciplinary administrator's office regarding the respondent's conduct. This complaint is the source for the docketed matter DA13,149.

"95. The respondent testified that he asked J.R. and T.R. to sign the Settlement and Release Agreement in order to protect himself and his client. He said that J.R. and T.R. were free to negotiate the terms of the agreement. The respondent said he felt that protecting himself and his client was warranted based on J.R.'s behavior.

"96. On November 13, 2018, J.R. sent the respondent a proposed revised version of the Settlement and Release Agreement, which removed the waiver of claims against the respondent and his client. The respondent stated that he approved these changes and asked if there were any other changes 'I missed.'

"97. The respondent testified that the reason he held the funds from June 2018 until November 15, 2018, was because J.R. had replied to the respondent's June 28, 2018, email stating 'I'll get back to you.' The respondent expected a response from J.R. regarding the Settlement and Release Agreement, which never came. Upon advice of counsel the respondent kept the funds in his trust account until his counsel directed him to mail a check for the garnished funds to T.R. on November 15, 2018.

"Case No. DA13,579

"98. In October 2015, M.H., Jo.H., and Ja.H. inherited a home located in Wichita, Kansas, after their mother passed away. The siblings could not agree on what to do with the home, so the home remained vacant until 2018 when M.H. filed a partition action in Sedgwick County District Court against Jo.H. and Ja.H. The property was also subject to a foreclosure matter.

"99. M.H. was represented by attorney Mark Ayesh. Jo.H. and Ja.H. were represented by attorney David Morgan. Judge Eric Commer presided over the partition matter.

"100. On July 9, 2020, Judge Commer ordered that the property be listed for sale under certain specified conditions, including listing the property with one of two real estate agencies. Mentor Capital, LLC ('Mentor'), a company that purchased and resold distressed properties in foreclosure, entered into a contract with M.H. to purchase the property for $90,000.00. Jo.H. and Ja.H. refused to sign the contract. The respondent was not involved in preparing or negotiating the contract.

"101. Mentor hired the respondent after Mentor learned that the property was involved in probate proceedings. The respondent determined the property was the subject of the partition action in front of Judge Commer.

"102. On August 25, 2020, M.H. filed a motion to compel the sale of the property to Mentor without the need for Jo.H. and Ja.H. to agree to the transaction. The respondent entered his appearance in the partition matter on behalf of Mentor as an interested party that same day.

"103. Around this time, Mr. Morgan filed a motion to withdraw as counsel for Jo.H. and Ja.H.

"104. On September 3, 2020, the court held a hearing via WebEx to consider M.H.'s motion to compel the sale to Mentor. The court first heard Mr. Morgan's motion to withdraw, which Mr. Morgan indicated was based on a disagreement with his clients over how to proceed. Judge Commer granted the motion.

"105. Judge Commer then heard argument on M.H.'s motion to compel the sale to Mentor. The respondent appeared at the hearing as an observer on behalf of Mentor and did not make any arguments regarding the motion to compel. Ja.H., acting *pro se*, objected to the sale of the property to Mentor and stated he wished to purchase the property himself. Judge Commer ultimately ruled that the property could be sold to Mentor according to the contract between M.H. and Mentor.

"106. After this hearing, Mentor had a final 'walk through' of the home and refused to close on the contract with M.H. under its present terms. In an email to Mr. Ayesh, M.H.'s attorney, the respondent stated that Mentor had discovered severe flooding in the home's basement, alleging that M.H. did not ensure the sump pumps were turned on. Respondent communicated that Mentor was still willing to purchase the property for a reduced price.

"107. On September 18, 2020, M.H. filed a second motion to compel the sale of the property, this time to a company called Northbound, Inc., for $65,000.00. That same day, the respondent filed a motion for Mentor to intervene in the partition action and asked the court to deny the motion to compel the sale to Northbound and order the property instead be sold to Mentor for a reduced price. Mentor had offered $65,000.00, $68,000.00, and $72,500.00 to purchase the property, all of which were rejected by M.H.

"108. On September 21, 2020, Northbound made a cash offer of $80,000.00 to purchase the property, with a closing date of October 15, 2020.

"109. On September 25, 2020, the court held a WebEx hearing on the pending motions. The respondent appeared and argued on behalf of Mentor as a party seeking to intervene in the matter. Ultimately, Judge Commer denied Mentor's motion to intervene and compel the sale of the home to it for $72,500.00. Because the original contract between M.H. and Mentor had a closing date of September 28, 2020, and was still active, the court ruled that M.H.'s motion to compel the sale of the property to Northbound was premature. If the contract with Mentor

failed to close by September 28, 2020, the court ruled that M.H. could request a new hearing on her motion to compel the sale to Northbound.

"110. The original contract between Mentor and M.H. failed to close. M.H.'s motion to compel the sale to Northbound was scheduled for hearing on October 2, 2020, via WebEx.

"111. Just prior to the October 2, 2020, hearing, the respondent filed a limited entry of appearance on behalf of Ja.H. for the purpose of seeking an order compelling M.H. to sell the home to Ja.H. for $100,000.00. The respondent also filed a combined response to M.H.'s motion to compel the sale to Northbound and request to compel the sale of the property to Ja.H.

"112. Attached to Ja.H.'s motion to compel sale to Ja.H. was a proposed contract, prepared by the respondent, who is also a licensed real estate broker, to purchase the home for $100,000.00. The contract, dated October 2, 2020, was contingent on Ja.H. obtaining financing within 45 days. The contract noted Ja.H. was not preapproved but would apply for financing within 10 days. The proposed contract had a closing date 'on or before December 30, 2020.'

"113. During the October 2, 2020, hearing, Judge Commer questioned whether the respondent had a potential conflict of interest, considering the respondent had previously represented Mentor and now represented Ja.H. The respondent stated that Mentor was no longer interested in purchasing the property and was not a party to the action since its motion to intervene was denied. The respondent argued that Mentor's interests were not in conflict with Ja.H. The respondent told the court that both Mentor and Ja.H. had been informed of the potential conflict and had each signed written conflict waivers.

"114. Judge Commer testified during the formal hearing that his concern about a conflict was based on the potential that the siblings may have a claim against Mentor for failing to close on the contract to purchase the property for $90,000.00. By later representing Ja.H. in his offer for more than $90,000.00, the respondent could negate any claims the siblings might have against Mentor. Judge Commer further explained, 'the argument could be made by Mentor Capital that, well, you really don't have any damages because if the court had approved the sale [to Ja.H.] for $90,000 . . . you wouldn't have had any damage.'

"115. The respondent testified, 'I still struggle with this a little bit because I don't see [the] argument how [Ja.H] could have a claim against Mentor even as a third party beneficiary when he refused to sign the contract.'

"116. The respondent testified during the formal hearing, that Ja.H. contacted the respondent seeking his assistance in purchasing the property. Once the respondent's representation of Mentor ended, the respondent decided to assist Ja.H., believing Ja.H. should have the opportunity to purchase the property.

"117. The respondent also testified during the formal hearing that he assisted Ja.H. pro bono, receiving no money in exchange for his legal or real estate

broker services. Further, Mentor had communicated to the respondent that Mentor was no longer interested in purchasing the property and was not interested in any type of legal action against M.H., Jo.H., or Ja.H.

"118. Mentor and Ja.H. both signed conflict waivers related to the transaction and partition matter. Ja.H. signed the waiver on October 2, 2020.

"119. During the October 2, 2020, hearing, the respondent argued that it was in the parties' best interests to either approve the sale to Ja.H. for $100,000.00 or to reject the contract with Northbound and allow the property to be listed with a real estate agent, as was contemplated in the court's July 9, 2020, order.

"120. Judge Commer ultimately granted M.H.'s motion to compel the sale to Northbound, reasoning that the partition action had been pending for two years, Ja.H. had been represented by prior counsel who could have previously assisted Ja.H. with financing and putting forward an offer, and the later closing date and risk that Ja.H.'s financing could fall through presented potential unnecessary delay. Judge Commer also noted that he would be unavailable for the next 24 days, making it impossible for him to resolve any issues that could arise should Ja.H.'s contract fall through.

"121. As Judge Commer explained the reasoning behind his order, the respondent began to interrupt him. At one point, Judge Commer stated: 'Sir, let me speak.' The respondent argued that it would be wrong for the court to allow the sale to Northbound and stated: 'What is happening to [Ja.H.] is an injustice this court should be ashamed of.'

"122. After Judge Commer announced that the court would approve the sale of the property to Northbound, the following exchange occurred:

'MR. DAVIS: May I respectfully ask you to list [the home] for ten days even though it still had not closed under [the] contract [with Northbound]? What you are doing is an injustice, Your Honor.

'THE COURT: You said that before, Mr. Davis. I made my ruling.

'MR. DAVIS: I want you to know what you are doing is wrong to [Ja.H.]. I want it on the record what you are doing is wrong.

'THE COURT: I'm not going to argue with you. I've made my ruling.

'MR. DAVIS: You made the ruling you believe is appropriate. I want it on the record I believe what you are doing is wrong.

'THE COURT: You are arguing.

'MR. DAVIS: For more time listed seven to ten days no harm whatsoever. That would just prove the fair value of the property. [Ja.H.] is being railroaded here, Your Honor. It is not right. I want it on the record.

'THE COURT: Mr. Davis.

'MR. DAVIS: It is not right.

'THE COURT: You said that. You made your argument, Mr. Davis. That is one of the problems with these Web[Ex] remote hearings that your conduct just now was in contempt of the court's ruling because you are arguing with the court. I explained why I was making this ruling when I indicated to you I will be unavailable.

'MR. DAVIS: You can correct this, Your Honor. Your unavailability shouldn't affect [Ja.H.]. That's unjust.

'THE COURT: Mr. Davis, if you were present in the courtroom I would likely be finding you in contempt of court for direct contempt.'

"123. After the hearing, Judge Commer submitted a complaint to the disciplinary administrator's office regarding the respondent's potential conflict representing Mentor and then Ja.H. as well as the respondent's conduct during the October 2, 2020, hearing.

"124. On October 16, 2020, the respondent provided the disciplinary administrator's office a response to Judge Commer's complaint. In his response, the respondent made the following statements:

'I appreciate that a complaint from a judge will carry significant weight—as it should—but frankly, this complaint is completely frivolous and was filed by Judge Commer as retaliation for my willingness to point out that he was denying my client his rights and entering an unjust decision.

* * *

'Moreover, Judge Commer stated on the record that his reason for not requiring this property be listed on the MLS or providing the defendant an opportunity to purchase it was because Judge Commer was going on vacation so he wouldn't be available to monitor any disputes. In response to this, I stated that his vacation schedule shouldn't affect an individual's rights, which I am sure is why he sent this complaint as he was unhappy with me making that statement and that I didn't just sit there quietly and allow him to railroad this Defendant so he could go on vacation.

* * *

'Considering [Judge Commer] knew the complaint was without merit because I had already advised him waivers were obtained, I have to wonder if this complaint was intended to discourage an appeal of his decision.

* * *

'Judge Commer knew there was no ethical violation when he submitted his complaint. I should also note he never asked to view the conflict waivers (in camera or otherwise) and I would have happily obliged had he done so. Instead, Judge Commer submitted this complaint knowing that it was untruthful and that no violation had occurred. Moreover, it is my opinion that his frustration with my agreeing to represent [Ja.H.] (who he had previously threatened to deny his right to participate in hearings) prevented him from making a fair and just decision based on the facts and law related to this case.

* * *

'Therefore [Judge Commer] has a desire to avoid this wrong decision being appealed.

* * *

'Judge Commer is just upset that I called out that he was not respecting the rights of my client and that his vacation should not be grounds for denying my client's requested relief.

* * *

'It is my hope that once you review this information, you will find this for what it is, which is a frivolous complaint filed by a judge in retaliation because he was being called out for treating my client unfairly and using his vacation as an excuse to deny relief to my client. This letter is his way of trying to punish me for having the courage to call out injustice when it happens and to try and prevent me from ever doing so in the future. Even entertaining this complaint would be a miscarriage of justice.'

"125. Further findings of fact are stated in the Conclusions of Law section below as appropriate to support the hearing panel's findings.

"*Conclusions of Law*

"126. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.15(a) (safekeeping property), 3.1 (meritorious claims and contentions), 3.5(d) (impartiality and decorum of the tribunal), 4.1(a) (truthfulness in statements to others), 4.4(a) (respect for rights of third persons), 8.1 (bar admission and disciplinary matters), 8.2(a) (judicial and legal officials), and 8.4(c) (misconduct), in the DA13,141 and DA13,579 matters as discussed further below.

"127. The hearing panel concludes there is not clear and convincing evidence of a violation of the Kansas Rules of Professional Conduct in DA13,149 (the T.R. complaint). The disciplinary administrator's office alleged the respondent violated KRPC 1.15(b), 4.1(a), and 4.4(a) in DA13,149.

"128. In the garnishment action, the respondent represented the property management company and thus had a responsibility to his client to protect its legal interests and gather adequate evidence to confirm whether T.R. was the judgment debtor before releasing the garnishment and collected funds. Had she chosen to, T.R. could have asked the court for a judicial determination at any time, but she did not. Instead, T.R. chose to have J.R. try to negotiate with the respondent and his client.

"129. Initially, the respondent attempted to return the funds to T.R. in late June 2018 through attorney Mark Logan, relying on Mr. Logan's status as counsel for T.R. to confirm T.R.'s identity and position in the case. However, Mr. Logan emailed the respondent to tell him that he would not continue to represent J.R. and T.R. The respondent asked Mr. Logan whether Mr. Logan could relay the check to T.R., which the respondent had already placed in the mail to Mr. Logan. However, Mr. Logan never responded to this email.

"130. When Mr. Logan ceased communicating with the respondent, the respondent sought to negotiate a settlement and release agreement with J.R. and T.R. Up to this point, J.R.'s contacts with the respondent had been aggressive, profane, and persistent. It is understandable that J.R. was upset and that he felt T.R.'s paycheck was wrongfully garnished. However, J.R.'s behavior should be taken into consideration when determining whether the respondent's subsequent conduct, aimed at protecting himself and his client, violated the rules of professional conduct. Further, the respondent had not ever met or spoken with T.R., so he also wanted to protect his client and himself from any potential claim that J.R. was not authorized to receive the funds on T.R.'s behalf.

"131. The disciplinary administrator's office asserted that the phrase, 'the results of the review above were inconsistent,' in the proposed settlement agreement dishonestly indicated that it was unclear whether T.R. was wrongfully garnished, which made it appear that T.R. was receiving some form of consideration for signing the settlement agreement. '[T]he results of the review above' refers to the respondent's own research, his correspondence with relevant individuals, and an investigation by a private investigator hired by the respondent. The respondent testified that throughout the garnishment proceeding there were facts that went both ways, both in support and in contravention that T.R. who worked at the school district was the judgment debtor. While the respondent never reached a conclusion with 100% certainty that he had garnished the wrong person's earnings, he and his client ultimately concluded that they should refund the collected amounts to T.R. Therefore, there is not clear and convincing evidence that the quoted language was a knowingly false statement.

"132. Moreover, the respondent was willing to negotiate the terms of the settlement agreement with T.R. and J.R. and was prepared to accept a version of the settlement agreement revised by J.R. and T.R. that removed much of the liability waiver language. In his June 28, 2018, email, J.R. told the respondent, 'I'll get back to you,' regarding the settlement agreement language and then did not contact the respondent about the agreement again until November 2018. The respondent sent a refund check to T.R. in November 2018.

"133. Accordingly, the hearing panel concludes that there is not clear and convincing evidence that the respondent's conduct in the DA13,149 matter violated KRPC 1.15(b), 4.1(a), or 4.4(a).

"134. Further, the disciplinary administrator's office alleged that the respondent violated KRPC 1.7(a)(2) in the DA13,579 (Judge Commer complaint) matter. Specifically, the ODA contends there was a substantial risk that the respondent's representation of Ja.H. would be materially limited by his responsibilities to his former client, Mentor. Further, the ODA asserts that the written conflict waiver signed by Ja.H. failed to fully disclose the conflict, meaning the respondent did not obtain informed consent from Ja.H.

"135. Testimony during the formal hearing indicated a potential claim by Mentor against the siblings and, conversely, a potential claim by the siblings against Mentor for failure to close the real estate sale contract for $90,000.00. In

the conflict waiver signed by Ja.H., the respondent notified Ja.H. of potential claims Mentor may have against M.H. and the real estate agent for the way the real estate transaction was handled. The respondent did not, however, notify Ja.H. that there may be potential claims by the siblings against Mentor. The respondent noted during his testimony that he struggled to see how Ja.H. could have a claim against Mentor when Ja.H. refused to sign the contract. The hearing panel agrees.

"136. For KRPC 1.7(a)(2) to be violated, there must have been a 'substantial risk' that the respondent's representation of Ja.H. 'will be materially limited by' the respondent's responsibilities to Mentor. KRPC 1.7(a)(2). The matter before Judge Commer was a partition action where each sibling was a separate party. M.H. signed the contract with Mentor on her own behalf only and then asked the court to rule that her brothers' signatures were not necessary to sell the property. Ja.H. refused to sign the contract to sell the property to Mentor. Therefore, it was reasonable for the respondent to conclude that Ja.H. did not have a viable claim against Mentor, and thus there was no substantial risk that the respondent's representation of Ja.H. would be materially limited by his former representation of Mentor.

"137. The hearing panel concludes that the waiver signed by Ja.H. properly informed Ja.H. of all potential concurrent conflicts as required by KRPC 1.7(b). Accordingly, the hearing panel concludes there is not clear and convincing evidence that the respondent violated KRPC 1.7.

"138. Finally, the Amended Formal Complaint alleged the respondent violated KRPC 3.3. No evidence was presented to support a violation of KRPC 3.3 and the disciplinary administrator's office did not argue the respondent violated KRPC 3.3 during the hearing. Therefore, the hearing panel concludes that the disciplinary administrator abandoned this allegation. The hearing panel does not find a violation of KRPC 3.3.

"KRPC 1.15(a)

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

'(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded.'

"140. On February 27, 2018, the respondent sent an email to L.Y. with a final invoice that states a total amount due to respondent as $2,814.70. The final invoice was itemized and included an expense of $714.70 for 'Deposition Transcripts.'

"141. L.Y. sent a check dated March 7, 2018, to the respondent for $2,814.70. The respondent deposited this check into his firm's operating account on March 15, 2018.

"142. Up to March 15, 2018, the respondent had not paid $714.70 for any deposition services in L.Y.'s case and the $714.70 was not fees owed to the respondent. Thus, the respondent was not permitted to place L.Y.'s $714.70 in his operating account.

"143. The respondent admitted he violated KRPC 1.15.

"144. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15(a) in the DA13,141 matter.

"KRPC 3.1

"145. 'A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.'

"146. During the small claims trial, the respondent claimed that because the deposition was scheduled by Ms. Russell, he did not owe Ms. Ragsdale the $37.50 one-half appearance fee. Further, the respondent claimed that he did not owe Ms. Ragsdale for the transcripts or any other fees.

"147. The only time the respondent asserted he did not owe the appearance fee was in connection with the small claims trial. At all other times before and after the trial, the respondent acknowledged that he at least owed the one-half appearance fee.

"148. Further, the respondent knew when he raised this defense that he had requested that Ms. Ragsdale and TBC Video stay later so that he could depose C.H.

"149. Judge Scott found in favor of Ms. Ragsdale and entered judgment against the respondent for $714.70 plus interest, ruling: 'I do know how depositions are ordered, I do know how depositions are paid for, and I find [the respondent's] actions to be abhorrent, unethical. And if [Ms. Ragsdale] doesn't file a complaint with the disciplinary committee, I am going to.' Further, the court stated: 'If you take a deposition and you tell someone you want them to perform services, they have completed the contract . . . [t]hat is basic contract law . . . . If you ask someone to do a job for you, then they have—it is a quantum meruit. And she performed her services for you.'

"150. The respondent acknowledged that Judge Scott's ruling was correct and attributed his defense to lack of experience with depositions and how they are billed.

"151. The respondent's asserted defense in 18-SC-00210 was frivolous and made without good faith argument for an extension, modification, or reversal of existing law.

"152. Accordingly, the hearing panel concludes the respondent violated KRPC 3.1.

"KRPC 3.5(d)

"153. 'A lawyer shall not . . . (d) engage in undignified or discourteous conduct degrading to a tribunal.'

"154. During the October 2, 2020, hearing before Judge Commer, the respondent interrupted Judge Commer as he was issuing his ruling. At one point, Judge Commer stated: 'Sir, let me speak.'

"155. The respondent was argumentative with the Court as it issued its ruling. The respondent used language with no substantial purpose other than to degrade the tribunal. For example, the respondent stated that the Court 'should be ashamed of' its ruling's effect on the respondent's client, that the Court was committing an 'injustice' and was 'wrong,' and that the respondent's client was being 'railroaded' by the Court's ruling.

"156. Judge Commer attempted to redirect the respondent multiple times to engage in appropriate conduct, but the respondent did not revert to engaging in appropriate conduct. Judge Commer stated that if the respondent were present in the courtroom as opposed to appearing via WebEx, the Court would have found the respondent in direct contempt of court.

"157. The hearing panel concludes that the respondent's conduct during the October 2, 2020, hearing before Judge Commer was undignified, discourteous, and degrading to the tribunal. Accordingly, the hearing panel concludes the respondent violated KRPC 3.5(d).

"KRPC 4.1(a)

"158. KRPC 4.1(a) provides that '[i]n the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.'

"159. During a March 19, 2018, phone call, the respondent told Ms. Ragsdale that he had received the funds for the deposition from his client and that he had placed a check in the mail.

"160. The respondent had not placed a check in the mail to Ms. Ragsdale by the time of this phone call. In fact, the respondent did not provide any payment to Ms. Ragsdale until August 2018, when the respondent paid a small claims court judgment entered against him for Ms. Ragsdale's invoice.

"161. The hearing panel concludes that at the time of his phone call with Ms. Ragsdale [in] spring 2018, the respondent knew that he had not placed a check (for $37.50 or any other amount) in the mail to Ms. Ragsdale.

"162. The hearing panel disagrees that the phrase 'the check is in the mail' is a turn of phrase that communicates that the person intends to send a check soon. The respondent's statement under the circumstances in this case would have led a reasonable person to believe that the check was actually in the mail, and the respondent knew this was not true.

"163. As a result, the hearing panel concludes the respondent violated KRPC 4.1(a) in DA13,141 by knowingly making a false statement of material fact to Ms. Ragsdale.

"KRPC 4.4(a)

"164. 'In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person.'

"165. For nearly three months, from February 8, 2018, until April 26, 2018, the respondent led Ms. Ragsdale to believe that the respondent planned to pay Ms. Ragsdale's invoice for the deposition and transcripts.

"166. Then, on April 26[,] 2018, the respondent sent Ms. Ragsdale an email that stated: 'We have no contract or agreement. We had no discussions prior to the deposition. I never agreed to your rates or charges. There is no contract or agreement between us, and you would be committing perjury if you file the petition that you provided below.'

"167. In the respondent's April 26, 2022, email to Ms. Ragsdale, the respondent denied the existence of a transaction that the respondent had acknowledged in communications throughout the months prior. Further, the respondent claimed Ms. Ragsdale would commit a crime if she exercised her right to ask the court to decide the matter and to seek to recover her damages.

"168. The respondent's conduct had no substantial purpose other than to embarrass, delay, or burden Ms. Ragsdale. Accordingly, the hearing panel concludes that the respondent violated KRPC 4.4(a) in the DA13,141 matter.

"KRPC 8.1

"169. Lawyers must cooperate in disciplinary investigations. KRPC 8.1 provides:

'[A] lawyer . . . in connection with a disciplinary matter, shall not:

'(a) Knowingly make a false statement of material fact; or

'(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from [a] . . . disciplinary authority, . . .'

"170. During the disciplinary investigation, the respondent made false statements of material fact to the disciplinary administrator's office in his July 31,

2018, response to Ms. Ragsdale's complaint, to Investigator Eldon Shields, and to former disciplinary administrator Stan Hazlett.

"171. In the respondent's July 31, 2018, response, sent to the disciplinary administrator's office, the respondent stated that he had 'submitted a check for the half of the appearance fee that was apparently not received by Ms. Ragsdale.' During Investigator Shields' interview of the respondent on August 23, 2018, the respondent told Investigator Shields that he sent a check to Ms. Ragsdale for the $37.50 appearance fee.

"172. The respondent never sent a check to Ms. Ragsdale for the $37.50 appearance fee.

"173. The respondent stated that he negligently told Investigator Shields things that are untrue. However, the respondent's false statements in his July 31, 2018, response and to Investigator Shields, made just a few months after the $37.50 check was purportedly sent, were made under circumstances that establish that the respondent knew the statements were false. At that time, the respondent was still in solo practice and had access to his solo firm billing software and files. The respondent's memory about whether he sent a check to Ms. Ragsdale would have been fresh at this time and he had access to the information needed to provide an accurate statement in his response and to Investigator Shields.

"174. On July 31, 2020, the respondent told former disciplinary administrator Stan Hazlett in an email that: 'The original check to Ms. Ragsdale (for the appearance fee) came directly from the client and was forwarded to her, so no funds were cycled through trust (or any other account).' The respondent's statement in his email to Mr. Hazlett was false. The respondent did not request a check from L.Y. for the $37.50 appearance fee and no such check was sent to Ms. Ragsdale.

"175. The hearing panel recognizes that at the time the respondent exchanged emails with Mr. Hazlett, the respondent had recently undergone a heart transplant surgery and was taking medications that likely would have had a significant impact on the respondent's ability to function and respond completely. But while the respondent's physical and mental condition at the time may mitigate the respondent's misconduct (as discussed further below), the statement to Mr. Hazlett was no less false.

"176. The respondent asserts he did not have the information he needed to respond accurately to Mr. Hazlett, such as access to his solo firm billing records, and instead was responding based on his faulty memory. However, the fabrication of this very specific story could not have occurred based on a lack of memory. Either the respondent did not remember what happened and could have stated such to Mr. Hazlett, or the respondent did remember what happened. The hearing panel concludes that the respondent fabricated the story about asking L.Y. to send a check directly to Ms. Ragsdale to intentionally avoid providing Mr. Hazlett the requested documents. The circumstances suggest that the respondent determined the responsive documentation contained no indication that a check was ever sent to Ms. Ragsdale from his own account, and fabricated this story to mislead Mr. Hazlett.

"177. Thus, the hearing panel concludes that the respondent's false statements in his response, to Investigator Shields, and to Mr. Hazlett were knowingly and intentionally made. The hearing panel further concludes that the respondent's false statements were of facts material to the disciplinary investigation.

"178. Because the respondent knowingly and intentionally made false statements of material fact during the disciplinary investigation in DA13,141, the hearing panel concludes that the respondent violated KRPC 8.1(a).

"KRPC 8.2(a)

"179. 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.' KRPC 8.2(a).

"180. In his October 16, 2020, response to Judge Commer's disciplinary complaint, the respondent stated the following about Judge Commer:

a. That Judge Commer's complaint was 'completely frivolous and was filed by Judge Commer as retaliation for [the respondent's] willingness to point out that he was denying [the respondent's] client his rights and entering an unjust decision';

b. That Judge Commer did not require the property be listed on the MLS or allow the respondent's client to purchase it because Judge Commer was going on vacation;

c. That Judge Commer 'knew there was no ethical violation when he submitted his complaint';

d. That Judge Commer submitted the complaint 'knowing that it was untruthful and that no violation had occurred';

e. That Judge Commer's [*sic*]was 'just upset that [the respondent] called out that he was not respecting the rights of [the respondent's] client and that his vacation should not be grounds for denying [his] client's requested relief';

f. That Judge Commer's complaint was 'a frivolous complaint filed by a judge in retaliation because he was being called out for treating [the respondent's] client unfairly and using his vacation as an excuse to deny relief to [the respondent's] client.'

"181. The respondent made other comments similar to the above throughout his October 16, 2020, response.

"182. When asked about the statements in his response, the respondent testified:

'I can't tell you what Judge Commer's motives are. I can tell you what I thought they were that day. I can tell you what I think they were today and those aren't the same thing because things have happened between now and that day.

* * *

'And, you know, that's what I said, what I said when I said. Today it was dumb. Shouldn't have sent it. And I would take it back every time, 10 out of 10 times, if I got asked the question.'

"183. Judge Commer testified that he did not file his complaint in retaliation for the arguments the respondent raised at the October 2, 2020, hearing or for the respondent's claim that Judge Commer violated Ja.H.'s rights and entered an unjust decision. Further, Judge Commer testified that he did believe there was a substantial likelihood the respondent committed an ethical violation when he filed his complaint. Finally, Judge Commer testified he did not knowingly file a false complaint against the respondent, and he did not file the complaint to discourage an appeal of his ruling.

"184. Judge Commer sent a complaint about the respondent's conduct to the disciplinary administrator's office because, after reviewing the Judicial Code of Conduct, Judge Commer believed 'there was a substantial indication that there had been a violation of the disciplinary rules that [he] was required by the Judicial Code to submit a complaint.'

