REPORTS

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

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No. 124,535

STATE OF KANSAS, *Appellee*, v. RICHARD DANIEL SHOWALTER, *Appellant*.

(543 P.3d 508)

SYLLABUS BY THE COURT

1. TRIAL—*Establishing Witness Unavailability under Statutory Hearsay Exception—Two Requirements.* To establish witness unavailability under the K.S.A. 2022 Supp. 60-460(c)(2) hearsay exception for depositions and prior testimony, the party seeking to introduce the deposition or prior testimony must show it acted in good faith and made a diligent effort to secure the witness' attendance at trial.

2. EVIDENCE—*Statutory Hearsay Exception for Depositions—Showing of Unavailability Not Required—Requirements.* The K.S.A. 2022 Supp. 60-460(c)(1) hearsay exception for depositions does not require a showing of unavailability, so the party seeking to introduce the deposition under this exception need not show it acted in good faith or made a diligent effort to secure the witness' attendance at trial. Subject to other rules of evidence, when a deposition testimony taken in a criminal trial qualifies as a hearsay exception because it was taken for use in the trial of the action in which it is offered, the party seeking to introduce it must only show (1) the witness is out of the state and the witness' appearance cannot be obtained, unless the offering party procured the witness' absence; or (2) the party offering the deposition has been unable to procure the attendance of the witness by subpoena or other process.

3. SAME—*Hearsay Testimonial Evidence—Admissible under Confrontation Clause of Sixth Amendment—Conditions.* Hearsay testimonial evidence in criminal prosecutions is admissible under the Confrontation Clause of the Sixth Amendment only when (1) the witness is unavailable, and (2) the accused had a prior opportunity to cross-examine the witness.

4. TRIAL—*Unavailability of Witness at Trial—Prosecutor Must Make Good-Faith Effort to Obtain Witness' Presence at Trial.* A witness is unavailable for Confrontation Clause purposes only if prosecutorial authorities have made a good-faith effort to obtain the witness' presence at trial. Constitutional provisions do not require the doing of a futile act, and the lengths to which the prosecution must go to produce a witness is a question of reasonableness.

5. SAME—*Witness in Foreign Country Is Unavailable for Confrontation Clause Purposes.* A witness residing in a foreign country is necessarily unavailable for purposes of the Confrontation Clause.

Appeal from Shawnee District Court; DAVID B. DEBENHAM, judge. Oral argument held September 11, 2023. Opinion filed February 23, 2024. Affirmed.

Debra J. Wilson, of Capital Appeals and Conflicts Office, argued the cause and was on the brief for appellant.

Jodi Litfin, deputy district attorney, argued the cause, and *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: This is Richard Daniel Showalter's direct appeal following his convictions for two counts of first-degree premeditated murder for the deaths of Lisa Sportsman and her 17-year-old cousin, J.P., and one count each of conspiracy to commit first-degree murder and aggravated burglary. Showalter argues the district court erred by: (1) admitting autopsy photographs into evidence, (2) admitting the deposition of an unavailable witness into evidence, and (3) admitting certain statements made by one of Showalter's co-conspirators into evidence. Showalter also contends the cumulative effect of these alleged errors violated his constitutional right to a fair trial. But Showalter failed to preserve his objections to all but one of the autopsy photographs, and for the one he did preserve, the prejudicial effect did not outweigh its probative value. Moreover, the district court properly found the State made sufficient efforts to establish the forensic pathologist—who had moved to New Zealand—was unavailable to testify at trial and thus did not err in admitting his deposition testimony into evidence. Finally, Showalter failed to preserve his evidentiary challenge to his co-conspirator's statements. As a result, there are no errors to accumulate.

FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2018, Ju. P. tried unsuccessfully to contact her niece, Lisa Sportsman, and her 17-year-old son, J.P., who had spent the previous night at Lisa's house in Topeka, Kansas. Ju. P. texted Lisa and called J.P. several times. After failing to reach them, Ju. P. went to Lisa's house and knocked on the doors and windows. Ju. P. left after no one answered but later returned after she was still unable to reach Lisa or J.P. by phone. Lisa's front and

back doors were both locked. At the back of the house, the screens on two bedroom windows had been cut. Ju. P. opened a window and went inside. Once inside, she discovered Lisa and J.P. on the floor, beaten and stabbed to death.

When law enforcement responded to the scene, Ju. P. told them she believed Lisa's estranged husband, Brad Sportsman, had killed Lisa and J.P. A few weeks before her death, Lisa moved to Topeka from Greenleaf, Kansas, where she had lived with Sportsman and his mother, Dema Diederich, in Diederich's house. Several others also lived there, including Lisa's niece and nephew, who Lisa had adopted. Showalter, Matthew Hutto, and Cole Pingel also lived at Diederich's house. In June 2018, Lisa asked Ju. P. to help her leave Sportsman because Lisa did not want to be involved with drugs anymore. Ju. P. brought Lisa and the children to Topeka, where they stayed with Ju. P. for a short time. Sportsman later took the children back to Diederich's house in Greenleaf, and Lisa moved into the Topeka home where she was killed. Ju. P. said Lisa feared Sportsman, who had told Lisa "he was gonna take her out if she had the police come down there and get the kids."

Ju. P. told law enforcement that the day before the murders, Lisa said Sportsman was coming to "check out the house." Ju. P. saw Sportsman leaving Lisa's house and saw Showalter, Hutto, and Pingel standing in front of the yard. Lisa observed that Sportsman and Showalter were wearing all black clothing and that Showalter had a knife in his belt loop. Lisa told Ju. P. that Sportsman planned to come back later that night to bring her some money.

While Ju. P. was talking with law enforcement about the events leading up to the murders, a blue pickup truck belonging to Sportsman's mother drove by. At some point after Ju. P. identified the passing truck to officers, law enforcement located and stopped the truck on a westbound highway in Topeka. Sportsman was driving the truck with Showalter, Hutto, and Pingel as passengers. Law enforcement arrested the four men.

During an interview with law enforcement, Showalter said the men had come to Topeka to look at the condition of Lisa's house and make sure she would not get the kids back. He said they left

after walking around the house for five minutes. When asked about Lisa's death and why the men did not stop to find out what happened, Showalter said he never liked Lisa, he "put up with her and tolerated her," and he did not care what happened to her. During the interview, Showalter also referred to Lisa as a "stupid bitch" and said she did not know when to keep her mouth shut.

When Pingel first spoke with law enforcement, he said the men had just come to Topeka that morning, July 23, around 3 a.m. But Pingel later admitted they went to Lisa's house in Topeka on July 20 so Sportsman could talk to her, but she was not home. Pingel said the men returned to Topeka on July 22 to "take care of business," which he explained meant killing Lisa. Pingel said Sportsman told Showalter and Hutto to kill Lisa, but he denied knowing why Sportsman wanted her killed. Pingel later hinted at a potential motive—he said Sportsman claimed membership in the MS-13 gang and answered to a boss named Penny. Pingel said Lisa talked a lot, could not keep her mouth shut, and "had been telling everyone about the MS-13."

Pingel claimed he did not want to be part of the plan to kill Lisa and did not initially believe the men would kill her. When they arrived in Topeka, Pingel said the men went to a Kwik Shop and then to the Econo Lodge Motel, where Sportsman and Hutto bought methamphetamine and they all discussed the plan to kill Lisa. Sportsman instructed Showalter and Hutto to knock on Lisa's door and rush in when someone answered. He told them to get in and out quickly and not disturb the house. After giving these instructions, Sportsman and Pingel dropped off Showalter and Hutto near Lisa's house and then went to a nearby Kwik Shop where they agreed to meet up afterward. The Kwik Shop was close to a wooded area with a footbridge leading to a street by Lisa's house. Pingel said Showalter had a hammer when they dropped him off. According to Pingel, Showalter returned to the truck with a hammer and a knife and was sweaty, breathing heavily, and had blood on his upper chest and neck. Pingel said they then drove to an area near Forbes Field, where Showalter and Hutto changed clothes and put their dirty clothes in a grocery bag.

Law enforcement searched Sportsman's truck and discovered a pair of black pants, a belt, a black t-shirt, two pairs of black shoes

(one with duct tape on the soles), a roll of duct tape, blue nitrile gloves, a receipt from Dollar General, a hammer, a knife, and three baggies of methamphetamine. Testing revealed blood on the clothing and shoes. These items contained a mixture of DNA from multiple individuals, including Lisa and J.P. The pants and one pair of the shoes contained a partial major male DNA haplotype consistent with Showalter or his biological male relatives. Law enforcement later located a second pair of black pants in the wooded area where Pingel said Showalter and Hutto changed clothes.

During its investigation, law enforcement received information from Dominick Ford, Showalter's cellmate at the Shawnee County Jail. Ford claimed Showalter told him the location of the weapons used to kill Lisa and J.P. Ford said Showalter wanted him to use this information as leverage to get released from jail so Ford could kill Pingel and find an alibi witness willing to place Showalter somewhere other than Lisa's house at the time of the murders. Ford said the weapons could be found in the same wooded area where law enforcement had found the second pair of black pants. Based on this information, law enforcement conducted another search of the area in March 2019. Near a tree, they found two sheathed knives wrapped in a black dress shirt.

The State charged Sportsman, Showalter, Hutto, and Pingel with various crimes related to the murders. Relevant to this appeal, the State charged Showalter with two counts of first-degree premeditated murder and two alternative counts of felony murder. The State also charged Showalter with one count each of conspiracy to commit first-degree murder, aggravated burglary, attempted first-degree murder, possession of methamphetamine, solicitation to commit first-degree murder, and aggravated intimidation of a witness.

The State presented the evidence outlined above to a jury at trial. In addition, the jury heard testimony from several witnesses about Showalter's relationship with Sportsman. Witnesses testified Sportsman was a leader who imposed his will on others, and Showalter did anything Sportsman asked him to do. Showalter even described himself as "Brad's enforcer" and said he did Sportsman's "dirty work." Witnesses also testified Sportsman hated Lisa, the two had a rocky relationship, and the children were a point of contention between them. Witnesses reported Lisa was afraid of Sportsman and was scared he would hurt her and take the children. Several witnesses testified about

Sportsman's claimed membership in MS-13 and his boss Penny. About a week before the murders, Sportsman told Diederich, his mother, that his boss Penny told him he or Lisa would have to die, and Sportsman would have to decide who it would be. Diederich claimed that soon after, she saw Sportsman talking to Showalter and heard Showalter say, "'I don't have a problem killing the bitch.'" Although scared, Diederich did not think Sportsman would kill Lisa.

The jury found Showalter guilty of both counts of premeditated first-degree murder, both alternative counts of felony murder, conspiracy to commit first-degree murder, and aggravated burglary. The jury found Showalter not guilty of the remaining charges. At sentencing, the district court merged the felony murder convictions with the premeditated first-degree murder convictions and sentenced Showalter to two consecutive hard 50 life sentences. The court also imposed a consecutive 146-month term of imprisonment for the conspiracy conviction and a concurrent 41-month term of imprisonment for aggravated burglary.

This is Showalter's direct appeal. 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)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court); K.S.A. 2022 Supp. 21-5402(b) (first-degree murder is off-grid person felony).

ANALYSIS

Showalter claims the district court erred by (1) admitting autopsy photographs into evidence; (2) declaring the forensic pathologist, who had moved to New Zealand, unavailable to testify at trial and admitting his deposition testimony into evidence; and (3) admitting Sportsman's statements claiming membership in MS-13 into evidence. Showalter also contends the cumulative effect of these alleged errors deprived him of his constitutional right to a fair trial. We address each of Showalter's claims in turn.

1. *Autopsy photographs*

Showalter claims the district court erred by admitting 10 autopsy photographs, marked as Exhibits 126-135, into evidence at trial. He

claims these photographs were gruesome, repetitious, and prejudicial to his defense, serving only to inflame the passions of the jury.

a. *Additional relevant facts*

Before trial, Showalter filed a "Motion to Exclude Gruesome Photographs" covering graphic photographs that the State intended to introduce at trial, including the autopsy photographs. The State opposed the motion, arguing the photographs were relevant to show the cause and manner of the victims' deaths and to establish the two intruders, armed with a knife and hammer, killed the victims intentionally and with premeditation.

At a pretrial hearing on the motion, the district court asked defense counsel to identify—by exhibit number—the gruesome and prejudicial photographs from the autopsy Showalter sought to exclude. In response, counsel specifically identified the 32 autopsy photographs presented in Exhibits 112-113, 115-121, 125-126, 139-140, 145-147, 149-157, 159-162, 166, 168, and 170. Relevant here, defense counsel did not identify as gruesome or prejudicial the autopsy photographs in Exhibits 127-135 and did not argue they should be excluded at trial for that or any other reason.

The parties presented their arguments on each individual autopsy photograph identified by defense counsel as gruesome, during which the State agreed to withdraw several exhibits. The court ruled contemporaneously on the probative value, gruesome nature, and undue prejudice of each individual photograph and ultimately denied Showalter's motion to exclude the identified autopsy photographs, except for those the State had agreed to withdraw.

At trial, Topeka Police Detective Jason Judd, the lead investigator in the case, testified he was present for the victims' autopsies, during which the autopsy photographs were taken. The State then moved to admit into evidence the autopsy photographs contained in Exhibits 103-170, except for those it had agreed to withdraw before trial. Showalter renewed his "previous objections that were ruled on at the pretrial motion" hearing and argued many photographs were repetitive, prejudicial, and irrelevant.

The district court asked whether the parties had reviewed at the pretrial hearing all the photographs the State was seeking to introduce, and defense counsel responded, "All the [photographs] that the State is admitting right now have been reviewed." The court then overruled Showalter's objections and admitted the autopsy photographs at issue into evidence, including Exhibits 126-135. Along with the autopsy photographs, the jury also viewed the video deposition testimony of Dr. Charles Glenn, the forensic pathologist who conducted the victims' autopsies. During his deposition, Dr. Glenn had extensively reviewed the autopsy photographs in Exhibits 126-135. Prior to Dr. Glenn's video deposition being played for the jury, Showalter renewed his objections to all the autopsy photographs.

On appeal, Showalter claims the district court erred by admitting Exhibits 126-135 into evidence because the probative value of the photographs was substantially outweighed by the risk of undue prejudice. Showalter asserts he preserved this claim for review by lodging contemporaneous objections at trial when the photographs were introduced into evidence through Detective Judd and Dr. Glenn. Although the State does not address preservation in its brief, it merits review here.

b. *Preservation*

The contemporaneous objection rule is set forth in K.S.A. 60-404, which generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Ballou*, 310 Kan. 591, 613-14, 448 P.3d 479 (2019) (discussing K.S.A. 60-404 in detail); see also *State v. Gaona*, 293 Kan. 930, 956, 270 P.3d 1165 (2012) (characterizing preservation as a "prudential rather than jurisdictional obstacle to appellate review"). Relevant here, any 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).

The purpose of the rule is self-evident: a timely and specific objection allows the district court to consider as fully as possible—in context—whether the evidence should be admitted, which

reduces the chances of using tainted evidence and thus avoids possible reversal and a new trial. *State v. King*, 288 Kan. 333, 341-42, 204 P.3d 585 (2009) (explaining purpose behind contemporaneous-objection rule of K.S.A. 60-404). Kansas appellate courts have sometimes declined to strictly apply the contemporaneous objection rule in certain contexts, but only after finding the underlying purpose for the rule has been satisfied. See, e.g., *State v. Hart*, 297 Kan. 494, 510-11, 301 P.3d 1279 (2013); *State v. Spagnola*, 295 Kan. 1098, 1103, 289 P.3d 68 (2012); *State v. Breedlove*, 295 Kan. 481, 490-91, 286 P.3d 1123 (2012).

Here, Showalter lodged a timely objection to Exhibits 126-135 at trial. But the question is whether his objection at trial was specific enough to allow the district court to consider the claim of error he now presents to us on appeal: that Exhibits 126-135 should not have been admitted into evidence because the probative value of the photographs was substantially outweighed by the risk of undue prejudice. As explained below, the record shows Showalter failed to preserve his evidentiary objections to Exhibits 127-135 but sufficiently preserved his objection to Exhibit 126.

i. Exhibits 127-135

Showalter concedes he did not object to Exhibits 127-135 at the pretrial hearing on his motion to exclude gruesome photographs. This failure deprived the district court of any opportunity to consider at the pretrial hearing whether the probative value of Exhibits 127-135 was substantially outweighed by the risk of undue prejudice.