"185. The hearing panel concludes that the respondent's statements about Judge Commer's integrity were false and were made with reckless disregard as to their truth or falsity. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.2(a).

"KRPC 8.4(c)

"186. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c).

"187. The respondent engaged in conduct that involved dishonesty when he sent an email to Ms. Ragsdale stating that he had mailed a check to her in April 2018 when the respondent had not done so, stated in his July 31, 2018, response to the disciplinary complaint and to Investigator Shields that he had sent Ms. Ragsdale a check for the $37.50 appearance fee when he had not done so, and told Mr. Hazlett by email that he had directed L.Y. to send a check to Ms. Ragsdale when the respondent had made no such request of L.Y. and no such check was sent.

"188. Accordingly, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

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

"190. *Duty Violated*. The respondent violated his duty to his client L.Y., to the public, to the legal system, and to the legal profession.

"191. *Mental State*. The respondent intentionally violated KRPC 8.1(a) and 8.4(c) and knowingly violated his duties in connection with the remaining rule violations.

"192. *Injury*. As a result of the respondent's misconduct in DA13,141, the respondent wasted resources of the small claims court and injured his client L.Y. by placing the $714.70 payment into his operating account and converting it for his own use. The respondent only paid the deposition expense after being ordered to do so by the small claims court. Further, the respondent injured Ms. Ragsdale by unduly delaying payment for her services through misrepresentation and harassing conduct and causing her to expend unnecessary time, stress, and effort to collect the amount owed from the respondent. The respondent caused injury to the disciplinary system by making multiple false statements creating the need for additional resources to be expended to discover the truth. As a result of the respondent's misconduct in DA13,579, the respondent caused injury to the legal profession by making false statements that reflected poorly on the respondent and the profession and caused injury to the legal system by making false statements that interfered with the proper adjudication of the partition matter and with the disciplinary proceeding.

"Aggravating and Mitigating Factors

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

"194. *Prior Disciplinary Offenses*. During the respondent's final semester of law school, in spring 2012, the respondent was admonished for an honor code violation for failing to disclose arrests and/or charges in nine separate criminal matters on his law school application. This resulted in a hearing before the Kansas Board of Law Examiners. According to the holding in *In re Black*, 283 Kan. 862, 156 P.3d 641 (2007), a prior proceeding before the Kansas Board of Law Examiners may be characterized as a prior disciplinary offense and considered an aggravating factor. The hearing panel may also give such evidence the appropriate weight in its consideration. *Black*, 283 Kan. at 877. The hearing panel concludes that the respondent's prior misconduct that led to admonishment and the Board of Law Examiners matter is an aggravating factor. However, this factor is given reduced weight due to its remoteness in time, the fact that the respondent self-reported the misconduct, and the fact that the Kansas Board of Law Examiners chose to allow the respondent to take the bar exam despite the misconduct.

"195. *Dishonest or Selfish Motive*. The hearing panel concludes that the respondent's conduct with regard to Ms. Ragsdale and in the disciplinary investigation was motivated by dishonest and selfish motive.

"196. *A Pattern of Misconduct*. The disciplinary administrator's office contends that the three disciplinary complaints show that the respondent engaged in a pattern of misconduct. However, the hearing panel did not find a violation in

the DA13,149 matter. The rules violations in the DA13,141 matter and the DA13,579 matter are not similar to each other. The hearing panel concludes there was not a pattern of misconduct here.

"197. *Multiple Offenses*. The respondent violated KRPC 1.15(a) (safekeeping property), 3.1 (meritorious claims and contentions), 3.5(d) (impartiality and decorum of the tribunal), 4.1(a) (truthfulness in statements to others), 4.4(a) (respect for rights of third persons), 8.1 (bar admission and disciplinary matters), 8.2(a) (judicial and legal officials), and 8.4(c) (misconduct), in the DA13,141 and DA13,579 matters. The respondent committed multiple offenses[.]

"198. *Submission of False Evidence, False Statements, or Other Deceptive Practices During the Disciplinary Process.* The respondent made false or deceptive statements during the disciplinary investigation multiple times. The respondent falsely stated in his response to Ms. Ragsdale's complaint and to Investigator Shields that he had sent a check for $37.50 to Ms. Ragsdale, he falsely stated to Mr. Hazlett that he directed L.Y. to send a check for $37.50 directly to Ms. Ragsdale, and he falsely told the disciplinary administrator's office that Judge Commer filed a complaint against him as retaliation for arguing on behalf of his client. Further, the respondent told Mr. Vogelsberg in a March 10, 2022, email that he had intended to invoice L.Y. for the videography services instead of the deposition transcript services. However, the respondent had been sued by both Ms. Ragsdale and TBC Video in small claims court for payment of their invoices related to this deposition. If the respondent had intended to invoice L.Y. for the videography services, L.Y.'s March 7, 2018, payment of this invoice in full should have resulted in the payment of TBC Video's invoice in full. The hearing panel concludes that the respondent repeatedly submitted false statements and engaged in deceptive practices throughout the disciplinary investigations in DA13,141 and DA13,579.

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

"200. *Physical Disability*. The respondent dealt with a significant health condition relating to his heart during all relevant times in this disciplinary matter. On March 13, 2020, he underwent heart transplant surgery. Before and after the heart transplant, the respondent was prescribed numerous medications. The respondent's heart condition and medications had a substantial effect on his physical condition, such as feelings of weakness, effects on his temperament, confusion, and drowsiness. The medications taken by the respondent also have many other potential serious side effects, including ones that can affect temperament, mental processing, emotional health, behavior, and physical wellbeing. The hearing panel concludes that the respondent's physical condition had a significant impact on his conduct in the docketed matters here, including the subsequent disciplinary investigations. This is a compelling mitigating factor.

"201. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. The respondent's heart condition and March 2020 heart transplant had a substantial impact on his mental and emotional state. The respondent testified that he spent a lot of time in the hospital in 2020, all while also being the primary source of income for his family. Further, the respondent testified that there were three times when he was in the hospital where he almost died. Understandably, he said that his emotional health is still a struggle today. All the misconduct in this case occurred during the time when the respondent's heart condition presented the most burden—leading up to and immediately following heart transplant surgery. It is clear that the respondent's emotional condition contributed to his misconduct, and this is also a compelling mitigating factor.

"202. *Inexperience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to the practice of law in April 2013. At the time of his misconduct, the respondent had been practicing law between 5 and 7 years and had not actively practiced for the first few years he was licensed. Further, the respondent was inexperienced in certain specific aspects of the practice of law, such as taking depositions. The hearing panel concludes that the respondent was inexperienced in the practice of law when the misconduct occurred.

"203. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the Kansas Bar Association. The respondent is the immediate past-president of the Kansas Bar Association Young Lawyers Section. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by the testimony of Kansas Bar Association President Nancy Morales Gonzalez and Past-President Cheryl Whelan. The respondent also submitted numerous positive client reviews in his exhibits.

"204. The evidence before the hearing panel presented a difficult set of circumstances under which to decide the appropriate discipline. Some of the conduct was quite troubling. However, the respondent's health condition during this time certainly contributed significantly to his misconduct. As a result, the hearing panel considered all possible types of discipline in analyzing the facts, rules violated, and aggravating and mitigating factors. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.'

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

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

'4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.'

'5.11 Disbarment is generally appropriate when:

'(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

'(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.'

'5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.'

'5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.'

'5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.'

'6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.'

'6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.'

'6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.'

'6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.'

'6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.'

'6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.'

'6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.'

'6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and cause [*sic*] little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.'

'6.31 Disbarment is generally appropriate when a lawyer:

'(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

'(b) makes an *ex parte* communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

'(c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.'

'6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.'

'6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.'

'6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.'

'7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.'

'7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

'7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.'

"*Recommendation of the Parties*

"205. The disciplinary administrator recommended that the respondent be indefinitely suspended.

"206. The respondent recommended that he receive a published censure, or, alternatively, be suspended for an unspecified period of time, to be stayed while the respondent is placed on probation according to the terms of his proposed probation plan.

"*Discussion*

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

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

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

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

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

"208. Rule 227(c) requires that the respondent 'establish that the respondent has been complying with each condition in the probation plan for at least 14 days prior to the hearing.'

"209. The respondent's proposed probation supervisor, Cheryl Whelan, testified that she and the respondent had an initial meeting on November 29, 2022, just nine days prior to the formal hearing in this matter. The respondent's proposed probation plan and supplement to that plan require the respondent to have an initial meeting with his proposed supervisor. Many of the other proposed probation terms require this meeting to occur before they can be complied with. Because the respondent met with Ms. Whelan for the first time nine days before the formal hearing, the respondent did not comply with each provision of his proposed plan 'for at least 14 days prior to the hearing.' See Rule 227(c).

"210. Further, the respondent engaged in dishonest conduct. Dishonest conduct cannot be effectively supervised on probation. *See In re Stockwell*, 296 Kan. 860, 868, 295 P.3d 572 (2013) ('Moreover, this court is generally reluctant to

grant probation where the misconduct involves fraud or dishonesty because supervision, even the most diligent, often cannot effectively guard against dishonest acts.')

"211. The hearing panel concludes that probation, on its own, is not appropriate discipline here. However, as discussed further below, the hearing panel concludes that probation could be helpful to the respondent to address the misconduct that was not dishonest in nature.

"*Recommendation of the Hearing Panel*

"212. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of 90 days. The hearing panel further recommends that after serving the 90-day suspension, the respondent be placed on probation for a period of two years according to the terms of his proposed probation plan and supplement to the original probation plan. Further, the hearing panel recommends that as a term of the respondent's probation, the respondent be required to obtain a psychological evaluation from a provider approved by the disciplinary administrator's office to determine whether the respondent is capable of practicing law professionally, which will include communicating with others honestly, completely, and with a professional temperament. The hearing panel recommends that the respondent be ordered to follow all recommendations of the psychological professional following this psychological evaluation.

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

DISCUSSION

If a disciplinary hearing panel finds misconduct and recommends discipline other than informal admonition, the matter proceeds to this court for hearing. See Supreme Court Rule 226(b) (2023 Kan. S. Ct. R. at 282). When this happens, the respondent and the ODA may file formal objections called "exceptions" to the hearing panel's factual findings or legal conclusions. See Supreme Court Rule 201(h) (2023 Kan. S. Ct. R. at 251) (defining "exception"). To preserve the issue for our review, a party must file an exception. Supreme Court Rule 228(e)(1) (2023 Kan. S. Ct. R. at 288). In the absence of a filed exception, the party is deemed to have admitted the factual findings and the legal conclusions in the final hearing report. Rule 228(g). When there are no exceptions filed, our task is usually focused on deciding the appropriate discipline.

In this case, both Davis and the ODA filed exceptions to the panel's factual findings and legal conclusions. Thus, the panel's findings and conclusions are not considered admitted, which means we must determine whether attorney misconduct has been established by clear and convincing evidence before deciding the appropriate discipline. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009).

RULE VIOLATIONS

A. *The Ragsdale Complaint*

In the Ragsdale complaint, the panel concluded Davis violated KRPC 1.15(a) (safekeeping property), KRPC 3.1 (meritorious claim in good faith), KRPC 4.1(a) (truthfulness in statements to others), KRPC 4.4(a) (respect for rights of third persons), KRPC 8.1(a) (false statement in disciplinary matters), and KRPC 8.4(c) (dishonest conduct).

Davis concedes his failure to deposit a $714.70 expense payment from his client into his trust account violated KRPC 1.15(a). But Davis claims the remaining rule violations found by the hearing panel are not supported by clear and convincing evidence because his actions resulted from careless mistakes and inexperience and were at most negligent, rather than intentional or knowing.

1. *KRPC 3.1 (meritorious claim in good faith)*

During the small claims trial on Ragsdale's demand for payment of appearance and transcription fees, Davis argued he did not have to pay Ragsdale half the appearance fee because he was not the attorney who originally scheduled the deposition. The hearing panel concluded clear and convincing evidence supported a finding that Davis' argument was frivolous and not made in good faith, in violation of KRPC 3.1. The panel found (a) Davis acknowledged before and after trial that he owed half the appearance fee, (b) the only time Davis asserted he did not owe any appearance fee was at the small claims trial, and (c) Davis knew when he raised this defense that he had requested Ragsdale to stay

later so that he could depose a witness. Davis takes exception to the panel's findings and legal conclusion, claiming that his argument to the trial court was not a frivolous one made in bad faith but resulted from his inexperience.

A majority of the court finds clear and convincing evidence supports the panel's finding that Davis violated KRPC 3.1. A minority of the court would find no violation of KRPC 3.1 based on a lack of clear and convincing evidence to support a finding that Davis' argument to the trial court was either frivolous or not made in good faith.

2. *KRPC 4.1(a) (truthfulness in statements to third person)*

The hearing panel concluded Davis violated KRPC 4.1(a) when he knowingly made a false statement of material fact to Ragsdale by telling her he had placed her check in the mail when knowing he had not done so. Davis takes exception to the panel's findings and legal conclusion, claiming he did not knowingly, but only negligently, misstated the truth to Ragsdale when he told her the check was in the mail.

A majority of the court finds clear and convincing evidence supports the panel's finding that Davis knowingly misstated the truth to Ragsdale in violation of KRPC 4.1(a). A minority of the court would find no violation of KRPC 4.1(a) based on a lack of clear and convincing evidence to support Davis knowingly misstated the truth.

3. *KRPC 4.4(a) (respect for rights of third persons)*

The hearing panel found Davis engaged in conduct that had no substantial purpose other than to embarrass, delay, or burden Ragsdale by telling her in an email that "[w]e have no contract or agreement. We had no discussions prior to the deposition. I never agreed to your rates or charges. There is no contract or agreement between us, and you would be committing perjury if you file the petition that you provided below." Davis takes exception to the panel's findings and legal conclusion, claiming that his response to Ragsdale was based on a good faith, although perhaps inexperienced, belief that he had no contract with her and that she would

be committing perjury if she filed a small claims petition alleging he had failed to pay for contracted deposition services.

A majority of the court finds clear and convincing evidence supports the panel's finding that Davis sent the email to Ragsdale for no purpose other than to embarrass, delay, or burden Ragsdale in violation of KRPC 4.4(a). A minority of the court would find no violation of KRPC 4.4(a).

4. *KRPC 8.1 (false statement in disciplinary matters)*

The hearing panel found that, during the disciplinary investigation, Davis made two false statements of material fact to the ODA.

1. In his July 31, 2018, response to Ragsdale's complaint, Davis falsely told Investigator Eldon Shields that he sent a check to Ragsdale for the $37.50 appearance fee. Davis concedes this statement was false but claims it was made negligently. The panel disagreed, finding he knowingly made the false statement because (a) it was just a few months after the check purportedly was sent and (b) he had access to his firm billing software and files to verify the veracity of his statement.

2. On July 31, 2020, Davis falsely told Stan Hazlett in an email that the $37.50 appearance fee check came directly from the client and was forwarded to Ragsdale. Davis concedes this statement was false but claims it was made negligently.

The court finds clear and convincing evidence supports the panel's finding that Davis knowingly made two false statements of material fact to the ODA.

5. *KRPC 8.4(c) (dishonest conduct)*

The hearing panel found Davis engaged in conduct involving dishonesty when he (a) sent an email to Ragsdale stating he had mailed a check to her in knowing he had not done so; (b) stated in his July 31, 2018, response to investigator Eldon Shields that he had sent Ragsdale a check for the $37.50 appearance fee when he had not done so; and (c) told Hazlett by email that he had directed

L.Y. to send a check to Ragsdale when Davis had made no such request from L.Y. and no check was sent. Davis concedes he made these three statements and each of them was false. But Davis takes exception to the panel's finding that he knowingly violated KRPC 8.4(c), claiming he made the false statements negligently.

The court finds clear and convincing evidence supports the panel's finding that Davis knowingly made three false statements of material fact to the ODA in violation of KRPC 8.4(c).

B. *Judge Commer Complaint*

Judge Commer filed a disciplinary complaint reporting a "substantial likelihood" that Davis violated "KRPC 1.7 and/or KRPC 1.9(a) and/or maybe 3.5(d)."

KRPC 1.7 (2023 Kan. S. Ct. R. at 342) and KRPC 1.9(a) (2023 Kan. S. Ct. R. at 358) generally prohibit a lawyer from representing a client if the representation involves a concurrent conflict of interest with a former client. KRPC 3.5(d) prohibits a lawyer from engaging in undignified or discourteous conduct degrading to the tribunal. Nearly all of Judge Commer's complaint focused on facts relating to the potential conflict of interest. Judge Commer included only limited facts in the two-page complaint relating to conduct degrading to a tribunal.

In his response, Davis addressed only the part of Judge Commer's complaint alleging the conflict of interest allegations, which he adamantly denied. Davis cited the hearing transcript, which reflects he told Judge Commer at the hearing that all parties were informed of the potential conflict and signed conflict waivers. Because Judge Commer knew there was no conflict of interest, Davis alleged the complaint was "completely frivolous" and filed in retaliation for his criticism of Judge Commer at the hearing, in which he basically accused the judge of railroading his client's interests in an unjust decision so the judge could go on vacation.

The ODA ultimately filed a formal complaint against Davis alleging he violated KRPC 1.7 (conflict of interest), KRPC 3.3 (2022 Kan. S. Ct. R. at 391) (candor toward the tribunal), KRPC 3.5 (conduct degrading to tribunal), and KRPC 8.2 (false statement about judge's integrity).

The hearing panel concluded clear and convincing evidence did not support a finding that Davis violated KRPC 1.7 because the waiver signed by Davis' client properly informed the client of all potential concurrent conflicts as required by KRPC 1.7(b). Additionally, the hearing panel concluded the ODA presented no evidence to support a violation of KRPC 3.3. The ODA did not file any exceptions to these conclusions.

But the hearing panel did find violations of KPRC 3.5(d) and 8.2(a). First, it found Davis' conduct before Judge Commer was undignified, discourteous, and degrading to the tribunal in violation of KRPC 3.5(d). It also found Davis violated KRPC 8.2(a) when he knowingly or recklessly made statements about Judge Commer's qualifications or integrity in response to Judge Commer's complaint.

Davis does not challenge the facts set forth in transcripts and written emails but filed exceptions to the panel's legal conclusions based on those facts. He challenges the panel's conclusions that (1) his behavior rose to the level of undignified or discourteous conduct degrading to a tribunal and (2) his statements about Judge Commer's integrity were false or in reckless disregard as to their truth or falsity.

1. *KRPC 3.5(d) (conduct degrading to tribunal)*

Rule 3.5 bears the title "Impartiality and Decorum of the Tribunal." Its main focus is prohibiting conduct that may improperly influence a judge, jury, witness, etc. A short sentence in subsection (d) is the decorum part of the rule.

"RULE 3.5 Impartiality and Decorum of the Tribunal

"A lawyer shall not:

"(a) give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by the Kansas Code of Judicial Conduct as it may, from time to time be adopted in Kansas, nor may a lawyer attempt to improperly influence a judge, official or employee of a tribunal, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with the Kansas Code of Judicial Conduct;

"(b) communicate or cause another to communicate with a member of a jury or the venire from which the jury will be selected about the matters under consideration other than in the course of official proceedings until after the discharge of the jury from further consideration of the case;

"(c) communicate or cause another to communicate as to the merits of a cause with a judge or official before whom an adversary proceeding is pending except:

. . . .

"(d) engage in undignified or discourteous conduct degrading to a tribunal."

There is one comment appended to KRPC 3.5, but it is unrelated to subsection (d).

The corresponding ABA Model Rule of Professional Conduct, MRPC 3.5, also focuses primarily on improper influence. The decorum subsection is set forth in MRPC 3.5(d), which prohibits a lawyer from engaging "in conduct intended to disrupt a tribunal." Unlike our decorum rule, MRPC 3.5(d) includes a mens rea requirement and refers to conduct *disrupting* a tribunal rather than conduct *degrading* a tribunal. But the comments to MRPC 3.5(d) equate disruption to "abusive or obstreperous conduct" as well as "belligerence or theatrics," which closely align with the KRPC 3.5(d) prohibition on conduct degrading a tribunal. Thus, the comment to MRPC 3.5(d) explaining the rule's purpose appears equally relevant to KRPC 3.5(d):

"The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics." Comment [4].

With the comment to MRPC 3.5(d) in mind, we review whether clear and convincing evidence supports the panel's legal conclusion that Davis violated KRPC 3.5(d). Again, our rule has no mens rea component, so by its plain language a lawyer can be held to have violated it by engaging in undignified or discourteous

conduct degrading to the tribunal regardless of intent to dishonor the court.

In support of its conclusion that Davis violated KRPC 3.5(d), the hearing panel found the following behavior by Davis to be undignified or discourteous conduct degrading to a tribunal:

- Davis interrupted Judge Commer.
- Davis was argumentative with Judge Commer.
- Davis used degrading language when he said the court "should be ashamed of" its ruling, the court was committing an "injustice" and was "wrong," and that Davis' client was being "railroaded" by the court's ruling.

We include the hearing transcript to provide context to the panel's factual findings and legal conclusions. The first excerpt provides context for when Davis said, "What is happening to [Ja.H.] here is an injustice this court *should be ashamed of*." (Emphasis added.)

"THE COURT: Mr. Davis, you are also here because your prior client didn't follow through with their contractual offer of ninety thousand dollars.

"MR. DAVIS: Your Honor, I mean this as respectfully as I need to. I am an attorney. I represent who I represent. [Ja.H.] had no contact to Minter[*sic*] Capital. This is two separate arm's length transactions. Whatever my previous client did or did not do is irrelevant to [Ja.H.]. What is happening here I stepped in for the record pro bono because I saw an injustice happening to [Ja.H.]. It is a grave injustice. You changed the rules for her and do not change the rules for him. He has offered more money. Either accept his money for more money or adjust things and order this property to be marketed. We can't for one party. That's essential for our justice system, Your Honor. What's good for the goose is good for the gander.

"Either accept the higher offer and bypass the process or order the process you ordered that they are asking you.

"I want to emphasize because they asked you to step around the process with Minter[*sic*] Capital these are the parties that knew the order. Mr. Ayesh ignored it quite frankly and should be sanctioned, Your Honor. That's a whole other point. He ignored your order and allowed her to enter a contract with Minter[*sic*] Capital when you ordered it. *What is happening to [Ja.H.] here is an injustice this court should be ashamed of.*

"THE COURT: Mr. Ayesh, I want to ask you in the hearing that was on done on September 3rd in that hearing on September 3rd you filed a motion for

that hearing that referenced a sale to Minter[*sic*] Capital. Had [M.H.] signed that order before that was presented to the court?" (Emphasis added.)

The second excerpt is from the last two pages of the hearing transcript, after the court issued its ruling.

"MR. DAVIS: May I respectfully ask you to list [the home] for ten days even though it still had not closed under [the] contract [with Northbound]? *What you are doing is an injustice, Your Honor.*

"THE COURT: You said that before, Mr. Davis. I made my ruling.

"MR. DAVIS: I want you to know *what you are doing is wrong to [Ja.H.]. I want it on the record what you are doing is wrong.*

"THE COURT: I'm not going to argue with you. I've made my ruling.

"MR. DAVIS: *You made the ruling you believe is appropriate. I want it on the record I believe what you are doing is wrong.*

"THE COURT: You are arguing.

"MR. DAVIS: For more time listed seven to ten days no harm whatsoever. That would just prove the fair value of the property. *[Ja.H.] is being railroaded here, Your Honor.* It is not right. I want it on the record.

"THE COURT: Mr. Davis.

"MR. DAVIS: It is not right.

"THE COURT: You said that. You made your argument, Mr. Davis. That is one of the problems with these Web[Ex] remote hearings that your conduct just now was in contempt of the court's ruling because you are arguing with the court. I explained why I was making this ruling when I indicated to you I will be unavailable.

"MR. DAVIS: You can correct this, Your Honor. Your unavailability shouldn't affect [Ja.H.]. That's unjust.

"THE COURT: Mr. Davis, if you were present in the courtroom I would likely be finding you in contempt of court for direct contempt." (Emphases added.)

We italicized the statements made by Davis on which the hearing panel relied to conclude Davis engaged in undignified or discourteous conduct degrading to a tribunal. We also italicized Davis' remark during this exchange where Davis acknowledged that Judge Commer made the ruling that the judge believed was appropriate.

Judge Commer's testimony at the disciplinary hearing also provides context to the panel's legal conclusions. Although most of Judge Commer's testimony related to facts surrounding the potential conflict of interest violation, the ODA questioned Judge Commer about Davis' demeanor during the hearing. Judge Commer generally said it was fine until the last few pages of the transcript, when Davis appeared to become aggressive and assertive.

"I noticed that he was not allowing me to speak, and sometimes I will start to speak and if the—if the person that I'm seeking to say something to continues I—I pause trying to be particularly respectful of them in a hearing, maybe sometimes overly, but I found that to be more probably a better approach to use as a judge so that the person gets to say what they want to say."

When asked about Davis' comment that the court would be committing a grave injustice against his client, Judge Commer said:

"I think [he] was beginning to become more assertive because he probably seemed to have the aggression that I was, 'um, not likely to grant his motion maybe. And, 'um, he was—I—I perceived it kind of to be an indication that—that these two people should be—and I was not giving [Ja.H.] equal consideration with [M.H.], 'um, although he was not party to the hearing or the trial that occurred back in April when I had gotten information about both of these persons that was still present in my mind and available."

And when asked about Davis' demeanor as reflected in the final two pages of the hearing transcript, Judge Commer said:

"[O]ne of the things that judges do not expect is argument after you've made your ruling. 'Um, and he—he was continuing to be assertive and to repetitively call my—call the decision an injustice to his client, and—and, 'um, being very insistent in the manner of speech."

As for Davis' tone of voice, Judge Commer said "[Davis] was speaking probably with more passion and emotion and volume than he had, for instance, at the start of the hearing." And when asked whether Davis' actions prevented him from maintaining control of the hearing, Judge Commer said:

"I was intending to kind of get him to stop his continued assertions with my statements that said, 'You've said that before and you're'—'I'm not going to argue with you,' and that—indicating that he was arguing with the decision. And I would say—I would say, yes, to some extent."

On cross-examination, Judge Commer was asked why he equivocated in the disciplinary complaint he filed against Davis by alleging Davis "maybe" violated KRPC 3.5(d). He responded:

> "because I didn't know if the Disciplinary Administrator Panel would consider telling the judge that it was an injustice repeatedly or that his client had been railroaded, fit the lack of decorum or the lack of, 'um, respect for the process of proceeding in the court. My concern particularly with that was that this—this man, [Ja.H.], was hearing it, hearing those statements. I can usually take some things and let them slide off my back, but my concern was more the impression being given to these—this litigant that the court system is unjust and the court system will allow somebody to railroad them through."

Davis claims his conduct, in context, does not rise to the level of a KRPC 3.5(d) violation. In support, Davis argues the conduct at issue was limited to only one of the three hearings where Davis appeared before Judge Commer in the matter. Davis also argues he engaged in the identified conduct solely to advocate for his client's interest and not to degrade the court. We are not persuaded by either of these arguments. First, that a lawyer adheres to the professional code of conduct two-thirds of the time is irrelevant to deciding whether clear and convincing evidence of a KRPC 3.5(d) violation exists. Second, and as we stated earlier, KRPC 3.5(d) does not have a mens rea requirement, so the reason *why* Davis engaged in the conduct at issue is immaterial to deciding whether Davis' behavior is undignified or discourteous conduct degrading to a tribunal.

Davis also points to some of our prior decisions interpreting and applying KRPC 3.5(d), which he says suggest that violations are limited to cases with worse facts, e.g., use of profanity, physical threats, or other threats. Cf. *In re Johnston*, 316 Kan. 611, 665, 520 P.3d 737 (2022) (where the attorney repeatedly accusing the bench and bar of collusion and racketeering, arguing with the judge, talking over and threatening to file litigation); *In re Rumsey*, 301 Kan. 438, 440, 442, 343 P.3d 93 (2015) (attorney called opposing counsel a "dirty bitch" and he had a history of engaging in similar conduct towards female attorneys); *In re Romious*, 291 Kan. 300, 309, 240 P.3d 945 (2010) (attorney shouted profanities at court staff, accused a judge of being a pedophile, brawled with U.S. Marshals, was rude, and disruptive towards court personnel in state and federal courts). But contrary to Davis' suggestion, we

have never construed KPRC 3.5(d) to require, and its plain language does not dictate, that a lawyer use profanity or make threats to violate the rule. See, e.g., *In re Berry*, 274 Kan. 336, 340-42, 346, 352-53, 50 P.3d 20 (2002) (although lawyer never used profanity or threatening language, court concluded lawyer violated KRPC 3.5[d] by continuing to argue with judge after judge announced ruling). To that end, each disciplinary case is unique and must be resolved in light of its own facts.