When Detective Judd testified at trial, the State moved to admit the autopsy photographs in Exhibits 103-170, except for those it had withdrawn. Showalter renewed his objection from his written motion and arguments presented by counsel at the pretrial hearing on his motion to exclude gruesome photographs, after which the following discussion took place:

"[DEFENSE COUNSEL]: Judge, I would like to renew my previous objections that were ruled on at the pretrial motion. I have made numerous objections to individual photos. I can go through those again. They would be the same as what was ruled on previously by the Court, and I would like to renew those.

"THE COURT: Okay. I just want to make sure I remember which ones. The pretrial you are talking about, is that the one that we had the first time.

"[DEFENSE COUNSEL]: I believe it was November of 2019.

"THE COURT: Okay. That pretrial. Okay. And then, I'm asking for help on this because I haven't gone through all of that.

"[DEFENSE COUNSEL]: I can walk through all of them.

"THE COURT: No, I just need to know, did we go through all the photographs at that time?

"[DEFENSE COUNSEL]: *All the ones that the State is admitting right now have been reviewed.*

"THE COURT: Okay. And I ruled on whether they would be admissible or not.

"[DEFENSE COUNSEL]: *Correct*.

"THE COURT: I appreciate you telling me that, because I need to know whether I have ruled on these previously, and I'm gonna give any additional objections you have on whether it's—it's a new objection completely, so . . .

"[DEFENSE COUNSEL]: I do have one additional objection.

"THE COURT: Okay.

"[DEFENSE COUNSEL]: At the time, I don't know whether we discussed, kind of, the cumulative affect [*sic*] of so many photographs. There are a lot of repetitive photographs in general. The cause and manner of death in this case are not at issue, and I think that that could have a very prejudicial affect [*sic*], especially given that there are a number of photographs that are taken after procedures have been done to the bodies including where they have shaved their heads, or removed skin, or opened up the skull. I think that can be very prejudicial, and it's not relevant in this case, because there is no issue as to the cause or manner of death.

"THE COURT: I'm gonna allow you to speak in just a second. If I remember right, we went through each one of those and even the ones on the autopsy where the heads were shaved, because that was the only way we were able to see the knife wounds in some of those head wounds which ones the head was shaved. It's—that's my memory of that. We went through those in that manner. Does the State have anything they want to address on that?

"[PROSECUTOR]: Just briefly, Judge. We did have a hearing in which all of these photographs were gone through one at a time. The exhibit list that you have notes a certain number of the exhibits that are withdrawn, and that was the result of the hearing where there was consideration for the cumulative nature of some of the pictures. In those instances, the Court either ruled or the State agreed to withdraw those pictures for that purpose. I think all of the arguments that I would make on this point have previously been made at that hearing, and I believe the objection should be overruled.

"THE COURT: I am going to admit the photograph[s]. I am going to admit those in groups for the record, and they will be from 103 to the first one that was withdrawn, 103 to 114, and I'll note 115 and -16 are withdrawn, and I'll do that for all the way through. And with somebody looking at the record that we are on, doesn't go, 'Where is 115 and 116?' And if I go 103 to 170, it looks like they are all admitted. So just for the record, that's how I'm gonna do it. Thank you for the arguments, though.

"(WHEREUPON, the following proceedings were had in the presence of the jury; to-wit:)

"THE COURT: The Court is going to admit State's Exhibit Number 103 through 114. I'll note 115 and 116 are withdrawn. The Court will admit 117 through 138. I'll note 139 and 140 were withdrawn. The Court will admit Exhibits 141 through 145. I'll note that 146 and 147 were withdrawn. The Court will admit Exhibits 148 through 154. I'll note 155 was withdrawn. The Court will admit Exhibits 156 through 160. I'll note that 161 was withdrawn. And then Exhibits 162 through 170 will be admitted."

Of course, we now know defense counsel incorrectly represented to the district court that (1) Showalter objected to and (2) the court individually reviewed for admissibility, Exhibits 103-170 at the pretrial hearing, except for those the State had withdrawn. In fact, Showalter never lodged a specific objection to Exhibits 127-135, and the court never reviewed or considered these exhibits. Because the trial transcript shows he objected to Exhibits 103-170 solely by renewing his pretrial objections, Showalter could not have lodged a specific objection to Exhibits 127-135 at trial.

Showalter's failure to specifically object to Exhibits 127-135 at trial deprived the district court of the opportunity to review the exhibits or consider their probative value against risk of undue prejudice—the widely recognized purpose of the contemporaneous objection rule under K.S.A. 60-404. Although acknowledging the court never reviewed Exhibits 127-135, Showalter argues on appeal the court abused its discretion by finding these photographs were not unduly prejudicial and allowing them to be introduced at trial. But Showalter's argument is illogical. He cannot challenge the court's discretion in comparing the probative value of Exhibits 127-135 to their prejudicial effect if he never presented the actual photographs in Exhibits 127-135 to the court for review.

In sum, Showalter failed to preserve his argument that the district court abused its discretion by finding Exhibits 127-135 were not unduly prejudicial and admitting those exhibits into evidence.

ii. Exhibit 126

Showalter also objected to Exhibit 126 at the pretrial hearing. In this instance, the parties presented extensive argument on its

admissibility and, after finding Exhibit 126 was not more prejudicial than probative, the district court overruled Showalter's motion to exclude and held the exhibit was admissible. At trial, Showalter globally objected to Exhibits 103-170 by renewing his pretrial objections, which included Exhibit 126. Thus, Showalter has preserved his argument that the court abused its discretion by finding Exhibit 126 was not more prejudicial than probative.

c. *Standard of review*

When reviewing a district court's decision to admit photographic evidence, the threshold issue is whether the evidence is relevant. Evidence is relevant if it has "any tendency in reason to prove any material fact." K.S.A. 60-401(b). All relevant evidence is admissible unless some other rule provides for its exclusion. See K.S.A. 60-407(f). Notably, we interpret K.S.A. 60-445 as permitting the district court to exclude relevant evidence if its probative value is substantially outweighed by the risk of undue prejudice. *State v. Cross*, 216 Kan. 511, 518, 532 P.2d 1357 (1975). "[T]he decision to admit the photographs over a challenging party's objection that they are overly repetitious, gruesome, or inflammatory, i.e., unduly prejudicial, is reviewed for an abuse of discretion." *State v. Williams*, 308 Kan. 1320, 1333, 429 P.3d 201 (2018). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021). As the party asserting error, Showalter bears the burden of proving the district court abused its discretion. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

d. *Discussion*

Exhibit 126 is a photograph from J.P.'s autopsy showing the top of J.P.'s skull with the skin removed. Showalter concedes Exhibit 126 was relevant but claims the district court abused its discretion by admitting it because its probative value was substantially outweighed by the risk of undue prejudice.

At the pretrial hearing, the State argued the photograph was relevant to show premeditation and the violent nature of the crime

in a way that the rest of the autopsy pictures did not. Showalter objected to its admission, claiming the photograph of J.P.'s skull after Dr. Glenn removed the skin "is far more gruesome and prejudicial than other photographs. I think the Court has to use extreme caution in introducing any photographs after that type of procedure has been [performed], because that does not reflect the state of the body prior to those intervening medical procedures." The court ultimately determined Exhibit 126 was not more prejudicial than probative, therefore it was admissible:

"On 126, I do understand [defense counsel's] objection to that. Normally, I do not like to see autopsy photographs. They have to have a very specific purpose in which—why they are being shown. In this case, I believe this photograph meets this.

"It is not a pleasant photograph to look at, but when you look at State's Exhibit 126, that is—that shows three defects to the back crown or skull area of the person in this case with the hair removed. When you look at 126, it reveals the extent of damage that was to the skull. So it—although it is a post autopsy photograph, it shows the amount of force that was used to crack the skull. So I do not find that it is—I find that there's a valid and relevant reason. It's not more prejudicial than probative. I'm gonna admit State's Exhibit 126, also."

Like the trial court, we find Exhibit 126 was not unduly prejudicial. First, the photograph is probative to the manner and cause of death. That Showalter does not challenge cause of death or the number or severity of the wounds is immaterial to whether the evidence is probative of a material fact pursuant to K.S.A. 60-401(b). We have repeatedly held the State must prove cause of death at trial even when the defendant concedes it. *Garcia*, 315 Kan. at 380 (citing *State v. Williams*, 308 Kan. 1320, 1334, 429 P.3d 201 [2018]; *State v. Backus*, 295 Kan. 1003, 1012, 287 P.3d 894 [2012]).

Second, the photograph is uniquely probative to the violent nature of the crime in a way that the rest of the autopsy pictures are not. The State introduced many photographs from the autopsy at trial. The autopsy photographs can be divided into three groups: (1) photographs from Lisa's autopsy showing external injuries, both before and after the body was washed; (2) photographs from J.P.'s autopsy showing external injuries, both before and after the body was washed; and (3) photographs from J.P.'s autopsy, show-

ing internal injuries to the skull, brain, dura, and large neck muscle. Exhibit 126 falls into the third group of autopsy photographs. The extensive internal damage to J.P.'s skull shown in Exhibit 126 directly corresponds to the external injuries to J.P.'s head in Exhibit 125. Thus, one can readily infer from the considerable force used to commit the crime that the perpetrator's conduct was intentional.

Third, the photograph is probative in that it materially assisted the jury's understanding of the pathologist's medical testimony and corroborated the pathologist's testimony and report. See *State v. Robinson*, 293 Kan. 1002, 1028-29, 270 P.3d 1183 (2012); *Williams*, 308 Kan. at 1334. We have long recognized photographs can depict injuries in a way that a coroner's testimony cannot. *Garcia*, 315 Kan. at 380 (citing *State v. Dupree*, 304 Kan. 43, 65, 371 P.3d 862 [2016]).

We agree with Showalter that Exhibit 126 may be gruesome. But, as this court has often said, "'[g]ruesome crimes result in gruesome photographs.'" *Garcia*, 315 Kan. at 380; *State v. Lowry*, 317 Kan. 89, 98, 524 P.3d 416 (2023); *State v. Alfaro-Valleda*, 314 Kan. 526, 536, 502 P.3d 66 (2022); *Williams*, 308 Kan. at 1334 (quoting *State v. Green*, 274 Kan. 145, 148, 48 P.3d 1276 [2002]). And although we also agree with Showalter that the photograph may be prejudicial to his case, "[a]ll evidence that is derogatory to the defendant is by its nature prejudicial to the defendant's claim of not guilty." *State v. Clark*, 261 Kan. 460, 477, 931 P.2d 664 (1997). The question is whether the evidence is "unduly prejudicial." *Garcia*, 315 Kan. at 381. "Photographs are unduly prejudicial and are erroneously admitted when they are unduly repetitious, are particularly gruesome, add nothing to the State's case, and bring about a wrong result." *Clark*, 261 Kan. at 478.

We have already determined the photograph may be gruesome. But we also have determined the photograph is not repetitive and had substantial probative value here. In balancing these competing interests, we conclude, as the district court did, that the probative value of Exhibit 126 was not outweighed by the risk of undue prejudice. Thus, the district court did not abuse its discretion in admitting this photograph into evidence.

2. *Admitting Dr. Glenn's deposition testimony into evidence at trial*

Showalter challenges the district court's decision to admit Dr. Glenn's deposition testimony into evidence after finding he was unavailable to testify at trial.

a. *Additional relevant facts*

Before trial, the State moved to depose Dr. Glenn under K.S.A. 22-3211(3), alleging he was an essential witness who may be unable to attend trial and his testimony would be material to establish the cause and manner of Lisa's and J.P.'s deaths. The State explained Dr. Glenn was moving to New Zealand to practice medicine before the scheduled trial and thus would be outside the jurisdiction of the court and the United States when the trial took place. The parties submitted an agreed proposed order authorizing the State to conduct a transcribed and videotaped deposition in Showalter's presence. The district court signed the agreed proposed order granting the motion.

Dr. Glenn's deposition took place on October 29, 2018. Showalter appeared in person and through his counsel. Dr. Glenn testified he would not be employed as the Shawnee County Coroner after November 15, 2018, because he was moving to Auckland, New Zealand, to work as a forensic pathologist there. He said his last day in the United States would be November 24, 2018. When asked, Dr. Glenn acknowledged he had been personally served with a subpoena to testify in Showalter's upcoming jury trial. The prosecutor then asked Dr. Glenn whether he would be willing to come back to testify at Showalter's trial. Rather than responding to the question in the context of Showalter's trial, Dr. Glenn responded in the context of all outstanding trials for which he had received subpoenas: "It's possible for me to testify in some of these. As far as coming back, I realize it's a possibility . . . however, I think it's impossible for me to come back for all of the jury trials I have subpoenas for, just because I don't think I'll have enough time off . . . and can keep my employment if I was spending weeks at a time away."

On April 1, 2019, the State moved to admit Dr. Glenn's deposition testimony. Because Dr. Glenn had moved to New Zealand,

the State expected he would not return to the United States for Showalter's trial. The State noted it had issued a subpoena for Dr. Glenn but suggested he would likely be outside the district court's jurisdiction at the time of the trial. The State acknowledged Dr. Glenn's global statement at the deposition suggesting the possibility of returning to the United States to testify in some cases but also stating it would be impossible to return for all cases due to the distance and lack of time off.

Represented by a new attorney, Showalter objected to the State's motion. He argued in part that the State had not met its burden to establish Dr. Glenn was unavailable under K.S.A. 22-3211(8) and that using the deposition testimony would violate his constitutional right to confront witnesses testifying against him. At a pretrial hearing, Showalter reiterated his objection that the State had failed to establish Dr. Glenn's unavailability and the resulting confrontation violation. The State argued the district court should make the unavailability determination at the time of trial, and the court agreed to reserve its ruling until then.

On May 1, 2020, the district court issued a pretrial order addressing various pleadings, including the State's motion to admit Dr. Glenn's deposition testimony. The court noted Showalter's April 28, 2020, jury trial had been continued indefinitely due to the COVID-19 pandemic and had not yet been rescheduled. Even so, the court found Dr. Glenn was unavailable under K.S.A. 22-3211(8)(b) because he lived in New Zealand and the court lacked authority to compel his attendance at Showalter's trial. The court concluded the use of Dr. Glenn's deposition at trial would not violate Showalter's constitutional confrontation rights and granted the State's motion to admit Dr. Glenn's deposition testimony.

Showalter's jury trial finally began on July 12, 2021. After opening statements, the district court held a hearing outside the presence of the jury to address several issues, including Dr. Glenn's unavailability. In relevant part, the State presented testimony from Amber Gonzalez, a legal assistant with the Shawnee County District Attorney's Office. Gonzalez testified she had been in contact with Dr. Glenn for the past couple of years via phone and email to find out whether he could return from New Zealand to testify in various cases. Gonzalez explained she sent separate

emails to Dr. Glenn for each case asking if he could return to testify live at trial. In each case, Dr. Glenn always responded he could not do so because he was in New Zealand. Gonzalez testified she did not expect Dr. Glenn's response to be any different when she contacted him to ask about whether he could return to testify live at Showalter's trial. Gonzalez emailed Dr. Glenn the morning before Showalter's jury trial began and asked if he could attend the trial that week. Dr. Glenn responded he could not return due to the travel restrictions in place.

Showalter renewed his objection to the admission of Dr. Glenn's deposition and questioned whether Dr. Glenn was truly unavailable. Showalter argued that asking Dr. Glenn to appear the day before trial was scheduled to begin did not constitute a good-faith effort by the State to secure his attendance. Relying on the evidence just presented as well as its prior order, the district court found Dr. Glenn unavailable under K.S.A. 22-3211(8)(b) and concluded the use of his deposition at trial would not violate Showalter's constitutional confrontation rights. Over Showalter's objection, the district court admitted Dr. Glenn's video deposition into evidence after finding he would remain unavailable throughout the trial. The jury watched the State's direct examination of Dr. Glenn. Showalter asked that the rest of the deposition not be played, so the jury did not view Dr. Glenn's cross-examination, redirect examination, or recross-examination.

b. *Discussion*

Showalter relies on K.S.A. 22-3211(8) and K.S.A. 60-459(g)(4), as well as the Sixth Amendment's Confrontation Clause and section 10 of the Kansas Constitution Bill of Rights, to challenge the district court's decision to admit Dr. Glenn's deposition testimony into evidence.

i. K.S.A. 22-3211(8) and K.S.A. 60-459(g)(4)

Showalter argues the district court erred in finding Dr. Glenn unavailable under K.S.A. 22-3211(8), which he claims is a statutory prerequisite to admitting deposition testimony into evidence at trial. Thus, our starting point is K.S.A. 22-3211(8). Relevant

here, the statute permits a deposition to be used at trial if it appears:

- the witness is out of the state and his or her appearance cannot be obtained, unless the offering party procured the witness' absence, K.S.A. 22-3211(8)(b); or
- the offering party cannot procure the witness' attendance by subpoena or other process, K.S.A. 22-3211(8)(d).