Finally, Davis points to our discussion of KRPC 3.5(d) in *In re Huffman*, 315 Kan. 641, 681-83, 509 P.3d 1253 (2022), to support his argument. In that case, respondent made statements in two motions for reconsideration that (1) implied the judge discriminated against her clients based on race or socioeconomic status, (2) implied the judge decided the issues in the case based on power rather than truth, and (3) accused the judge of treating the attorney differently than opposing counsel. The hearing panel concluded this conduct violated KRPC 3.5(d). But we disagreed.

> "Taken together, her testimony demonstrates a serious lack of judgment in making these comments and statements. But we are also cognizant that judges and courts are not above criticism—even harsh criticism—by lawyers vigorously advocating sometimes unpopular causes on behalf of marginalized people. And balancing this against the equally important need for a decorous and orderly courtroom is an inexact endeavor at best. Given this, a majority of the court holds Huffman's statements do not rise to the heightened standard necessary to support the panel's conclusion that she violated KRPC 3.5(d) and KRPC 8.2(a). In reaching that decision the majority considered and weighed as significant the fact Judge Marten himself did not take affront to Huffman's comments or invoke contempt at the time. A minority of the court would have found violations of these two rules." 315 Kan. at 682-83.

Davis says we should reach the same result here. We stand by our analysis in *Huffman*. But a majority of the court finds application of the *Huffman* analysis to the facts here results in a finding that Davis violated KRPC 3.5(d). In concluding Huffman's conduct did not constitute clear and convincing evidence to support a KRPC 3.5(d) violation, we "considered and weighed as significant the fact Judge Marten himself did not take affront to Huffman's comments or invoke contempt at the time." 315 Kan. at 683. Judge Marten did not file a disciplinary complaint against Huffman.

The opposite is true here. It was Judge Commer himself who initiated and filed the complaint against Davis alleging a possible KRPC 3.5(d) violation. And Judge Commer testified he did take affront to Davis' conduct because the parties, not just the lawyers, heard Davis' accusation that the court railroaded his client by deciding the case in a shameful and unjust manner inconsistent with the applicable law. In this context, Judge Commer believed Davis' conduct was degrading to the tribunal—not necessarily to him personally—but to the concept of an independent judiciary as a whole.

Upon review of the entire record, a majority of the court finds clear and convincing evidence supports the panel's conclusion that Davis violated KRPC 3.5(d) by engaging in undignified or discourteous conduct degrading to a tribunal. In reaching this decision, the majority considered and weighed as significant the fact that Judge Commer initiated and filed the complaint against Davis and that Judge Commer took affront to Davis' conduct as degrading to the tribunal in the sense that it undermined the concept of an independent judiciary. A minority of the court would find no violation of KRPC 3.5(d) based on a lack of clear and convincing evidence to support the violation.

2. *KRPC 8.2(a) (false statement about judge's integrity)*

KRPC 8.2(a) prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge." The hearing panel found Davis violated the rule by knowingly or with reckless disregard making false statements about Judge Commer's qualifications and integrity in his written response to Judge Commer's complaint. The panel identified the following false statements about Judge Commer's qualifications and integrity made by Davis:

- Judge Commer's bar complaint alleging Davis had a conflict of interest was frivolous and untruthful because Judge Commer knew when he filed it that Davis had no conflict of interest;

- Judge Commer filed the bar complaint alleging Davis had a conflict of interest in order to retaliate against Davis for exposing Judge Commer's decision as wrong, unfair, unjust, and made in order to accommodate the judge's personal vacation plans; and

- Judge Commer filed the bar complaint alleging Davis had a conflict of interest to deter Davis from appealing the judgment.

In support of its conclusion that Davis' statements about Judge Commer were false, the panel cited Judge Commer's testimony from the disciplinary hearing stating he did not file the bar complaint against Davis to retaliate or to deter Davis from appealing. To the contrary, Judge Commer testified he believed there was a substantial likelihood Davis committed an ethical violation when he filed his complaint.

In support of its conclusion that Davis knowingly or recklessly made the false statements about Judge Commer's qualifications and integrity, the panel cited to Davis' own testimony at the disciplinary hearing:

"I can't tell you what Judge Commer's motives are. I can tell you what I thought they were that day. I can tell you what I think they were today and those aren't the same thing because things have happened between now and that day. . . .

. . . .

" . . . And, you know, that's what I said, what I said when I said. Today it was dumb. Shouldn't have sent [the email]. And I would take it back every time, 10 out of 10 times, if I got asked the question."

A majority of the court finds clear and convincing evidence supports the panel's conclusion that Davis violated KRPC 8.2(a) by knowingly or recklessly making false statements about Judge Commer's qualifications and integrity. A minority of the court would find no violation of KRPC 8.2(a) based on a lack of clear and convincing evidence to support the violation.

C. *T.R. Complaint*

The ODA charged Davis with violating KRPC 1.15(b) (failing to promptly deliver funds belonging to a third person), KRPC 4.1(a) (2022 Kan. S. Ct. R. at 403) (truthfulness in statements to

others), and KRPC 4.4(a) (2022 Kan. S. Ct. R. at 406) (respect for rights of third persons). The hearing panel found no clear and convincing evidence to establish any of these violations. The ODA filed exceptions, arguing the panel ignored the clear and convincing evidence it presented.

We agree with the panel that the ODA's evidence is not clear and convincing. As for the settlement agreement and placing the funds in his trust account, the panel found Davis had a duty to protect his client's legal interests and gather adequate evidence to confirm whether T.R. was the judgment debtor before releasing the funds. The panel noted T.R. could have filed a motion with the court at any time but chose instead to negotiate with Davis. The panel also noted Davis tried to return the funds through attorney Mark Logan, who did not respond, and given the garnishee's anger and rather aggressive interactions with Davis, Davis was justified in wanting to protect himself and his client. Finally, the panel said that while Davis never reached a conclusion with 100% certainty that he had garnished the wrong person's earnings, he and his client ultimately concluded that they should refund the collected amounts to T.R. Thus, there was no clear and convincing evidence that the "inconsistent results" from the investigation language was a knowingly false statement.

D. *Summary of Violations*

We have reviewed the hearing panel's findings of fact and conclusions of law on Davis' rule violations and summarize our conclusions below.

In the Ragsdale complaint, a majority of the court finds clear and convincing evidence supports the panel's conclusion that Davis violated

- KRPC 1.15(a) (safekeeping property) by placing his client's payment for the cost of the deposition in his operating account instead of his trust account.
- KRPC 3.1 (meritorious claim in good faith) by defending against Ragsdale's suit in small claims court seeking payment of the deposition invoice on grounds that he did not owe the $37.50 appearance fee when he acknowledged he

owed it both before and after the court appearance. *A minority of the court would find no violation of KRPC 3.1.*

- KRPC 4.1(a) (truthfulness in statements to others) by falsely telling Ragsdale he had placed a check in the mail to pay the deposition invoice. *A minority of the court would find no violation of KRPC 4.1(a).*

- KRPC 4.4(a) (respect for rights of third persons) by telling Ragsdale over a period of three months that he planned to pay the deposition invoice. *A minority of the court would find no violation of KRPC 4.4(a).*

- KRPC 8.1 (false statement in disciplinary matters) by falsely telling disciplinary investigator that he sent a check to Ragsdale for the $37.50 appearance fee and falsely telling former Disciplinary Administrator two years later that his client sent the $37.50 appearance fee directly to the court reporter.

- KRPC 8.4(c) (dishonest conduct) (the conduct establishing this violation is indistinguishable from the conduct establishing the KRPC 4.1[a] and 8.1 violations).

In the Judge Commer complaint, a majority of the court finds clear and convincing evidence supports the panel's conclusion that Davis violated

- KRPC 3.5(d) (conduct degrading to tribunal) by engaging in undignified or discourteous conduct degrading to the concept of a fair and independent judiciary —in front of his client and other parties to the litigation—when he accused the court of railroading his client and deciding the case in a shameful and unjust manner inconsistent with the applicable law. *A minority of the court would find no violation of KRPC 3.5(d).*

- KRPC 8.2(a) (false statement about judge's integrity) by stating Judge Commer filed the bar complaint alleging Davis had a conflict of interest not based on the facts, but

> solely to retaliate against Davis for exposing Judge Commer's decision as wrong, unfair, unjust, and made to accommodate the judge's personal vacation plans. *A minority of the court would find no violation of KRPC 8.2(a).*

Finally, we find no clear and convincing evidence to establish any violations in the T.R. complaint.

DISCIPLINE

The remaining question is the appropriate discipline. We generally look to the American Bar Association Standards for Imposing Lawyer Sanctions to aid in determining discipline. That framework considers "four factors in determining punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors." *In re Hodge*, 307 Kan. 170, 231, 407 P.3d 613 (2017). The panel considered these same factors.

As for the duty violated, the panel determined Davis "violated his duty to his client L.Y." and his duty "to the public, to the legal system, and to the legal profession." But clear and convincing evidence does not support the finding that Davis violated a duty to L.Y. Although Davis admitted violating KRPC 1.15(a) requiring a lawyer to hold property of clients or third persons separate from the lawyer's own property, the evidence does not support a finding that L.Y. owned the funds when she paid for deposition costs already incurred.

As to mental state, the panel found Davis intentionally told Ragsdale the check was in the mail when it was not, intentionally told the investigator that he sent a check to Ragsdale for the $37.50 appearance fee when he had not, and intentionally told the former Disciplinary Administrator two years later that his client sent the $37.50 appearance fee directly to the court reporter when his client had not. It found Davis knowingly placed his client's payment in his operating account, knowingly denied owing the $37.50 deposition appearance fee in small claims court, knowingly delayed payment to Ragsdale over three months, knowingly engaged in undignified conduct degrading to the tribunal, and knowingly made false statements about Judge Commer's integrity.

As for injury, the panel found wasted time and energy (Ragsdale pursuing small claims suit), wasted resources (small claims court and ODA), and conversion of funds (client L.Y.). Again, we find clear and convincing evidence does not support a finding that Davis converted funds owned by L.Y. or that L.Y. suffered any injury as a result of Davis placing those funds in his operating account rather than his trust account. We find injury to the small claims court and the ODA in terms of wasted resources to be de minimis. This leaves a singular injury suffered by Ragsdale in terms of wasted time and energy in pursuing the small claims suit.

In terms of aggravating factors, the panel found the violations in the Ragsdale complaint and the Judge Commer complaint did not establish a pattern of conduct and thus was not an aggravating factor. The panel found aggravating but gave reduced weight to Davis' prior misconduct when he was a youth due to its remoteness in time, the fact that Davis self-reported the misconduct, and the fact that the Kansas Board of Law Examiners chose to allow Davis to take the bar exam despite the misconduct. The panel found aggravating the fact that Davis committed multiple offenses in the current disciplinary case and his conduct included false statements motivated by dishonesty and selfishness. The ODA argues the violations establish a pattern of conduct and takes exception to giving Davis' prior misconduct reduced weight. We are not persuaded by the ODA's arguments.

The panel found four mitigating factors, two of which it found compelling. The first compelling mitigating factor was Davis' *physical* health condition related to his heart transplant. The second was his personal and emotional condition related to his heart transplant. The panel also found Davis' inexperience in the practice of law and his good character and reputation in the community to be mitigating factors. The ODA takes exception to the panel's finding that the physical and mental disability conditions suffered by Davis were compelling factors for mitigation purposes. Specifically, the ODA argues that to find Davis' physical and mental disability conditions compelling factors for mitigation purposes, the panel needed to establish a causal connection between the conditions and the misconduct. We disagree and find no support in the ABA standards or our caselaw for the ODA's position.

Based on its assessment of the four punishment factors, the panel recommends Davis be suspended for 90 days and then placed on probation for two years. The panel also recommends Davis undergo a psychological evaluation and follow all recommendations resulting from the evaluation. The ODA recommends Davis be indefinitely suspended. Davis seeks a published censure or that he be suspended for an unspecified period of time to be stayed while he is placed on probation.

"In any given case, this court is not bound by the recommendations from the hearing panel or the Disciplinary Administrator. 'Each disciplinary sanction is based on the specific facts and circumstances of the violations and the aggravating and mitigating circumstances presented in the case.' [Citations omitted.]" *In re Hodge*, 307 Kan. at 230.

After carefully considering the evidence presented, the exceptions filed by Davis and the ODA, and the ABA Standards for Imposing Lawyer Sanctions, a majority of this court holds that published censure is the appropriate discipline. In deciding on published censure as the appropriate discipline, we rely on ABA Standard 5.13 (reprimand generally appropriate when lawyer knowingly engages in conduct that involves dishonesty, fraud, deceit, or misrepresentation). See *In re Spencer*, 317 Kan. 70, 86, 524 P.3d 57 (2023) (published censure appropriate sanction for lawyer who committed "a misdemeanor that involved dishonesty, fraud, deceit, or misrepresentation which adversely reflected on his fitness to practice law but did not seriously adversely reflect on his fitness to practice law"). We also find Davis' physical and mental condition related to his heart transplant during the relevant time period to be a compelling mitigating factor in deciding on published censure as the appropriate discipline. A minority of the court would impose more severe discipline.

CONCLUSION

IT IS THEREFORE ORDERED that Richard K. Davis is disciplined by published censure to be published in accordance with Supreme Court Rule 225(a)(5) (2023 Kan. S. Ct. R. at 281) for violations of KRPC 1.15(a), 3.1, 4.1(a), 4.4(a), 8.1(a), 8.4(c), 3.5(d), and 8.2(a).

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

* * *

STEGALL, J., concurring: My view of this case is captured in the phrase "a minority of the court would . . ." in the opinion above (with the exception of the discipline imposed). Most of the time that is sufficient in an attorney discipline case. I take the unusual step of writing today to emphasize the danger we court with our ruling on the Judge Commer complaint. Respondent's argument that Judge Commer's vacation plans influenced his decision was within the realm of plausibility and grounded in the actual exchange that took place. But our ruling today goes a long way toward making it unethical for attorneys to push back against judicial actions they consider either wrong, unjust, or unethical. Certainly decorum toward the tribunal must be balanced with an attorney's obligation to zealously advocate for his or her client. Judicial tolerance of criticism fosters such a balance and is integral to our adversarial system.

Perhaps more importantly, it does the judicial branch no favors to present publicly with a collective glass chin. Rather than preserving a reputation for fairness and integrity, oversensitivity to criticism and circling-the-wagons tends to give the impression that judges can dish but they can't take. This perception can undermine the rule of law if it lends credence to the worry harbored by some that judges and other powerful actors in our democracy are protected from accountability by a system not based on law but on power imbalances. To ward off such destabilizing suspicions, I would give significantly more ethical latitude to attorneys arguing their clients' causes in court. And when lines are crossed, contempt proceedings are a better tool in the judge's tool-belt for maintaining the dignity and decorum of the judicial system.

WILSON and WALL, JJ., join the foregoing concurring opinion.

CCR No. 1364

In the Matter of DANA BURKDOLL, *Respondent*.

(542 P.3d 332)

ORIGINAL PROCEEDING IN DISCIPLINE

COURTS—*Disciplinary Proceeding—Twelve Months' Probation*.

Original proceeding in discipline. Oral argument held September 15, 2023. Opinion filed February 2, 2024. Twelve months' probation.

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

James B. Biggs, of Cavanaugh, Biggs & Lemon, P.A., of Topeka, argued the cause and was on the brief for the respondent.

PER CURIAM: This is an original proceeding in discipline filed by the State Board of Examiners of Court Reporters (Board) against respondent, Dana Burkdoll, a court reporter.

On July 11, 2022, a Notice of Hearing was filed alleging that respondent engaged in conduct in three different cases which violated the provisions of Supreme Court Rule 367 (2023 Kan. S. Ct. R. at 464), Rules Adopted by the State Board of Examiners of Court Reporters, Board Rules Nos. 9.F.2, professional incompetency; 9.F.3, knowingly making misleading, deceptive, untrue, or fraudulent representations as a court reporter; and 9.F.6, fraud in representations relating to skill or ability as a court reporter. (2023 Kan. S. Ct. R. at 468-69). Respondent was served with the Notice of Hearing on July 11, 2022.

The parties filed a stipulation of facts for each of the three cases on August 1, 2022, which the Board ultimately adopted and incorporated into its findings:

"Stipulation of Facts
"(Attorney General's Office [CCR 1364-07-2021])

"The parties hereby stipulate to the following facts:

"1. Between 5-10-21 and 5-26-21, Respondent was the reporter for nine depositions in *Peppiatt v. State of Kansas* in the U.S. District Court for the District of Kansas, Case No. 20-CV-1257.

"2. On 6-21-21, defendant's counsel contacted Respondent to check on the status of the transcripts.

"3. Respondent represented she would 'get all of them to you this week,' and that 'the first set' was already 'completed.'

"4. Having not received the transcripts by 6-29-21, defense counsel Shon D. Qualseth sent an email that received no response.

"5. On 7-6-21, Respondent was contacted by plaintiff's counsel regarding the promised transcripts. Respondent represented that the parties 'should expect them today.'

"6. On several other occasions, Respondent received requests from counsel involved in the case for the transcripts of the depositions.

"7. Respondent made various excuses for why the transcripts were not completed, and repeatedly promised delivery of the transcripts.

"8. On 7-12-21, the parties filed a Joint Motion for Extension of Time to File Motion for Summary Judgment.

"9. . . . .

"10. The Court granted the parties' Motion and extended the deadline to file dispositive motions to 9-7-21.

"11. On 7-26-21, Respondent emailed parties' counsel and stated that she was 'assisting David in production to get the finals out to you in the next two day [sic], so you all can meet your deadlines.'

"12. The dispositive motion deadline was 8-1-21.

"13. On 8-10-21, defendant's counsel contacted Respondent by email to check on the status of the deposition transcripts.

"14. Respondent advised with the following: 'The transcripts are being process [sic], I have attached two of the drafts I am proofing first. During my absence, the new proofers were checking these over, and will send finals asap.'

"15. Respondent sent another response by email that stated in part: 'On Personal Note, I had a COVID death 3 weeks ago, in my immediate family. So again the delay is on me as the reporter, but rectifying immediately.'

"16. On 8-17-21, the Kansas Department of Administration sent an email to Respondent inquiring about the status of the transcripts. Respondent has no record of the email.

"17. Respondent advised to the Department of Administration: 'Received . . . we at Midwest Reports is [sic] back on track . . .'

"18. On 8-19-21, defendant's counsel had a deposition with Respondent in

an unrelated case. Respondent stated that the two drafts she had attached to her 8-10-21 email were in such bad shape that she would send out revised transcripts for the witnesses' review.

"19. (This item intentionally left blank.)

"20. On 8-23-21, defendant's counsel reviewed the final transcript from the interrupted deposition taken on 8-19-21 in the aforementioned unrelated case. It was largely error-free.

"21. On 8-23-21, Respondent again responded to the Department of Administration's request: 'All Hutchinson Correctional will go out to Shon and his office today, and he will have all seven before end of week to meet his court deadlines.'

"22. On 9-1-21, the parties received drafts of two of the *Peppiatt* deposition transcripts.

"23. On 9-3-21, a Status Conference was held with Judge Lungstrum in the *Peppiatt* case. Respondent indicates she had no information or knowledge regarding this.

"24. A joint oral Motion to Stay the case was granted.

"25. All deadlines and the trial were stayed.

"26. The parties were ordered to provide a status report in 60 days if they had not received the deposition transcripts. Respondent indicates she had no information or knowledge regarding this.

"27. On 9-8-21, counsel received an email from Respondent: '[W]e are completing the last few deposition this week in *Pepp*[*ia*]*tt* case, and we will continue to email them over. . . . But by Sunday of this week should all be completed, with the help and assistance I have in the office now.'

"28. On 10-5-21, the parties received a draft of a third deposition transcript.

"29. In response, plaintiff's counsel wrote to Respondent: 'The Final Transcript you attached is not complete. It ends on page 8, essentially when the depo was just starting.'

"30. Plaintiff's counsel also listed the transcripts of the witnesses the parties were waiting on.

"31. Respondent advised: 'We made the wrong PDF. Will resend.'
6

"32. On 10-5-21, the parties received the first complete transcript.

"33. The witness had no changes to the transcript.

"34. On 10-6-21, the parties received two more complete transcripts.

"35. The witnesses made minor changes to the transcripts.

"36. On 10-18-21, Respondent emailed counsel: 'The balance of finals will be done in the next few days here in office, as I subbed them out to an outside proofers and they came back needing to have more work done to them . . . [M]y priority are these *Peppiatt* files for the next few days.'

"37. On 10-29-21, Defendants' counsel asked for a status update from Respondent on the remaining transcripts.

"38. Respondent advised: 'The update will be to everyone on the email by Monday [11/1/21]. They are almost done and will update you then.'

"39. On 11-2-21, Respondent emailed counsel at 8:21 a.m.: 'Will have the update to you by noon today.'

"40. At 12:16 p.m., Respondent emailed counsel: 'Please report to Judge Lundstrum [sic] on Friday, November 5th, the balance of the *Peppiatt* Transcripts will be delivered to all Parties.' Respondent then listed only five of the six outstanding depositions.

"41. Plaintiff's counsel emailed Respondent to ask about the status of defendant Van Hoose's transcript. Respondent advised: 'His is done. Will resend from production today.'

"42. As of 11-2-21, the parties had not received transcripts for six of the depositions.

"43. On 11-2-21, the parties filed a Status Report. In the Report, the parties jointly moved for an order to compel Respondent to produce final, completed transcripts by 11-19-21. Respondent indicates she had no information or knowledge regarding this.

"44. The Status Report was emailed to Respondent.

"45. The Court extended the stay of all proceedings through 12-15-21, with another Status Report due on the same day.

"46. The Court retained under advisement the parties' Motion to Compel the production of the remaining transcripts.

"47. On 11-4-21, attorney Shon Qualseth of the Attorney General's office submitted a complaint to the Board of Examiners of Court Reporters on behalf of several attorneys in the Attorney General's office, including Bryan Ross, Art Chalmers, and Natasha Carter (now general counsel at the Department of Corrections).

"48. The Board notified Respondent of the complaint submitted against her. Respondent indicates no information was sent to her.

"49. On 11-5-21, the parties received the fourth complete transcript. Respondent sent an email to the parties: 'The finals of all *Peppiatt* Transcripts our MWR Production will resend to everyone on email list . . . And send hardcopies of all *Peppiatt* finals to both offices.'

"50. On 11-22-21, the parties received seven draft and final transcripts of the nine depositions taken.

"51. On 11-22-21, Plaintiff's counsel emailed Respondent stating the parties had not received a transcript of defendant Williams or of plaintiff's testimony.

"52. Respondent advised: 'Will have production resend the correct documents to all in email. It will be a little later today, but will be done.'

"53. On 11-22-21, Respondent contacted Judge Lungstrum's courtroom deputy, Sharon Scheurer, for permission to 'get the 3 draft files to the parties before 11/24/21.' Judge Lungstrum granted permission.

"54. 11-28-21, the parties received a 'final' version of one witness's transcript. Other than misspelling one name, there were no errors.

"55. On 11-29-21, the parties received a 'final' version of defendant Van Hoose's transcript. There were no errors.

"56. On 12-14-21, the parties filed a Second Status Report. Respondent indicates she had no information or knowledge regarding this.

"57. As of 12-14-21, the parties had not received the two remaining transcripts.

"58. The Second Status Report was emailed to Respondent. Respondent indicates she had no information or knowledge regarding this.

"59. The parties again jointly moved for an Order to Compel Respondent to produce final, completed transcripts this time by 12-31-21.

"60. On 12-15-21, the Court extended the stay of all proceedings through 1-21- 22, with another Status Report due on the same day.

"61. The Court retained under advisement the parties' Motion to Compel the production of the remaining transcripts.

"62. On 1-7-22, defendants' counsel again asked Respondent for a status update on the remaining transcripts.

"63. Respondent advised: 'Tommy and Erin's files will be to you this weekend in electronic format. Hardcopies Monday 1/10/22.'

"64. On 1-14-22, the parties received plaintiff's deposition transcript. There were no errors.

"65. On 1-21-22, the parties filed a Third Status Report. As of that date, the

parties had not received the one remaining transcript.

"66. The Third Status Report was emailed to Respondent.

"67. The parties again jointly moved for an Order to Compel Respondent to produce final, completed transcripts this time by 2-4-22.

"68. On 1-22-22, the parties received the one remaining transcript (defendant Williams's deposition).

"69. On 1-24-22, the parties received copies of exhibits used in defendant Williams's deposition.

"70. On 1-25-22, the Court ordered the stay to continue to 2-25-22.

"71. . . . .

"72. The court further ordered that Respondent was admonished that if the final completed transcripts were not delivered to counsel by 2-4-22, the Court will consider moving forward at that time on the parties' request for a Motion to Compel.

"73. On 2-21-22, defendant's counsel furnished the errata sheet for defendant Williams's deposition. Other than errors regarding names, there were no other errors.

"74. On 2-25-22, the parties filed a Fourth Status Report with the Court. The parties stated that they had finally received all deposition transcripts and were ready for the Court to establish deadlines to move the case forward. Respondent indicates she had no information or knowledge regarding this.

"75. The dispositive motion deadline that was originally scheduled to 8-2-21 was rescheduled to 4-8-22.

"76. The jury trial previously scheduled for 1-18-22, was rescheduled for 9-19-22. Respondent indicates she had no information or knowledge regarding this."

"Stipulation of Facts
"(McCray Complaint [CCR 1364-08-2021])

"The parties hereby stipulate to the following facts:

"1. On 6-29-21, Respondent was the reporter for the deposition of defendant Alan Gast in Riley County District Court Case No. 2020-CV-000065, *Reynolds v. Gast, et al.*

"2. On 8-5-21, at 3:22 p.m., Respondent received a request for the transcripts from Cheryl Little, a paralegal at Norris Keplinger Hicks & Welder in Leawood, KS.

"3. On 8-20-21, at 11:56 a.m., Respondent replied to the request: 'Cheryl; Wanted to updated you and Mr. Norris and your office. We are finishing up Mr.

Gates final and will have to you this weekend. But wanted to send an update.'

"4. On 8-25-21, at 2:32 p.m., Respondent sent marked exhibits via electronic mail to Ms. Little. Respondent included: 'Received your call today, and final transcript just about done. Will keep you posted today and tomorrow.'

"5. On 9-10-21, at 2:20 p.m., Respondent received a second request for the transcripts from Ms. Little.

"6. On 12-8-21, Courtney McCray, an attorney at the firm of Norris, Keplinger, Hicks, & Welder, submitted a complaint to the Board of Examiners of Court Reporters.

"7. The Board notified Respondent of the complaint submitted against her.

"8. On 2-7-22, at 9:36 a.m., Respondent confirmed the transcripts were received by attorney McCray.

"9. On 3-14-22, Respondent submitted a written answer to the complaint.

"10. In the written answer, Respondent acknowledged the reasons for the delay: '(1). Staffing shortage in 2021, and court reporter's family members passings from COVID. [Four] immediate family members, within a six-month period. (2). There is no excuse for the delay, and to delay client, and all parties. And all issues for reporter and our reporting office have been remedied. (3). There were no charges to any client with this case of Reynolds vs. Ebert Mayo, and sincerest apologies for the delay to all the parties involved in case was made directly. (4). The COVID Pandemic has made me as a reporter more aware of deadlines, and to have a backup plan in case the reporter, (myself), and owner for a freelance firm has to have someone to take over their position in extreme times as I have experienced.'"

"Stipulation of Facts
"(Gibbons Complaint [CCR 1364-01-2022])

"The parties hereby stipulate to the following facts:

"1. On 11-12-21, Respondent was the reporter for two depositions in Manhattan, KS in the case of *Livingston Enterprises v. Farmers' Cooperative*, CI 18-46, Jefferson County, NE.

"2. The two depositions were of Dr. Bia and Dr. Jones.

"3. On 12-14-21, at 8:20 a.m., Respondent received the first written request for the transcripts from Alyssa Osler, a paralegal at Woodke & Gibbons in Omaha, NE.

"4. On 12-14-21, at 8:45 a.m., Respondent replied to the first request: 'Alyssa; Let me check with my proofer now to see if they are done, And we will get these out to you asap.'

"5. On 12-16-21, at 9:36 a.m., Respondent received a second written request for the transcripts from Ms. Osler. Respondent failed to reply to this request.

"6. On 12-20-21, at 1:39 p.m., Respondent received a third written request for the transcripts from Ms. Osler.

"7. On 12-20-21, at 1:46 p.m., Respondent replied to the third written request: 'Hi Alyssa: the finals will be this week, as I am in the office finishing those for your attorneys before the holiday. Apologies for the delay. But it will be in next two days this week.'

"8. On 12-23-21, at 7:55 a.m., Respondent received a fourth written request for the transcripts from Ms. Osler.

"9. On 12-23-21, at 8:27 a.m., Respondent replied to the fourth written request: 'Hi Alyssa: Thank you for checking in. I am presently working on those 2 files. And will do everything I can to get them to you before 1:00. But if it is after, 1:00 do I still email them to you direct.' Respondent, two minutes later, after receiving an answer to her question, promised the transcripts by the end of that week, 'Yes you will have them to week definite. As I am still in office rest week getting files out.'

10. On 12-26-21, at 5:10 p.m., Respondent received a fifth written request for the transcripts from Ms. Osler. Respondent failed to reply to this request.

11. On 12-28-21, at 2:08 p.m., Respondent received a sixth written request for the transcripts from Ms. Osler. Respondent failed to reply to this request.

12. On 12-29-21, at 4:53 p.m., Respondent received a seventh written request for the transcripts from Michael Gibbons, an attorney at Woodke & Gibbons in Omaha, NE.

13. On 12-29-21, at 4:55 p.m., Respondent replied to the seventh written request: 'Mike: They will be done asap. And I am not leaving office until I have sent them to you and Alyssa.'

14. On 12-30-21, at 6:59 a.m., Respondent received an eighth written request for the transcripts from attorney Gibbons. Respondent failed to reply to this request.

15. On 12-30-21, at 9:04 a.m., Respondent received a ninth written request for the transcripts from Ms. Osler.

16. On 12-30-21, at 9:38 a.m., Respondent replied to the ninth written request: 'Yes, Mike has updated me you need these two files asap for expert today after 1:00 p.m.'

17. On 12-30-21, at 3:37 p.m., Respondent received a tenth written request for the transcripts from attorney Gibbons.

18. On 12-30-21, at 3:38 p.m., Respondent replied to the tenth written request: 'Mike: Will have file to you soon, and no problems with files, And will have today.'

19. On 12-30-21, at 6:34 p.m., Respondent received an eleventh written request for the transcripts from attorney Gibbons.

20. On 12-30-21, at 6:35 p.m., Respondent replied to the eleventh written request: 'Mike: And you will have them by 8.'

21. On 12-31-21, after 3:00 p.m., Respondent produced only Dr. Jones's transcript.

22. On 1-3-21, at 8:46 a.m., Respondent promised Dr. Bia's transcript by the end of the day to Mary Harrington, an office manager at Woodke & Gibbons in Omaha, NE.

23. On 1-4-21, at 6:55 a.m., Respondent received a twelfth written request for Dr. Bia's transcript from Ms. Harrington.

24. On 1-4-22, at 7:31 a.m., Respondent replied to the twelfth written request: 'Mary: Haven't emailed it yet. And yes the file is in tact, And in office since 5 finishing.'

25. On 1-4-22, attorney Gibbons submitted a complaint to the Board of Examiners of Court Reporters.

26. The Board notified Respondent of the complaint submitted by attorney Gibbons.

27. On 3-14-22, Respondent submitted an answer to the complaint submitted by attorney Gibbons.

28. In the written answer, Respondent acknowledged the reasons for the delay: '(1). Staffing shortage in 2021, and court reporter's family members passings from COVID. [Four] immediate family members, within a six-month period. (2). There is no excuse for the delay, and to delay client, and all parties. And all issues for reporter and our reporting office have been remedied. (3). There were no [charges] to Mr. Gibbons with this case of Livingston Enterprises, In. Vs. Farmers Corporation, Case No. CI 18-46, and sincerest apologies for the delay to all the parties involved in case was made directly. (4). This delay was due to new staff responses to emails being new and inexperienced. (5). The COVID Pandemic has made me as a reporter more aware of deadlines, and to have a backup plan in case the reporter, (myself), and owner of a freelance firm has to have someone to take over their position in extreme times as I have experienced.'

29. Copies of the emails attached to the complaint by attorney Gibbons are true and accurate copies of the actual correspondence with Respondent."

On August 1, 2022, the Board conducted a remote hearing by videoconference regarding respondent's alleged violations. Respondent appeared live and by her counsel. Upon conclusion of the hearing, the Board took the matter under advisement.

On April 10, 2023, the Board filed a Findings, Conclusions, and Recommendation Concerning Discipline. The Board's findings and recommendations adopted and incorporated the parties' stipulations of facts. The Board found clear and convincing evidence of violations of Board Rules Nos. 9.F.2. and 9.F.3 but held that there was not clear and convincing evidence that respondent violated No. 9.F.6. The Board recommended that we place respondent on probation for a period of 12 months, and that during the probationary period, respondent must report information about each pending proceeding to the Board during the first month of each quarter.

Respondent does not contest the findings and conclusion of the Board. Indeed, she stipulated to the facts and admits she violated Board Rule, Nos. 9.F.2. and 9.F.3. We conclude that the findings of the Board establish the alleged misconduct by clear and convincing evidence. We adopt the Board's findings and conclusions and accordingly find respondent engaged in prohibited conduct by displaying professional incompetency and by knowingly making misleading, deceptive, untrue, or fraudulent representations as a court reporter.

The only remaining issue before us is the appropriate discipline for respondent's violations. The Board may recommend the following discipline: (1) public reprimand; (2) imposition of a period of probation with special conditions which may include additional professional education or re-education; (3) suspension of the certificate; or (4) revocation of the certificate. Rule 367, Board Rule, No. 9.E.4 (2023 Kan. S. Ct. R. at 467).

When we impose discipline, we do so with the goal of protecting the public interest and maintaining the public's confidence in the integrity, honor, and dignity of the judicial system. *In re Janoski*, 316 Kan. 370, 389, 516 P.3d 125 (2022); *In re Henderson*, 306 Kan. 62, 71, 392 P.3d 56 (2017). In addition to these goals, we also endeavor to use the disciplinary process to help salvage careers whenever possible. *In re Janoski*, 316 Kan. at 389.

The Board, respondent, and disciplinary counsel all agree probation is appropriate discipline in this case. In support of her requested

discipline, respondent argues: (1) she has acknowledged and accepted her fault, (2) she has since taken several measures and employed certain protocols to ensure that such delays would not occur again, (3) she has directly offered sincere apologies for the delay to all affected parties, (4) she never

charged the parties for any of the work she had done in their cases, and (5) throughout the period in question, respondent suffered the deaths of four immediate family members within a six-month period, including that of her former husband.

While disciplinary counsel agrees that probation is the appropriate discipline, it urges the court to adjust the recommended probation to require respondent to report to a third party each month, rather than to the Board each quarter. Disciplinary counsel further suggests that this court admonish respondent for her misconduct.

Having considered all matters raised, we find the Board's recommendation for probation to be appropriate, and we decline disciplinary counsel's requested adjustments to the Board's recommendation and its request for additional admonishment.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Dana Burkdoll be and is hereby disciplined by 12 months' probation under the terms and conditions recommended by the Board, effective from the date this opinion is filed, in accordance with Rule 367, No. 9.E.4. of the Rules Adopted by the State Board of Examiners of Court Reporters.

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

No. 113,267

LUKE GANNON, by his Next Friends and Guardians, et al., *Appellees*, v. STATE OF KANSAS, *Appellant.*

(542 P.3d 372)

ORDER

The court notes Kansas Solicitor General Anthony Powell's entry of appearance as counsel for State of Kansas.

In *Gannon v. State*, 309 Kan. 1185, 443 P.3d 294 (2019) (*Gannon VII*), the court retained jurisdiction to ensure continued legislative compliance with the school funding requirements of article 6, § 6(b) of the Kansas Constitution as mandated in *Gannon v. State*, 308 Kan. 372, 420 P.3d 477 (2018) (*Gannon VI*). In 2019 House Substitute for Senate Bill 16 (S.B. 16), the Legislature scheduled a series of incremental increases to the base aid for student excellence (BASE) culminating in school year 2022-2023. The court retained jurisdiction to ensure the State's implementation of the phased-in financial solution in S.B. 16, which solution the court accepted in *Gannon VI*.

The State now asks the court to issue the mandate, noting that the BASE increases have been implemented. The plaintiffs acknowledge the BASE increases and the Legislature's appropriation of funding for both school years 2023-2024 and 2024-2025 using the approved formula, but they argue no one can know whether these amounts are sufficient. Given the court's stated purpose was to retain jurisdiction to ensure implementation of the phased-in amounts and that has occurred, a majority of the court grants the State's motion. The court directs the Clerk of the Appellate Courts to issue the mandate instanter.

Justice Rosen dissents. Given the legislative history of school funding, Justice Rosen would deny the State's motion and continue to withhold the mandate.

The court notes the plaintiffs' response to the State's motion and the State's reply thereto.

The court denies Kansas Governor Laura Kelly's application to file a brief amicus curiae under Supreme Court Rule 6.06 (2023 Kan. S. Ct. R. at 38). The court does not currently permit the filing of a brief by an amicus curiae when, as here, the court has not

invited the parties to submit briefs on a motion. See Supreme Court Rule 5.01 (2023 Kan. S. Ct. R. at 31) (generally governing appellate motions practice).

The court directs that this order be published in the official Kansas Reports.

STEGALL, J., not participating.

Dated this 6th day of February 2024.

State v. Sinnard

No. 123,687

STATE OF KANSAS, *Appellee*, v. JOSHUA F. SINNARD, *Appellant.*

(543 P.3d 525)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Grant of Motion for Continuance—Speedy Trial Exceptions—Appellate Review.* Appellate courts review a district court's decision to grant a continuance under the speedy trial exceptions in K.S.A. 2019 Supp. 22-3402(e) for an abuse of discretion. A district court abuses its discretion if its decision (1) is based on an error of law—if the discretion is guided by an erroneous legal conclusion; (2) is based on an error of fact—if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based; or (3) is arbitrary, fanciful, or unreasonable—if no reasonable person would have taken the view adopted by the trial court. The party claiming error bears the burden to show the district court abused its discretion.

2. TRIAL—*Motion for Continuance—Speedy Trial Exceptions—Conditions on Granting Continuance.* K.S.A. 2019 Supp. 22-3402(e)(4) imposes several conditions on the use of the crowded-docket exception to Kansas' speedy trial statute. First, the district court may order only one continuance based on a crowded docket. Second, the district court must order the continuance within the original speedy trial deadline. Third, the new trial date must be not more than 30 days after the limit otherwise applicable. And fourth, the record must show that other pending cases, rather than secondary matters such as witness availability, prevented the court from setting the trial within the speedy trial deadline.

3. SAME—*Motion for Continuance—Speedy Trial Exceptions—Appellate Review*. When a defendant argues the district court abused its discretion by making an error of fact because the record does not support the district court's crowded-docket finding, we review that finding for substantial competent evidence. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. An appellate court does not reweigh conflicting evidence, evaluate witness credibility, or determine questions of fact, and the court presumes the district court found all facts necessary to support its judgment.

4. EVIDENCE—*Guidelines for Admissibility of Lay and Expert Opinion Testimony under Statute.* K.S.A. 2022 Supp. 60-456 provides guidelines for the admissibility of lay and expert opinion testimony. The distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.

5. SAME—*Timely and Specific Objection Required to Preserve Challenge on Appeal under Statute*. K.S.A. 60-404 directs that a verdict shall not be set aside, or a judgment reversed, based on the erroneous admission of evidence without a timely and specific objection. In other words, the statute is a legislative mandate limiting the authority of Kansas appellate courts to address evidentiary challenges. Thus, much like jurisdictional issues, appellate courts may consider a party's compliance with K.S.A. 60-404 on their own initiative.

6. SAME—*Admission or Exclusion of Hearsay Statements—Appellate Review.* Like many evidentiary determinations considered on appeal, an appellate court reviews a trial court's admission or exclusion of hearsay statements for an abuse of discretion. Hearsay is defined as evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated. Out-of-court statements that are not offered to prove the truth of the matter stated are not hearsay under K.S.A. 2022 Supp. 60-460. The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability, and the declarant must therefore be subject to cross-examination.

7. TRIAL—*Jury Instruction—Element of Crime Omitted—Legally Erroneous*. A jury instruction that omits an essential element of the crime charged is legally erroneous.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 7, 2022. Appeal from Douglas District Court; JAMES R. MCCABRIA, judge. Oral argument held September 13, 2023. Opinion filed February 16, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Jon Simpson, assistant district attorney, argued the cause, and *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: In July 2017, Joshua F. Sinnard arranged to have sex with a 17-year-old in exchange for money. The State charged Sinnard with commercial sexual exploitation of a child. Sinnard's trial began after the speedy trial deadline in K.S.A. 2019 Supp. 22-3402(a). But before that deadline had lapsed, the district court invoked the crowded-docket exception. That exception authorizes the district court to grant a one-time continuance for up to 30 days

if the court's docket cannot accommodate another trial setting within the original speedy trial deadline. Sinnard's trial began within 30 days of his original speedy trial deadline.

At trial, the investigating detective testified as a lay witness about the contents of Sinnard's phone records from the day of the incident and explained in general terms how cell phones connect to cell towers. The detective also testified to the contents of Sinnard's phone records during a two-week period before and after the incident, even though those records had not been admitted into evidence. A jury convicted Sinnard as charged. And a panel of the Court of Appeals affirmed. *State v. Sinnard*, No. 123,687, 2022 WL 5287901 (Kan. App. 2022) (unpublished opinion).

Sinnard now challenges the Court of Appeals' judgment on four grounds. First, he argues the district court erred by invoking the crowded-docket exception. But the district court's continuance satisfied the statutory conditions for invoking the exception. Substantial competent evidence supports the district court's crowded-docket finding. And the district court's decision to continue Sinnard's trial was not objectively unreasonable. Thus, Sinnard has failed to show that the district court abused its discretion or that the panel erred by affirming that decision.

Second, Sinnard continues to argue that the detective's lay testimony about how to interpret Sinnard's cell phone call records from the day of the incident and his general explanation about how cell phones connect to cell towers was inadmissible expert opinion testimony. But Sinnard has failed to preserve his challenge to the detective's testimony about the contents of Sinnard's cell phone records. And the detective's comments about cell phone connectivity were not so specialized as to bring them within the realm of expert opinion testimony.

Sinnard also contends that the detective's testimony about the contents of Sinnard's unadmitted phone records before and after the incident was inadmissible hearsay that affected the verdict. Granted, the district court erred by admitting this hearsay testimony, but we agree with the panel's conclusion that this error was harmless given the abundance of other evidence corroborating the victim's account of the incident.

Third, Sinnard claims that the jury instruction on commercial sexual exploitation of a child was clearly erroneous. But the elements instruction given to the jury was legally appropriate and included the culpable mental state for that crime. While Sinnard's proposed instruction was also legally appropriate, the instructions given accurately stated the law and were not reasonably likely to confuse the jury.

Finally, Sinnard argues the panel erred by holding that cumulative error did not deprive him of a fair trial. But having found only one harmless error, Sinnard is not entitled to relief under the cumulative error doctrine.

Thus, we affirm the judgment of the Court of Appeals and affirm Sinnard's conviction.

FACTS AND PROCEDURAL BACKGROUND

On July 25, 2017, 17-year-old P.F. went to the Tonganoxie Public Library around noon. While there, she decided that she wanted to go meet a friend at the Legends Outlet Mall in Kansas City. She asked her mom, M.F., if she could go, but M.F. said no. P.F. then started looking for other ways to get there.

P.F. saw a Snapchat from a user named "Wamma Jamma" asking if anyone wanted to make $200. P.F. understood this to mean having sex with someone in exchange for money. P.F. responded to Wamma Jamma's message. P.F. then received a message on Snapchat from another user named "Blu." Blu told P.F. his name was Josh, and he would pick her up at the Tonganoxie Public Library. Police later determined that the Snapchat account using the name "Blu" was associated with Sinnard's phone number and e-mail address. And at trial, P.F. identified Sinnard as the man who picked her up at the library.

When P.F. got into Sinnard's car, they had a short conversation. They agreed Sinnard would take P.F. to his apartment in Lawrence to have sex and then he would drive her to the Legends and pay her on the way there. They left the library around 12:30 p.m. P.F. testified they took the "back way" to Lawrence "on [highways] 24 40" though she could not remember the exact route. During the drive, Sinnard told P.F. he worked at a car dealership.

P.F. was not familiar with Lawrence, so she could not exactly recall the location of Sinnard's apartment. But she remembered going down an "older" one-way street with a lot of stoplights and a lot of trees on both sides. When they arrived at Sinnard's apartment, they again discussed what would happen before going in—they would have sex, and then Sinnard would drive P.F. to the Legends and pay her on the way there.

Sinnard and P.F. spent no more than 30 minutes at Sinnard's apartment. They had sex in Sinnard's bedroom. He then drove P.F. to the Legends, traveling on I-70. On the way, he gave P.F. $200 in $20 bills.

At the Legends, P.F. met up with her friend and they spent the afternoon and evening there. Using the $200 she had just received, P.F. bought some items from Victoria's Secret and some food. A friend of her friend then gave her a ride back to Tonganoxie in exchange for the rest of P.F.'s cash.

When P.F. arrived home, she was carrying a Victoria's Secret bag and a Chipotle bag. Upon seeing the bags, M.F. became suspicious because she knew P.F. had no job and no money. M.F. questioned P.F. about the day's events. Over the next couple days, P.F. explained to her mother that she had spoken with a Snapchat user named Wamma Jamma about getting money and a ride to the Legends. A man named Josh had then picked P.F. up at the Tonganoxie Public Library and driven her to Lawrence where they had sex. Afterward, the man gave her $200 and drove her to the Legends.

At first, P.F. did not want to report the incident to police. But after her father found out what happened, she spoke with Detective Scott Slifer with the Lawrence Police Department. P.F. provided some screenshots of conversations she had with Wamma Jamma both before and after meeting with Sinnard. P.F. also provided Slifer with an image from her phone's Google Maps application, which she believed showed a location near Sinnard's apartment. The screenshot shows the location of the University of Kansas campus with the address for Strong Hall and a pin drop "[s]hortly behind Allen Fieldhouse," and asks, "Were you here?" from "1:04 PM to 1:28 PM" on "July 25, 2017." P.F. did not recall ever being on the University of Kansas campus, but she believed

Google Maps simply identified "the nearest most popular [location] that you passed."

P.F. also described Sinnard's apartment to Slifer. She said both Sinnard's bedroom and the rest of the apartment were cluttered, with items like clothes and cups strewn about. She drew a diagram of the layout of the apartment. She also described a sex toy that Sinnard owned. And she said she had made it clear to Sinnard that she was only 17 years old.

Slifer found Sinnard at the car dealership where Sinnard worked. Sinnard provided the address for his apartment on Tennessee Street. His address was "about five blocks east" of Strong Hall. And Tennessee Street happened to be one of the two one-way streets Slifer had thought of when P.F. described the route Sinnard had taken to get to his apartment.

Police searched Sinnard's apartment. Photographs of the apartment showed the living room and one of the bedrooms were cluttered. Police found business cards and mail with Sinnard's name in the cluttered bedroom. Police also found a sex toy in that bedroom matching P.F.'s description. And a police diagram of the layout of the apartment matched the diagram P.F. had drawn for Slifer.

During his investigation, Slifer also obtained records for Sinnard's cell phone to determine whether they tracked with P.F.'s version of events. Those records showed the times that particular cell towers serviced Sinnard's phone for incoming and outgoing calls on July 25, 2017. All calls before 12:34 p.m. were serviced by a single cell tower in Baldwin City. An incoming call at 12:34 p.m. (routed to voicemail at 12:35 p.m.) and an outgoing call at 12:36 p.m. were serviced by a cell tower in Tonganoxie. Slifer testified the Tonganoxie tower was about 3.86 miles from the Tonganoxie Public Library "as the crow flies." He also believed the tower was close to I-70.

Sinnard's phone then neither placed nor received any calls until 2:02 p.m. At 2:02 p.m., 2:04 p.m., and 2:27 p.m., calls to and from Sinnard's phone were serviced by a cell tower in Kansas City, Kansas. Slifer, relying on Google, determined that the tower was "about 200 feet south" of the Kansas Speedway "very near the Legends Shopping Center." Calls at 2:36 p.m. and 2:38 p.m. were

again serviced by the cell tower in Tonganoxie. All incoming and outgoing calls after 3:51 p.m. were serviced by cell towers in Lawrence.

At trial, the parties stipulated to the admission of the phone records from July 25, 2017. Slifer had also obtained records for the two weeks before July 25 and the two weeks following July 25, but those records were not offered into evidence at trial. Even so, Slifer testified, over Sinnard's hearsay objection, that the only time in that four-week period that Sinnard's phone connected with the Tonganoxie tower was on July 25.

A jury convicted Sinnard of commercial sexual exploitation of a child. The district court sentenced Sinnard to 38 months' imprisonment. Sinnard appealed, raising multiple claims of error. The Court of Appeals affirmed his conviction. *Sinnard*, 2022 WL 5287901.

Sinnard petitioned for review, and we granted all issues raised in his petition. We heard oral argument from the parties on September 13, 2023. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petition for review of Court of Appeals decision); K.S.A. 60-2101(b) (providing Supreme Court jurisdiction over cases subject to review under K.S.A. 20-3018).

ANALYSIS

I. *The District Court Did Not Abuse Its Discretion by Granting a Continuance of Sinnard's Trial Under the Crowded-Docket Exception*

Sinnard first claims a violation of his statutory speedy trial right. Kansas statute requires the State to bring a criminal defendant to trial within 150 days (if the defendant is in custody) or 180 days (if the defendant makes bond). K.S.A. 2019 Supp. 22-3402(a) and (b). But the statute provides for an extension of that deadline in several circumstances. See K.S.A. 2019 Supp. 22-3402(e). Relevant here, a district court may grant one continuance of not more than 30 days if "because of other cases pending for trial, the court does not have sufficient time to commence the trial of the case within the time fixed for trial by this section." K.S.A. 2019 Supp. 22-3402(e)(4). This is commonly known as the crowded-docket exception.

Here, the district court invoked the crowded-docket exception to move Sinnard's trial outside his original speedy trial deadline. Sinnard argues the district court abused its discretion by invoking the exception. But the panel found that the district court judge balanced all the competing interests in setting its docket and that the court's "discretionary decision . . . should be free from appellate interference." 2022 WL 5287901, at *3.

On review, Sinnard continues to assert his claim of error. To resolve the issue we first highlight additional facts relevant to the analysis. Then, we identify the applicable standard of review and legal framework before analyzing the merits of Sinnard's claim.

A. *Additional Facts Relevant to the Speedy Trial Claim*

On April 22, 2019, Sinnard waived arraignment. Because Sinnard had posted bond, the State was statutorily required to bring Sinnard to trial within 180 days—in this case, by October 19, 2019. See K.S.A. 2019 Supp. 22-3402(b). When setting their dockets, district courts commonly stack several cases for trial on the same date. This practice increases the chances that at least one case will proceed to trial on a given date because cases are often continued or resolved. Here, Sinnard's case was the second setting on July 29, 2019, behind *State v. Ross*, a rape case.

At a motions hearing on July 23, 2019, the State informed the district court judge that Sinnard's trial needed to be moved because *State v. Ross* would likely proceed to trial on July 29. The judge suggested that Sinnard's trial could be set on October 28, November 4, or November 12, though it would have to be another second setting because there were already trials scheduled on each of those dates. The State then informed the judge that Sinnard's speedy trial deadline was October 19. Sinnard offered to waive his speedy trial rights through October 28. To ensure that Sinnard's waiver was made knowingly, the judge offered to look for trial dates available before October 19, if any. But after conferring with defense counsel, Sinnard stood by his original offer and waived his speedy trial rights for 10 days, until October 28. Sinnard's case was the second setting for that day because another case, *State v. Potts*, already occupied the first setting.

On July 29, 2019—the day *State v. Ross* was set to go to trial—the district court held a hearing in *State v. Ross* to address the defense's motion for a continuance due to defense counsel's illness. The district court judge suggested October 28, 2019, as a possible trial date. The parties confirmed that October 28 was the only date in 2019 when both counsel and witnesses would be available. The judge scheduled *State v. Ross* as the first setting for October 28. The State later moved for a continuance in Sinnard's case, which was the second setting on that date. It is unclear from the record what happened to *State v. Potts*, which had originally been the first setting on October 28.

At a motions hearing on August 5, 2019, the district court addressed the State's motion to continue Sinnard's trial. The State argued that *State v. Ross* had justifiably been set as the first case on October 28 because that case had been pending longer than Sinnard's case. Rather than continuing Sinnard's trial, the State suggested the court leave Sinnard's case in the second setting on October 28 and look for a backup trial date. Sinnard objected to any continuance of his trial beyond October 28. In exploring backup trial dates, the judge first offered November 4, but the State noted that there was already a trial set for that week. The judge then suggested November 12, and both the State and defense counsel confirmed they were available. The judge also reluctantly offered to move some civil matters scheduled the week of September 30, but neither defense counsel nor the prosecutor were available that week. So the district court reserved November 12 as the backup date.

At a status conference on October 16, 2019, the State informed the court that *State v. Ross* would likely proceed to trial on October 28 and had scheduling priority over Sinnard's case. The district court made a crowded-docket finding and continued Sinnard's trial to November 12. Sinnard asserted his speedy trial rights and objected to the crowded-docket finding.

On November 7, 2019, Sinnard requested a continuance of his trial because defense counsel needed additional time to prepare due to counsel's involvement with a federal jury trial. Sinnard's trial was set for January 21, 2020, and Sinnard waived his speedy

trial rights from November 12 until the new trial date. Sinnard's trial began on January 21 as scheduled.

B. *Standard of Review and Relevant Legal Framework*

"A claimed violation of the statutory right to speedy trial presents an issue of law over which [this court] ha[s] unlimited review." *State v. Brown*, 283 Kan. 658, 661, 157 P.3d 624 (2007). And to the extent this issue requires the court to engage in statutory interpretation, that also presents a question of law subject to unlimited review. *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023).

But a district court's decision to grant a continuance under K.S.A. 2019 Supp. 22-3402(e) is reviewed for an abuse of discretion. *State v. Robinson*, 306 Kan. 1012, 1017-18, 399 P.3d 194 (2017). A district court abuses its discretion if its decision (1) is based on an error of law—if the discretion is guided by an erroneous legal conclusion; (2) is based on an error of fact—if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based; or (3) is arbitrary, fanciful, or unreasonable—if no reasonable person would have taken the view adopted by the trial court. *State v. Green*, 315 Kan. 178, 179-80, 505 P.3d 377 (2022). As the party claiming error, Sinnard bears the burden to show the district court abused its discretion. *Robinson*, 306 Kan. at 1018.

Kansas' speedy trial statute requires that a defendant held to answer on an appearance bond must be brought to trial within 180 days after arraignment, and if not, the defendant must be discharged from any further liability for the crime charged. K.S.A. 2019 Supp. 22-3402(b). But recognizing the realities of litigation, the statute provides for an extension of that deadline in several circumstances. See K.S.A. 2019 Supp. 22-3402(e). Relevant here, the crowded-docket exception permits a district court to grant one continuance of not more than 30 days if "because of other cases pending for trial, the court does not have sufficient time to commence the trial of the case within the time fixed for trial by this section." K.S.A. 2019 Supp. 22-3402(e)(4).

Sinnard waived his speedy trial rights from October 19, 2019, to October 28, 2019, and again from November 12, 2019, until

January 21, 2020. So Sinnard's issue focuses on the 16 days, between October 28 and November 12—the period in which he did not waive his speedy trial rights. We must determine whether an exception applies to those 16 days. If not, the statute compels us to release Sinnard from prison and dismiss his charges. See *State v. Queen*, 313 Kan. 12, 29, 482 P.3d 1117 (2021) (dismissal of charges is only possible remedy for violating defendant's speedy trial right).

C. *The District Court Did Not Abuse Its Discretion by Invoking the Crowded-Docket Exception*

Sinnard contends that the district court abused its discretion on five different grounds. First, he argues the court made an error of law by invoking the crowded-docket exception because the exception should not apply to the circumstances of his case. Second, he argues the court made an error of law by misinterpreting the relevant statutory language. Third, he argues the court made an error of law by failing to make fact-findings with sufficient particularity. Fourth, he argues the court made an error of fact because the record does not support its crowded-docket finding. And fifth, he argues the court's decision to invoke the crowded-docket exception and continue his case was unreasonable. We address these arguments in turn.

1. *The District Court Did Not Err by Applying the Crowded-Docket Exception to the Circumstances of This Case*

First, Sinnard argues the crowded-docket exception simply does not apply in situations like his. Under Sinnard's view, the district court would have been authorized to invoke the crowded-docket exception only if the case originally scheduled for the first setting, *State v. Potts*, had proceeded to trial on October 28, 2019. If not, Sinnard argues the district court could not rely on the crowded-docket exception to continue his trial and schedule yet another matter, *State v. Ross*, for the first setting on October 28. In other words, once his trial was scheduled for the second setting on October 28, 2019, Sinnard believes he had a vested right to

automatically move into the first setting when *State v. Potts* did not proceed to trial that day.