The district court granted the State's motion to admit Dr. Glenn's deposition testimony into evidence under K.S.A. 22-3211(8) based on findings that Dr. Glenn was out of the state, his appearance at trial could not be obtained, and the State had been unable to procure Dr. Glenn's attendance by subpoena or other process. Showalter does not challenge these findings on appeal. Instead, he claims that under the facts presented here, K.S.A. 22-3211(8) incorporates the witness unavailability requirements of K.S.A. 2022 Supp. 60-460(c)(2) provided in the hearsay exception statute. To establish witness unavailability under the hearsay exception statute, K.S.A. 60-459(g)(4), the prosecution "must show it acted in good faith and made a diligent effort . . . [to] secure the witness' attendance at trial" as articulated in *State v. Keys*, 315 Kan. 690, 709, 510 P.3d 706 (2022). Relying on this rule, Showalter argues the undisputed facts establish the State failed to act in good faith and make a diligent effort to secure Dr. Glenn's *voluntary* attendance at trial, and so Dr. Glenn was not unavailable as a matter of law and his deposition testimony was inadmissible under K.S.A. 22-3211(8).

Showalter's argument fails as it incorrectly assumes the unavailability requirement of K.S.A. 2022 Supp. 60-460(c)(2) governs the admission of Dr. Glenn's depositions here. K.S.A. 2022 Supp. 60-460 requires all hearsay evidence be excluded unless it fits within a specific statutory exception. Subsection (c) creates two categories of hearsay exceptions for depositions and prior testimony. Showalter relies on the second category to argue the judge must find witness unavailability before a deposition can be admitted. The second category is set forth in subsection (c)(2), which provides a hearsay exception if the judge finds, among other things,

- *that the declarant is unavailable* and
- the witness testimony was given
    - *in another action*, or
    - in a preliminary hearing or former trial *in the same action*, or
    - in a deposition for use as testimony *in the trial of another action*. K.S.A. 2022 Supp. 60-460(c)(2).

Although Showalter is correct that K.S.A. 2022 Supp. 60-460(c)(2) requires the judge to make a finding of unavailability, this subsection of the statute does not apply here because Dr. Glenn's deposition testimony was not given *in another action*, or in a preliminary hearing or former trial *in the same action*, or in a deposition for use as testimony *in the trial of another action*. Instead, Dr. Glenn's deposition testimony was admissible under the first category of hearsay exceptions for depositions and prior testimony set forth in subsection (c)(1), which provides a hearsay exception for deposition testimony

"taken in compliance with the law of this state *for use as testimony in the trial of the action in which offered*." (Emphasis added.) K.S.A. 2022 Supp. 60-460(c)(1).

Here, the State sought to depose Dr. Glenn before trial to establish the cause and manner of Lisa's and J.P.'s deaths because Dr. Glenn was moving to New Zealand before the scheduled trial and would be outside the court's jurisdiction when the trial took place. Thus, his deposition testimony falls squarely under the hearsay exception in K.S.A. 2022 Supp. 60-460(c)(1). The purpose of taking a deposition under K.S.A. 22-3211 is to perpetuate testimony. *State v. Hernandez*, 227 Kan. 322, 327-28, 607 P.2d 452 (1980). K.S.A. 22-3211(8)(b) allows the use of a deposition at trial if it appears the witness is out of the state, the witness' appearance at trial could not be obtained, and the State had been unable to procure the witness' attendance by subpoena or other process. This requirement does not place upon the State the increased burden of showing unavailability as does K.S.A. 2022 Supp. 60-460(c)(2). The district court did not err by admitting Dr. Glenn's

deposition testimony into evidence at trial under K.S.A. 22-3211(8).

ii. Confrontation Clause

Showalter argues the district court's decision to admit Dr. Glenn's deposition testimony into evidence upon a finding he was unavailable to testify at trial violated his right to confront witnesses guaranteed in the Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. The Sixth Amendment's Confrontation Clause provides an accused "shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; see also *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (holding Sixth Amendment's Confrontation Clause binds States through the Fourteenth Amendment). Section 10 of the Kansas Constitution Bill of Rights guarantees "[i]n all prosecutions, the accused shall be allowed . . . to meet the witness face to face." Kan. Const. Bill of Rights, § 10. Showalter does not suggest that our state Constitution grants greater protection to the accused than does the Sixth Amendment's Confrontation Clause, so we apply the Sixth Amendment Confrontation Clause standard to his section 10 confrontation claim. Our decision to apply the Sixth Amendment standard is based on the arguments presented in this case and should not be read to preclude a potential future argument claiming section 10 grants greater protection to the accused than the Sixth Amendment.

"Issues related to confrontation under the Sixth Amendment to the United States Constitution or the Kansas Constitution Bill of Rights, § 10 raise questions of law over which this court exercises de novo review." *Brown*, 285 Kan. at 282. In *Crawford v. Washington*, the United States Supreme Court held hearsay testimonial evidence in criminal prosecutions is admissible under the Confrontation Clause of the Sixth Amendment only when (1) the witness is unavailable and (2) the accused had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

The State correctly points out that Showalter's arguments focus entirely on the district court's unavailability determination and

the State's efforts to establish Dr. Glenn's unavailability. Showalter does not challenge the adequacy of his ability to cross-examine Dr. Glenn during the deposition, likely because Showalter appeared in person and through his counsel at the deposition. Given he does not challenge it, we will not address that issue. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (An issue not briefed is deemed waived or abandoned.).

A witness is "unavailable" for Confrontation Clause purposes only if "prosecutorial authorities have made a good-faith effort to obtain [the witness'] presence at trial." *Hardy v. Cross*, 565 U.S. 65, 69, 132 S. Ct. 490, 181 L. Ed. 2d 468 (2011) (quoting *Barber v. Page*, 390 U.S. 719, 724-25, 88 S. Ct. 1318, 20 L. Ed. 2d 255 [1968]). That said, constitutional provisions "[do] not require the doing of a futile act," and "[t]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *abrogated on other grounds by Crawford*, 541 U.S. at 60.

Showalter argues the district court erred in finding Dr. Glenn unavailable for Confrontation Clause purposes, and thus erred in admitting Dr. Glenn's deposition testimony, because the State failed to make a good-faith effort to secure Dr. Glenn's live presence at trial. In support, Showalter claims "Dr. Glenn expressed a willingness to return and testify in this case" but the State did not ask him if he would be willing to do so until the night before Showalter's trial began.

Contrary to Showalter's assertion, Dr. Glenn never expressed a willingness to return and testify live *in this case*. Dr. Glenn generally commented that coming back to testify in some cases was possible but he would be unable to keep his new job in New Zealand if he was spending weeks at a time away. After Dr. Glenn moved to New Zealand, the State maintained contact with him. The district court rescheduled Showalter's jury trial multiple times and continued it indefinitely on March 20, 2020, because of the COVID-19 pandemic. The State issued subpoenas via email to Dr. Glenn on March 18, 2019; April 30, 2019; August 2, 2019; and March 10, 2020. Showalter's trial was eventually scheduled for July 12, 2021. Gonzalez testified that whenever she emailed Dr.

Glenn about returning for other jury trials, his response was always the same: he could not come to the United States to testify because he was in New Zealand. Gonzalez did not expect Dr. Glenn's answer to be any different when she emailed him the day before Showalter's trial was scheduled to begin. Indeed, Dr. Glenn responded he could not return for the trial due to travel restrictions. It is unclear from the record whether international travel restrictions due to the COVID-19 pandemic permitted travel from New Zealand to the United States at that time, but the State suggested a New Zealand resident would have been required to quarantine for three weeks following international travel.

Although the State might have contacted Dr. Glenn earlier than the day before trial was scheduled to begin, reasonable and good-faith efforts here did not require the State to do so. See *Roberts*, 448 U.S. at 74 (measure of State's effort is one of reasonable diligence and the law does not require the doing of a futile act). In the almost three-year period between when Dr. Glenn moved to New Zealand in 2018 and Showalter's trial in 2021, Dr. Glenn never traveled from New Zealand to testify live at a jury trial. And it is questionable whether such travel would have been feasible or even permitted given the travel restrictions in place during the COVID-19 pandemic. Under these circumstances, we find the State made sufficient and reasonable efforts to establish Dr. Glenn's unavailability for purposes of the Confrontation Clause. Thus, the district court did not err in admitting Dr. Glenn's deposition testimony as evidence in trial.

In affirming the district court's decision to admit Dr. Glenn's deposition testimony into evidence, we also recognize the United States Supreme Court's relevant holding in *Mancusi v. Stubbs*, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972), which Showalter failed to reference in his brief.

In *Mancusi*, the United States Supreme Court held that a witness residing in a foreign country is necessarily unavailable for purposes of the Confrontation Clause. 408 U.S. at 212-13. *Mancusi*'s holding does not require the prosecution to ask a witness in a foreign country to voluntarily return to satisfy the State's burden of unavailability though some courts have held reasonable and

good-faith efforts impose such a requirement. See, e.g., *Commonwealth v. Hunt*, 38 Mass. App. Ct. 291, 295, 647 N.E.2d 433 (1995) (relying on *Mancusi* for the proposition that witness unavailability is conceded "[w]hen a witness is outside of the borders of the United States *and declines to honor a request to appear as a witness* . . . because a [s]tate of the United States has no authority to compel a resident of a foreign country to attend a trial here"); cf. *Hamilton v. Morgan*, 474 F.3d 854, 859 (6th Cir. 2007) ("If the desired witness is beyond the subpoena power of the trial state but an established procedure of voluntary cooperation exists, then the government must go to reasonable lengths to utilize that procedure to locate, contact, and arrange to reasonably transport the witness."); *United States v. Siddiqui*, 235 F.3d 1318, 1323-24 (11th Cir. 2000) (concluding that two witnesses were unavailable and admitting their prior Rule 15 depositions where the witnesses testified, respectively, that it would be "impossible for [the first witness] to travel to the United States for the trial" and that "'[the second witness] d[id not] want to go, if possible'"); *United States v. Sanford, Ltd.*, 860 F. Supp. 2d 1, 4 (D.D.C. 2012) ("A witness who resides abroad and outside the reach of a court's subpoena power is not automatically 'unavailable' without a further showing that he or she will not testify in court.") (quoting *United States v. Warren*, 713 F. Supp. 2d 1, 4 [D.D.C. 2010]); *State v. Hassapelis*, 620 A.2d 288, 289, 292-93 (Me. 1993) (finding efforts insufficient to establish unavailability where the State did not ask a Canadian witness if he was available to attend trial, did not serve him with a subpoena, and presented no evidence showing the witness was unavailable).

Although appearing to concede Dr. Glenn is a witness residing in a foreign country outside of any reasonable legal means to compel attendance, Showalter argued the State failed to make a good-faith effort to secure Dr. Glenn's *voluntary* attendance at trial, as described above. But Showalter's argument ignores *Mancusi's* holding that a witness residing in a foreign country is necessarily unavailable. See 408 U.S. at 212. Although other jurisdictions have construed *Mancusi* broadly to require the prosecution ask a witness in a foreign country to voluntarily return to satisfy

its burden of unavailability, Showalter has not asked us to do so here.

3. *Admitting co-conspirator statements into evidence at trial*

Showalter argues the district court erred in allowing the State to introduce evidence that Sportsman claimed membership in the MS-13 gang and that his superior, Penny, had ordered him to kill Lisa. Showalter claims this evidence was irrelevant to the question of his motive because the State failed to prove Showalter heard or was aware of Sportsman's claims.

a. *Additional relevant facts*

Before trial, the State moved to admit certain evidence under K.S.A. 2022 Supp. 60-460, including statements made by Sportsman regarding his membership in the MS-13 gang and Penny's orders to kill Lisa. The State argued Sportsman's statements did not constitute hearsay because it was not seeking to admit the statements for the truth of the matter asserted. Instead, the State claimed the statements were relevant to explain the context of the agreement to kill Lisa and to show Showalter's motive and intent in committing the murders for Sportsman. Alternatively, the State alleged the statements were admissible under several hearsay exceptions. In response, Showalter argued the court should admit only statements made to him or in his presence.

After reviewing the parties' arguments, the district court held Sportsman's statements about MS-13 and Penny were not hearsay because they were not offered to prove the truth of the matter asserted. Pending foundation requirements, the court held these statements admissible because they were relevant to explain why Sportsman had asked Showalter and the other men to kill Lisa and to provide a motive for Showalter's participation in the murders.

At trial, the State presented testimony from several witnesses regarding Sportsman's claimed membership in MS-13 and his statements about Penny. When the State attempted to elicit this testimony from two of these witnesses, Charles Vinsonhaler and Larissa Mills, Showalter raised hearsay objections. The district court overruled the objections after the State advised this evidence was subject to the court's pretrial ruling. Vinsonhaler and Mills

both testified they heard Sportsman say he was a member of MS-13. Mills also testified Sportsman talked about "the head lady named Penny" and showed her a photograph of Penny. Mills said she then believed the woman in the photograph was Penny but now knew it was a photograph of United States Representative Nancy Pelosi with tattoos covering her face. Finally, Mills said she never heard Showalter say that he did not believe Sportsman was a member of MS-13 or that he doubted whether Sportsman's claims about MS-13 were true.

Diederich also testified about the MS-13 evidence, but Showalter did not object to this testimony. Diederich said Sportsman told her he was a branch leader of the Mexican gang MS-13 and the gang's leader, Penny, lived in Topeka. According to Diederich, Sportsman said Penny would call him with instructions or missions to complete. Diederich heard Sportsman talk about MS-13 more than once but never witnessed him talking about it in front of Showalter. Diederich testified that the week before Sportsman was arrested in Topeka, Sportsman told her "Penny called and told him that either him or Lisa was gonna have to die, and it was up to him." After that, Diederich said Sportsman asked to talk to Showalter, and she saw the two men talking outside. Diederich then heard Showalter say, "'I don't have a problem killing the bitch.'"

Showalter challenges the testimony outlined above from Vinsonhaler, Mills, and Diederich. He argues the testimony is irrelevant because the State did not prove he was aware of Sportsman's claims. The State responds Showalter did not preserve this issue for appeal, and he is otherwise not entitled to relief on the merits.

b. *Preservation*

K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *Ballou*, 310 Kan. at 613-14. In his brief, Showalter suggests he preserved his challenge to the MS-13 testimony from Vinsonhaler and Mills by renewing his pretrial objection that Sportsman's claims were irrelevant if not made in Showalter's presence. True, Showalter did argue *before trial* that

the district court should only admit statements made in his presence. But when the State sought to admit Sportsman's statements about MS-13 through Vinsonhaler and Mills *at trial*, Showalter only objected based on hearsay. Because a pretrial ruling "'is subject to change when the case unfolds,' . . . a pretrial objection must be contemporaneously renewed during trial." *Richard*, 300 Kan. at 721 (quoting *Luce v. United States*, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443 [1984]; *State v. Inkelaar*, 293 Kan. 414, 421, 264 P.3d 81 [2011]). Moreover, a party may not object at trial to the admission of evidence on one ground and then on appeal argue a different ground. *State v. Robinson*, 306 Kan. 1012, 1028-29, 399 P.3d 194 (2017).

Showalter failed to preserve his challenge to the relevancy of the MS-13 testimony from Vinsonhaler and Mills.

As for Diederich's testimony about MS-13, Showalter acknowledges his failure to object to this testimony at trial. But he asks this court to consider the merits of his argument anyway, relying on *State v. Race*, 293 Kan. 69, 259 P.3d 707 (2011). In *Race*, the defendant did not object to a witness' trial testimony about a child victim's accusations against him but argued on appeal that this testimony constituted inadmissible hearsay. Despite the defendant's failure to object below, this court made a substantive exception to the contemporaneous objection rule because the defendant had made an unsuccessful hearsay objection to earlier testimony from another witness regarding the child victim's allegations. 293 Kan. at 75.

Showalter urges us to apply this same logic to his challenge to Diederich's testimony. He claims that because he had unsuccessfully renewed his pretrial relevance objections during earlier testimony from Vinsonhaler and Mills, the district court was unlikely to issue a different ruling with respect to Diederich's testimony. Showalter also notes that he lodged a failed hearsay objection to the question posed just before the prosecutor asked Diederich if she had ever heard Sportsman talk about MS-13.

Showalter's reliance on *Race* is misplaced. *Race* involved a situation where we allowed the defendant to raise an unpreserved *hearsay* objection on appeal after he had unsuccessfully raised a *hearsay* objection to earlier testimony from another witness on the

same topic. Here, Showalter raises an unpreserved *relevance* objection after unsuccessfully lodging *hearsay* objections to the MS-13 testimony from Vinsonhaler and Mills and to previous testimony from Diederich on an unrelated topic. Thus, *Race* does not apply to save his argument. As a result, we find that Showalter did not preserve his challenge to Diederich's testimony. See *Dupree*, 304 Kan. at 62; *Gaona*, 293 Kan. at 956.

4. *Cumulative error*

Finally, Showalter argues the cumulative effect of the alleged errors warrants reversal of his convictions. Cumulative trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establishes the defendant was substantially prejudiced by the errors and denied a fair trial. *State v. Hirsh*, 310 Kan. 321, 345, 446 P.3d 472 (2019). But when an appellate court finds no errors exist, the cumulative error doctrine cannot apply. *State v. Lemmie*, 311 Kan. 439, 455, 462 P.3d 161 (2020). Because Showalter establishes no errors, his cumulative error argument necessarily fails.

Affirmed.

CCR No. 1721

In the Matter of MEGHAN ROGERS, *Respondent*.

(543 P.3d 549)

ORIGINAL PROCEEDING IN DISCIPLINE

COURTS—*Disciplinary Proceeding—Public Reprimand*.

Original proceeding in discipline. Oral argument held November 2, 2023. Opinion filed February 23, 2024. Public reprimand.

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.

Bryan W. Smith, of Smith Law Firm, of Topeka, argued the cause, and *Christine Caplinger*, of the same firm, was with him 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, in its disciplinary capacity, against the respondent, Meghan Rogers, a certified court reporter.

On July 11, 2021, appointed disciplinary counsel for the Board filed a formal complaint and notice of hearing against respondent, alleging she failed to timely file an expedited transcript with the Court of Appeals and failed to meet completion dates. It was asserted the nature of these failures violated the provisions of Rules Adopted by the State Board of Examiners of Court Reporters, Supreme Court Rule 367 (2023 Kan. S. Ct. R. at 464), as follows:

- Board Rule No. 9.F.2 (2023 Kan. S. Ct. R. at 468)—Professional incompetency;
- Board Rule No. 9.F.3—Knowingly making misleading, deceptive, untrue, or fraudulent representations as a court reporter;
- Board Rule No. 9.F.6—Fraud in representations relating to skill or ability as a court reporter; and
- Board Rule No. 9.F.11—Refusal to cooperate in an investigation conducted by the Board or obstructing such investigation.

(For clarity, we will refer to the Board in its disciplinary capacity as "Prosecutor"; and the Board in its judicial capacity as "Board.")

Respondent was served with the formal complaint and notice of hearing on July 14, 2021, and responded to the complaint's allegations on August 3, 2021. Respondent was given timely notice of the formal hearing before the Board.

On January 31, 2022, this matter was heard by the Board, and respondent was present at the hearing, where she was self-represented. After presentation of testimony and other evidence, the Board took the matter under advisement.

On April 11, 2023, the Board issued its written findings of fact, conclusions, and recommendation concerning discipline:

"BOARD FINDINGS, CONCLUSIONS, AND RECOMMENDATION CONCERNING DISCIPLINE

. . . .

"1. On May 4, 2020 the initial request for transcript was filed in Case No. 16JC331 in Shawnee County.

"2. On May 11, 2020, the Court entered an Order expediting the case.

"3. On June 10, 2020, Respondent filed a Motion for Extension of Time to complete and file the transcript, alleging it was 40% completed but not finished: 'Due to current pandemic lack of access to files. I have returned to the office setting and will continue to expedite the matter now that I have access to the files needed to complete the requested hearing.'

"4. On June 18, 2020 the Motion was granted, but Respondent was advised there would be no further extensions absent exceptional circumstances and was directed to produce the transcripts on or before July 10, 2020.

"5. On July 9, 2020, Respondent filed a Motion for Additional Extension of Time to complete and file the transcript, alleging it was 60% completed but not finished: 'Due to several requests upon returning from administrative leave.'

"6. On July 20, 2020, the Motion was granted, but Respondent was advised there would be no further extensions absent exceptional circumstances and was directed to produce the transcripts on or before August 19, 2020.

"7. On August 19, 2020 Respondent filed Motion for Extension of Time seeking a 14-day extension of time to complete and file the transcript, alleging it was 60% completed but 14 additional days were needed: 'To finalize

edits.'

"8. On August 20, 2020, the Motion was granted, but it was ordered that there would be no further extensions.

"9. Respondent was granted an extension to September 2, 2020.

"10. On September 8, 2020 Respondent filed a Motion for Extension of time to complete and file the transcript, seeking an additional 20 days, alleging it was 85% completed but 20 additional days were needed: 'Due to personal circumstances.'

"11. On September 9, 2020, the Motion was granted, and Respondent was again advised there would be no further extensions.

"12. Respondent was granted an extension to September 22, 2020.

"13. On September 28, 2020, Respondent filed an out-of-time Motion for Extension of time to complete and file the transcript, alleging it was 85% completed but 30 additional days were needed because: 'Personal circumstances related to the pandemic and transferring of districts.'

"14. On October 8, 2020 the Motion was granted, and Respondent was again advised there would be no further extensions.

"15. Respondent was granted an extension to October 22, 2020.

"16. On October 15, 2020, a complaint was filed with the Board of Examiners of Court Reporters against the Respondent.

"17. On December 28, 2020, the Board notified Respondent of the complaint submitted against her. The Office of Judicial Administration did not receive an answer to the initial request for information although Respondent stated during the hearing that she sent a response via regular mail.

"18. Respondent delivered the completed transcript on February 5, 2021.

"CONCLUSIONS

"Respondent does not contest the facts contained in the Notice of Hearing. Respondent failed to present any evidence justifying the delay in transcript production or mitigating the circumstances which led to the delay. The Board finds by clear and convincing evidence that Respondent violated Supreme Court Rule 367, Nos. 9.F.2, professional incompetency.

"RECOMMENDATIONS

"The Board recommends that Respondent be suspended for a period of six months."

On July 5, 2023, respondent filed a brief with this court, purportedly taking exception to the Board's findings of fact by asserting the Board had omitted seven uncontested facts. But respondent did not take exception to the findings of fact the Board made. Respondent also took exception to the Board's conclusion that clear and convincing evidence showed respondent had committed a Board rule violation. Finally, respondent argued the case should be dismissed for failure to prove a violation or, if violation was found, that mitigating factors would support admonishment rather than the more severe sanction of a suspension recommended by the Board.

Prosecutor filed a responsive brief on September 5, 2023. He takes exception to respondent's proposed additional facts. Prosecutor also asserts facts number 16 through 21 that are slightly different than, or in addition to, findings of fact found by the Board. As for the conclusions to be drawn from the facts, Prosecutor urges this court not only to find a violation of Board Rule No. 9.F.2. (professional incompetency) but also violation of Board Rule No. 9.F.3 (knowingly making misleading, deceptive, untrue, or fraudulent representations as a court reporter). Finally, Prosecutor urges this court either to adopt the Board's recommendation of a six-month suspension or add two months, making it an eight-month suspension.

During oral arguments before this court, the parties again argued what they believed the evidence established, conclusions to be drawn from the evidence, and what punishment, if any, ought to be imposed.

DISCUSSION

In court reporter discipline cases, "[t]he Board may, based upon clear and convincing evidence," impose certain discipline or recommend discipline for the Supreme Court to impose. Rule 367, Board Rule No. 9.E. of the Rules Adopted by the State Board of Examiners of Court Reporters. So we must first determine whether the Board's Findings of Fact are supported by clear and convincing evidence.

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

In our independent review of the record, and because the parties do not contest them, we find the Board's findings of fact are supported by clear and convincing evidence. We also find that the parties' proposed additional facts are either redundant, immaterial, argumentative, or are not established by clear and convincing evidence, so they will not be considered.

As in any disciplinary proceeding, once we have ascertained the evidence sufficiently proved, we will consider that evidence, along with the parties' arguments to determine whether the rules applicable to court reporters were violated and, if so, what discipline to impose. See *Morton*, 317 Kan. at 740 (concerning attorney discipline). Thus, we next turn to the Board's conclusion that respondent committed the violation of professional incompetency. The Board rules do not define "professional incompetency." The dictionary defines "incompetent" as: (1) "lacking the qualities needed for effective action"; (2) "unable to function properly"; (3) "not legally qualified"; or (4) "inadequate to or unsuitable for a particular purpose." "Incompetent." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/incompetent. Because this definition does not reveal the specific parameters of *professional* incompetency, however, we look elsewhere for guidance. For instance, K.S.A. 65-2837(a) defines "professional incompetency" for physicians this way:

"(1) One or more instances involving failure to adhere to the applicable standard of care to a degree that constitutes gross negligence, as determined by the board.

"(2) Repeated instances involving failure to adhere to the applicable standard of care to a degree that constitutes ordinary negligence, as determined by the board.

"(3) A pattern of practice or other behavior that demonstrates a manifest incapacity or incompetence to practice the healing arts."

For nurses, K.S.A. 2022 Supp. 65-1120(e) defines "professional incompetency" as:

"(1) One or more instances involving failure to adhere to the applicable standard of care to a degree which constitutes gross negligence, as determined by the board;

"(2) repeated instances involving failure to adhere to the applicable standard of care to a degree which constitutes ordinary negligence, as determined by the board; or

"(3) a pattern of practice or other behavior which demonstrates a manifest incapacity or incompetence to practice nursing."

The Kansas Rules of Professional Conduct (KRPC) require a Kansas attorney to be competent in his representation, stating:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." KRPC 1.1 (2023 Kan. S. Ct. R. at 327).

We use these definitions by analogy in the context of this case. Respondent is a certified court reporter. The record reflects no prior discipline, so respondent's professional competence, or lack of it, is judged only by this record.

That record shows that the district court ordered a transcript on May 4, 2020, then expedited it on May 11, 2020. Respondent was the court reporter for the hearing, and thus was responsible for preparing and delivering the transcript for filing. Respondent did not deliver the completed transcript until February 5, 2021—some nine months later. In the meantime, she filed five Motions for Extension of Time to complete this transcript. While all five motions were granted, one of the motions was not filed until the previous deadline had expired. The last extension expired October 22, 2020, so the transcript was officially delinquent for more than three months.

The Prosecutor challenges respondent's reasons for her requests for extension of time to comply with the request for transcript. Since the court reviewing her requests found those reasons adequate, we decline to review the sufficiency of those reasons vis-à-vis the appropriateness of respondent's deadline extensions.

The Prosecutor urges us to find two violations: first, professional incompetency under Board Rule No. 9.F.2.; and second, that respondent knowingly made misleading, deceptive, or untrue representations as a court reporter under Board Rule No. 9.F.3. He

argues the reasons respondent gave for extensions of time to submit the transcript were untruthful. But, although respondent was formally accused of knowingly making misleading, deceptive, untrue, or fraudulent representations, she presented testimony to refute those accusations. After reviewing all the evidence presented, the Board did not make a finding that respondent was untruthful. We agree there is not clear and convincing evidence to show the respondent was untruthful or that she violated Board Rule No. 9.F.3.

The Prosecutor argues the delay was significant and harmful and that respondent's excuses were suspect. He asserts her conduct was not efficient, lacked necessary skill, and showed she was not capable of producing the transcript in compliance with court orders, all of which demonstrates professional incompetency.

Respondent counters that one late transcript does not demonstrate professional incompetency. There is no allegation that the transcript itself was insufficient, and she avoided having to show cause why she should not be held in contempt of court. Besides, a litigant does not have the right to a transcript, the failure to make a record is not automatically reversible error, and there are probably backup files in the office of the clerk.

But none of these arguments help respondent much. It was her job to produce an official transcript and to do it timely. We have previously held that "repeated failure to timely respond to discovery requests, court orders, and dispositive motions is clear evidence of incompetence." *In re Dennis,* 286 Kan. 708, 727, 188 P.3d 1 (2008). Here, although respondent successfully requested five extensions of time to deliver the transcript, those extensions expired on October 22, 2020. Respondent knew how to request more time, but she did not. So the now delinquent transcript was delivered 106 days after respondent's last extension expired.

Court reporters serve a valuable role in our judicial system. "Unlike the executive or the legislature, the judiciary 'has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.' The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. [Citation omitted.]" *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 445, 135 S. Ct. 1656, 191 L. Ed. 2d 570

(2015). "Court reporters employed by the district courts are officers of the court. Supreme Court Rule 352 (2019 Kan. S. Ct. R. 412)." *In re Shepard*, 310 Kan. 1017, 1023, 453 P.3d 288 (2019). As such, court reporters have an ongoing duty to meet and satisfy their duties competently.

A majority of this court concludes respondent's actions and failures to act constituted professional incompetency. A minority of the court disagrees and concludes the respondent's actions here, while concerning, do not rise to the level of incompetency.

The only remaining issue before us is the appropriate discipline for the respondent's violation. For attorney discipline, we receive guidance from the American Bar Association Standards for Imposing Lawyer Sanctions to help us determine appropriate discipline. That framework considers "four factors in determining punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors." *In re Hodge*, 307 Kan. 170, 231, 407 P.3d 613 (2017).

While court reporter discipline has no counterpart to the ABA Standards for lawyers, we are similarly guided by their commonsense approach. Here, the ethical duty violated by respondent was the single violation of professional incompetency.

Respondent's mental state was not at issue. As to injury, actual injury from respondent's violation was alleged in an exhibit admitted at the formal hearing. This initial complaint against respondent states: "The children in question have been in care for more than 4 years and they cannot have permanency in an adoptive family until the parental rights termination appeal is settled . . . ." Though no further evidence of injury was presented, and the Board made no findings in that regard, the delay of a transcript in this context has the potential for injury in the children's quest for family stability.

Finally, we address the existence of any aggravating or mitigating factors. Here, the Board found no evidence of mitigating circumstances. We disagree. In her Response to the Prosecutor's Formal Complaint, which was admitted as an exhibit during the formal hearing, respondent stated:

"During the pandemic I was and have been responsible for the care of an elderly grandfather, teacher of three children in remote learning classes along with other personal matters that were contributing factors. . . . I also had transferred districts during a time that was very difficult to receive communications. . . .

"Additionally, I would like to provide you with more information regarding this past year. I am currently on extended leave due to medical issues that have been ongoing and will be on leave for several weeks to come. . . . We have been in quarantine a few times and had several positive cases within our household. I had a computer crash during the pandemic which led to several delays . . . ."

Representing herself without benefit of counsel, respondent testified that some hardships she mentioned in her Response occurred before, and some after, delivery of the completed transcript. But her computer crash and delay of replacement parts, difficulty transferring records from Shawnee County District Court (where the record was taken) to Douglas County District Court (where she continued to work during transcript preparation), health issues, and childcare responsibilities all contributed to delays in completing the transcript. These are all considered to be mitigating circumstances.

The Board may recommend the following discipline to the Kansas Supreme Court: (1) public reprimand; (2) imposition of a period of probation with special conditions which may include additional professional education or re-education; (3) suspension of the certificate; or (4) revocation of the certificate. Board Rule, No. 9.E.4 (2023 Kan. S. Ct. R. at 467). Here, the Board recommends a six-month suspension of respondent's certificate. The prosecutor recommends either a six-month or eight-month suspension. Respondent recommends we issue a public reprimand if violation is found.

Having considered all matters raised, we find that appropriate discipline is a public reprimand.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Meghan Rogers be and is disciplined by public reprimand in accordance with Rule 367, Board Rule 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.

State v. Perry

No. 122,246

STATE OF KANSAS, *Appellee*, v. LEROY L. PERRY, *Appellant*.

(543 P.3d 1135)

SYLLABUS BY THE COURT

APPELLATE PROCEDURE—*Statutory Right to Appeal Criminal Case When Defendant Not Present—Thirty Days from Date Received Notice of Judgment*. Under K.S.A. 2022 Supp. 60-2103(a), if entry of judgment in a criminal case occurs when a defendant is not present, defendant has 30 days from the date he receives notice of the judgment to take an appeal without a showing of excusable neglect.

Appeal from Atchison District Court; JOAN M. LOWDON, judge. Submitted without oral argument September 15, 2023. Opinion filed March 1, 2024. Affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, was on the brief for appellant.

Patrick E. Henderson, special prosecutor, of Henderson Law Office, of Atchison, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Leroy L. Perry was convicted of murder in the 1990s and received a hard 40 life sentence. More than 20 years later, he filed a self-represented motion in district court to modify his life sentence. The court denied the motion. The order was filed with the clerk on April 30, 2018, and the clerk's notation shows the order was sent to Perry. A year and a half later, Perry filed a notice of appeal, which asserted he never received the order denying his motion.

We remanded the case to the district court and directed it to make factual findings about the notice of appeal's untimeliness. The district court found Perry received the order shortly after it was mailed to him, and concluded Perry was properly notified of the order as required by statute and court rule. The district court also held that Perry could not show excusable neglect for his failure to timely appeal. Perry appeals to this court. We affirm.