But the plain language of K.S.A. 2019 Supp. 22-3402(e)(4) does not support Sinnard's argument. See *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022) (in interpreting statutes, courts first look to statute's plain language). The statute provides, in relevant part:

> "(b) If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within 180 days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant, or a continuance shall be ordered by the court under subsection (e).
>
> . . . .
>
> "(e) For those situations not otherwise covered by subsection (a), (b) or (c), the time for trial may be extended for any of the following reasons:
>
> . . . .
>
> (4) because of other cases pending for trial, the court does not have sufficient time to commence the trial of the case within the time fixed for trial by this section. Not more than one continuance of not more than 30 days may be ordered upon this ground." K.S.A. 2019 Supp. 22-3402(b), (e)(4).

The plain language of the statute places no limit on the district court's ability to prioritize trial settings on a given day. See *State v. Young*, 313 Kan. 724, 728, 490 P.3d 1183 (2021) (when statute's language is unambiguous, courts do not add or ignore words). Nor does the language grant the defendant a vested right to have his or her case move into the first trial setting if the original first setting does not proceed to trial.

Instead, we have observed that the statute creates four conditions or limitations on the crowded-docket exception. First, the district court may order only one continuance based on a crowded docket. K.S.A. 2019 Supp. 22-3402(e)(4); *Queen*, 313 Kan. at 15 (statute "allows for a one-time, 30-day continuance"). Second, the district court must order the continuance within the original speedy trial deadline. *State v. Cox*, 215 Kan. 803, 805, 528 P.2d 1226 (1974). Third, the new trial date must not be "'more than thirty days after the limit otherwise applicable.'" *State v. Coburn*, 220 Kan. 750, 753, 556 P.2d 382 (1976). And fourth, the record must show that other pending cases, rather than secondary matters such as witness availability, prevented the court from setting the

trial within the speedy trial deadline. See *Queen*, 313 Kan. at 22 (record did not support crowded-docket finding when trial set outside of speedy trial deadline because of difficulty securing witnesses at an earlier date); see also *State v. Edwards*, 291 Kan. 532, 543, 243 P.3d 683 (2010) (noting State presented no evidence to show other pending cases prevented district court from commencing defendant's trial within statutory speedy trial deadline).

The district court's continuance of Sinnard's trial satisfied all four statutory conditions. On October 16, 2019, the district court ordered a single continuance. The court ordered that continuance before both Sinnard's original speedy trial deadline of October 19, 2019, and the date to which he waived his speedy trial rights, October 28, 2019. The new trial date was set within 30 days of both October 19 and October 28. And the record shows the district court continued Sinnard's trial because of other pending cases and not because of secondary concerns like the availability of counsel or witnesses. Thus, the crowded-docket exception applied to the circumstances of Sinnard's case.

2. *The District Court Did Not Base Its Decision on an Erroneous Legal Conclusion*

Sinnard next argues the district court erroneously interpreted K.S.A. 2019 Supp. 22-3204(e)(4). Sinnard bases his argument on comments the district court judge made at the August 5 hearing. There, the judge explained he did not make a crowded-docket finding at the July 23 hearing (during which Sinnard's trial was scheduled for October 28) because Sinnard waived his speedy trial rights up to October 28. The judge added: "Had he not waived speedy trial, I may have had to make a [crowded-docket] finding at that time, and I'm not sure I read the—I think as long as I am within the 30 days, I can move [the trial] as necessary."

Sinnard argues the district court judge erred by concluding that K.S.A. 2019 Supp. 22-3402(e)(4) permitted the judge to move Sinnard's trial "as necessary" because the statute permits only one continuance. But here, the judge ordered only one continuance based on the crowded-docket exception. So, even assuming Sinnard's interpretation of the judge's comments are accurate, the district court did not act on any erroneous legal conclusion. See

Green, 315 Kan. at 180 (district court abuses its discretion if discretion is guided by erroneous legal conclusion). Thus, Sinnard has failed to show that the district court abused its discretion on this basis.

3. *The District Court's Fact-Findings Were Not Legally Inadequate*

Sinnard also argues that the district court's crowded-docket finding lacked the requisite specificity. He claims the court needed to explicitly find on the record that it lacked sufficient time to commence Sinnard's trial before the statutory speedy trial deadline and that the reason it did not have sufficient time was because of other cases pending for trial.

Sinnard cites K.S.A. 2019 Supp. 22-3402(e)(4) for support of this proposition. But the plain language of that subsection does not require the district court to make any specific findings on the record when invoking the crowded-docket exception.

And while the district court did not use the precise language Sinnard believes to be required, the court did make findings sufficient to establish that it could not commence Sinnard's trial within the speedy trial deadline due to other pending cases. At the July 23 hearing, the judge walked through the many trials scheduled in the weeks to come and stated, "I think there's ample basis for the Court to make a crowded-docket finding if I have to go out past October 28." At the August 5 hearing, the judge again stated, "[M]y docket is very crowded." And on October 16, 2019, when the judge invoked the crowded-docket exception, he stated, "I don't have any other options" than to continue the trial to November 12.

Kansas appellate courts have consistently affirmed similar findings. See *State v. Rodriguez-Garcia*, 27 Kan. App. 2d 439, 441, 8 P.3d 3 (1999) (district court's statement "'I don't have anything open until November 17, 1997'" sufficient without more to establish court's docket would not accommodate trial before November 17); *State v. Bennett*, No. 117,800, 2018 WL 1770447, at *3 (Kan. App. 2018) (unpublished opinion) (The district court's statement that "'there's just no possibility of scheduling the case earlier. This is the first date I've got available for a first setting'" is

sufficient finding for crowded-docket exception.); *State v. Parrish*, No. 110,568, 2015 WL 967546, at *6 (Kan. App. 2015) (unpublished opinion) (district court's statement "'I will make a 30-day finding as well, if it's close to being within that time frame, because my calendar is a mess trying to find dates'" established earlier trial date was unavailable).

The district court made findings sufficient to establish that it could not commence Sinnard's trial within the speedy trial deadline due to other pending cases. Sinnard's argument fails to establish that the district court abused its discretion.

4. *The Record Supports the District Court's Crowded-Docket Finding*

Next, Sinnard argues the district court abused its discretion by making an error of fact because the record does not support the district court's crowded-docket finding. In assessing this type of challenge, we review a district court's crowded-docket finding for substantial competent evidence. *Queen*, 313 Kan. at 20. Substantial competent evidence is "'such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion.'" *State v. Shockley*, 314 Kan. 46, 53, 494 P.3d 832 (2021). "An appellate court does not reweigh conflicting evidence, evaluate witness credibility, or determine questions of fact, and the court presumes the district court found all facts necessary to support its judgment." 314 Kan. at 53.

In making his argument, Sinnard focuses on the time between his original trial setting (July 29, 2019) and the statutory speedy trial deadline (October 19, 2019). He highlights that at the July 23 hearing, the district court indicated there might be availability for Sinnard's trial the weeks of August 19 and September 3. Because the district court might have been able to accommodate his trial before October 19, 2019, Sinnard claims the record does not support the district court's crowded-docket finding.

But Sinnard's argument ignores the circumstances of his case. At the July 23 hearing, the parties agreed to set Sinnard's case as the second setting on October 28, 2019. The State then pointed out that Sinnard's statutory speedy trial deadline was October 19. The district court offered to look for earlier dates, but Sinnard agreed

to waive his speedy trial rights until October 28. Only then did the district court state that it was unlikely that it could accommodate Sinnard's trial before October 28 in any event:

> "Alright. I said I would look for other dates, but the record should reflect that starting next week, I have a week-long rape trial. I have jury trials stacked the next week. Potentially—no, I can't, because Mr. Rosebud is the next week after that. Potentially, I could suggest August 19th. Then I have trial the week after that. I have a week in between those trials and then what starts is a three-week jury trial. My point is, I think there's ample basis for the Court to make a crowded docket finding if I have to go out past October 28."

Sinnard claims that these comments suggest the court might have had possible availability the weeks of August 19 and September 3. But rather than inquiring about a trial setting on those dates, Sinnard agreed to a second setting on October 28 and waived his speedy trial rights up to that date. In other words, Sinnard invited the district court not to set his trial before October 28, 2019.

The record also establishes that on the day the district court ordered the continuance—October 16, 2019—the earliest available date after October 28 for Sinnard's trial was November 12. *Ross* was set for trial the week of October 28, and another case was set for trial the week of November 4. The district court also stated on the record that it had no other option but to continue Sinnard's trial to November 12. Based on this evidence, a reasonable person could infer that on the day the district court ordered the continuance, the earliest available date to set Sinnard's trial was November 12. See *Shockley*, 314 Kan. at 53.

Thus, the district court's crowded-docket finding is supported by substantial competent evidence. And Sinnard has failed to show the district court abused its discretion by making any error of fact.

5. *The District Court's Decision to Grant a Continuance Based on the Crowded-Docket Exception Was Not Unreasonable*

Finally, Sinnard argues no reasonable person would have set *State v. Ross* as the first setting on October 28, 2019, and continued Sinnard's case because Ross was willing to waive his speedy trial rights for as long as needed to ensure his attorneys could be present at his trial. But as the panel observed, "[t]his argument ignores the fact that there are

other people involved in a jury trial of that type—the victims, other witnesses, the trial attorneys, and court personnel. A trial judge setting trials must take all of those interests into account when setting the docket." *Sinnard*, 2022 WL 5287901, at *3.

The crowded-docket exception "was designed to accommodate the conflicting demands of speedy justice and crowded court calendars," *Coburn*, 220 Kan. at 753. Here, the district court reasonably balanced those interests. The district court explained that *State v. Ross* involved "a high-level felony" and had been continued twice. The record also indicates that *State v. Ross* had been pending longer than Sinnard's case. The district court also noted that continuing *State v. Ross* would be especially difficult on the victim in that case. And given witness availability, the court explained that the first date after October 28 on which *State v. Ross* could be set for trial was February 10, 2020.

We also disagree with Sinnard's contention that the record shows no consideration for his speedy trial rights. Although the continuance of Sinnard's case pushed his trial past the date to which he had waived those rights (October 28), the district court rescheduled his trial for November 12, within 30 days of his original speedy trial deadline (October 19). While it is possible another district court judge may have balanced these interests differently, the record does not show that the judge's decision to move *State v. Ross* to October 28 and invoke the crowded-docket exception to continue Sinnard's trial was "arbitrary, fanciful, or unreasonable." *Green*, 315 Kan. at 180.

In sum, Sinnard has not met his burden to show that the district court abused its discretion by continuing his trial under the crowded-docket exception. The district court's continuance satisfied the statutory conditions for invoking the exception. The court's crowded-docket finding is supported by substantial competent evidence, and a reasonable person could agree with the court's decision to continue Sinnard's trial.

II. *The District Court Did Not Err by Allowing Detective Slifer to Testify as a Lay Witness and Any Error in Admitting Slifer's Testimony About the Contents of Phone Records Not Admitted into Evidence Was Harmless Error*

Sinnard next raises two types of evidentiary challenges to Detective Slifer's testimony. First, Sinnard argues the district court erred by

allowing Slifer to testify as a lay witness regarding how to interpret call records from Sinnard's cellular provider and how cell towers generally connect to cell phones. Sinnard asserts Slifer's testimony on these subjects included specialized knowledge that could only have been provided by a qualified expert. See K.S.A. 2022 Supp. 60-456(a). Second, Sinnard argues Slifer's testimony about the four weeks of phone records not admitted into evidence was hearsay, and the State failed to lay an adequate foundation for the hearsay exception for business records under K.S.A. 2019 Supp. 60-460(m).

As to Sinnard's expert opinion challenge, the panel rejected Sinnard's argument that Slifer's testimony crossed into expert opinion territory. The panel reasoned that Slifer gave a "nontechnical explanation of commonly understood cell phone technology" when he testified that cell phones generally connect to the closest cell tower. *Sinnard*, 2022 WL 5287901, at *5. The panel also explained that Slifer did not try to pinpoint the location of Sinnard's phone, and "[a] lay person reading the [admitted] call detail report and the accompanying guide" could do what Slifer did. 2022 WL 5287901, at *5.

As to Sinnard's hearsay challenge, the panel agreed that Detective Slifer's testimony about the contents of phone records not admitted into evidence was hearsay and the State failed to lay an adequate foundation for admitting that testimony under the

business records exception in K.S.A. 2021 Supp. 60-460(n). 2022 WL 5287901, at *6. Still, the panel held that the admission of that evidence was harmless error. 2022 WL 5287901, at *7.

On review, Sinnard argues the panel erred by characterizing Slifer's testimony as lay opinion. And while Sinnard agrees with the panel's holding regarding the erroneous admission of Slifer's hearsay testimony, he argues that the admission of this evidence affected the verdict. We review the expert opinion and hearsay challenges in turn.

A. *The District Court Did Not Abuse Its Discretion by Allowing Detective Slifer to Testify as a Lay Witness*

To assess Sinnard's claim that Slifer improperly offered expert opinion testimony, we first identify the applicable legal frame-

work. Then, we examine the content of Detective Slifer's testimony and the contemporaneous objections the defense lodged against it. This will confirm which evidentiary challenges to Slifer's opinion testimony are properly before our court. Finally, we review the merits of those expert opinion objections that Sinnard properly preserved for appellate review.

1. *Standard of Review and Relevant Legal Framework*

Any witness who testifies on a "relevant or material matter" must show they "ha[ve] personal knowledge thereof, or experience, training or education if such be required." K.S.A. 60-419. Kansas law also permits a witness to testify in the form of opinions or inferences when certain conditions are met. Such testimony is generally divided into two categories—lay and expert opinion testimony.

K.S.A. 2022 Supp. 60-456(a) and (b) provide the guidelines for the admissibility of lay and expert opinion testimony:

> "(a) If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b).
>
> "(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case."

"The distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." *United States v. Yeley-Davis*, 632 F.3d 673, 684 (10th Cir. 2011) (citing and quoting Fed. R. Evid. 701 advisory committee notes [2000 amend.]).

"'Whether a witness, expert or layman, is qualified to testify as to his or her opinion is to be determined by the trial court in the

exercise of its discretion.'" *State v. Timley*, 311 Kan. 944, 952, 469 P.3d 54 (2020).

2. *Sinnard Did Not Preserve All His Objections to Detective Slifer's Purported Expert Opinion Testimony*

Before discussing the merits of Sinnard's challenge to Detective Slifer's purported expert opinion testimony, we must confirm what opinion testimony drew a contemporaneous objection from the defense in compliance with K.S.A. 60-404. Just before Detective Slifer testified at trial, Sinnard moved for an order to exclude any testimony about cell phone technology. Sinnard argued that any testimony about how cell phones connect with cell towers or why cell phones would connect with certain towers over others was expert testimony and the State had not designated Slifer as an expert under K.S.A. 2019 Supp. 22-3212.

In response to the motion, the prosecutor said that Slifer would not be offering any expert testimony. Instead, she believed Slifer would testify about the contents of Sinnard's phone records, specifically what cell towers serviced certain calls. The prosecutor added that Slifer would offer no opinion on the exact location of Sinnard's phone at the time calls were made or received, other than to say cell phones generally connect to the nearest cell phone tower.

The district court ruled that Slifer could testify as a lay witness, provided he testified only that cell phones generally connect to the nearest cell tower because that knowledge was not so specialized as to qualify as expert testimony. The court added that Sinnard was free to renew his objection if Slifer's testimony crossed into expert territory.

When he took the stand, Slifer first discussed his experience with law enforcement working with electronic devices and phone records. Then, without objection from the defense, Slifer testified that cell phone service providers keep records of the dates and times of customers' calls and text messages as well as the location of the towers that serviced those calls and messages. He also explained that cell phones generally connect to the cell tower with the strongest signal, and the closest tower usually has the strongest

signal unless there is interference or a high volume of cell phone usage in the area.

Slifer then discussed three exhibits that he had obtained from Sinnard's cell phone service provider. One exhibit was a spreadsheet listing the calls made from or received by Sinnard's phone on July 25, 2017; the times of those calls; and the addresses of the cell phone towers that serviced those calls. Another exhibit was a guide explaining how to read the phone records. And the final exhibit showed account details for the phone and identified Sinnard as the subscriber. The parties stipulated to the admission of all three exhibits.

Detective Slifer explained the type of information that was contained in the phone records and how the records were created. He also described the contents of the call records from July 25, 2017. And he compared the location of the cell towers that had serviced Sinnard's calls with the locations P.F. said she and Sinnard had traveled to on the day of the incident. Sinnard did not object that any of this testimony constituted improper expert opinion.

At one point while Detective Slifer was describing the contents of the records, the prosecutor asked Slifer to revisit his earlier testimony about the factors that influence connections to cell towers. The question drew an objection on grounds of improper expert opinion from defense counsel. The district court overruled the objection. Slifer once again testified that cell phones generally connect to the nearest cell tower:

> "[A]ll other things being equal, your cell phone will try to connect to the tower that it has the strongest signal from, and the biggest variable in that is almost always distance. It tries to connect to the closest tower. There would be obviously exceptions . . . but in general, in a flat place, it will connect to the closest tower."

As noted, Sinnard argued to the Court of Appeals that Slifer offered improper expert opinion testimony on two subject-matter categories: (1) how cell towers generally connect to cell phones; and (2) how to interpret call records from Sinnard's cellular provider. The State argued that Sinnard had contemporaneously objected to testimony falling into only the first category—how cell towers connect to cell phones. And by failing to lodge a timely

and specific objection to any other opinion testimony, as required under K.S.A. 60-404, the State believed Sinnard had failed to preserve his objection to Slifer's opinion testimony on the second category—how to interpret call records. The panel did not address the State's statutory preservation argument. Instead, it reached the merits, concluding all Slifer's challenged testimony was proper lay opinion.

In his petition for review, Sinnard again challenged both subject-matter categories of Slifer's opinion testimony. But the State did not renew its preservation argument under K.S.A. 60-404 in a cross-petition or conditional cross-petition. Generally, we do not consider issues not presented or fairly included in a cross-petition dress a plain error not presented. See Supreme Court Rule 8.03(b)(6)(C)(i) (2023 Kan. S. Ct. R. at 56.) Thus, one might argue that the State's failure to renew its K.S.A. 60-404 preservation argument in a cross-petition or conditional cross-petition precludes our review of that argument.

But a K.S.A. 60-404 preservation argument is a different animal. K.S.A. 60-404 "directs that a verdict 'shall not' be set aside, or a judgment reversed, based on the erroneous admission of evidence without a contemporaneous trial objection." *State v. Scheetz*, 318 Kan. 50, Syl. ¶ 2 , 541 P.3d 79, 83 (2024). In other words, the statute is a legislative mandate limiting the authority of Kansas appellate courts to address evidentiary challenges. Thus, much like jurisdictional issues, appellate courts may consider a party's compliance with K.S.A. 60-404 on their own initiative.

One might also assume that if an appellate court concludes an evidentiary challenge loses on its merits, any question of whether the challenge was properly preserved under K.S.A. 60-404 would be inconsequential. But K.S.A. 60-404 permits only one outcome regarding unpreserved evidentiary challenges: that the challenge will not be the basis for setting aside the verdict or reversing the judgment. Thus, for an appellate court to go beyond this pronouncement and consider the merits of the unpreserved challenge—even to conclude no error occurred—would be akin to an advisory opinion. And "Kansas courts do not render advisory opinions." *Sierra Club v. Stanek*, 317 Kan. 358, 361, 529 P.3d 1271 (2023).

For these reasons, we must determine whether Sinnard complied with K.S.A. 60-404 as to Slifer's opinions on both subject-matter categories: (1) how cell phones generally connect to cell towers; and (2) how to interpret the call records. As for the first category, Sinnard argues some of Detective Slifer's explanations regarding the contents of the records—such as the meanings of certain acronyms—exceeded the permissible scope of lay testimony. But Sinnard did not object on these grounds at trial. See K.S.A. 60-404; *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010) ("The contemporaneous objection rule requires each party to make a specific and timely objection at trial in order to preserve evidentiary issues for appeal."). So, that evidentiary challenge is not preserved for our review, and we do not reach the merits of that challenge.

As for the second category, Sinnard argues Detective Slifer's testimony regarding cell tower connectivity to cell phones required specialized training and experience, and thus the district court erred in allowing Slifer to provide lay testimony on this topic. As noted, Sinnard moved to exclude this testimony before Slifer took the stand and later renewed his objection during Slifer's testimony on this topic. These actions complied with K.S.A. 60-404, and we have authority to review this issue on the merits.

3. *Detective Slifer Provided Appropriate Lay Opinion Testimony*

The relevant inquiry here is whether the district court abused its discretion by concluding that Detective Slifer's testimony was not so specialized as to be beyond a lay person's ken and was thus admissible under K.S.A. 2019 Supp. 60-456(a).

Sinnard claims the panel's holding that Detective Slifer need not have been qualified as an expert to discuss how cell phones generally connect with cell towers conflicts with our decision in *Timley*. There, we held the district court did not abuse its discretion by allowing a detective to provide lay testimony regarding the contents of cell phone records, including the time a call was placed and the location of the cell tower that serviced the call. *Timley*, 311 Kan. at 953-54. But the detective in *Timley* did not testify regarding cell phone connectivity with cell towers, so that issue was

not before us then. Nor did we express any opinion in *Timley* on whether a lay witness could provide only the same type of testimony as the detective in that case.

While we did not address the issue in *Timley*, other jurisdictions have found that general testimony about how cell phone towers function—including the typical range of cell towers, that cell phones typically connect to the nearest tower, and factors affecting connectivity—does not rely on specialized knowledge falling only within the purview of an expert witness. See, e.g., *United States v. Batista*, 558 Fed. Appx. 874, 876 (11th Cir. 2014) (unpublished opinion) (records custodians could testify as lay witness that cell phones connect to cell towers and phones generally connect to the tower with the closest, strongest signal, adding "[i]t is common knowledge that cell phones connect wirelessly to a nearby cell phone tower"); *United States v. Kale*, 445 Fed. Appx. 482, 485 (3d Cir. 2011) (unpublished opinion) (witness' limited discussion of operation of cell phone towers did not require any "'scientific, technical, or other specialized knowledge'" and "[a] person of average intelligence would almost certainly understand that the strength of one's cell phone reception depends largely on one's proximity to a cell phone tower"). But see *United States v. Natal*, 849 F.3d 530, 536-37 (2d Cir. 2017) (Sprint employee's testimony regarding how cell phone towers operate was expert testimony). And because K.S.A. 2022 Supp. 60-456 is substantively identical to the federal rules of evidence governing lay and expert opinion testimony, federal caselaw interpreting those provisions is persuasive. *State v. Lyman*, 311 Kan. 1, 21, 455 P.3d 393 (2020); *State v. Sasser*, 305 Kan. 1231, 1244-45, 391 P.3d 698 (2017).

Indeed, in a case involving testimony like Slifer's, the Fourth Circuit held that a witness need not be qualified as an expert to testify about cell tower function. *United States v. Graham*, 796 F.3d 332 (4th Cir. 2015), *rev'd on other grounds on reh'g* 824 F.3d 421 (4th Cir. 2016). In *Graham*, a Sprint records custodian testified that cell phones connect to the cell tower emitting the strongest signal, and that along with proximity, factors such as line of sight and volume of call traffic may affect the ability of a phone to connect to a certain cell tower. The Fourth Circuit held that the

witness' testimony did not "rise to the level of an expert opinion" because the witness "did not . . . engage in any analysis comparing the factors or seek to determine how these factors resulted in any particular connection, which would have required scientific, technical, or specialized knowledge." 796 F.3d at 365. Instead, the witness "merely presented the fact that these factors exist, which prevented the jury from being misled into believing that signal strength is a matter of proximity alone or that a cell phone will always connect to the nearest tower." 796 F.3d at 365.

On the other hand, the Tenth Circuit has held that an agent's testimony "concerning how cell phone towers operate constituted expert testimony because it involved specialized knowledge not readily accessible to any ordinary person." *Yeley-Davis*, 632 F.3d at 684. In *Yeley-Davis*, the agent made a chart of phone calls made between the defendant and a coconspirator, but a third phone number was included in the chart. The agent explained the third number was the coconspirator's number because when a person travels outside "[their] assigned area" the cell tower will assign a new phone number for "switching purposes to get to [their] phone." 632 F.3d at 683-84.

But a closer examination of *Yeley-Davis* reveals that it is distinguishable. In *Yeley-Davis*, the agent applied his specialized knowledge about cell tower operation to the evidence and drew a conclusion about a discrepancy in the phone records at issue in those proceedings. See also *State v. Patton*, 419 S.W.3d 125, 132 (Mo. Ct. App. 2013) ("analysis of the many variables that influence cell site signal strength," which was probative of whether the defendant was closer to one of two towers with overlapping coverage, amounts to expert opinion testimony). But here, Slifer provided only general testimony about the factors that affect cell phone connectivity. He did not apply that knowledge to the evidence in the case to provide an opinion on the location of Sinnard's phone at the time certain calls were made or to explain how connectivity factors resulted in a connection to a particular cell tower. See *State v. Blurton*, 484 S.W.3d 758, 772 (Mo. 2016) (lay witness testimony based on cell phone records did not cross line into expert witness territory because witness did not "attempt[] to pinpoint the defendants' exact location within a small geographic

area"). In fact, the Tenth Circuit later distinguished *Yeley-Davis* on similar grounds. See *United States v. Henderson*, 564 Fed. Appx. 352, 364 (10th Cir. 2014) (unpublished opinion) (distinguishing *Yeley-Davis* because there was no discrepancy in Henderson's phone records needing expert clarification and opinion testimony focused on location of cell towers to which phone connected).

We agree with those jurisdictions that have found that a lay witness may provide general information about how cell towers function. Such lay testimony is proper so long as the witness does not rely on such information to support a more technical opinion regarding topics such as the location of a cell phone at a particular time, an explanation as to why a cell phone connected to a specific cell tower over another, or an explanation of apparent discrepancies in call records. Slifer's testimony fits comfortably within this rule. He identified proximity as the primary factor influencing a cell phone's connection to a cell tower. He also acknowledged cell phone connectivity is subject to other variables. But he did not explain the science behind cell phone connectivity in technical detail. Nor did he try to pinpoint the location of Sinnard's cell phone at any given time. See *Timley*, 311 Kan. at 953-54 (finding detective's lay testimony properly admitted, in part, because he "did not definitively represent that [the defendant] *was* present at any given point at any given time").

For these reasons, Sinnard has failed to show that the district court abused its discretion by allowing Slifer to testify as a lay witness. And we affirm the Court of Appeals' judgment on this point.

B. *The District Court Erred by Admitting Detective Slifer's Testimony About the Contents of Phone Records Not Admitted into Evidence but the Error Is Harmless*

In addition to the opinion testimony discussed above, Detective Slifer also testified that he had reviewed Sinnard's phone records for the two weeks before and the two weeks after July 25, 2017. Slifer explained that he typically requests four weeks of cell phone data so he can identify a pattern of usage for a particular subscriber and determine whether any phone activity deviated from that pattern. The phone records for that four-week period were not admitted into evidence. Even

so, the State asked Slifer if he saw a pattern of Sinnard's cell phone connecting with the cell tower in Tonganoxie during that period.

Sinnard objected to the question on hearsay grounds, satisfying the contemporaneous objection rule in K.S.A. 60-404. But the district court overruled the objection. Slifer then said: "The only time the cell phone used any towers in Tonganoxie, Kansas, were on July 25th, 2017. It did it five times, and those are the five times that you see in Exhibit 5. It is the only time in that four-week period it used those towers in Tonganoxie."

On appeal, Sinnard argued that the district court erred by overruling his objection and admitting Slifer's testimony. The panel agreed, reasoning that Slifer's testimony about the unadmitted cell phone records was hearsay. *Sinnard*, 2022 WL 5287901, at *6. But it concluded that this error was harmless.

On review to our court, Sinnard agrees with the panel's admissibility analysis but contends that the erroneous admission of Slifer's testimony impacted the verdict. The State contends that the testimony was not hearsay at all.

1. *Standard of Review and Legal Framework*

"Like many evidentiary determinations considered on appeal, an appellate court reviews a trial court's admission or exclusion of hearsay statements for an abuse of discretion." *State v. Race*, 293 Kan. 69, 75, 259 P.3d 707 (2011).

Hearsay is defined as "[e]vidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated." K.S.A. 2022 Supp. 60-460. "Out-of-court statements that are not offered to prove the truth of the matter stated are not hearsay under K.S.A. 60-460." 293 Kan. at 76. "'The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability, and the declarant must therefore be subject to cross-examination.'" 293 Kan. at 76.

2. *The Detective's Testimony Was Inadmissible but Not Prejudicial*

The four weeks of phone records constituted out-of-court statements because the State did not admit those records into evidence. And

Detective Slifer's testimony about the content of those records was offered to prove that Sinnard's phone had not connected with the Tonganoxie tower on any day other than July 25, 2017. Thus, Slifer's testimony about the content of those records should not have been admitted at trial unless an exception to the hearsay rule applied. See K.S.A. 2022 Supp. 60-460.