Jurisdiction is proper. See K.S.A. 2022 Supp. 22-3601(b)(3) (direct appeals to Supreme Court allowed for life sentence

crimes); K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 2022 Supp. 22-3601).

FACTS AND PROCEDURAL BACKGROUND

In 1996, a jury convicted Leroy L. Perry of one count of first-degree premeditated murder, two counts of attempted first-degree murder, and one count of aggravated battery. The court sentenced Perry to a hard 40 life sentence for the first-degree premeditated murder conviction, 97 months for each of the attempted first-degree murder convictions, and 41 months for the aggravated battery conviction. We reversed the aggravated battery conviction as multiplicitous but affirmed Perry's other convictions and sentences on direct appeal. *State v. Perry*, 266 Kan. 224, 230, 968 P.2d 674 (1998).

Acting without counsel, Perry filed a motion in district court on April 13, 2018, alleging his hard 40 life sentence was unconstitutional. The district court denied the motion in an order filed April 30, 2018. Nearly 10 months later, Perry sent a letter to the clerk requesting a copy of "the ROA [Register of Actions] report on my case." The clerk responded in a letter by stating "advance payment is required before copies of documents will be furnished. . . . The ROA record is 9 pages which would be a total of $2.25." About seven months later, Perry again requested the ROA report in his case. A couple of weeks after that, on October 24, 2019, Perry filed a notice of appeal, asserting he did not receive the April 2018 order.

Noting the lapse of time between the order and the notice of appeal, we issued a show cause order directing Perry to show why his appeal should not be dismissed for lack of jurisdiction because it was untimely. In his response, Perry asked us "to find excusable neglect in his filing of a late notice of appeal due to the fact that he never received notice of the district court's decision." So we remanded the case to the district court to make factual findings about the notice of appeal's untimeliness in light of *State v. Hooks*, 312 Kan. 604, 607, 478 P.3d 773 (2021) (untimely appeal may be allowed if order issued outside defendant's presence and notice inadequate).

During a hearing before the district court on remand, Perry, by then represented by counsel, testified he did not receive a copy

of the April 2018 order denying his motion. Perry also testified he knew the clerk's note indicates the April 2018 decision was sent to him. He explained he did not hear from the district court for over a year and eventually wrote to the clerk. He then received a letter from the clerk, and learned he would have to pay $2.25 for a ROA report in his case. He testified that "at this time I had no absolute money on my inmate account to pay for the copy of the ROA." He said that it took him two months to save up money to pay for it. Perry asserted he received a copy of the ROA report in October 2019. He then immediately filed a notice of appeal upon realizing his motion had been denied.

On cross-examination, Perry explained he did not take any steps to determine his motion's status between April 2018 and February 2019 because he was waiting to hear from the court. He conceded that he did not produce any records outlining his account balances during the time in question. The court took the matter under advisement, but then held a second hearing.

At the second hearing, Perry submitted documents showing he did have enough funds to pay for the ROA report from as early as April 2018 and until at least September 2019. Perry also offered an affidavit from a fellow inmate, asserting he sent $2.50 to the Atchison County District Court on September 25, 2019, to pay for Perry's ROA report because Perry could not do so.

The State argued the appropriate test was whether Perry could show excusable neglect, and further argued Perry could not do so here because he had enough money to pay for the ROA report when the district court clerk notified him of the $2.25 fee.

After hearing arguments, the court found Perry could have purchased the ROA report at any time after he received the clerk's fee request for a copy of it. Additionally, Perry's testimony that he could not afford to buy the report was not credible. Further, Perry's delay in filing was not due to excusable neglect.

The court's attention then turned to when and how Perry received notice of the district court's April 2018 order. The court stated:

> "And, again, noting as previously stated that the funds were positive the entire time and could have covered the ROAs at any point after he received the letter from the clerk that was dated March 12th of 2019.

"Primarily the Court does address that particular issue because I do think it's a credibility issue, and that is one of the considerations of the Court that Mr. Perry—the Court did not find that particular statement that he could not afford the ROAs to be credible, and that his account records clearly show he could have covered that cost at any point.

"The one thing that I found I think most particularly compelling in this particular matter, as it relates to whether or not Mr. Perry did receive the notice—or the order from April 30th of 2018 was that Mr. Perry had requested for the second time his ROAs on October 7th of 2019.

"On October 24th of 2019, roughly three weeks later, he filed his notice of appeal, and he specifically wrote his notice of appeal was to appeal the District Court adverse ruling of the defendant's motion for sentence modification of April 30th of 2018.

"At that particular point, he—I'm showing—or at least I was struggling to find that he would have received the ROAs before that date.

. . . .

"So without the ROAs, there would have been no way for him to know about that order without having actually received it. And so that was the compelling piece, I guess, for the Court.

"So I do show compliance as it relates to KSA 60-252 [*sic*], as well as 134(a). Mr. Perry's statements at the time that he testified—actually at one point he denied receiving the ROAs. At another point he said he got the ROAs in October of 2019. But I don't show a record within the Court file within the ROAs themselves that they were sent out to him prior to him filing his notice of appeal. And without that, again, I don't see how he would have known about the order without having received it. Or having known that there was anything to appeal.

. . . .

"So I do believe that Mr. Perry did have actual notice of the District Court's order or actual knowledge of the same based on the appeal itself.

"I will say, as it relates to the actual date, that it's much more difficult. Quite frankly, it appears to me that that's why he had initially requested the ROAs and that takes us back then to February 26th of 2019.

"And so that's where I think that it likely Mr. Perry had received his order, but that is significantly more difficult, other than to note that it did go out from the District Court back on the time that it was authored or released, I guess I should say, on April 30th of 2018."

Perry filed a notice of appeal on June 14, 2021.

The district court later issued an order memorializing its findings and conclusions. The order explained Perry could have purchased the ROA report at any time from March 2019 through October 2019. Nor did the court find Perry credible when he testified that he had to save up money to buy the report. Next, the court explained that, since Perry never received the ROA report, he would only have known to file a notice of appeal by receiving the

order denying his pro se motion to modify his sentence. The court noted: "Given the parties agree that the order was sent out April 30, 2018, which is the same day that the court issued the order, and the court's finding that Defendant did receive it, there is compliance with K.S.A. 60-258 and 134(a)." Finally, the order explained that the court adopted the State's excusable neglect argument from the State's brief.

In April 2022, we granted leave for Perry to docket his appeal out of time.

ANALYSIS

On appeal, Perry argues the district court erred by finding he received the order shortly after it was filed on April 30, 2018. The State did not respond to the claim of error, but argues the district court correctly held that Perry did not show excusable neglect.

Standard of Review

"When a district court has made findings of fact and conclusions of law, an appellate court determines whether the factual findings are supported by substantial competent evidence and whether those findings adequately support the district court's conclusions of law." *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 481, 509 P.3d 1211 (2022). "'Substantial competent evidence is "such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." [Citation omitted.]'" *State v. Smith*, 312 Kan. 876, 887, 482 P.3d 586 (2022). "'In evaluating the evidence to support the district court's factual findings, an appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact.' [Citation omitted.]" *Bicknell*, 315 Kan. at 481.

To the extent this issue requires statutory interpretation or construction, we have unlimited review. *In re Marriage of Shafer*, 317 Kan. 481, 484, 531 P.3d 524 (2023).

"'The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found

in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. [Citations omitted.]'" *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023).

Perry's Window for Appeal

"In Kansas, the right to appeal is entirely statutory and, as a general rule, appellate courts may exercise jurisdiction only when authorized to do so by statute." *State v. McCroy*, 313 Kan. 531, 534, 486 P.3d 618 (2021). "The filing of a timely notice of appeal is jurisdictional. Failure to file a timely notice of appeal requires dismissal of the untimely appeal." *Guillory v. State*, 285 Kan. 223, 224, 170 P.3d 403 (2007). Whether jurisdiction exists is a question of law, subject to unlimited appellate review. *State v. Hillard*, 315 Kan. 732, 775, 511 P.3d 883 (2022).

The district court's April 2018 order characterized Perry's motion as either a motion to correct an illegal sentence pursuant to K.S.A. 22-3504, or a motion of prisoner attacking his sentence pursuant to K.S.A. 60-1507. On appeal, Perry agrees it was a motion to correct an illegal sentence.

A defendant has 30 days to file an appeal from the denial of a motion to correct an illegal sentence. K.S.A. 2022 Supp. 60-2103(a); *State v. Swafford*, 306 Kan. 537, 540, 394 P.3d 1188 (2017).

K.S.A. 2022 Supp. 60-2103(a) provides:

"When an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be 30 days from the entry of the judgment, as provided by K.S.A. 60-258, and amendments thereto, except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed."

In *Hooks,* we considered whether an untimely notice of appeal precluded us from having jurisdiction over Hooks' appeal when Hooks asserted his untimeliness was based on a lack of notice of the district court's ruling. The district court denied Hooks' motion to correct an illegal sentence, as well as relief under K.S.A. 60-1507. Hooks filed a notice of appeal four months later, arguing he had just recently learned of the court's decision. When Hooks docketed his appeal, we issued a show cause order requiring

Hooks to explain why his case should not be dismissed for lack of jurisdiction. Hooks replied that there was no indication the order was mailed to him and attributed his untimeliness to the court's error. He suggested his appeal should be permitted based on the unique circumstances doctrine.

Even though the unique circumstances doctrine had been eliminated in Kansas, we found Hooks could still prevail because appellate courts, in limited circumstances, may "exercise jurisdiction despite an untimely notice of appeal." *Hooks*, 312 Kan. at 606 (citing *Albright v. State*, 292 Kan. 193, 198, 251 P.3d 52 [2011]). We noted "Hooks' allegations about deficient service of the journal entry denying his motion and recognize[d] that incarcerated pro se defendants are at the mercy of the prison mail system to receive notice of the denial of their motions. These allegations are relevant to the jurisdictional inquiry." 312 Kan. at 607.

We based this conclusion on three authorities. First, K.S.A. 2022 Supp. 60-258 provides: "When judgment is entered by judgment form, the clerk must serve a copy of the judgment form on all attorneys of record within three days, excluding Saturdays, Sundays and legal holidays." The statute applies to defendants who are self-represented. *Hooks*, 312 Kan. at 607. Second, Supreme Court Rule 134(a) (2023 Kan. S. Ct. R. at 218) provides: "If the court rules on a motion or other application when an affected party who has appeared in the action is not present—either in person or by the party's attorney—the court immediately must serve notice of the ruling."

Third, we relied on our previous decision in *McDonald v. Hannigan*, 262 Kan. 156, 936 P.2d 262 (1997). There, McDonald filed a petition for writ of habeas corpus in the district court. Around three months later, McDonald wrote the court "requesting a copy of the appearance docket and asking whether a hearing had been scheduled in the case." 262 Kan. at 158. He received a copy of the docket, realized his case had been dismissed, and filed a notice of appeal. He also moved to allow a late filing of the notice of appeal. The district court granted the motion, and the Court of Appeals reversed. It concluded that the district court's reasoning for granting the motion did not rely on excusable neglect, which the panel explained was the only way to permit a late notice of appeal under K.S.A. 60-2103(a). 262 Kan. at

159. The Court of Appeals then denied a motion for reconsideration. We granted McDonald's petition for review.

We explained "[u]nder most Kansas statutes, the time for taking an appeal under the civil code does not commence to run until the party entitled to appeal has received notice of the judgment or order or the judgment is filed with the clerk of the court." *McDonald*, 262 Kan. at 163. We clarified that the time for "taking an appeal from a final judgment entered without notice commences to run when there has been a compliance with K.S.A. 60-258 and Supreme Court Rule 134." 262 Kan. at 163-64. We ultimately reversed the Court of Appeals, finding "that McDonald, upon receiving notice of the trial court's judgment, promptly filed a motion to allow a late notice of appeal based upon excusable neglect for failure to learn of the entry of judgment in the district court." 262 Kan. at 164.

In *Hooks*, we relied on *McDonald* to hold that Hooks might have been entitled to file his appeal out of time if Hooks did not learn about the district court's decision until after the deadline had passed. *Hooks*, 312 Kan. at 607. That said, we ultimately remanded to the district court to make factual findings "concerning the date of compliance with K.S.A. 2019 Supp. 60-258, compliance with Supreme Court Rule 134(a), and Hooks' actual receipt of the district court's order or actual knowledge of the same." 312 Kan. at 608. In Perry's case, our remand directed the district court to make these findings.

McDonald and *Hooks* therefore indicate that, under K.S.A. 60-2103(a), Perry had 30 days to file his notice of appeal *from the date he received notice* of the district court's April 2018 order. *McDonald*, 262 Kan. at 164; *Hooks*, 312 Kan. at 607; see also *State v. R.H.*, 313 Kan. 699, 701, 490 P.3d 1157 (2021) (finding jurisdiction over an appeal where defendant did not receive actual notice of the district court's ruling until "well outside the 30-day time limit to file an appeal").

The district court's findings about the date of notice and compliance with K.S.A. 2020 Supp. 60-258 and Rule 134(a) are supported by substantial competent evidence.

Perry's only argument on appeal is directed at the district court's factual finding that he must have received the order sometime shortly after April 30, 2018. Perry argues this finding is not supported by substantial competent evidence because the more likely scenario, based on

the evidence, is that he received notice of the court's April 2018 decision after receiving the ROA report in October 2019. Perry contends this explanation is more reasonable because it accounts for the "flurry of activity" leading up to the notice of appeal being filed. This flurry consists of Perry's February 2019 letter asking for a ROA report, the clerk's reply in March 2019, Trotter's payment to the district court in September 2019, Perry's October 2019 letter asking for a copy of the ROA report, and Perry's October 2019 notice of appeal.

But Perry's argument misses the point. As an appellate court, when we consider the district court's findings of fact we do not decide whether the district court could have made different findings or even whether *we* might have made different findings. We only consider the findings made and whether those findings are supported by competent evidence.

Here, we discern the court was most persuaded by the significance of two pieces of evidence, duly admitted or considered from the court record without objection. First, the last page of the April 2018 order includes a hand-written "check mark" immediately preceding the following words: "Copy to: Gerald Kuckelman Atchison County Attorney [and] Leroy Perry Defendant." From this notation—and the parties' stipulation—the court found the order was *sent* by the clerk to Perry around the time the order was entered into the record. Second, the ROA report includes notations of the clerk's *receipt* of two requests from Perry for an ROA report but does not include an entry showing an ROA report was *sent* to Perry. From this *absence* of a notation that an ROA report was sent by the clerk, the court inferred an ROA report was *not sent* by the clerk to Perry or there would have been a notation to that effect. Thus, if an ROA report was not sent, Perry could not have received one.

From these facts and the court's inferences from these facts, the district court reasoned that Perry must have received the order shortly after the clerk sent it to him. Otherwise, he would not have known there was a decision to appeal, let alone the precise date the order was filed, which was included in his notice of appeal. And since the notation on the order shows the order was sent to Perry around the time the order was filed, Perry must have received notice of the order around that same time—April 30, 2018.

Perry asserts the court's findings are not supported by competent evidence. He suggests, "In actuality, the Court's finding is less of an affirmative finding supported by evidence and more of a logical conclusion based upon a faulty premise." Perry argues the evidence conveys he received notice of the April 2018 order after receiving an ROA report in October 2019, after Trotter paid $2.50 to the district court. Perry claims this is more likely than the "logical conclusion" the district court came to.

In essence, Perry challenges the inferences the district court drew when reaching its conclusion. See Black's Law Dictionary 930 (11th ed. 2019) (defining inference as, "A conclusion reached by considering other facts and deducing a logical consequence from them."). When evaluating whether substantial competent evidence supports a district court's factual findings, this court "must accept as true the evidence and all the reasonable inferences drawn from the evidence which support the district court's [factual] findings and must disregard any conflicting evidence or other inferences that might be drawn from it." *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017). The question therefore becomes whether the district court's inferences were reasonable.

The distinction between reasonable inferences and impermissible speculation is not amenable to clear explanation. See, e.g., *Harper v. Washburn,* 308 Or. App. 244, 254, 479 P.3d 1101(2020) ("As we have observed before, the line between permissible inferences and impermissible speculation is 'sometimes faint.'"); *Hooper v. State,* 214 S.W.3d 9, 16 (Tex. Crim. App. 2007) ("Without concrete examples, it can be difficult to differentiate between inferences and speculation, and between drawing multiple reasonable inferences versus drawing a series of factually unsupported speculations."); Restatement (Third) of Torts: Phys. & Emot. Harm § 28 (2010) ("The difficulty that courts confront is that the line between reasonable inference and prohibited speculation is one of the more indistinct lines that exists in law and also is one on which reasonable minds can and do differ.").