Rather than argue that a hearsay exception applied, the State argues the testimony was not hearsay at all. The State cites *State v. Randle*, 311 Kan. 468, 477, 462 P.3d 624 (2020), which held, "A statement is not hearsay if it is 'used circumstantially as giving rise to an indirect inference but not as an assertion to prove the matter asserted.'" The State argues Slifer's testimony was offered to support the inference that Sinnard's phone did not connect to any towers other than the towers specified in those records. But that is a direct inference from the unadmitted phone records (the out-of-court statements), and it was clearly offered to prove the truth of the matter asserted—that Sinnard's phone did not connect with the Tonganoxie tower on any day other than July 25, 2017. Thus, *Randle* is inapposite.

The State also argues the records were computer-generated and thus non-hearsay. The State relies on *State v. Everette*, No. 115,645, 2018 WL 4517575 (Kan. App. 2018) (unpublished opinion), where a panel of the Court of Appeals distinguished computer-*stored* information from computer-*generated* information. The panel held the former is hearsay while the latter is not. 2018 WL 4517575, at *7. But the State did not establish at trial that the call records were entirely computer-generated. See 2018 WL 4517575, at *7 (defendant produced no evidence that call logs were entirely computer-generated, thus no foundation to admit call logs as nonhearsay-computer-generated records). So even if the rule in *Everette* controlled, the State failed to establish a foundation for admission of the challenged records under that rule.

Further, as we noted, the purpose of the hearsay rule is to ensure the credibility of declarants when their out-of-court statements are offered for the proof of the matter asserted. *State v. Cosby*, 293 Kan. 121, 127, 262 P.3d 285 (2011). Courts have reasoned that out-of-court statements that are auto-generated by a machine do not present the same credibility concerns as state-

ments made by a person because "'there is no possibility of a conscious misrepresentation.'" *State v. Schuette*, 273 Kan. 593, 596, 44 P.3d 459 (2002) (quoting *State v. Armstead*, 432 So. 2d 837, 840 [La. 1983]), *disapproved of on other grounds by State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006). But this rationale applies to the computer-generated records themselves. Here, the State did not admit the four weeks of call records. Instead, Slifer testified about the contents of those unadmitted records. The rationale for admitting auto-generated records does not extend to a live witness testifying to the contents of machine-generated records that are not in evidence.

Thus, Detective Slifer's testimony about the contents of the unadmitted call records was hearsay, and the district court erred by admitting it.

Having found error, we must now consider whether it was harmless. The erroneous admission of evidence is reviewed under the statutory harmless error test. Under that test, the party benefitting from the error (in this case, the State) has the burden to show there is no reasonable probability that the error will or did affect the outcome of the trial in light of the entire record. *State v. Gaona*, 293 Kan. 930, 940, 270 P.3d 1165 (2012); see also K.S.A. 2022 Supp. 60-261 (erroneous admission of evidence is harmless unless it affects the defendant's substantial rights).

We agree with the Court of Appeals that the evidentiary error was harmless. As the panel pointed out, "[t]he incriminating part of Detective Slifer's testimony was that Sinnard's phone connected to the Tonganoxie tower and then the Kansas City tower at the times P.F. said they were in Tonganoxie and at Legends in Kansas City. The unchallenged exhibits displaying Sinnard's cell phone records corroborated P.F.'s testimony on those points." *Sinnard*, 2022 WL 5287901, at *7. Slifer's testimony about Sinnard's phone activity during the weeks before and after July 25, 2017, suggested his phone activity on the day of the incident was unusual. This information would have added an additional level of corroboration to P.F.'s version of events but was insignificant compared to the inculpatory records from July 25, which were admitted without objection.

And Sinnard is incorrect that P.F.'s testimony was otherwise uncorroborated. Along with Sinnard's phone records from July 25, 2017, the State corroborated P.F.'s account with the following evidence: (1) a screenshot from P.F.'s phone of the Google Maps application showing P.F. was near the University of Kansas campus on the day and time P.F. claimed to be at Sinnard's apartment near the campus; (2) testimony that Sinnard's apartment was located on a one-way street like the one P.F. described; (3) photographs and a diagram of Sinnard's apartment which matched P.F.'s description; (4) photographs of a sex toy recovered from Sinnard's apartment which matched P.F.'s description; (5) M.F.'s testimony about what P.F. told her, which was generally consistent with P.F.'s testimony; and (6) Detective Slifer's testimony about information uncovered in his investigation which matched details P.F. had provided him, such as Sinnard using a Snapchat account with the user name "Blu" and working at a car dealership. Given P.F.'s testimony and the other evidence corroborating it, the State has met its burden to show there is no reasonable probability that Detective Slifer's hearsay affected the outcome of the trial.

III. *The District Court's Elements Instruction Was Not Clearly Erroneous*

Next, Sinnard challenges the jury instruction on the elements of commercial sexual exploitation of a child. At the conclusion of the evidence, the district court instructed the jury:

> "The defendant is charged with commercial sexual exploitation of a child. The defendant pleads not guilty.
>
> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant hired [P.F.] by giving, offering, or agreeing to give, anything of value to any person.
>
> "2. The defendant hired [P.F.] to engage in sexual intercourse.
>
> "3. At the time of the act, [P.F.] was less than 18 years old. The State need not prove the defendant knew the child's age.
>
> "4. This act occurred on or about the 25th day of July, 2017, in Douglas County, Kansas.
>
> . . . .
>
> "The State must prove that the defendant committed the crime knowingly. A defendant acts knowingly when the defendant is aware of the circumstances in which he was acting."

Sinnard contends the culpable mental state of "knowingly" should have been included in the first and second elements, rather than placed only in a separate paragraph below the listed elements. And he asserts the failure to include the word "knowingly" in the first and second elements is akin to omitting an essential element of the crime.

A. *Standard of Review and Relevant Legal Framework*

We follow a multi-step framework when addressing instructional error issues. First, we consider whether the issue was properly preserved below. Second, we decide whether the challenged instruction was legally and factually appropriate. In doing so, we exercise unlimited review of the entire record and view the evidence in the light most favorable to the requesting party. Third, upon a finding of error, we determine whether that error requires reversal. *State v. Douglas*, 313 Kan. 704, 709, 490 P.3d 34 (2021).

The first step of this framework affects the last step because an unpreserved instructional error will be considered for clear error—that is, the error may be considered harmless unless the party claiming it can firmly convince us the jury would have reached a different verdict without the error. *State v. Harris*, 310 Kan. 1026, 1034-35, 453 P.3d 1172 (2019); see also K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction . . . unless the party objects thereto before the jury retires to consider its verdict . . . unless the instruction or the failure to give an instruction is clearly erroneous."). Because Sinnard raises his instructional challenge for the first time on appeal, we apply the clear error standard for reversibility.

B. *The Challenged Instructions Accurately Stated the Law and Were Not Reasonably Likely to Confuse the Jury*

Sinnard's claim of error centers on the legal appropriateness of the challenged instruction. 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). Furthermore, the district court has the duty to inform the jury of every essential element of the crime charged. *State v. Richardson*, 290 Kan. 176, 181, 224 P.3d 553 (2010). This duty arises from a defendant's jury trial right as guaranteed by the state and federal Constitutions. *State v. Butler*, 307 Kan. 831, 847, 416 P.3d 116 (2018); *State v. Brown*, 298 Kan. 1040, 1045, 318 P.3d 1005

(2014). Thus, if Sinnard is correct that the challenged instruction omits an essential element of the crime charged, the instruction would be legally erroneous.

"[A] culpable mental state is an essential element of every crime defined by" Kansas' criminal code, unless otherwise provided. K.S.A. 2022 Supp. 21-5202(a). And if a statute prescribes a culpable mental state for a crime but does not distinguish between the material elements of that crime, the culpable mental state applies to all the material elements "unless a contrary purpose plainly appears." K.S.A. 2022 Supp. 21-5202(f).

Here, Sinnard was charged with commercial sexual exploitation of a child under K.S.A. 2017 Supp. 21-6422(a)(1), which provides,

> "Commercial sexual exploitation of a child is knowingly . . . Hiring a person younger than 18 years of age by giving, or offering or agreeing to give, anything of value to any person, to engage in a manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another, sexual intercourse, sodomy or any unlawful sexual act."

K.S.A. 2017 Supp. 21-6422(a)(1) prescribes a culpable mental state of "knowingly" but does not distinguish between the material elements of the crime. Thus, to be convicted of that crime, the State must show that the defendant knowingly hired the victim by giving, or offering or agreeing to give, anything of value to any person; and that the defendant knowingly engaged in certain sex acts with the victim. But the State need not show the defendant knew the victim was under 18 years of age. K.S.A. 2022 Supp. 21-5204 provides that proof of a mental culpable state does not require the accused to have knowledge of the age of a minor, even when the age is a material element of the crime charged. See K.S.A. 2022 Supp. 21-5204(b).

Sinnard relies on *State v. Jackson*, 61 Kan. App. 2d 184, 188, 500 P.3d 1188 (2021), to argue the challenged instruction is erroneous. In *Jackson*, the Court of Appeals addressed an instructional challenge to an elements instruction for commercial sexual exploitation of a child under K.S.A. 2018 Supp. 21-6422(a)(1). The instruction in *Jackson* did not include the word "knowingly" in the first and second elements of the crime, nor did it later inform the jury that the State had to prove the defendant committed the crime

knowingly. The panel recognized the given instruction mirrored PIK Crim. 4th 64.091 (2017 Supp.) but held that both the given instruction and the pattern instruction erroneously omitted the required culpable mental state. 61 Kan. App. 2d at 188.

But *Jackson* is clearly distinguishable. Unlike the instruction in *Jackson*, the instruction here informed the jury of the culpable mental state. The instruction stated: "The State must prove that the defendant committed the crime knowingly." The instruction also clarified that the State need not prove that Sinnard knew P.F. was under 18 years of age, so the jury could infer the State must prove Sinnard committed the other two elements knowingly. Thus, the panel here correctly held the instruction was legally appropriate because it "clearly instructed [the jury] that the defendant's actions had to have been done knowingly." *Sinnard*, 2022 WL 5287901, at *9.

Granted, the instruction Sinnard proposes on appeal would have also been legally appropriate. He argues the instruction should have said, "The defendant *knowingly* hired [P.F.] by giving, offering, or agreeing to give, anything of value to any person," and, "The defendant *knowingly* hired [P.F.] to engage in sexual intercourse." (Emphases added.) And in fact, after the Court of Appeals issued *Jackson*, PIK Crim. 4th 64.091 was amended to include the word "knowingly" in the first two elements of commercial sexual exploitation of a child under K.S.A. 2022 Supp. 21-6422(a)(1).

But the fact Sinnard's proposed instruction would have also been legally appropriate does not establish error. A party is not entitled to any proposed instruction merely because it is legally and factually appropriate. Thus, if a party's requested instruction is legally and factually appropriate, "we must also determine whether the instructions given by the district court, considered together as a whole, properly and fairly stated the applicable law and were not reasonably likely to mislead the jury." *State v. Shields*, 315 Kan. 814, 820, 511 P.3d 931 (2022), *cert. denied* 143 S. Ct. 616 (2023). "If so, the district court's failure to give the requested instruction does not constitute error." 315 Kan. at 820. For the reasons explained above, the instructions given properly and fairly stated the elements of commercial sexual exploitation of a child

under K.S.A. 2017 Supp. 21-6422(a)(1) and these instructions would not have reasonably misled the jury.

Thus, Sinnard has failed to establish any instructional error. And because there was no instructional error, we need not proceed to the reversibility inquiry—the third step of the instructional error framework.

IV. *Did Cumulative Error Deprive Sinnard of a Fair Trial?*

Finally, Sinnard contends the cumulative effect of the alleged evidentiary errors and instructional error deprived him of a fair trial. "The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial." *State v. Martinez*, 317 Kan. 151, 172, 527 P.3d 531 (2023). But Sinnard has established only one error—the admission of hearsay evidence—and that error was harmless. "A single, nonreversible error does not establish reversible cumulative error." *State v. Ballou*, 310 Kan. 591, 617, 448 P.3d 479 (2019). Thus, Sinnard is not entitled to relief on these grounds.

CONCLUSION

In sum, the district court did not abuse its discretion by invoking the crowded-docket exception under K.S.A. 2019 Supp. 22-3402(e)(4) to continue Sinnard's trial beyond the original speedy trial deadline. The district court's continuance satisfied the statutory conditions to invoke the exception. Substantial competent evidence supports the district court's crowded-docket finding. And the district court's decision was not objectively unreasonable.

Nor did the district court abuse its discretion by allowing Detective Slifer to testify as a lay witness. Slifer's testimony about cell phone connectivity was not so specialized as to bring it within the realm of expert testimony. And he did not analyze the factors affecting connectivity and apply that knowledge to determine the location of Sinnard's phone at any given time, to explain why Sinnard's phone connected to a particular tower, or to otherwise explain inconsistencies in the call records.

While the district court erred in admitting Detective Slifer's hearsay testimony regarding the contents of the four weeks of

phone records not admitted into evidence, we agree with the panel's conclusion that this error was harmless.

The jury instruction on the elements of commercial sexual exploitation of a child was legally appropriate and did not omit an essential element of the offense. While Sinnard's proposed instruction was also legally appropriate, the instructions given accurately stated the law and were not reasonably likely to confuse the jury.

Finally, because we have identified only one nonreversible error, the cumulative error doctrine does not apply.

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

ROSEN, J., concurs in the result.

State v. Coleman

No. 124,223

STATE OF KANSAS, *Appellee*, v. DARNELL D. COLEMAN, *Appellant*.

(543 P.3d 61)

SYLLABUS BY THE COURT

1. TRIAL—*Premeditation Includes Time and Consideration—Prosecutorial Error if Closing Argument Contradicts Definition.* Premeditation includes both a temporal element (time) and a cognitive element (consideration). A prosecutor thus commits error during closing arguments by making statements that contradict or obfuscate the cognitive aspect of premeditation by saying premeditation only requires time.

2. SAME—*Prosecutorial Error—Arguing Facts Not in Evidence Is Error.* Prosecutors err by arguing facts not in evidence.

3. SAME—*Prosecutor Did Not Err under Facts of This Case—Conflicting Evidence.* Under the facts presented, a prosecutor did not err by downplaying a theory of defense because the prosecutor acknowledged there is conflicting evidence and merely presented a path for resolving the conflict that favors the State's theory of the case.

4. SAME—*Under Facts of This Case Prosecutor's Statement Was Not Error.* Under the facts, a prosecutor's use of "we don't know" when discussing inconclusive evidence was not error and was not an expression of the prosecutor's opinion.

5. SAME—*To Avoid Prosecutorial Error—State Must Show There Is No Reasonable Possibility Error Contributed to Verdict.* To avoid reversible prosecutorial error, the State must demonstrate beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial considering the entire record, i.e., that there is no reasonable possibility that the error contributed to the verdict.

6. SAME—*Jury Instructions—No Error if Properly and Fairly State the Law.* When jury instructions properly and fairly state the law and are not reasonably likely to mislead the jury, no error exists. It is immaterial whether another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been more clear or more thorough than the one given.

7. ATTORNEY AND CLIENT—*Sixth Amendment Right to Effective Assistance of Counsel—Trial Judge has Duty to Inquire if Dissatisfaction*. A defendant has a right under the Sixth Amendment to the United States Constitution to effective assistance of counsel. Effective assistance includes a right to representation unimpaired by conflicts of interest or divided loyalties but, in situations with appointed counsel, it does not include the right to counsel

of the defendant's choosing. When a defendant articulates dissatisfaction with counsel, the trial judge has a duty to inquire. Dissatisfaction can be demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant.

8. APPEAL AND ERROR—*Claim of Cumulative Error—Appellate Review.* Appellate courts analyzing a claim of cumulative error consider the errors in context, the way the trial judge addressed the errors, the nature and number of errors and whether they are connected, and the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test from *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), applies. Under that test, the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome.

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Oral argument held May 15, 2023. Opinion filed February 16, 2024. Affirmed.

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

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

The opinion of the court was delivered by

LUCKERT, C.J.: Darnell D. Coleman appeals his conviction of first-degree premeditated murder. Coleman asserts:

(1) The prosecutor who presented the State's initial closing argument and a second prosecutor who presented an argument rebutting Coleman's closing erred by making incorrect statements of law and fact about premeditation.

(2) The district court committed clear error by failing to give a modified jury instruction on premeditation approved by this court in *State v. Bernhardt*, 304 Kan. 460, 372 P.3d 1161 (2016), and *State v. Stanley*, 312 Kan. 557, 478 P.3d 324 (2020).

(3) The district court erred by failing to remove his trial counsel after a complete breakdown in communication.

(4) And cumulative error deprived him of a fair trial.

We reject most of Coleman's claims but hold the prosecutors erred during closing argument. But prosecutorial error alone does not mandate reversal. Instead, we must consider the errors, individually and cumulatively, in the context of all closing arguments,

the instructions, and the evidence and analyze whether the prosecutorial errors affected the jury verdict. After doing so, we conclude beyond a reasonable doubt that the prosecutorial errors did not affect the verdict, and we affirm Coleman's conviction.

FACTS AND PROCEDURAL BACKGROUND

In October 2017, the Sedgwick County Sheriff's Office responded to a call reporting a body found near railroad tracks in a remote, rural area. Officials determined Tamsen Kayzer was the victim.

Kayzer and Coleman had been in a long-term on-again-off-again, non-monogamous relationship. Kayzer's two daughters described the relationship as abusive, toxic, and lacking in trust. One daughter told the jury that Coleman would "put his hands on [her mother] from time to time," although she was not asked to explain what that meant. The other daughter, when asked if she had ever observed Coleman become violent toward her mother, replied, "Yes." She also testified that her mother told her Coleman had been physically violent. One daughter testified that Coleman kept guns in a closet. She also reported seeing Coleman wearing a revolver in his waistband near the time her mother died.

The day before Kayzer's body was found, Kayzer used Facebook to arrange a sexual encounter with someone other than Coleman. Coleman had access to Kayzer's social media accounts and monitored her communications with others, which Kayzer knew. Coleman confronted Kayzer in Facebook messages about having sex with someone, which Kayzer denied.

Around 10 p.m. that same night, Kayzer went to the home of one of her daughters. Coleman showed up soon after. According to Kayzer's daughter, Coleman seemed angry and asked whether Kayzer was "done now, are you finished now." Kayzer replied by asking what he was talking about. Coleman stared at her and left. About 15 minutes later, Coleman returned and asked if Kayzer was coming over to his house. Kayzer's daughter interjected that Kayzer had agreed to take her granddaughter to Kayzer's sister's house, where Kayzer lived, to spend the night. Coleman drove off like he was mad. Kayzer's daughter suspected her mother texted Coleman. After a while, Kayzer grabbed her cigarettes and phone

and stepped outside. Her daughter was "pretty positive" her mother left with Coleman, and she estimated the time to be around 11 p.m. Security footage from a nearby apartment building showed Coleman and Kayzer getting into a Chevrolet Suburban around that time. About an hour and a half later, a passing train captured video of Kayzer's corpse near the railroad tracks.

Kayzer suffered five bullet wounds, three in or near her chest and two to the face. Stippling on her clothing and body suggested Kayzer was shot at close range. The crime scene investigator believed Kayzer was first shot twice in the face and later in the chest, but the coroner could not determine the order in which the wounds occurred.

Evidence collected from the scene included Kayzer's phone and a piece of mail addressed to Coleman's daughter. No bullet casings were found, suggesting someone collected them or the killer used a revolver.

One of Kayzer's daughters identified Coleman as a potential suspect. Law enforcement went to Coleman's apartment and observed a blue Suburban with what appeared to be blood splatter. The Suburban was registered to Coleman's mother. Investigators found envelopes, mail, and other papers throughout the car. Later testing would confirm the blood on the Suburban was Kayzer's.

A search of Coleman's apartment uncovered a box of ammunition that could be fired from a revolver. The box was missing six shells.

Law enforcement searched Kayzer's phone and discovered a locally stored copy of a Facebook confrontation between Kayzer and Coleman the night she died. Someone accessed Kayzer's Facebook account after she died and deleted this conversation, but the effort failed to delete the copy stored on her phone. An internet protocol address belonging to Coleman logged into Kayzer's account after her death.

Law enforcement also pulled cell phone location data for Coleman's and Kayzer's phones. Around 11:23 p.m., Coleman's cell phone pinged to a cell phone tower located near the location officers found her body.

At Coleman's trial, the defense used the testimony of Casheena Hadley to explain the presence of Kayzer's blood on Coleman's Suburban. Hadley testified she was dating Coleman around the time of Kayzer's death. She also told the jury about an incident between her and Kayzer that happened two days before Kayzer's death. According

to Hadley, the confrontation started with a verbal exchange, but it became physical. Hadley hit Kayzer in the nose and mouth. Kayzer then spat her blood towards Hadley, who was up against Coleman's Suburban. Hadley also claimed Coleman slept at her place the night Kayzer died. This testimony differed from her statement to law enforcement the day after Kayzer's death. In her out-of-court statement, she told investigators that she slept alone the night of Kayzer's death.

Coleman testified in his own defense. He recalled the fight between Hadley and Kayzer, and testified he saw blood after Hadley hit Kayzer. Moving to the night of Kayzer's death, he explained that he hosted a barbecue at his house. Around 10 or 10:30 p.m., Coleman drove his son home. Coleman then testified about a series of interactions he had with Kayzer that night: After picking up drugs for Kayzer, he picked her up and took her to his house for the barbecue. While at his house, he gave her the drugs, and she asked him for a pipe. When he said he did not have one, Kayzer asked him to take her to her sister's house so she could take a bath and get a pipe. He dropped her off, thinking she would later contact him. She did not call, nor did he.

Coleman conceded that he, and no one else, possessed his phone after he drove Kayzer to her sister's house. Coleman threw away his cell phone the morning after Kayzer died.

The State called Kayzer's sister on rebuttal. The sister was home the night Kayzer died. She was expecting Kayzer to come over with her granddaughter and stayed up until around 2 a.m. waiting. Kayzer never came.

The jury convicted Coleman of one count of first-degree premeditated murder. The district court imposed a hard 50 life sentence. Coleman timely appealed. Jurisdiction is proper. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2022 Supp. 22-3601); K.S.A. 2022 Supp. 22-3601(b)(3) (direct appeals to Supreme Court allowed for life sentence crimes).

ANALYSIS

Coleman presents four arguments. The first two are based on errors arising from attempts to explain the meaning of premeditation to the jury. First, Coleman alleges error arising from the prosecutors' arguments about premeditation. Second, he complains the trial judge

gave the standard pattern instruction on premeditation and did not expand it to include other language this court has approved. He makes this argument even though he did not ask the trial judge to give an expanded explanation. Coleman, in his third claim, contends the judge should have appointed new counsel for him because he could no longer effectively communicate with his trial counsel. Fourth, Coleman argues that if the individual errors do not lead us to reverse his conviction, we must do so because cumulatively they denied him a fair trial.

At the heart of Coleman's first, second, and, to some extent, his fourth claims, is the concept of premeditation. A brief discussion of premeditation will help frame these claims.

Premeditation is "a factual element that relates to the conditions under which the culpable mental state of intent was formed." *Stanley*, 312 Kan. at 568. Those conditions include "both a temporal element (time) and a cognitive element (consideration)." 312 Kan. at 573. By this we mean that 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." 312 Kan. at 574.

These concepts were reflected in the pattern jury instructions the trial judge gave the jury. One defined premeditation as "to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act." PIK Crim. 4th 54.150 (2020 Supp.). That pattern instruction also distinguished premeditated murder from an intentional, unpremeditated murder by explaining that "[a]lthough there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life." PIK Crim. 4th 54.150.

Coleman argues the prosecutors conflated the concepts of premeditation and an intentional act during their closing arguments. He also argues the judge should have expanded the jury instruction to include additional language approved in *Stanley* and *Bernhardt*, 304 Kan. 460. We turn to those arguments.

ISSUE 1: HARMLESS PROSECUTORIAL ERROR OCCURRED

Coleman first cites several passages from the prosecutors' closing arguments—both in the arguments of the prosecutor who presented the State's initial closing argument and in the arguments of a second prosecutor who rebutted Coleman's closing argument. He contends these passages illustrate that the prosecutors "diluted the cognitive component and implied premeditation only requires a temporal element—time to think before the act." He also argues the prosecutors, through these misstatements of law, denied him a fair trial by confusing and misleading the jury. We agree that some of the prosecutors' statements suggested the jury could find Coleman premeditated the murder simply because he had time to think about his actions, regardless of whether he did so. We thus find prosecutorial error. We conclude, however, that these errors—whether considered individually or cumulatively—do not warrant reversal of Coleman's conviction.

Standard of Review

In considering these claims of prosecutorial error, we apply a two-step standard of review.

First, considering a prosecutor's statements in context, appellate courts ask whether the prosecutor stepped outside the wide latitude afforded prosecutors "to conduct the State's case in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Brown*, 316 Kan. 154, 164, 513 P.3d 1207 (2022); *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021). This wide latitude extends to allow prosecutors to highlight evidence and discuss inferences reasonably drawn from that evidence. *State v. Timley*, 311 Kan. 944, 949-50, 469 P.3d 54 (2020). But a prosecutor may not misstate the law applicable to the evidence, comment on witness credibility, or shift the burden of proof to the defendant. *State v. Hilt*, 307 Kan. 112, 124, 406 P.3d 905 (2017); see *State v. Sherman*, 305 Kan. 88, Syl. ¶ 5, 108-09, 378 P.3d 1060 (2016).

If an error is found, appellate courts move to the second step of review to determine whether to reverse the defendant's convictions because of the prosecutor's error. In that review, appellate courts apply the traditional constitutional harmlessness test stated

in *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). See *Sherman*, 305 Kan. at 109. Under that test, "prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]).

No objection is required to preserve the question of prosecutorial error for appellate court review. *Blevins*, 313 Kan. at 428. That said, "'the presence or absence of an objection may figure into our analysis of the alleged misconduct.'" *State v. Sean*, 306 Kan. 963, 974, 399 P.3d 168 (2017) (quoting *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 [2009]).

Analysis

Turning to the specifics of Coleman's arguments, we find error in three portions of the prosecutors' closing argument to the jury.

First, one prosecutor argued: "The person clearly had time to think before the first shot, after the first shot, after the second, after the third, and after the fourth, I want her to die." Second, a prosecutor argued: "You can use your common sense, your experience. Bang, when that first round goes off, the cylinder has to rotate. One would assume, human nature, there's a reaction, there's a moment there. And then what happens? It's followed by two, three, four, and five." And, third, a prosecutor said:

> "Again premeditation, this isn't Hollywood. This isn't Good Fellas or whatever mafia show. The law does not require a plan. I don't know how many times defense counsel kept telling you a plan. A plan. That's not what your instructions say. That's not what it says. It does not require a plan. It doesn't have to be schemed, contrived, or anything else beforehand. . . . [Y]ou don't have to lay in wait. We heard that expression as well. It only requires time. Time to have thought the matter over beforehand. That's it. Time. Time is what it takes for premeditation. Time to think it over. Those are my words in layman's terms. That's the requirement for premeditation, ladies and gentlemen."

We agree with Coleman's contention that each of these statements was outside the wide latitude allowed in argument. Considering that premeditation includes "both a temporal element (time)

and a cognitive element (consideration)," *Stanley*, 312 Kan. at 573, these statements ignore—or at least obfuscate—the cognitive aspect of premeditation. They make no mention of the principle that premeditation requires a period of thoughtful, conscious reflection and pondering. *Stanley*, 312 Kan. at 574. Instead, they imply that satisfying the temporal aspect can be enough to find premeditated murder because, according to the prosecutors, premeditation "only requires time" and "[t]ime is what it takes for premeditation."

Granted, at other points in the closing, the prosecutors referred to the need for thoughtful, conscious reflection and pondering. But the statements Coleman points to as error contradict any statements about needing conscious reflection. Instead, according to the prosecutor: "Time to have thought the matter over beforehand. That's it. Time. Time is what it takes for premeditation. Time to think it over. Those are my words in layman's terms. That's the requirement for premeditation." These words negated the concept of conscious reflection. We thus find these statements misstated the law and were error.

The prosecutor erred in another way when saying, "You can use your common sense, your experience. Bang, when that first round goes off, the cylinder has to rotate. One would assume, human nature, there's a reaction, there's a moment there. And then what happens? It's followed by two, three, four, and five." In this statement, the prosecutor argued facts not in evidence and beyond the common understanding of many jurors. Cf. *State v. Owens*, 314 Kan. 210, 239-40, 496 P.3d 902 (2021) (prosecutor erred by arguing facts not in evidence). The prosecutor did not point to any evidence about the time it takes for a cylinder to rotate. Instead, the prosecutor asked the jury to apply common sense and experience. But the mechanism of how a revolver functions and the time it takes for certain actions to occur are not matters of common knowledge and experience. The argument invited speculation or reliance on other jurors to fill the evidentiary gap when the State should have presented evidence if it wanted jurors to consider whether the time it takes to rotate a revolver's cylinder provided Coleman sufficient time to deliberate and change his mind or abandon an impulse.

On top of these three erroneous passages, Coleman argues the prosecutor erred by making other misstatements. Through these other statements, he contends the prosecutor implied that premeditation could be instantaneous or even formed after death. He supports his argument by comparing the prosecutor's choice of words with arguments in other cases in which we held the prosecutor made misstatements of law or fact that suggested premeditation could be "instantaneous or virtually so." *State v. Morton*, 277 Kan. 575, 585, 86 P.3d 535 (2004) (error to gesture as though firing a gun and saying that sufficed to establish premeditation); see *State v. Huddleston*, 298 Kan. 941, 953, 318 P.3d 140 (2014) (error to argue premeditation could be formed after event that caused death); *State v. Hall*, 292 Kan. 841, 850-52, 257 P.3d 272 (2011) (error to argue premeditation could have formed after the first trigger pull).

We have considered the case-specific words Coleman points to and hold none of the statements were prosecutorial errors. We read the arguments as (1) emphasizing how quickly premeditation may be formed without suggesting it was instantaneous and (2) pointing to the factors that support an inference of premeditation, such as listing the actions Coleman took from bringing a gun and driving to a remote area before shooting Kayzer. These arguments track others in which we found no prosecutorial error. Cf. *State v. Moore*, 311 Kan. 1019, 1041, 469 P.3d 648 (2020) (no prosecutorial error where prosecutor listed evidence, which included defendant's statements before killing and purchase of a gun a month before killing); *State v. Brownlee*, 302 Kan. 491, 518, 354 P.3d 525 (2015) (no prosecutorial error when prosecutor "pointed out key factual intervals supported by the evidence that established premeditation").

Next, Coleman asserts the State exceeded the wide latitude afforded it by arguing the jury should reject any argument that the head shots were fired first. Because Coleman presented contrary arguments about the order of the shots and cited expert statements that supported his argument, he compares these statements to those in *State v. Watson*, 313 Kan. 170, 484 P.3d 877 (2021),

where a prosecutor erroneously asked a jury to disregard a defendant's theory. *Watson* presented a distinguishable situation, however.

In *Watson*, the State argued no evidence supported a defendant's theory of defense. But the defendant's testimony provided support, and we held the prosecutor erred by failing to acknowledge the evidence. See *Watson*, 313 Kan. at 181. In contrast, here the prosecutor acknowledged conflicting evidence had been presented. Citing the evidence, the prosecutor asked the jury to conclude the evidence did not establish which shot was first. Given the prosecutor's discussion of the conflicting evidence, an argument about a path for resolving the conflict that favored the State's theory about the order of the shots did not exceed the wide latitude prosecutors are afforded.

Finally, Coleman argues the prosecutor impermissibly injected his opinion in closing argument by repeatedly saying "we don't know" which shot was fired first. We have not previously discussed whether a prosecutor errs by using the phrase "we don't know," although we have some analogous caselaw.

For example, we have recognized and recently reaffirmed that a prosecutor exceeds the wide latitude afforded by opining on issues for the jury, including opining on the defendant's guilt or on witness credibility. We criticized using "I think" or words of similar import as introducing the prosecutor's opinion or view, which is irrelevant to the jury's task. We have also determined a prosecutor can err by saying "we know" or using similar words because "we" includes the prosecutor and thus, depending on context, might state the prosecutor's irrelevant opinion about the evidence. See *State v. Alfaro-Valleda*, 314 Kan. 526, 538-40, 502 P.3d 66 (2022).

The use of "I think" or "we know" is not always error, however. In the cases discussing "we know," we have drawn a distinction depending on what follows the phrase. "We know" followed by a discussion of uncontroverted evidence is not prosecutorial error because no opinion is expressed. But "we know" followed by a discussion of controverted evidence does involve an expression of opinion on the strength of the evidence and thus constitutes prosecutorial error. See *Alfaro-Valleda*, 314 Kan. at 539-40.

Here, the disputed "we don't know" statement was in the context of the disputed evidence about whether the witness could determine the order of the shots and was not an expression of the prosecutor's opinion. Coleman argues the prosecutor expressed an opinion that the investigator was not credible when she testified about her belief that the murderer first fired the head shots. We disagree. The prosecutor's use of "we don't know" merely embraced the uncertainty reflected in the investigator's and the coroner's testimony. Both testified that the order of shots could not be determined with certainty. The prosecutor did not err by saying "we don't know" to describe inconclusive evidence.

We thus find only three errors, each of which disregarded the cognitive component of premeditation. Our next step is to determine whether these errors denied Coleman a fair trial. To avoid reversible prosecutorial error, the State must demonstrate "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., [that] there is no reasonable possibility that the error contributed to the verdict." *Sherman*, 305 Kan. 88, Syl. ¶ 8.

The State here asks us to reconsider this standard. It contends the defendant should bear the burden to show plain error when the issue is not preserved by a contemporaneous objection. The State notes this is the burden applied in federal cases, and it asserts this used to be the rule in Kansas before modified in *Ward*, 292 Kan. at 568-69.

The State's reliance on federal law is misplaced because Kansas preservation requirements differ from federal preservation rules and those rules direct which party carries the burden of persuasion. The federal preservation and burden requirements cited by the State derive from Federal Rule of Criminal Procedure 52. Rule 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Rule 52(b) defines the standard when no objection is made by stating that "[a] plain error that affects substantial rights may be considered."

While Rule 52 does not explicitly define the burden of persuasion, the United States Supreme Court has held the reversibility standard in subsection (b) requires a defendant to establish that

the error affected the verdict, although the Government carries the burden when an issue is preserved at trial. *United States v. Olano*, 507 U.S. 725, 734-35, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). "This burden shifting is dictated by a subtle but important difference in language between the two parts of Rule 52: While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights' (emphasis added), Rule 52(b) authorizes no remedy unless the error *does* 'affec[t] substantial rights.'" 507 U.S. at 734-35.

The State asks us to apply *Olano*'s discussion of the plain-error standard under Federal Rule of Criminal Procedure 52(b). In doing so, the State argues this court's decision in *Ward* failed to recognize the federal court's imposition of the burden of persuasion on defendants. This argument fails to recognize that the federal courts impose the burden on defendants because of wording in Rule 52(b) that differs from the Kansas statutory language interpreted in *Ward*.

Ward applied K.S.A. 60-261, which is phrased like Federal Rule of Criminal Procedure 52(a). Compare K.S.A. 60-261 (requiring appellate courts to "disregard all errors and defects that do not affect any party's substantial rights") with Fed. R. Crim. Proc. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). Under Rule 52(a), the Government has the burden of persuading the appellate court the error was harmless. *Olano*, 507 U.S. at 735. *Ward* itself considered a motion for mistrial raised during the trial and did not concern an unpreserved claim of error. *Ward*, 292 Kan. at 544. *Ward* is thus factually distinguishable, and it is legally distinguishable from cases applying Rule 52(b) because *Ward* interpreted language like that in Rule 52(a).

The State cites no Kansas authority for placing the burden of persuasion on the defendant. Most significantly it cites no statutory basis like Rule 52(b), although the Kansas Legislature has shifted the burden to prove harmlessness to a nonobjecting party in other situations. See, e.g., K.S.A. 2022 Supp. 22-3414(3) (clear error standard applies if party fails to object to jury instruction).

The State does make the point, however, that we have historically applied a "plain error" standard in prosecutorial error cases.

But that standard differs from Rule 52(b). The federal standard requires that an error be clear or obvious at the time of a ruling and that the error affect substantial rights. Even then, relief is permissive, not mandatory. *Olano*, 507 U.S. at 734-35. In contrast, in Kansas prosecutorial error cases (then called prosecutorial misconduct), the typical recitation of the plain-error standard had three requirements, included the *Chapman* harmless error test, and did not designate which party carried the burden of persuasion. This test was stated in *State v. Tosh*, 278 Kan. 83, 91 P.3d 1204 (2004), *overruled by State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016):

> "In the second step of the two-step analysis for alleged prosecutorial misconduct the appellate court considers three factors to determine if the prosecutorial misconduct so prejudiced the jury against the defendant that a new trial should be granted: (1) whether the misconduct is gross and flagrant; (2) whether the misconduct shows ill will on the prosecutor's part; and (3) whether the evidence against the defendant is of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jurors. None of these three factors is individually controlling. Before the third factor can ever override the first two factors, an appellate court must be able to say that the harmlessness tests of both K.S.A. 60-261 and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), have been met." 278 Kan. 83, Syl, ¶ 2.

When a decision did designate which party had the burden of showing that prosecutorial misconduct did not affect the verdict, it was the State—not the defendant—that had the burden. See *State v. Kleypas*, 272 Kan. 894, 1084, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002) (discussing prosecutorial misconduct, applying *Chapman*'s constitutional error standard, and stating that "[a] constitutional error may be declared harmless where the State proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"). *Ward* cited *Kleypas* as an example of decisions in which this court had placed the burden of persuasion on the party benefitting from an error. *Ward*, 292 Kan. at 568-69.

The significant difference between the federal test and Kansas' pre-*Sherman* prosecutorial plain error framework undercuts the State's argument that federal law supports its view. And, as *Kleypas* illustrates, our history of applying the *Chapman* test in

the context of prosecutorial misconduct, now error, is not on the State's side either.

Finally, we note that the State does not discuss *Sherman*, 305 Kan. 88, which reworked the framework for analyzing prosecutorial error claims and, in doing so, imposed the burden to show harmless error on the State. Explaining the need for reworking the framework, *Sherman* discussed the *Tosh* test and other aspects of the "dizzying patchwork of harmlessness and error tests [that] has resulted in significant confusion." 305 Kan. at 110. After discussing this history, *Sherman* imposed the burden on the State to prove harmlessness. 305 Kan. at 110-11.

Sherman's review of our caselaw discussed this court's long-honored recognition that an objection to prosecutorial error is not necessary. This rule derives, in part, because of the "'duty of the district courts in jury trials, to interfere in all cases of their own motion, where counsel forget themselves so far as to exceed the limits of professional freedom of discussion.'" 305 Kan. at 101 (quoting *State v. Gutekunst*, 24 Kan. 252, 254, 1880 WL 976 [1880]). *Sherman* also discussed "the particularly unique responsibility held by those with prosecuting power." 305 Kan. at 99. To impose the burden of persuasion on the defendant would shift these duties and responsibilities to the defendant, but the State offers no justification for doing so.

After *Sherman*, we have twice rejected arguments that the standard for analyzing prosecutorial error should differ depending on whether the defendant objected at trial. See *State v. Boothby*, 310 Kan. 619, 628, 448 P.3d 416 (2019) ("We have not applied a plain error standard when reviewing claims of prosecutorial error and, in keeping with *Sherman*, we decline the State's invitation to adopt the federal plain error standard [to claims of judicial comment error] here."); *State v. Chandler*, 307 Kan. 657, 682-84, 414 P.3d 713 (2018) (rejecting State's argument that analysis of prosecutorial error should change because errors were not objected to at trial).

In summary, the State does not address *Sherman*'s reasoning or our post-*Sherman* caselaw and instead cites only federal authority based on rules that differ from those in Kansas. It thus gives us

little reason to change our framework for analyzing claims of prosecutorial error, and we decline to do so.

Applying our established standard, we conclude there is no reasonable possibility the three erroneous passages in the prosecutors' closing arguments contributed to the verdict. We note, as developed below, that the trial judge instructed the jury on premeditation, using a pattern instruction that informed the jury that premeditation requires the defendant "to have thought the matter over beforehand." PIK Crim. 4th 54.150. We presume the jury applied the instruction and weigh that presumption in favor of finding a prosecutor's comments harmless. See *Brown*, 316 Kan. at 170 ("Appellate courts often weigh these instructions when considering whether any prosecutorial error is harmless.").

Another consideration is the strength of the State's evidence. See 316 Kan. at 171-72. And, here, the State's evidence of premeditation was strong. In arguing how the evidence showed Coleman premeditated the murder, the State also focused on the several hours between when Coleman discovered Kayzer's liaison with another man and when Kayzer died. The State argued that Coleman began planning the murder hours before she died. He got his gun, six bullets, picked her up, drove her 15 miles into the country, got out of the car, walked around to Kayzer's door, somehow got her out of the car, then shot her five times. The State pointed to various times during the evening the plan could have been formed, discussing the Facebook exchanges, Coleman's first visit to the home of Kayzer's daughter, the nearly half hour before the second visit to the daughter's house, and the drive to a remote country road. The State also established that Coleman tried to conceal incriminating evidence after Kayzer's death by accessing Kayzer's Facebook account to delete messages and throwing away his phone. See *State v. Kettler*, 299 Kan. 448, 467, 325 P.3d 1075 (2014) ("Kansas caselaw identifies factors to consider in determining whether the evidence gives rise to an inference of premeditation that include: '[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.").

We are persuaded beyond a reasonable doubt that none of the statements complained of here, when considered individually, affected the outcome of the trial. Considering the prosecutorial errors in the totality of the record, the context of the errors, the number and nature of the errors, and the strength of the evidence, we conclude beyond a reasonable doubt that no error individually affected the outcome of the trial. We will discuss the cumulative effect of the errors in our discussion of issue 4.

ISSUE 2: NO JURY INSTRUCTION ERROR

In Coleman's second issue, he argues the trial judge erred by not expanding the pattern instruction that explains premeditation. The instruction given by the judge mirrored the pattern instruction on premeditation:

"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." PIK Crim. 4th 54.150.

At trial, Coleman did not object to this instruction or ask the judge to add any language to it. Now on appeal Coleman argues the judge should have included additional language that this court has approved of in two other cases—*Stanley*, 312 Kan. 557, and *Bernhardt*, 304 Kan. 460.

In *Bernhardt*, the earlier of these two decisions, both the State and the defendant requested additional language. The trial judge included language Anson Bernhardt requested that focused on the cognitive aspect of premeditation: "'Premeditation is the process of thinking about a proposed killing before engaging in homicidal conduct.'" 304 Kan. at 465. And the judge added language requested by the State that discussed when premeditation can occur and circumstances from which premeditation can be inferred:

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

"'Premeditation can be inferred from other circumstances including: (1) the nature of the weapon used, (2) the lack of provocation, (3) the defendant's conduct before and after the killing, (4) threats and declarations of the defendant

before and during the occurrence, or (5) dealing of lethal blows after the deceased was felled and rendered helpless.

"'Premeditation can occur during the middle of a violent episode, struggle, or fight.'" *Bernhardt*, 304 Kan. at 464.

The *Bernhardt* majority held the trial judge did not err in adding both requested passages. 304 Kan. at 472. But see 304 Kan. at 483 (Johnson, J., dissenting) (concluding additions were confusing and contradictory); 304 Kan. at 489 (Luckert, J., dissenting) (same).

This court revisited this language in *Stanley*, 312 Kan. 557. There a majority of the court determined the "best practice" would be to use some of the *Bernhardt* language to explain that premeditation "requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." 312 Kan. at 574. But see 312 Kan. at 574-75 (Luckert, C.J., concurring). Coleman, for the first time on appeal, argues the trial judge should have added this language plus more of the language approved in *Stanley*, 312 Kan. at 574, and *Bernhardt*, 304 Kan. at 472.

Coleman is not the first appellant to argue a trial court erred by not using the language approved in *Stanley*. Like Coleman, these appellants argued we should take a step beyond *Bernhardt* and *Stanley* and hold a trial judge errs by not giving an expanded premeditation instruction, even if not requested to do so at trial. We declined to do so in *State v. Hilyard*, 316 Kan. 326, 335-36, 515 P.3d 267 (2022). *Hillyard*'s reasoning applies here as well.

We began our analysis in *Hilyard* by noting that the instructions as given must constitute error for an appellant to succeed. If the jury instructions properly and fairly stated the law and were not reasonably likely to mislead the jury, then no error exists for this court to correct. See *Hilyard*, 316 Kan. at 334. In other words, "it is immaterial if another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been *more* clear or *more* thorough than the one given." 316 Kan. at 334. We concluded the PIK instruction on premeditation accurately sets forth the core substance of the legal concept of premeditation. 316 Kan. at 335. The pattern PIK instruction

standing alone "is legally sufficient and generally not likely to mislead the jury." 316 Kan. at 336.

Coleman seeks to distinguish *Hilyard* because of what he contends were prejudicial arguments by the prosecutors that suggested premeditation can be instantaneous and merely an intentional act. As we have held, however, the prosecutor's argument did not suggest the killing here involved an instantaneous taking of a life. Instead, the prosecutor suggested deliberation was required before each shot was fired, that Coleman deliberated and committed to action before the first shot, and that Coleman remained recommitted with each shot. In other words, the prosecutor's argument as a whole suggested that premeditation persisted even after the first shot was fired, not that it only formed after the first shot.

Also, the evidence at trial, unlike that in *Bernhardt* and *Stanley*, did not include evidence of an ongoing dispute in the moments leading up to the fatal acts. Coleman did not testify to any dispute. And no one witnessed what occurred in the moments before Kayzer's death. There was simply no factual record in this case of an ongoing dispute in the moments before Kayzer was shot to suggest the type of instructions provided in *Bernhardt* and *Stanley* would have been legally or factually appropriate.

Just as in *Hilyard*, our analysis ends with our holding that the trial judge's premeditation instruction was sufficient. The district court did not err, and so there is no need to consider prejudice. *Hilyard*, 316 Kan. at 336.

ISSUE 3: NO ERROR IN NOT REMOVING TRIAL COUNSEL

In Coleman's next argument, he contends the trial judge should have removed his trial counsel. Some additional facts provide the context of his arguments.

Additional Facts

Throughout the court proceedings, when represented by counsel, Coleman had appointed counsel. A public defender represented Coleman early in the proceedings. Coleman then filed a pro se motion requesting counsel of record be removed. After a hearing, the trial judge noted the primary issue was an alleged lack of

communication. The judge denied the motion. Coleman filed another motion requesting replacement counsel again asserting justifiable dissatisfaction. During the hearing, Coleman and his counsel referred to disagreements about defenses that might be pursued, including a potential alibi defense. The court again denied the motion, finding no justifiable dissatisfaction. Following the ruling, Coleman asked to represent himself. The district court informed him it would require a written motion if he wanted to pursue self-representation.

Coleman then filed a written motion to represent himself, and the judge granted his motion. After a few months, Coleman asked for and received appointed counsel, with the court reappointing the same counsel who represented Coleman before his request to represent himself. A few months after that, Coleman again asked to have different counsel appointed, alleging a breakdown in communication. The judge expressed concern that Coleman would not communicate with other counsel any better than he was with current counsel. After some discussion, the judge found an irreconcilable conflict and appointed new counsel. The judge cautioned: "I think it's probably obvious to you from our discussion here that this won't go on lawyer after lawyer, that you are going to need to be able to work with counsel to the best of your ability in the future."

About six months after the judge appointed another attorney, Coleman filed a pro se motion, alleging a complete breakdown of communication with counsel, that counsel was not providing adequate representation, and that counsel had not complied with Coleman's requests. At the hearing, Coleman reduced his issues with counsel to one: "My only issue is the lack of communication." Defense counsel explained the investigation was behind schedule because of the investigator's caseload. She requested a continuance. The judge concluded that he could not "find that there is a breakdown in communication given the circumstances we have here, so I will deny the motion."

A little more than a month later, Coleman again asked the court to remove his counsel, alleging a breakdown of communications, a failure to act with reasonable diligence, and a failure to follow his instructions about developing his defense. At a hearing

on the motion, Coleman explained current counsel had not communicated with him since the last proceeding. He acknowledged one visit from her investigator to a family member, but he said counsel otherwise had not seen him or communicated with him since the last hearing. Defense counsel explained that while she had not visited Coleman, she had spent the two weeks before the hearing going through thousands of pages produced in his case and the last three or four weeks making sure she had everything.

The judge recited the legal standard for finding justifiable dissatisfaction with existing counsel, "which has been defined as being a conflict of interest, an irreconcilable conflict, or a complete breakdown of communication between counsel and the defendant." The judge acknowledged "in a perfect world, [defense counsel] would only have one client to deal with. She would be able to communicate at whatever rate her client thought was appropriate . . . ." Coleman interjected, "Just once a period would be fine. She didn't let me know nothing that's going on. . . . She had this case since April . . . [t]hat's five months . . . [w]e ain't talked about it one time." Defense counsel interrupted to clarify she had met him in person to introduce herself and get his side of the story. The judge resumed his ruling, pausing to explain to Coleman his lawyer's role in the case:

> "And I am trying to explain to you that may help this make more sense. She is charged with defending you. She is charged with preparing for trial. And in an ideal world communication would be better. It has not been ideally what I believe—what I would like it to be, sir, and not what you would like it to be, but there is a process here where she has to communicate with her investigator and have him do the things that she needs him to do to prepare for trial. That is a person that works for her at her direction, and she has made the point, and I think it is important for you to note, that much of the work—in fact, almost all of the work that she will do to prepare for your trial is not done in front of you.
>
> "So I will not find that there is justifiable dissatisfaction here. It would be my request [defense counsel] to summarize the things you have done for Mr. Coleman and send him a summary letter at your—as soon as possible, so that Mr. Coleman has some insight about all the things you have done.
>
> "Mr. Coleman, I think you would be surprised at all the things that it takes to prepare for a trial of this nature."

Legal Duties and Standard of Review

Against this factual backdrop, we consider Coleman's appellate argument.

A defendant has a right under the Sixth Amendment to the United States Constitution to effective assistance of counsel. *State v. McDaniel*, 306 Kan. 595, 606, 395 P.3d 429 (2017). Effective assistance includes a right to representation unimpaired by conflicts of interest or divided loyalties but, in situations with appointed counsel, it does not include the right to counsel of the defendant's choosing. *State v. Pfannenstiel*, 302 Kan. 747, 758-59, 357 P.3d 877 (2015). When a defendant articulates dissatisfaction with counsel, the trial judge has a duty to inquire. Dissatisfaction can be "'demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant.[Citations omitted.]'" 302 Kan. at 759-60. Judges may err in exercising their duty—that is, they commit an abuse of discretion—if they (1) fail to conduct an inquiry once aware of a potential conflict, (2) fail to conduct an inquiry in an appropriate matter, in other words, fail to fully investigate the basis for defendant's dissatisfaction with counsel, or (3) make an unreasonable decision based on the facts revealed by an appropriate inquiry. 302 Kan. at 761-62.

Here, Coleman argues the judge unreasonably determined there was no breakdown in communication between him and his counsel. But in making this argument, Coleman shifts the standard from a complete breakdown in communication to a standard requiring an attorney to communicate the details of an attorney's pretrial preparation. For support he cites *Missouri v. Frye*, 566 U.S. 134, 140-45, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). *Frye* considered the failure to communicate a pretrial plea offer. A plea offer ultimately requires a decision to accept or reject the offer and that is a decision only a client can make. The offer thus must be communicated promptly to the client. In contrast, Coleman complains that his counsel did not communicate about the investigation and strategy decisions made in preparation for trial; these strategy decisions ultimately remain the attorney's call. See

Bledsoe v. State, 283 Kan. 81, 92, 150 P.3d 868 (2007). We decline to extend *Frye*'s requirement to communicate regarding a plea offer to communications about other pretrial issues involving strategy decisions the lawyer must make.

Without application of this higher standard, the issue before us is whether the trial judge abused his discretion by finding there had not been a complete breakdown in communication between Coleman and his attorney.

Analysis

"'The focus of the justifiable dissatisfaction inquiry is on the adequacy of counsel in the adversarial process, not the accused's relationship with his attorney.'" *Pfannenstiel*, 302 Kan. at 761-62 (quoting *United States v. Baisden*, 713 F.3d 450, 454 [8th Cir. 2013]). And, as we have acknowledged, "a lack of communication between a defendant and counsel will not always rise to a level of justifiable dissatisfaction." *State v. Brown*, 305 Kan. 413, 425, 382 P.3d 852 (2016). Trial judges thus do not abuse their discretion in not appointing new counsel if they have """"a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense."""" 305 Kan. at 425 (quoting *State v. Bryant*, 285 Kan. 970, 986, 179 P.3d 1122 [2008]). An inquiry into justifiable dissatisfaction based on a breakdown of communications may ask whether the limited communication impeded presentation of the defense. See *State v. Staten*, 304 Kan. 957, 972-73, 377 P.3d 427 (2016).

Applying these standards, we find no abuse of discretion. As the State argues, Coleman's complaints are like those raised by the defendant in *State v. Crum*, 286 Kan. 145, 158-59, 184 P.3d 222 (2008). There, the defendant complained the public defender failed to spend sufficient time with him and failed to keep him fully informed about the planned defense. Counsel conceded he had not spent much time with the defendant. But he explained he had developed a defense and was ready to proceed to trial. Shortly before trial, the defendant did more than complain. He formally sought time to retain counsel. The court denied the request.

On appeal, we held the defendant failed to establish justifiable dissatisfaction. In reaching this holding, we noted that the trial judge questioned both the defendant and his appointed counsel. That inquiry resulted in counsel's representation that he was preparing for trial and ready to proceed. We summarized the situation: "Crum's unilateral problem stemmed from a dissatisfaction with the amount of time and attention the appointed counsel devoted directly to Crum. An attorney's inability to shower as much personal attention upon a client as he or she would like does not necessarily rise to the level of a conflict of interest." 286 Kan. at 158-59. Coleman's issues here similarly stem from dissatisfaction with the amount of counsel's time devoted directly to him and not from a complete breakdown in communication.

Coleman also argues the trial judge here erred as a matter of law by concluding at the hearing on Coleman's first motion that counsel's ability to meaningfully communicate was impacted by the incomplete status of the investigation. He relies on professional rules of conduct that require attorneys to keep their clients reasonably informed, to promptly comply with reasonable requests for information, and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." KRPC 1.4 (communication) (2023 Kan. S. Ct. R. at 332). The foundation of this argument fails because the rules of professional conduct do "not constitute ineffective and inadequate counsel as a matter of law. [They are] simply one factor to be considered as a part of the totality of the circumstances in making a judicial determination as to whether an accused has been provided representation by effective counsel." *State v. Wallace*, 258 Kan. 639, 646, 908 P.2d 1267 (1995). This is even more true when the complaint involves an alleged lack of communication under KRPC 1.4 because KRPC 1.4 sets a higher standard than the Sixth Amendment test of a complete breakdown in communication. The trial judge did not err by failing to use KRPC 1.4 as the standard against which to measure counsel's communication.

Coleman alternatively suggests we should find a breakdown in communication because the investigator's failure to make progress could have been caught earlier if defense counsel had regular

status updates. But the possibility that earlier and more regular communication might have caught an issue does not mean the lack of communication constituted a complete breakdown in communication establishing justifiable dissatisfaction.

Coleman also notes that his counsel did not improve her communication even after his repeated complaints and the trial judge's suggestions that counsel do better. The trial judge seemed to recognize this, but he also noted that counsel had explained the steps she took to prepare Coleman's defense between the hearings. The trial judge implicitly found her explanations credible and, while noting that she could have done more to communicate with her client, determined the level of communication was not unreasonable. Coleman did not receive as much attention as he might have liked, but that does not as a matter of law require removing defense counsel from the representation. Cf. *Crum*, 286 Kan. at 158-59. The trial judge thus did not make an error of law.

Nor was the trial judge's decision one with which no reasonable person would agree. The trial judge explained his ruling was made in the context of the history of the proceedings and the investigation. Coleman had filed several motions and, at the hearings on the early motions, Coleman expressed his frustration with and a difference of opinion about the proposed defense strategy. The same judge heard all of Coleman's motions and had this context. Given the stage of the proceedings, the stage of the investigation, and the overall history of the proceedings, we conclude others could agree with the trial judge's decision that a complete breakdown in communication had not occurred.

In summary, the trial judge did not abuse his discretion in concluding that things had not reached the level of a complete breakdown in communication supporting a finding of justifiable dissatisfaction.

ISSUE 4: CUMULATIVE ERRORS DO NOT CAUSE REVERSAL

Finally, Coleman argues we should consider the cumulative effect of any errors. Appellate courts analyzing a claim of cumulative error consider the errors in context, the way the trial judge addressed the errors, the nature and number of errors and whether they are connected, and the strength of the evidence. If any of the

errors being aggregated are constitutional, the constitutional harmless error test of *Chapman*, 386 U.S. 18, applies. Under that test, the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020).

We have held the prosecutors repeatedly committed prosecutorial error during closing arguments, but we have found no other errors. Considering the prosecutorial errors in the totality of the record, the context of the errors, the number and nature of the errors, and the strength of the evidence, we conclude beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. *Brown*, 316 Kan. at 172-73. As we have discussed, the prosecutor accurately stated the law at other points in the closing and the trial judge correctly instructed the jury on premeditation. In addition, the State outlined convincing evidence of premeditation, including driving to a remote location, taking multiple shots at close range, and attempting to conceal evidence of the murder. Under the totality of the circumstances, we conclude beyond a reasonable doubt that the cumulative effect of the errors did not affect the jury's verdict.

We thus affirm Coleman's conviction.

Affirmed.

In re Johnson

No. 126,478

In the Matter of SARAH E. JOHNSON, *Respondent*.