We have described the distinction between reasonable inferences and speculation as being related to established facts. See, e.g., *State v. Brown*, 316 Kan. 154, 169, 513 P.3d 1207 (2022) ("Considering the entire record, the prosecutor's comments were

a fair inference drawn from the evidence presented at trial."); *State v. Johnson*, 284 Kan. 18, 27, 159 P.3d 161 (2007) ("We need not resort to conjecture and speculation to find that Johnson inflicted mental anguish upon his victim, but rather such a conclusion is a reasonable inference to be drawn from the proven facts."); *Duncan v. Railway Co*., 86 Kan. 112, 123, 119 P. 356 (1911) ("While the jury were warranted in drawing fair and reasonable inference from the facts and conditions shown, it was only from those shown, and not from those imagined or inferred, that such inference could rightfully be drawn.").

The court's reasoning is logical and its logic is tethered to facts. We believe a person could make reasonable inferences from the evidence to reach the finding of fact that Perry received his copy of the order shortly after it was sent to him. See *Bicknell*, 315 Kan. at 481-82 ("'Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion.'") (quoting *Gannon v. State*, 298 Kan. 1107, 1175-76, 319 P.3d 1196 [2014]).

And even if the facts could support alternative findings, we must affirm the district court in the face of these alternatives so long as the district court's findings are supported by substantial competent evidence. See, e.g., *Webber v. Automotive Controls Corp.*, 272 Kan. 700, 705, 35 P.3d 788 (2001) (explaining that "findings supported by substantial evidence will be upheld by an appellate court even though evidence in the record would have supported contrary findings"); *Pearcy v. Williams*, 163 Kan. 439, 442, 183 P.2d 243 (1947) (explaining "our only function on appeal is to ascertain whether there is substantial competent evidence supporting, or tending to support, the finding as made and not whether some evidence appears in the record which would have supported a contrary finding had the trial court seen fit to make one").

We find the facts and inferences the court relied on are supported by substantial competent evidence and support the court's rationale. We therefore affirm the district court's findings that Perry received notice of the April 2018 decision shortly after it was issued. We affirm the district court's findings that the district court complied with K.S.A. 2020 Supp. 60-258 and Rule 134(a).

We dismiss Perry's appeal for lack of jurisdiction because it is untimely under K.S.A. 2022 Supp. 60-2103(a).

We do not reach the State's excusable neglect argument.

Affirmed.

State v. G.O.

No. 124,676

STATE OF KANSAS, *Appellant*, v. G.O., *Appellee*.

(543 P.3d 1096)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fifth Amendment Right to Remain Silent—Requirement of Voluntary Waiver—Voluntariness Standard Used to Review Waiver.* The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment to the United States Constitution, protects the right of a person to remain silent, unless the individual chooses to speak in the unfettered exercise of the person's own will, and to suffer no penalty for such silence. Under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), law enforcement officers must inform individuals subject to custodial interrogation of this and other Fifth Amendment rights. Once the *Miranda* advisories are communicated, an individual may waive the right to remain silent, provided the waiver is made voluntarily, knowingly, and intelligently. Courts use this same voluntariness standard to evaluate a juvenile's waiver of *Miranda* rights.

2. SAME—*Application of Due Process Clause of Fourteenth Amendment When Reviewing Interrogation of Individual—Courts Required to Assess Totality of All Surrounding Circumstances.* The Due Process Clause of the Fourteenth Amendment applies when the interrogation techniques were improper because, in the circumstances of the case, the confession is not the product of an individual's free and rational will. Applying this aspect of the due process protection requires courts to assess the totality of all an interrogation's surrounding circumstances—both the characteristics of the individual and the details of the interrogation—to determine if a confession is a free and unconstrained choice by its maker.

3. CRIMINAL LAW—*Voluntariness of Confession— Coercive Police Activity a Predicate to Finding of Involuntary Confession.* Coercive police activity is a necessary predicate to a finding that a confession is not voluntary. And there must be a link between coercive activity of the State and a resulting confession by a defendant.

4. SAME—*Voluntariness of Confession—Consideration of Individual's Mental Condition.* An individual's mental condition, by itself and apart from its relation to official coercion, can never dispose of the inquiry into constitutional voluntariness of a confession.

5. SAME—*Voluntariness of Confession Determined from Totality of Circumstances.* Even where there is a link between police misconduct and a confession, it does not automatically follow that there has been a violation of the Due Process Clause of the Fourteenth Amendment. Voluntariness must be determined from the totality of the circumstances.

6. SAME—*Voluntariness of Confession—Potential Circumstances of Interrogation—Relevant Factors for Determining Voluntariness of Confession.* Potential circumstances of the interrogation that may be relevant to whether a confession was voluntary include, but are not limited to, the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statements took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises, inducements, threats, methods, or strategies used to compel a response; whether the accused was informed of the right to counsel and the right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights.

7. SAME—*Voluntariness of Confession—Potential Characteristics of Accused—Relevant Factors.* Potential characteristics or circumstances of the accused that may be relevant to a determination of whether a confession was voluntary include, but are not limited to, the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement.

8. CONSTITUTIONAL LAW—*Protections of Fifth and Fourteenth Amendment Applicable – State's Burden of Proof that Individual Waived Rights to Make Statement – Requirements.* When the protections of the Fifth and Fourteenth Amendments apply, the State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment to the United States Constitution and voluntarily—that is, based on the person's unfettered will—made a statement. To do so, the State must establish that police or other state actors did not intimidate, coerce, deceive, or engage in other misconduct that, when considered in the totality of the circumstances, was the motivation for the individual to make a statement.

9. APPEAL AND ERROR—*Determination Whether Confession was Voluntary—Mixed Standard of Review—Appellate Review.* On appeal from a trial judge's determination of whether the State met the burden of proving an individual voluntarily confessed, appellate courts apply a mixed standard of review. The appellate court reviews the trial judge's findings of fact about the totality of circumstances to see whether each is supported by substantial competent evidence. Appellate courts assess de novo the trial judge's legal conclusion based on those facts. This means the appellate court gives no deference to the trial judge's legal conclusion about voluntariness.

10. EVIDENCE—*Determination if Violation of Due Process Clause by Officers—Purpose to Prevent Fundamental Unfairness in Use of Evidence.* Neither K.S.A. 2022 Supp. 60-460(f)(2)(B), a hearsay exception, nor the reliability standard it incorporates apply when a court decides whether an accused's statements to law enforcement officers violate the Due Process

Clause of the Fourteenth Amendment. The purpose of the Due Process Clause is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. Holdings to the contrary in *State v. McCarther*, 197 Kan. 279, 285, 416 P.2d 290 (1966), and its progeny are overruled.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 23, 2022. Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Oral argument held January 31, 2023. Opinion filed March 1, 2024. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

Natalie Chalmers, assistant solicitor general, argued the cause, and *Derek Schmidt,* attorney general, was with her on the briefs for appellant.

Reid T. Nelson, of Capital and Conflicts Appeals Office, argued the cause and was on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: G.O., a minor, seeks to prevent the State from using statements he made during an interview with a police officer at trial. He argues the officer's coercive tactics caused him to involuntarily waive rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The trial judge agreed with his arguments, but a divided panel of the Court of Appeals reversed the suppression order. *State v. G.O.*, No. 124,676, 2022 WL 4391366, at *9 (Kan. App. 2022) (unpublished opinion).

We affirm the trial judge and reverse the Court of Appeals. In reversing the Court of Appeals, we hold the Due Process Clause of the Fourteenth Amendment protects against an involuntary confession being used as evidence against an accused regardless of its reliability. In reaching that holding, we overrule caselaw cited by the Court of Appeals majority in holding the record did not support the conclusion that G.O. falsely confessed and, because his confession was reliable, it should not be suppressed. Rather than focusing on the reliability of G.O.'s confession, we examine the coercive nature of the police detective's interrogation techniques and the totality of other circumstances surrounding the interrogation. This review leads us to hold that the interrogation offended concepts of due process.

FACTUAL AND PROCEDURAL BACKGROUND

When G.O. was 16 years old, his younger stepsister, while hospitalized, revealed G.O. had molested her. Hospital personnel notified G.O.'s mother, his stepfather, and the Kansas Department for Children and Families, known as DCF. A DCF representative came to G.O.'s home and told G.O.'s mother that G.O. would need to be removed from the home by the time G.O.'s stepsister was released from the hospital. The representative also suggested individual and family counseling and discussed a long-term goal of reintegrating the family. The DCF representative said that all family members would be interviewed, and they would be contacted to set up the interviews.

The next call received by G.O.'s mother was from a Topeka Police Department detective. G.O.'s mother testified she understood DCF had referred the family for interviews, so they cooperated in setting up interviews with the detective. The detective interviewed G.O.'s stepsister first and then other members of the family, except G.O. The detective then told G.O.'s mother he would like to interview G.O. at the police station. He assured her that G.O. would not be arrested, only interviewed.

G.O. had moved in with his father, but G.O.'s mother drove him to the interview at the Topeka Police Department. She told G.O., who had no earlier contact with law enforcement, that he had to talk to the detective because she "thought we all had to." She also told G.O. that "he was going to have to give more details when he talked to" the detective than he had when he talked to her about the allegations. No one explained to her that G.O. and the other family members could refuse to talk to the police.

When they arrived at the police station, G.O.'s mother asked if she could sit in on the interview. The detective told her to wait in the lobby. He then took G.O. to an interview room.

The detective began the interview by saying they would just "hang out" in the room and that he would not take long so that G.O. could get back to school. G.O. explained he was on his way to the orthodontist to repair a broken bracket and wire on his braces. The detective reassured G.O. their talk would not take long. He then thanked G.O. for coming "so we can get some stuff cleared up. Your Mom probably told you but I'm going to tell you again, all right. You are not under arrest." G.O. said he knew. The

detective added: "You're not going to be under arrest when we're done." G.O. nodded his head affirmatively.

The detective then framed the purpose of the meeting: "I'm just trying to clear some things up for you and your sister, especially for your sister." G.O. replied, "Yeah," and the detective continued: "I mean, you know, I think you know that your sister is kinda hurting right now." G.O. responded: "Oh, big time. I want her to be better." The detective followed that by saying, "If we can get some of this stuff cleared up and kind of aired out, I think that's going to help out everybody. Okay?" When G.O. replied, "Yeah," the detective added: "And, so, that's what we are here to do, right. This isn't about getting people in trouble. This is about trying to fix some things. Okay?" G.O. said, "Okay."

The detective then reiterated, "So we can all move on. Like I said, you are not under arrest. You are not going to be under arrest. But we're kinda sitting in this room, right? So I'm going to read you your *Miranda* rights just so you make sure you understand them." After reading the rights, the detective verified that G.O. understood, and he made sure G.O. meant "yes" when he answered, "mm hmm." The detective did not ask if G.O. wanted to waive his rights.

The detective asked about G.O.'s school and his interests. G.O. reported that he got good grades, planned to go to college, and hoped to work for Apple.

The detective then talked about the kind of work the detective did, explaining that previously he had investigated everything from shoplifting to homicide. The detective, who wore dress pants and an open collared shirt rather than a uniform and who did not have a visible firearm, added, "Now I work a lot with kids, usually young, young kids. Okay. The past few weeks I've been kind of talking to your sister, helping, trying to help her out."

G.O. responded by repeating, "I just want her to get better." Without further prompting, G.O. reported that he thought what happened with his stepsister connected to his own experiences when his daycare provider's son molested him. This was a theme G.O. would return to at other points during the interview. The detective told G.O. that "[a] lot of times these things [referring to G.O.'s conduct with his stepsister] happen because things have

happened to people in the past, right? And those things kind of start to manifest themselves."

When asked to explain the specifics of what happened to him, G.O. hesitated to speak. The detective reiterated that the purpose of the interview was to help G.O.'s stepsister. "It's just something that you and I are going to talk about so we can move past it to help [your stepsister] out." The detective then said, "[L]ike if we talk here for 45 minutes and you tell me what happened and I go and I find out that some of those aren't true or some of the things you tell me wasn't everything, that's when things start to get out of control."

The detective renewed his request for details about what happened to G.O. as a child. After G.O. explained those events, the detective asked what happened between G.O. and his stepsister. When G.O. was again reluctant, the detective said that "we might as well rip the bandaid off" and then asked G.O. where he would like to start. G.O. said, "Preferably nowhere but we have to get somewhere."

G.O. eventually described sexual acts with his stepsister, including anal and oral sex that occurred about 5 to 10 times. G.O. was often reluctant to speak. The detective sometimes would prompt G.O. by telling him what his stepsister had said. G.O. usually replied to these comments by saying he did not remember but, if that is what she said, then it likely happened. Other times, the detective encouraged G.O. to help his stepsister, and he added, "This is your time to get it all out on the table." G.O. responded, "I know, yeah, I know." The detective also encouraged G.O. to get things "off his chest."

G.O. explained: "All I want to do is I just want to go home. I want to get this done and over with. Get everything just cleared up and make sure I can just be less of a wreck." G.O. then described frequent anxiety and panic attacks and told the detective he was on medication as a result. He added that his mother said DCF wanted him to be in therapy and that he was seeing a therapist.

At the end of the interview, which lasted just under an hour, G.O. asked the detective if there was anything else he wanted to know.

Procedural History

More than two years after G.O.'s police interview, the State filed a complaint. The complaint charged G.O. with one count of aggravated criminal sodomy against a child younger than 14 when the offender

was younger than 18, K.S.A. 2016 Supp. 21-5504, and one count of aggravated indecent liberties of a child younger than 14 when the offender was younger than 18, K.S.A. 2016 Supp. 21-5506(b)(3)(A). The State also moved for prosecution as an adult, which was granted.

G.O. quickly reached a plea agreement in which the State agreed to dismiss one charge and to recommend a departure sentence. G.O. entered a plea. But before sentencing, the trial judge allowed him to withdraw his plea after finding that the plea was not knowing and voluntary because the sentence recommended by both parties would have resulted in an illegal sentence. The case returned to the docket and was set for a preliminary hearing. After that hearing, the State filed an amended complaint, charging G.O. with 60 counts: 6 counts of aggravated criminal sodomy, 51 counts of aggravated indecent liberties with a child, 1 count of attempted rape, and 2 counts of rape.

G.O. moved to suppress his statement to the detective, contending his waiver of rights and his confession were not knowing and voluntary. The trial judge held an evidentiary hearing at which the detective and G.O.'s mother testified. The detective's testimony reviewed the setting for the interview, the reading of the *Miranda* warnings and G.O.'s response, and the things both he and G.O. said, all of which was consistent with our summary. G.O.'s mother testified about G.O.'s maturity, mental health, learning disabilities that included attention deficit disorder, and schooling. She also explained her belief the interview was arranged at DCF's request with the goal of family reintegration.

In speaking about G.O.'s schooling and learning disabilities, G.O.'s mother testified that G.O. had always been less mature than his peers and he had learning disabilities. His school made testing accommodations by reading questions to him "so he could comprehend them better." When G.O. reached high school, he was making C's and D's "at best," except in orchestra, and he had failed several classes. In the school year during which the interview occurred, he moved to an alternative education program and was doing better there with smaller classes and more one-on-one time. His grades improved and, as G.O. had reported to the detective, his grades were "good." When asked if G.O. was on schedule to

graduate, his mother responded, "No. He would not have graduated on time, if at all, had he not been moved up there." When informed that G.O. had told the detective he planned to go to college and hoped to work for Apple, his mother said, G.O. was "obsessed with all things Apple" and working for Apple meant "at the Apple store one day, not for the Apple Incorporated." She added there was no plan for G.O. to go to college because "he's not college material. And that's okay." Asked to characterize G.O.'s comments to the detective, she explained they were "[m]ore like . . . when you ask a kid[,] . . . what do you want to do when you grow up?"

The trial judge also viewed the video of the interview. She commented that she had watched it before in an earlier court proceeding.

After hearing the evidence and the arguments of the attorneys, the trial judge granted the motion to suppress. The judge did not issue a written memorandum order but orally made factual findings and discussed the applicable legal standards.

The judge began by commenting that "this is a close question" as to whether G.O.'s comments were voluntary. She then observed that the circumstances are "strikingly similar" to those presented in *State v. R.W.*, 58 Kan. App. 2d 135, 464 P.3d 27 (2020). She discussed the framework the *R.W.* court had followed in its analysis—factors the Kansas Supreme Court has listed to help weigh relevant circumstances when determining if a confession is voluntary. The judge found there were "certainly a number of parallels between" R.W.'s interview and G.O.'s when these factors are examined.