(543 P.3d 78)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Indefinite Suspension.*

Original proceeding in discipline. Oral argument held November 2, 2023. Opinion filed February 16, 2024. Indefinite suspension.

Matthew J. Vogelsberg, Chief Deputy Disciplinary Administrator, argued the cause and was on the formal complaint for the petitioner.

No appearance by respondent.

PER CURIAM: This is an attorney discipline proceeding against the respondent, Sarah E. Johnson, of Lawrence. Johnson received her license to practice law in Kansas in September 2001.

On February 17, 2023, the Office of Disciplinary Administrator filed a formal complaint against Johnson alleging violations of the Kansas Rules of Professional Conduct (KRPC). The formal complaint addressed six separate complaints which had been filed with the ODA against the respondent. She failed to file a response in three of the complaints and provided untimely responses in the remaining three complaints. On April 18, 2023, a hearing was held before a panel of the Kansas Board for Discipline of Attorneys. The respondent failed to appear at the hearing.

On June 5, 2023, the panel issued its final hearing report concluding that the respondent violated the following rules: KRPC 1.3 (diligence) (2023 Kan. S. Ct. R. at 331); KRPC 1.4 (communication) (2023 Kan. S. Ct. R. at 332); KRPC 1.16 (termination of representation) (2023 Kan. S. Ct. R. at 377); KRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal) (2023 Kan. S. Ct. R. at 394); KRPC 8.1(b) (knowingly failing to respond to a lawful demand for information) (2023 Kan. S. Ct. R. at 431); KRPC 8.4(d) (conduct prejudicial to the administration of justice) (2023 Kan. S. Ct. R. at 433); and Supreme Court Rule 210 (duty to timely respond to a request for information) (2023 Kan. S. Ct. R. at 263). The panel set forth its findings of fact and conclusions

of law, along with its recommendation on disposition. The relevant portions of the final hearing report are set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

"*Findings of Fact*

. . . .

"12. On September 22, 2021, the respondent was administratively suspended for nonpayment of the annual attorney registration fee. Her license has been suspended since that time.

"Case No. DA13,678

"13. In February 2016, M.D. was convicted of premeditated murder, four aggravated batteries, and criminal possession of a firearm. He was sentenced to [a] hard-25 life sentence for the murder conviction and a consecutive 257-month sentence for the remaining convictions. The Supreme Court of Kansas affirmed M.D.'s convictions on October 25, 2019.

"14. M.D. sought representation from the respondent to prepare and file a K.S.A. 60-1507 to attack his sentence in April 2020.

"15. The respondent agreed to the representation and M.D. paid her $3,050.

"16. On March 22, 2021, the ODA received a complaint from M.D. alleging that the respondent claimed that she had filed a 60-1507 motion for him, but then stopped communicating with him after M.D. asked the respondent for a copy of the motion. M.D. also alleged the respondent failed to send him a copy of the discovery she obtained from his case as he requested.

"17. The ODA opened an investigation into M.D.'s complaint numbered 13,678. On March 31, 2021, the ODA sent the respondent a letter asking her to provide a written response to the complaint within 20 days. The respondent failed to respond to the complaint within the 20[-]day period.

"18. Attorney Bethany Roberts was assigned to investigate the matter. The investigation revealed that the respondent never filed a 60-1507 motion on behalf of M.D.

"19. Roberts sent additional letters to the respondent on April 5, 2021, and May 19, 2021, regarding the investigation of complaint 13,678. The respondent failed to respond to either letter.

"20. The respondent emailed an untimely response to complaint 13,678 to the ODA on July 12, 2021.

"21. The respondent stated that she worked diligently on M.D.'s case and reviewed his entire record which took the entire summer of 2020. She said she remained in frequent contact with M.D., and they spoke once a week.

"22. The respondent stated that the 60-1507 motion was almost finished and ready to be filed; but she never explained why she did not provide a copy to M.D.

"23. The respondent acknowledged not providing M.D. with the copies of the discovery she obtained because she did not see it as a priority.

"24. According to the respondent, in January of 2021 she explained to M.D. that she 'could face serious liability for sending him parts of his discovery that were not properly redacted.'

"25. According to the respondent, in February of 2021 she discovered that phone calls from the prison were being marked as spam and being sent directly to her voicemail. The respondent fixed this problem and notified M.D.'s brother of the issue. The brother indicated that M.D. would call the respondent, but she never received a call.

"26. The respondent explained that her representation with M.D. ended because he failed to call her.

"27. In August of 2021, Investigator Roberts sent the respondent multiple emails and letters regarding the investigation of the complaints. The respondent failed to respond to the emails and letters.

"Case No. DA13,689

"28. The respondent was appointed to represent defendants[] H.F. Jr., J.W., and R.M., in three separate criminal appeals.

"29. In J.W. and R.M., the Supreme Court issued orders on April 12 and 14, 2021, respectively, finding that the respondent had rendered ineffective assistance [of counsel] in each case due to missing deadlines.

"30. The Supreme Court ordered the respondent be removed as counsel and remanded both cases to the district court for appointment of new counsel.

"31. In H.F. Jr., H.F. Jr. and his family attempted to contact the respondent multiple times after she was appointed as his counsel. The respondent never contacted H.F. Jr. or his family members regarding the status of his case.

"32. On April 9, 2021, the Supreme Court issued an order stating that by May 10, 2021, the respondent was to file either (1) the brief; (2) a motion requesting an extension of time; or (3) a notice that the appellant wished to voluntarily dismiss his appeal. The order also stated that the respondent's failure to take action would result in the court finding respondent ineffective, removing her as counsel and remanding the case to the district court for the appointment of counsel.

"33. On April 16, 2021, the Clerk of the Appellate Courts reported the respondent's conduct to the ODA in the three appellate cases.

"34. The ODA docketed the matter for investigation as 13,689 and sent a letter to the respondent on April 19, 2021, asking for a response in 20 days. The respondent failed to respond within 20 days.

"35. The respondent had taken no action in H.F. Jr. by the May 10, 2021, deadline from the Supreme Court order, so, on May 19, 2021, the Supreme Court issued an order finding the respondent rendered ineffective assistance of counsel, removed the respondent from the case, and remanded it to the district court for appointment of counsel. The respondent's inaction caused a delay of approximately ten months [in] H.F. Jr.'s case while he awaited appointment of new counsel.

"36. Roberts was assigned to investigate the complaint. She sent the respondent letters on May 19 and May 30, 2021, asking the respondent to contact her regarding the complaint. The respondent did not respond to the letters.

"37. On July 12, 2021, the respondent sent the ODA an untimely response to complaint 13,689 and indicated that she had been working with a therapist and KALAP to address her 'shortcomings.' She explained that her therapist suspected she had 'undiagnosed ADHD' which disrupts her ability to accurately track the passage of time.

"38. In August 2021, Investigator Roberts sent emails and letters to the respondent asking her to contact Roberts regarding the investigation of the complaints. The respondent failed to respond to the emails and letters.

"Case No. DA13,691

"39. The Johnson County District Court convicted J.J. of three counts of misdemeanor stalking and one count of felony stalking. He was sentenced to 12 months' probation. The Court of Appeals affirmed his convictions.

"40. According to the Kansas Adult Supervised Population Electronic Repository, J.J. was discharged from probation on January 11, 2019.

"41. On September 24, 2019, J.J. filed a pro se 60-1507 motion collaterally attacking his convictions in Johnson County District Court. The language of K.S.A. 60-1507(a) states that only 'a prisoner in custody under sentence of a court of general jurisdiction' may apply for relief under the statute.

"42. On February 7, 2020, the district court dismissed J.J.'s motion for lack of jurisdiction. J.J. filed a notice of appeal.

"43. The respondent was appointed to represent J.J. on appeal. The registry of actions shows the respondent filed two motions on March 2, 2021, and March 31, 2021, respectively, to extend the deadline for filing an appellate brief. The deadline was extended to April 30, 2021.

"44. J.J. filed a complaint with the ODA on April 16, 2021, alleging that he had not received competent counsel.

"45. On April 19, 2021, the ODA docketed the complaint as 13,691 and sent a letter to the respondent asking her to provide a written response to J.J.'s complaint within 20 days. The respondent failed to timely respond.

"46. The ODA assigned Roberts to investigate J.J.'s complaint. Roberts sent the

respondent a letter on May 19, 2021, asking her to contact Roberts regarding the complaint. The respondent failed to respond to the letter.

"47. The Court of Appeals issued an order on May 19, 2021, stating that the respondent failed to file her appellant's brief by the April 30, 2021, deadline making it overdue. It ordered the respondent to file a brief by June 9, 2021, or the appeal would be dismissed for failure to comply with the rules of the court.

"48. J.J. filed a pro se motion to remove the respondent from his appellate case and to appoint new counsel on June 14, 2021.

"49. On June 28, 2021, the Court of Appeals granted J.J.'s motion and remanded the case to allow for the appointment of substitute counsel. The order also directed the respondent to file a motion to withdraw by July 14, 2021. The respondent failed to file a motion to withdraw.

"50. On July 12, 2021, the respondent provided the ODA with an untimely response to J.J.'s complaint. The respondent stated that J.J. had completed his sentence prior to filing his 60-1507 motion making relief unavailable to him under the statute. The respondent claimed that she explained this to J.J.

"51. The respondent claimed that she 'was preparing to file a brief making a novel argument about the lack of remedy for defendants who had typical 1507 grounds for making a collateral challenge to their convictions but had such short sentences, they had no meaningful access to 1507 relief.' But she 'ceased working on his case when [she] learned he was planning to ask for a different attorney.'

"52. Investigator Roberts sent letters and emails to the respondent asking her to contact her regarding the complaint investigation in August 2021, but the respondent failed to respond to her communications.

"Case No. DA13,806

"53. D.S. was convicted of first-degree murder and kidnapping in November 2014. In December 2014, D.S. was sentenced to a hard-25 life sentence for the murder conviction and a consecutive 77-month sentence for the kidnapping conviction. The Supreme Court later confirmed his convictions on appeal.

"54. D.S. filed a pro se K.S.A. 16-1507 motion to collaterally attack his convictions (Case No. 18-CV-754) in March 2018. The motion languished until an attorney was appointed to represent D.S. in March 2020.

"55. D.S. also contacted the respondent to represent him on the 1507 motion in March 2020. The respondent agreed to represent him and sent D.S. an attorney-client retainer agreement dated March 12, 2020.

"56. The retainer agreement stated that D.S. was hiring the respondent 'to provide legal services in connection with Sedgwick County Case 18 CV 0754.' The agreement provided that the respondent would bill her services at an hourly rate of $150 and required a $2,500 advance payment before she would begin working.

"57. D.S. signed the agreement on March 17, 2020, and returned it to the respondent. D.S.'s girlfriend and sister paid the $2,500 advance to the respondent.

"58. The respondent entered her appearance in the case on April 1, 2020. The registry of actions for the case shows no further actions taken by the respondent.

"59. In December 2020, D.S.['s] girlfriend paid an additional $1,000 and D.S. paid $1,000 to the respondent to hire a toxicologist as an expert witness in his case.

"60. D.S.'s $1,000 was returned to his inmate account. D.S.'s girlfriend never got her money back. D.S. does not know whether the respondent used the money to hire a toxicologist.

"61. On January 10, 2022, the ODA received a complaint from D.S. (13,806) stating that the last communication he had with the respondent was in June 2021, and other than the respondent's entry of appearance, he did not receive any other evidence that the respondent had performed any work on his case. The respondent never refunded any money to D.S.'s sister or girlfriend.

"62. The ODA sent a letter by certified mail on January 12, 2022, to the respondent's residential address asking her to provide a written response to D.S.'s complaint. The letter was returned to the ODA as unclaimed on February 9, 2022.

"63. The ODA sent a second letter on February 15, 2022, to the respondent's office address asking her to provide a written response to D.S.'s complaint. The letter was returned to the ODA on May 2, 2022, as 'NOT DELIVERABLE AS ADDRESSED' and 'UNABLE TO FORWARD.'

"64. Between March and April 2022, Investigator Roberts sent letters and emails to the respondent regarding D.S.'s complaint. The respondent failed to respond to the communications.

"65. In April 2022 Disciplinary Administrator Gayle Larkin, pursuant to Supreme Court rule 217(a), issued a subpoena to Lawrence attorney Sherri E. Loveland, chair of the Douglas County Bar Association's Ethics and Grievance Committee, to take the respondent's deposition at Loveland's office on May 13, 2022. Assistant Disciplinary Administrator Katie McAfee personally served the respondent with the subpoena at her residence on April 28, 2022.

"66. On May 12, 2022, the day before the scheduled deposition, the respondent called Disciplinary Administrator Gayle Larkin and asked her to release the respondent from the subpoena. The respondent discussed the personal difficulties she was having such as an inability to properly track the passage of time and a struggle with staying awake. Larkin spoke with her in detail about options available to her, such as taking disabled status, but informed her that the nature of the discussion would not release her from the subpoena.

"67. The respondent failed to appear for the deposition the following day.

"Case No. DA13,810

"68. In August 2014, E.A. was convicted of three counts of identity theft. He received a suspended sentence of 22 months[']' imprisonment and was placed on supervised probation for 18 months. The Court of Appeals later affirmed his convictions. Based on the registry of actions for E.A., his probation was terminated in 2016.

"69. E.A. later contacted the respondent about seeking clemency from the governor regarding his identity theft convictions. According to E.A., the respondent agreed to file a clemency application on his behalf and quoted him a fee of $1,500.

"70. E.A. provided the respondent with a $1,500 check on August 15, 2020. The check was cashed on September 10, 2020.

"71. In December 2020, the respondent met with E.A. at his home and discussed what she could do for him regarding the clemency petition.

"72. E.A. last heard from the respondent in May 2021. E.A. sent multiple texts and made phone calls. The respondent never answered them.

"73. In July 2021, E.A. traveled to the respondent's office to try and speak with her, but she was not there. While at the office building, E.A. spoke to a person who said that the respondent had not been to her office since December 2020.

"74. The ODA received a complaint (13,810) from E.A. on January 6, 2022, regarding the respondent.

"75. The ODA sent a letter by certified mail on January 11, 2022, to the respondent's residential address, asking her to provide a response to E.A.'s complaint. The ODA received the certified mailing receipt on January 18, showing that the letter was delivered on January 13. The respondent failed to respond to the letter.

"76. The ODA sent a second letter by certified mail the respondent's office address, asking her to respond to E.A[.]'s complaint. The letter was returned to the ODA as 'NOT DELIVERABLE AS ADDRESSED' and 'UNABLE TO FORWARD.'

"77. Between March and April 2022, Investigator Roberts sent letters and emails to the respondent and attempted to call her regarding E.A.'s complaint. The respondent failed to respond to the communications.

"Case No. DA13,856

"78. K.S. retained the respondent to file a motion to withdraw his pleas in early 2020. On April 1, 2020, the respondent entered her appearance in K.S.'s criminal case.

"79. K.S. made payments to the respondent totaling $1,775.

"80. The respondent filed a motion on K.S.'s behalf seeking to withdraw his plea.

"81. The respondent took no further action to get the motion set for a hearing.

"82. K.S. was never refunded the money he paid the respondent for his representation.

"83. K.S. filed a complaint with the ODA regarding the respondent. K.S. reported receiving infrequent communications from the respondent and indicated that he was unable to reach her. He stated that the last time he had heard from the respondent was May 2021 during a phone call.

"84. The ODA docketed the matter for investigation as 13,856 and sent a letter to the respondent's business address on June 21, 2022, asking her to provide a written response to K.S.'s complaint. The respondent failed to respond to the letter.

"85. On July 12, 2022, the ODA sent letters by certified mail to the respondent's business and residential address, asking the respondent to provide a response to K.S.'s complaint. The letter sent to the business address was returned to the ODA on July 26, 2022, as 'NOT DELIVERABLE AS ADDRESSED' and 'UNABLE TO FORWARD.' The letter sent to the residential address was returned to the ODA on August 2, 2022, as 'UNCLAIMED' and 'UNABLE TO FORWARD.'

"*Conclusions of Law*

"Service

"86. The respondent failed to appear at the hearing on the formal complaint. It is appropriate to proceed to hearing when a respondent fails to appear only if proper service was obtained. Kansas Supreme Court Rule 215 governs service of process in disciplinary proceedings and requires the disciplinary administrator to serve the respondent with a copy of the formal complaint and notice of hearing no later than 45 days before the hearing on the formal complaint by either personal service, certified mail to the respondent's most recent registration address with the Office of Judicial Administration, or on the respondent's counsel by personal service, first-class mail, or email. 2023 Kan. S. Ct. R. at 268.

"87. In this case, the disciplinary administrator complied with Rule 215 by sending a copy of the formal complaint and the notice of hearing and prehearing conference, *via* certified United States mail, postage prepaid, and regular mail to both the respondent's business address and residential address that the respondent registered with the Office of Judicial Administration more than 45 days in advance of the hearing on the formal complaint. The ODA also sent a copy of the formal complaint and notice of hearing and prehearing conference via email to the respondent's registered business email address and a personal email address.

"88. Additionally, the ODA also made multiple attempts to personally serve the respondent at her residential address. The hearing panel concludes that the respondent was afforded the notice that the Kansas Rules require and more.

"89. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.3 (diligence); KRPC 1.4 (communication);

KRPC 1.16 (termination of representation); KRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal); KRPC 8.1(b) (knowingly failing to respond to a lawful demand for information); KRPC 8.4(d) (conduct prejudicial to the administration of justice); and Supreme Court Rule 210 (duty to timely respond to a request for information), as detailed below.

"KRPC 1.3

"90. Attorneys must act with reasonable diligence and promptness in representing their clients. *See* KRPC 1.3. The respondent failed to diligently and promptly represent her clients. In 13,689, the respondent failed to meet deadlines established by court orders resulting in the court ordering her removal and finding ineffective assistance of counsel. In 13,806, the respondent failed to hire an expert witness for D.S. and failed to take any action to represent him in his 60-1507 motion. In 13,810, the respondent failed to perform any work on E.A.'s clemency petition. In 13,856, the respondent filed a motion to withdraw K.S.'s pleas but failed to take any further action on the case. In all cases, the respondent failed to respond to clients diligently and promptly. Because the respondent failed to act with reasonable diligence and promptness in representing her clients, the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"91. KRPC 1.4(a) provides that '[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.' KRPC 1.4(a). In these cases, the respondent violated KRPC 1.4(a) when she failed to respond to multiple requests from her clients for information regarding the status of their representation. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(a).

"KRPC 1.16

"92. In certain circumstances, attorneys must withdraw from representing a client. KRPC 1.16 provides:

'(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

[…]

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client[.]'

KRPC 1.16. The respondent was required to withdraw from the representation of her clients when her physical health or mental condition impaired her ability to adequately represent them. *See* KRPC 1.16(a)(2). The respondent first indicated her personal difficulties were interfering with the representation of her clients in an untimely email response to complaint 13,689 sent to the ODA on July 12, 2021. The email explained that she is suspected to be suffering from undiagnosed ADHD and has difficulties keeping track of time and meeting deadlines because of this. The respondent took no further action to represent her clients in that matter. The respondent mentioned her mental conditions again when she sought to be excused from a subpoena obligation for another complaint investigation against her. The respondent left a voicemail with Sherri Loveland the evening before she was supposed to give sworn testimony. The respondent explained that she was working with KALAP and was

considering taking disabled status as a reason for why she was unable to go to the sworn testimony. The respondent also called the ODA on May 12, 2022, again explaining her mental impairments and how it impacts her ability to experience time and seeking to be excused from the subpoena obligation. Accordingly, the respondent was aware of her mental condition and that the condition impaired her ability to represent her clients. The respondent therefore had a duty to withdraw from representation of her clients under these circumstances. Because the respondent was required to withdraw from the representation of her clients, the hearing panel finds that the respondent violated KRPC 1.16(a)(2).

"93. KRPC 1.16 also requires the attorney to withdraw from representation when she is discharged. See KRPC 1.16(a)(3). Clearly, in 13,691, J.J. did not want the respondent to continue to represent him after he filed a pro se motion to remove her as counsel and request he be appointed new counsel. After the court granted J.J.'s motion, the respondent should have filed a motion to withdraw from the representation. The respondent failed to do so. The respondent's failure to file a motion to withdraw from the representation delayed J.J.'s case. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.16(a)(3).

"KRPC 3.4(c)

"94. Lawyers must comply with court orders. Specifically, KRPC 3.4(c) provides: '[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.' In 13,689, the respondent knowingly failed to meet deadlines as directed by the court resulting in findings of ineffective assistance of counsel. In 13,691, the respondent was ordered to file a motion to withdraw from representation but failed to do so, contrary to the court's order. In the investigation of 13,806, the respondent was personally served with a subpoena requiring her to submit a sworn statement on May 13, 2022, but the respondent failed to appear. Because the respondent violated the courts' orders her client's cases suffered, and the investigation of 13,806 was hindered. Accordingly, the hearing panel concludes that the respondent violated KRPC 3.4(c).

"KRPC 8.1(b)

"95. Lawyers must cooperate in disciplinary investigations. KRPC 8.1(b) provides that 'a lawyer . . . in connection with a disciplinary matter, shall not: . . . knowingly fail to respond to a lawful demand for information from [a] . . . disciplinary authority.' KRPC 8.1(b). During the disciplinary investigations of the six complaints against the respondent, the respondent knowingly failed to respond to Investigator Roberts['] requests for information regarding each complaint against her. The respondent only sent the ODA an untimely email response to complaints 13, 678, 13,689, and 13,691, but failed to respond to any further requests for information from the investigator or the ODA. Furthermore, the respondent knowingly did not appear at the deposition regarding complaint investigation 13,806 after being personally served. Because the respondent knowingly failed to respond to lawful requests for information during the disciplinary investigations, the hearing panel concludes that the respondent failed to fully cooperate in the investigation in violation of KRPC 8.1(b).

"KRPC 8.4(d)

"96. 'It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.' KRPC 8.4(d). The respondent engaged in conduct that

was prejudicial to the administration of justice in 13,689 when she was appointed to represent J.W., R.M., and H.F. Jr. The respondent prejudiced the administration of justice in J.W.'s case when she failed to timely docket the appeal and respond to the court's order resulting in a finding of ineffective assistance of counsel. The respondent engaged in conduct prejudicial to the administration of justice in R.M.['s] and H.F. Jr.'s cases when she failed to timely file a brief, extension of time, or a voluntary dismissal in response to . . . court orders constituting ineffective assistance of counsel. As such, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"Rule 210(b)

"97. Lawyers must cooperate in disciplinary investigations. Rule 210(b) provides the requirement in this regard. 'An attorney must timely respond to a request from the disciplinary administrator for information during an investigation and prosecution of an initial complaint or a report, a docketed complaint, and a formal complaint.' Rule 210(b). The respondent knew that she was required to forward a written response to the six initial complaints[;] she had been repeatedly instructed to do so in writing by the disciplinary administrator and Investigator Roberts. The respondent knowingly failed to provide a timely response to complaint 13,678, 13,689, and 13,691. The respondent knowingly failed to provide any response to the other initial complaints against her (13,806, 13,810, and 13,856). Accordingly, the hearing panel concludes that the respondent violated Rule 210(b).

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

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

"99. *Duty Violated.* The respondent violated her duty to her clients, the legal system, and the legal profession.

"100. *Mental State.* The respondent knowingly violated her duty.

"101. *Injury.* As a result of the respondent's misconduct, the respondent caused actual injury to her clients and the legal profession. Her actions caused delay in her clients' cases and the respondent failed to complete the work her clients paid to do.

"Aggravating and Mitigating Factors

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

"103. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct. The respondent repeatedly failed to comply with court orders, failed

to communicate with clients, and failed to cooperate with the disciplinary investigation.

"104. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated, KRPC 1.3 (diligence), KRPC 1.4 (communication), [KRPC] 1.16 (termination of representation), KRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), KRPC 8.1(b) (knowingly failing to respond to a lawful demand for information), KRPC 8.4(d) (conduct prejudicial to the administration of justice), and Kan. Sup. Ct. R. 210 (duty to timely respond to a request for information). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"105. *Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Process*. The respondent failed to provide timely written responses to the complaints in this case. The respondent was repeatedly instructed to provide written responses. The respondent failed to otherwise cooperate with the complaint investigations. Specifically, the respondent failed to comply with her subpoena obligation during the investigation in which she was properly served. The respondent's actions amount to bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules and orders of the disciplinary process.

"106. *Vulnerability of Victim*. The respondent's clients were incarcerated individuals who were particularly vulnerable to the respondent's misconduct.

"107. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 2001. At the time of the misconduct, the respondent has been practicing law for more than 20 years.

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

"109. *Absence of a Prior Disciplinary Record*. The respondent has not previously been disciplined in her 20 years of practice.

"110. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. The respondent suffers from some sort of emotional or personal problems as indicated in her response to complaint 13,689. The respondent also alluded to mental health issues and her work with KALAP in her phone call with the ODA. The respondent's personal or emotional problems contributed to her misconduct.

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

'4.41 Disbarment is generally appropriate when:

(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.'

'4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.'

'6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.'

'6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.'

'7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.'

"*Recommendation of the Parties*

"112. The disciplinary administrator recommended that the respondent be suspended for 30 months and be required to undergo a reinstatement hearing.

"*Recommendation of the Hearing Panel*

"113. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be indefinitely suspended. The hearing panel further recommends that prior to reinstatement, the respondent be required to undergo a hearing pursuant to Supreme Court Rule 232.

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

DISCUSSION

In a disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147,

504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2023 Kan. S. Ct. R. at 281). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so the court must determine whether it is supported by clear and convincing evidence. *In re Hodge*, 307 Kan. 170, 209-10, 407 P.3d 613 (2107). If so, the finding will not be disturbed. The court does not reweigh conflicting evidence, assess witness credibility, or redetermine questions of fact when undertaking its factual analysis. *In re Hawver*, 300 Kan. 1023, 1038, 339 P.3d 573 (2014).

Respondent was given adequate notice of the formal complaint, to which she did not file an answer. Respondent was also given adequate notice that the formal complaint was set for hearing before the disciplinary panel. Respondent also failed to appear before the panel.

After the hearing panel issued its report, we ordered oral arguments in this matter under Rule 232(g)(4)(D) (2023 Kan. S. Ct. R. at 296). The matter was set for the November 2, 2023 docket. Several attempts were made by the Clerk of the Appellate Courts to contact the respondent to notify her that her disciplinary case was set for oral argument. The Clerk filed an affidavit setting forth his attempts in contacting the respondent to provide notice of the hearing. Attempts to reach the respondent at her business and residence were sent by phone, email, regular mail, and certified mail, all of which went unanswered. See Rule 206(n) (2023 Kan. S. Ct. R. at 260) (requiring attorneys register contact information including residential and business addresses). The affidavit states that the 2023 November Docket was mailed by regular mail and certified mail to respondent's business and residential addresses. The docket mailed to her business address was returned as "no forwarding address." The certified mail addressed to her residence was returned "as unclaimed and unable to forward" but the docket mailed to her residence by regular mail was not returned. The Clerk sent an appearance letter by regular and certified mail to the

respondent. The certified letter was returned to the Clerk "as unclaimed and unable to forward." The letter sent by regular mail was not returned.

No exceptions were filed in the case, and therefore, the findings of fact and conclusions of law in the hearing panel's final report are deemed admitted. Supreme Court Rule 228(g)(1), (2) (2023 Kan. S. Ct. R. at 288). The evidence before the panel clearly and convincingly established that the charged misconduct violated KRPC 1.3 (diligence), KRPC 1.4 (communication), KRPC 1.16 (termination of representation), KRPC 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), KRPC 8.1(b) (knowingly failing to respond to a lawful demand for information), KRPC 8.4(d) (conduct prejudicial to the administration of justice), and Supreme Court Rule 210.

The only issue left for us to resolve is the appropriate discipline. There are both aggravating and mitigating factors present that affect the degree of discipline warranted. The aggravating factors present include: that respondent has established a pattern of misconduct, she has committed multiple unique offenses, she demonstrated bad faith by intentionally failing to comply with the rules of the disciplinary process, the victims of her actions were particularly vulnerable, and she has substantial experience in the practice of law. The mitigating factors include: the respondent has no prior disciplinary record and she has been suffering from mental health, emotional, and personal problems.

At oral argument, the Disciplinary Administrator's office recommended that we adopt the hearing panel's recommendation to indefinitely suspend respondent's license to practice law and that respondent be subject to a reinstatement hearing under Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293). The court agrees with the panel's recommendation.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Sarah E. Johnson is indefinitely suspended from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(2) (2023 Kan. S. Ct. R. at 281) for violating

KRPC 1.3, 1.4, 1.16, 3.4(c), 8.1(b), 8.4(d), and Supreme Court Rule 210.

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292) (notice to clients, opposing counsel, and courts following suspension or disbarment).

IT IS FURTHER ORDERED that if respondent applies for reinstatement, she shall comply with Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) and be required to undergo a reinstatement hearing.

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