The judge focused on the fairness of the interview, which drove *R.W.*'s outcome and, in the judge's view, the outcome of G.O.'s motion. The judge stressed the detective's constant reassurances to G.O. that the interview's purpose was to help G.O.'s stepsister and everyone, not to get people in trouble:

"I think the thing that may really tip the balance in this Court's opinion is why [G.O.] believed he was at the law enforcement center to talk with [the detective]. And that was pretty clear in the interview . . . because of what [the detective] told him, that they were there to talk about what would help his step sister, . . . and that nobody was in trouble. And so that seemed to be the purpose of his discussion."

The judge also found it significant that G.O.'s mother had told him that "he had to talk with the detective. They were all trying to cooperate for the benefit of" G.O.'s stepsister. The judge added that based on "how [G.O.] was providing information, it was clear that it was to help" his stepsister.

The judge then responded to some arguments G.O.'s attorney had presented about alleged procedural defects in the interview process. She noted the detective did not allow G.O.'s mother into the interview room, but the law did not require allowing a parent to attend the interview of someone of G.O.'s age. She also agreed with the factual basis of another of G.O.'s arguments, finding that the detective did not specifically ask G.O. to waive his *Miranda* rights or otherwise verify the waiver. But she concluded that these failures made no difference in the legal analysis because the law does not require those formalities.

Finally, the judge ruled that G.O.'s confession was not voluntary and summarized the reasons for the decision:

"As I said, I think it's a very close question. But based on the issue with his education—the fact that he was in therapy and had had anxiety attacks—the fact that he had actually no prior experience with law enforcement, and that he believed that he was there to help his step sister, . . . who had been in placement and had some very difficult issues—I am going to find the statement was involuntarily made by [G.O.]."

The State brought an interlocutory appeal in the Court of Appeals under K.S.A. 2022 Supp. 22-3603. A divided panel of the Court of Appeals reversed the trial judge, holding that G.O.'s confession was voluntary. *State v. G.O.*, No. 124,676, 2022 WL 4391366, at *9 (Kan. App. 2022) (unpublished opinion). One Court of Appeals judge dissented, saying she would conclude that the totality of the circumstances supports the holding that G.O.'s confession was involuntary. 2022 WL 4391366, at *9 (Hurst, J., dissenting).

G.O. petitioned this court for review of the Court of Appeals decision, and the State filed a conditional cross-petition. We granted both petitions. We have jurisdiction under K.S.A. 20-3018(b) (allowing jurisdiction over petitions for review of Court

of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

G.O. asks us to reverse the Court of Appeals majority and adopt the reasoning of the Court of Appeals dissent and the trial judge. He contends the trial judge correctly concluded his confession was involuntary. He argues the detective's conduct was misleading in three ways. First, the detective repeatedly made false reassurances that G.O. would not be arrested or be in any trouble if he revealed everything. Second, the detective never disclosed he was investigating a crime or that he was investigating G.O. And, third, the detective hid the true purpose of the interview by convincing G.O. that it was therapeutic—that is, that it was to help G.O.'s stepsister and everybody, including G.O.

The State does not argue that Fifth Amendment and Due Process Clause protections do not apply. Instead, it contends G.O. freely and voluntarily waived his Fifth Amendment and due process rights and voluntarily confessed. It also distinguishes *R.W.*, 58 Kan. App. 2d 135, the decision relied on by G.O., the trial judge, and the dissenting Court of Appeals judge. In addition, in the State's conditional cross-petition, it makes two arguments about circumstances considered by the trial judge. First, it contends G.O.'s struggles in school are irrelevant because nothing in the record suggests he struggled to understand questions during the interview or that the police officer exploited any educational difficulties. Second, it argues that giving *Miranda* warnings should be considered a factor undermining any claim of coercion.

The ultimate questions before us are whether G.O. knowingly, intelligently, and voluntarily waived his Fifth Amendment privilege against self-incrimination and whether the detective violated G.O.'s Fourteenth Amendment due process rights by coercing him to involuntarily make incriminating statements.

1. *General Overview of Applicable Law*

We separate these issues because G.O. mainly bases his arguments on the Fifth Amendment's self-incrimination privilege,

while the Court of Appeals discussed the Due Process Clause. Although there are doctrinal and substantive differences in the rights granted under the two provisions, the same legal test of voluntariness ultimately applies to a determination of whether a confession was obtained in violation of an accused's rights under the Fifth and Fourteenth Amendments. See *Dickerson v. United States*, 530 U.S. 428, 433-34, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). To explain, we look to the applicable caselaw applying both the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.

The Fifth Amendment, which applies to the states through the Fourteenth Amendment, protects "'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.'" *State v. Brown*, 286 Kan. 170, 172-73, 182 P.3d 1205 (2008) (citing and quoting *Malloy v. Hogan*, 378 U.S. 1, 6, 8, 84 S. Ct. 1489, 12 L. Ed. 2d 653 [1964]). In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court imposed a procedural safeguard, requiring law enforcement officers to inform individuals subject to custodial interrogation of their Fifth Amendment rights to remain silent and to have an attorney. Once the *Miranda* advisories are communicated, "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." 384 U.S. at 444. Courts use "voluntariness" as shorthand for this test.

In *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979), the United States Supreme Court adopted the same voluntariness waiver standard—voluntarily, knowingly, and intelligently—to evaluate a juvenile's waiver of *Miranda* rights. This voluntariness test thus applies to our consideration of G.O.'s motion to suppress his confession.

G.O. asserted both substantive and procedural Fifth Amendment rights in arguments to the trial judge. But on appeal G.O. did not raise the alleged procedural violations—that the detective did not verify G.O.'s waiver of rights or protect G.O., who was a minor, by involving his mother in the waiver. His abandonment of these arguments on appeal means those arguments are not preserved for our review. See *State v. Dooley*, 308 Kan. 641, 651, 423

P.3d 469 (2018). That abandonment does not forfeit G.O.'s ability to assert a violation of his substantive Fifth Amendment rights and to seek suppression of his confession, however. Even if *Miranda* advisories are read and an individual waives the rights, a confession can still be involuntary. See *State v. Palacio*, 309 Kan. 1075, 1087, 442 P.3d 466 (2019) (citing *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20, 104 S. Ct. 3138, 82 L. Ed. 2d 317 [1984]) (recognizing availability of remedy but observing such instances are rare).

The Fifth Amendment test for voluntariness substantially tracks the voluntariness test applied under the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 164, 169-70, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). The Court of Appeals framed its analysis under the Due Process Clause.

The Fourteenth Amendment's Due Process Clause states that no state shall "deprive any person of life, liberty, or property, without due process of law." Due process requires that confessions be voluntary. Under the Due Process Clause, "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned." *Miller v. Fenton*, 474 U.S. 104, 109, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). This concept of a due process protection against involuntary confessions flows from a "set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

Fenton noted two paths for applying due process protection against involuntary confessions: (1) Those that are inherently coercive and a per se violation of the Due Process Clause and (2) those where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive. 474 U.S. at 109.

The first path relates to interrogation techniques that in isolation are inherently offensive to a civilized system of justice. 474

U.S. at 109. Cases finding a per se violation of due process are rare, but the Court listed some illustrative cases. In them, police officers used coercive techniques that included extreme psychological pressure or brutal beatings and other physical harm. 474 U.S. at 109; see, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 153-54, 64 S. Ct. 921, 88 L. Ed. 1192 (1944) (confession involuntary where the confessant was psychologically pressured by being held for 36 hours incommunicado, without sleep or rest, and was subject to uninterrupted questioning by "relays of officers, experienced investigators, and highly trained lawyers"); *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936) (beating and other forms of physical and psychological torture). G.O. has not argued the characteristics of his interrogation were this type of inherently coercive action.

That does not foreclose suppression, however, because under the second path discussed in *Fenton* the Due Process Clause "applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." 474 U.S. at 110. Applying this aspect of the due process protection requires courts to "assess[] the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation"—to determine whether a confession is a "'free and unconstrained choice by its maker[.] If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' [Citation omitted.]" *Schneckloth*, 412 U.S. at 225-26.

In applying this totality-of-the-circumstances examination, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Connelly*, 479 U.S. at 167. And there must be a "link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." 479 U.S. at 165. The *Connelly* Court observed that the "sole concern . . . on which *Miranda* was based, is governmental coercion. . . . Indeed, the Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.' [Citation omitted.]" 479 U.S. at 170. The flip side of these conclusions is that an

accused's susceptibility to coercion does not alone give rise to a due process violation. 479 U.S. at 165. The facts and holding of *Connelly* illustrate this point.

In *Connelly*, the United States Supreme Court reviewed a Colorado Supreme Court decision that upheld the suppression of Francis Barry Connelly's statement. Connelly spontaneously gave the confession after voluntarily approaching a police officer and saying that he murdered someone and wanted to talk about it. The officer advised Connelly of his *Miranda* rights, which Connelly waived because a voice in his head told him he should confess. The Colorado Supreme Court held that Connelly's mental state interfered with his "rational intellect" and his "free will" and "the absence of police coercion or duress does not foreclose a finding of involuntariness. One's capacity for rational judgment and free choice may be overborne as much by certain forms of severe mental illness as by external pressure." *People v. Connelly*, 702 P.2d 722, 728, 729 (Colo. 1985), *rev'd* 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

The United States Supreme Court explicitly rejected this holding and the Colorado court's exclusive reliance on an accused's mental state as the constitutional basis for suppressing a confession. *Connelly*, 479 U.S. at 167. The Court did so after summarizing its caselaw and noting that "cases demonstrate that while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." 479 U.S. at 165. At the same time, it recognized such a holding might be demanded by state rules of evidence. 479 U.S. at 159, 167. It also acknowledged "that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus. [Citation omitted.]" 479 U.S. at 164. But "this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness.'" 479 U.S. at 164. Instead, an accused's characteristics are relevant to proving the State's coercive conduct induced the confession. 479 U.S. at 164-65, 170-71.

The individual's susceptibility to misconduct remains relevant. In a footnote, the *Connelly* Court noted that "[e]ven where there is causal connection between police misconduct and a defendant's confession, it does not automatically follow that there has been a violation of the Due Process Clause." 479 U.S. at 164 n.2. For support, the Court cited *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969).

There, while interviewing a homicide suspect, police misrepresented the statements of the defendant's cousin who had participated in the crime. The police falsely stated that the cousin had confessed. In addition, they "sympathetically suggested that the victim had started a fight by making homosexual advances." 394 U.S. at 738. The Court examined the totality of the circumstances surrounding the interview. It first mentioned that the defendant had received "partial warnings" of his constitutional rights (he had been told he had a right to an attorney and that anything he said could be used against him). It then also observed that the questioning was of short duration and the defendant was mature and of normal intelligence. The Court concluded the misrepresentation "while relevant, [was] insufficient in our view to make this otherwise voluntary confession inadmissible." 394 U.S. at 739. The Court added that "[t]hese cases must be decided by viewing the 'totality of the circumstances.'" 394 U.S. at 739.

This same totality-of-the-circumstances consideration applies whether the accused is an adult or a minor. But, when the accused is a minor, like G.O., unique characteristics may exist. For example, the *Fare* Court cautioned judges "to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved." 442 U.S. at 725. The Court later further explained that judges considering Fifth Amendment issues should factor in that "children 'generally are less mature and responsible than adults,' . . . 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,' [and] 'are more vulnerable or susceptible to . . . outside pressures' than adults." *J.D.B. v. North Carolina*, 564 U.S. 261, 272-73, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). See also *State v. Vonachen*, 312 Kan. 451, 464, 476 P.3d 774 (2020) (judges "'must exercise

the greatest care in assessing whether the juvenile's inculpatory statement to law enforcement was voluntary'").

These concerns relating to minors fit into the overall consideration of the totality of circumstances of a police interview of a criminal suspect. Whether dealing with a minor or adult, no list can be comprehensive because the circumstances of each case vary. Even so, this court has identified factors that might be relevant to judicial consideration of voluntariness. In doing so, we have emphasized that a court should not merely tally the factors. Nor do the factors necessarily deserve equal weight. Instead, "'a single factor or a combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act. [Citation omitted.]'" *State v. Sharp*, 289 Kan. 72, 81, 210 P.3d 590 (2009). In other words, a voluntariness outcome does not "turn[] on the presence or absence of a single controlling criterion" but "reflect[s] a careful scrutiny of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226.

As we have noted, the trial judge considered the circumstances of G.O.'s interrogation and identified several of the factors this court has outlined for consideration when conducting a totality-of-circumstances review. When dealing with minors, we have urged—but not required—judges to consider a minor's age, the length of questioning, the minor's education, the minor's experience with law enforcement, and the minor's mental state. E.g., *State v. Davis*, 268 Kan. 661, 674, 998 P.2d 1127 (2000) (citing seminal case listing factors, *State v. Young*, 220 Kan. 541, 546-47, 552 P.2d 905 [1976]). We have also developed a list of characteristics for judges to consider when conducting a totality-of-the-circumstances review in any case—juvenile or adult. These factors include the accused's mental condition, the manner and duration of interview, the accused's ability to communicate with the outside world, the accused's age and intellect, the officer's fairness in conducting the interview, and the accused's fluency in English. *State v. Gilliland*, 294 Kan. 519, 529, 276 P.3d 165 (2012). Here, the trial judge referred to both the juvenile and the general sets of factors.

In the State's conditional cross-petition for review, it repeats an argument it made to the Court of Appeals. It argues our list should include the factor of whether *Miranda* warnings were given. We have described these lists as nonexclusive, so any relevant factor may—and should—be considered. See, e.g., *Gilliland*, 294 Kan. at 528-29. Knowledge that one possesses constitutional rights when confronted with the accusation of criminal conduct—the very purpose of the *Miranda* advisory—is relevant. And the United States Supreme Court and other appellate courts commonly list knowledge of the criminal accusations and one's rights when listing circumstances for consideration under the Due Process Clause. E.g., *Schneckloth*, 412 U.S. at 227 (noting relevance of "the failure of the police to advise the accused of his rights"); *Frazier*, 394 U.S. at 739 (noting defendant "received partial warnings of his constitutional rights" and observing that "this is, of course, a circumstance quite relevant to a finding of voluntariness," citing *Davis v. North Carolina*, 384 U.S. 737, 740-41, 86 S. Ct. 1761, 16 L. Ed. 2d 895 [1966]). And, under *Miranda*'s procedural protections of Fifth Amendment rights, it can be a determinative factor in custodial interrogation cases. *Miranda*, 384 U.S. at 444.

We thus revise our factors to explicitly include consideration of whether *Miranda* warnings were given. But we also note that courts likewise consider whether a police officer negates, contradicts, or fails to honor the *Miranda* advisory. See, e.g., *Doody v. Schriro*, 548 F.3d 847, 869 (9th Cir. 2008), *aff'd on reh'g en banc* 596 F.3d 620 (9th Cir. 2010), *vacated on other grounds sub nom. Ryan v. Doody*, 562 U.S. 956, 131 S. Ct. 456, 178 L. Ed. 2d 282 (2010); *Ross v. State*, 45 So. 3d 403, 433-34 (Fla. 2010).

In addition to adding consideration of the giving and honoring of the *Miranda* advisory, we update the list with some other factors illustrated by caselaw. We have split the factors into two categories: (1) those relating to the details of the interrogation and (2) those relating to the accused. Judges should continue to consider the totality of the circumstances—that is, the circumstances in both categories plus any other relevant circumstances—when deciding whether a state actor's coercive actions induced the con-

fession. Consistent with prior decisions, trial judges need not address every factor, but we urge them to articulate the factors that influence their findings about whether a state actor engaged in coercive conduct and whether that coercive activity induced the confession.

Potential details of the interrogation that may be relevant include: the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statement took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises of benefit, inducements, threats, methods, or strategies used to coerce or compel a response; whether an officer informed the accused of the right to counsel and right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights.

Potential characteristics of the accused that may be relevant when determining whether the officer's conduct resulted in an involuntary waiver of constitutional rights include the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement.

These—and other factors arising from facts of a case—may be relevant no matter whether the accused is a juvenile or an adult, making separate lists unnecessary. But in cases involving a juvenile, we continue to urge judges to exercise great care in weighing these factors to decide whether the juvenile's inculpatory statement to law enforcement was voluntary.

Before applying these considerations to the trial judge's ruling suppressing G.O.'s confession, we add two other points to our overview of applicable law: the burden of proof and the appellate standard of review.

2. *Burden of Proof and Standard of Review*

When the protections of the Fifth and Fourteenth Amendments apply, the State bears the burden of proving by a prepon-

derance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment and voluntarily—that is based on the person's unfettered will—made a statement. *Brown*, 286 Kan. at 172. A trial judge examining whether the prosecutor met this burden must first ask whether police or other state actors overreached—that is, did they intimidate, coerce, deceive, or engage in other misconduct? If the answer is no, the police did not violate the defendant's constitutional rights under the Fifth Amendment or the Due Process Clause. If the answer is that the State actor overreached, then the judge must ask whether there the facts establish the "essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." *Connelly*, 479 U.S. at 165.

After a trial court applies that test and makes a voluntariness determination and a party appeals that decision, Kansas appellate courts apply a standard of review that divides the voluntariness determination into questions of fact and questions of law. *Vonachen*, 312 Kan. at 463; *Sharp*, 289 Kan. at 88-89. This mixed standard of review derives from the standard used by the United States Supreme Court when making voluntariness determinations about confessions. See, e.g., *Sharp*, 289 Kan. at 88-89 (citing *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L. Ed. 2d 302 [1991]). The Supreme Court's rationale for adopting the mixed question standard of review deserves some discussion because it elucidates how appellate courts should apply the standard and how trial courts should determine if the State has met its burden of persuasion.

The United States Supreme Court in *Culombe v. Connecticut*, 367 U.S. 568, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961), identified a review process involving "at the least," three phases. 367 U.S. at 603."First, there is the business of finding the crude historical facts, the external, 'phenomenological' occurrences and events surrounding the confession." 367 U.S. at 603. This totality-of-the-circumstances phase is normally determined by the trier of fact with the caveat that the findings must be supported by evidence. 367 U.S. at 603. Turning to the second and third phases—the determination of how the accused reacted to the external facts and

the legal significance of the reaction—the Court applied a de novo review.

The Court, in explaining why it gave less deference to the trial court when considering the second and third phases, acknowledged the factual aspects of discerning an accused's mental state. But it explained the analysis of mental state in the context of voluntariness could not be siloed as a pure question of fact because the two, "although distinct as a matter of abstract analysis, become in practical operation inextricably interwoven." 367 U.S. at 604. In part, this is "because the apprehension of mental states is almost invariably a matter of induction, more or less imprecise, and the margin of error which is thus introduced into the finding of 'fact' must be accounted for in the formulation and application of the 'rule' designed to cope with such classes of facts." 367 U.S. at 604. In other words, as the Court explained, "the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel." 367 U.S. at 605.

Those considerations led the Court to conduct an independent or de novo review of the voluntariness of the confession because "[n]o more restricted scope of review would suffice adequately to protect federal constitutional rights." 367 U.S. at 605. That said, the Court softened its de novo review by indicating it would give "[g]reat weight . . . to the inferences which are drawn by the state courts." 367 U.S. at 605. But those inferences would be tested through consideration of prior decisions because "it is only by a close, relevant comparison of situations that standards which are solid and effectively enforceable—not doctrinaire or abstract—can be evolved." 367 U.S. at 622.

Almost a quarter of a century after *Culombe* and fifty years after the United States Supreme Court had first adopted the mixed question of fact and law standard of review, it was asked to reshape the appellate standard for voluntariness determinations in habeas corpus appeals. The Court declined to do so in *Fenton*, 474 U.S. 104. 474 U.S. at 109-18. The decision to retain the standard

was partially guided by a federal habeas corpus statute not applicable here, but the Court also discussed why the standard applied in direct appeals. First, the Court cited the doctrine of stare decisis, noting the long-standing use of the standard. Second, it concluded "the nature of the inquiry itself lends support to the conclusion that 'voluntariness' is a legal question meriting independent consideration." 474 U.S. at 115. Third, and arguably most significantly, it referred to the "uniquely legal dimension" of the right to due process and its constitutional roots. 474 U.S. at 115.

In discussing the legal dimension of a voluntariness determination, the Court acknowledged, as the concurring opinion here suggests, the factual aspects of considering the circumstances of the confession and the characteristics of the suspect. But the Court cited back to the discussion in *Culombe,* 367 U.S. at 603, 605, and noted that "[a]lthough sometimes framed as an issue of 'psychological fact,' the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. [Citations omitted.]" 474 U.S. at 115-16.

The Court went on to explain that the legal dimension of the right arises because the "locus of the right" is the Due Process Clause under which "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." 474 U.S. at 116. Protection of this constitutional right required the Court to view the voluntariness inquiry as a question of law. The Court concluded "[t]his hybrid quality of the voluntariness inquiry, subsuming, as it does, a 'complex of values,' [citation omitted] itself militates against treating the question as one of simple historical fact" that would warrant deference to the trial judge's decision. 474 U.S. at 116. In other words, as one commentator observed, "No amount of metaphysics will enable a court to discover when a will is overborne. A court can reach this judgment only by analyzing the established facts and comparing them to earlier determinations of when a will was overborne." Comment, *The Standard of Review for the Voluntariness of a Confession on*

Direct Appeal in Federal Court, 63 U. Chi. L. Rev. 1311, 1333 (1996).

Culombe and *Fenton* are consistent with the standard of review this court has applied and that we reaffirm today. We thus review the trial judge's findings about historical facts regarding the circumstances of the confession as issues of fact. See *Sharp*, 289 Kan. at 88-89 (citing *Fulminante*, 499 U.S. at 287). This means the judge's findings about these factors must be supported by substantial competent evidence or, in other words, evidence that a reasonable person could accept as adequate to support a conclusion. *State v. Talkington*, 301 Kan. 453, 461, 345 P.3d 258 (2015). In assessing whether substantial competent evidence supports the factual underpinnings of a district court's decision, an appellate court does not reweigh the evidence, assess witness credibility, or resolve evidentiary conflicts. *Vonachen*, 312 Kan. at 464. This means that appellate courts disregard any conflicting evidence or other inferences that might be drawn from the evidence. *Unruh v. Purina Mills*, 289 Kan. 1185, 1196, 221 P.3d 1130 (2009).

We then review the question of whether the state actor overreached, the determination of how the accused reacted to the external facts, and the legal significance of the reaction as issues of law. We examine the totality of circumstances and assess de novo the trial judge's legal conclusion based on those facts. This means we give no deference to the trial judge's legal conclusion that G.O. did not voluntarily confess. *Vonachen*, 312 Kan. at 464.

3. *Application to Trial Judge's Ruling*

With those considerations in mind, we turn to an analysis of the trial judge's ruling. The judge relied heavily on *State v. R.W.*, 58 Kan. App. 2d 135. Like this case, the trial judge in *R.W.* suppressed a juvenile's confession after finding it involuntary, in large part because of the juvenile's lack of understanding of the interview's purpose.

R.W. was a 17-year-old high school student when interviewed by police officers. He had mental health issues and was coping with sadness and depression due to the recent passing of his father, whose body R.W. had found under tragic circumstances. R.W. had

bonded with a school resource officer (SRO), who had recently lost a son. When police investigated a complaint by R.W.'s girlfriend that he had raped her, two detectives contacted the SRO and had him introduce them to R.W.

The officers were introduced by first names only. They explained to R.W. that they wanted to talk to him "'about some stuff that occurred.'" They assured him he was not under arrest, but they took him to a police facility where they interviewed him for four hours. They told him they would take him back to school "'when we're done talking.'" 58 Kan. App. 2d at 137. R.W. was not allowed to call his mother.

Like the detective who interviewed G.O., the officers never told R.W. that he was the subject of a criminal investigation, and they obfuscated their role as criminal investigators. On the ride to the police facility, R.W. explained he had bonded with the SRO because they had both lost a family member. After expressing sympathy, one of the officers told R.W. that they were "'kind of like'" an SRO and that their jobs were to "'talk to kids, primarily.'" They explained their jobs were different from an SRO because they were not assigned to a school and an SRO did not have as "'much time to devote to longer-term . . . type of incidents with kids or crises that they're going through.'" 58 Kan. App. 2d at 137-38.

The officers read R.W. his *Miranda* rights but, like the detective's comments to G.O., they said things that downplayed the significance of the *Miranda* advisory. They portrayed it as "'a formality'" they needed to do only because they were in a police station. 58 Kan. App. 2d at 138.

Like the detective who interviewed G.O., the officers did not reveal the true purpose of the interview. Instead, they said, "'[W]e're just trying to understand,'" and they told him they would "'figure it out together.'" They responded to R.W.'s reluctance to talk by saying things like "'we've heard everything before'" and telling him "'it's going to be okay.'" They also said things like "'part of growing up[] is making mistakes and figuring out'" things. They urged him to tell them about his relationship with his girlfriend so he could "'clear his conscience,'" "'heal,'" "'leave it all there,'" "'walk away,'" "'move forward,'" and "'have a successful

future.'" They added that his former girlfriend was also "'going to heal, and she's going to be able to move past this . . . and move on with her life, too.'" 58 Kan. App. 2d at 139-41.

The trial judge in *R.W.* found the officers' omissions and obfuscations determinative of the issue of voluntariness because of the significant potential to confuse a juvenile about the purpose and gravity of the situation. The trial judge found the officers' frequent reassurances to R.W. gave him the impression that the interview was like a "'therapy session'" rather than a criminal investigation. 58 Kan. App. 2d at 148. As the trial judge here found, G.O.'s interview is "parallel" in tenor and purported purpose.

The trial judge in *R.W.* found the way the interview was conducted to be the main reason for a finding of involuntariness. But the judge also found other factors played into this—R.W.'s lack of experience with police, other than the SRO whom he considered a friend; R.W.'s mental state following the death of his father; and R.W.'s isolation in the interview room.

The Court of Appeals affirmed, finding that substantial competent evidence supported the trial judge's factual findings. 58 Kan. App. 2d at 145. The Court of Appeals also held that the trial judge applied the correct legal standard and affirmed the suppression. This court denied review.

4. *Totality of Circumstances Around G.O.'s Interview*

Here, the Court of Appeals majority and the State distinguish *R.W.* from G.O.'s circumstances, noting three distinguishing facts. They first observe that the interview in *R.W.* was four hours compared to G.O.'s one hour interview. Second, the police interviewing R.W. offered assurances that no one was in trouble more often than did the detective who interviewed G.O. And, third, G.O. more readily volunteered information than did R.W. While these are valid distinctions, the similarities the trial judge found are striking. The police officers' statements in both interviews were confusing. Given the inexperience and lack of maturity of the teens, the confusing statements provided misleading information about the purpose and gravity of the interviews. The officers in both situations gave the impression that the interview was a therapy session rather than part of a criminal investigation. Like,

R.W., G.O. had no experience with law enforcement and was suffering from mental health issues—in G.O.'s case, he was in therapy, being medicated for anxiety and, in his words, he was a "wreck." Nevertheless, the *G.O.* Court of Appeals majority discussed reasons they would not give the same weight to these matters as had the panel deciding *R.W.*, including that substantial competent evidence does not support the trial judge's findings.

Before discussing those conclusions, we observe that in briefs before the Court of Appeals the parties presented no arguments about the trial judge's findings of fact. Instead, the State conceded that substantial competent evidence supported the existence of the four factors about G.O.'s characteristics cited by the trial judge. These factors were G.O.'s educational problems, his anxiety attacks and ongoing therapy, his lack of experience with law enforcement, and his belief that he was talking to the police to help his stepsister and was not in trouble. But it argued the judge erred in its legal determination that the facts required suppression.

The Court of Appeals majority categorized the trial judge's findings in a different manner. It listed five findings it found supported by substantial competent evidence. Those were that the interrogation lasted just under an hour, G.O. was just under 17 years of age, he exhibited a good vocabulary during the interview, his mother drove him to the police station and waited there to drive him home, and the detective read the *Miranda* rights to G.O. 2022 WL 4391366, at *5. The *G.O.* majority concluded substantial competent evidence did not support the judge's findings about G.O.'s education struggles. 2022 WL 4391366, at *6-7. After discussing those findings, the majority found fault with the judge's reliance on *R.W.* and with the judge's legal conclusion that G.O.'s inculpatory statement was involuntary. 2022 WL 4391366, at *8-9. The majority also concluded the detective made no misrepresentations and otherwise did not exceed the fair boundaries of police conduct allowed during interrogations. See 2022 WL 4391366, at *8 ("The record shows [the detective] made no threats of harm or promises of benefit. Nor does it show [the detective's] undue influence over G.O."). It also impliedly found the trial judge's causation ruling—that G.O. spoke openly because he believed the purpose of the interview was to help his stepsister and

that no one would be in trouble—was unsupported. Instead, it concluded that G.O. spoke because he "wanted to clear the air and get something off his chest. G.O. was compelled to confess not by any officer's overreaching acts, but by his own guilty conscience." 2022 WL 4391366, at *9.

The dissenting Court of Appeals judge disagreed with these conclusions, however, noting support in the record for the trial judge's findings. See 2022 WL 4391366, at *12 ("The district court determined that [the detective's] misleading conduct tipped the scale in favor of finding G.O.'s statements involuntary. . . . [The detective's] misleading and inaccurate statements, which can be categorized as unfair interview tactics, weigh heavily in favor of finding G.O.'s statements involuntary, even without consideration of G.O.'s education, mental condition, and inexperience with law enforcement.").

We turn to the factors discussed by the trial judge and the Court of Appeals. We begin with the state actor's conduct—here the detective's comments.

4.1 *Circumstances of the Interview*

The trial judge found that the detective's conduct was the "thing that may really tip the balance" because the detective led G.O. to believe he was there to "talk about what would help his step sister . . . and that nobody was in trouble." We find substantial competent evidence supports the trial judge's findings on these points.

- *The Detective's Statements—Substantial Competent Evidence Review*

As for the promises of leniency, the detective at first told G.O. that he would not be "under arrest when we're done." The Court of Appeals correctly noted that G.O. was not arrested then or for about two more years, meaning the detective did not mislead G.O. But the majority did not directly discuss the detective's comment just before he read the *Miranda* rights that "you are not under arrest. You are not going to be under arrest." Unlike the statement the majority highlights about not being under arrest at the end of the interview, this representation had no temporal limitation, and

it came within a few words of the detective saying, "This isn't about getting people in trouble." Rather, as the detective repeatedly stated, they were there as the judge found "to talk about what would help his step sister."

Although the Court of Appeals did not directly discuss these representations, it dealt with the comments indirectly. It dismissed all alleged misrepresentations about leniency because Kansas caselaw requires that a police officer's promise of leniency make an individual's statement unreliable, and it concluded the record does not show that G.O. lied. For support, it cited *State v. Garcia*, which held:

> "In order to render a confession involuntary as a product of a promise of some benefit to the accused, including leniency, the promise must concern action to be taken by a public official; it must be such that it would likely cause the accused to make a false statement to obtain the benefit of the promise; and it must be made by a person whom the accused reasonably believed had the power or authority to execute it." 297 Kan. 182, 196, 301 P.3d 658 (2013).

As the Court of Appeals pointed out, under this standard, G.O.'s argument fails because nothing in the record suggests the detective's representations led to a false confession. And we acknowledge that *Garcia* is not our only decision to incorporate this reliability standard as a test of voluntariness. The reliability requirement appears in decisions as long ago as 1966. See *State v. McCarther*, 197 Kan. 279, 285, 416 P.2d 290 (1966).

Despite this history, we now recognize that reliability when applying the Fifth Amendment and the Due Process Clause is contrary to decisions of the United States Supreme Court. The misunderstanding arises from reliance on common-law history and on statutory rules of evidence that test reliability when deciding whether to admit hearsay.

The United States Supreme Court explained this history and reliance. It noted that common-law considerations mainly concerned the reliability of confessions, "recogniz[ing] that coerced confessions are inherently untrustworthy." *Dickerson*, 530 U.S. at 433. This recognition evolved into rules of evidence that allowed judges to admit only trustworthy out-of-court statements under hearsay exceptions. 530 U.S. at 433. Like the federal rules of evidence and other states' rules, Kansas' hearsay statute, K.S.A. 2022

Supp. 60-460(f)(2)(B), includes a reliability test, reflected in the requirement the State's action "must be such that it would likely cause the accused to make a false statement to obtain the benefit of the promise." *Garcia*, 297 Kan. at 196.

The early case of *McCarther* cites this statutory hearsay exception. 197 Kan. at 285 (quoting 1966 version of statutory hearsay exception, which differs from current statute only by using "he" where current statute uses "the accused"). *McCarther* and its progeny conflated the hearsay statute and the voluntariness test under the Due Process Clause of the Fourteenth Amendment. In doing so, *McCarther* did not discuss the United States Supreme Court's holding five years earlier that use of an evidentiary standard "that [takes] into account the circumstance of probable truth or falsity . . . is not a permissible standard under the Due Process Clause of the Fourteenth Amendment." *Rogers v. Richmond*, 365 U.S. 534, 543-44, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961). Instead, "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false." *Lisenba v. California*, 314 U.S. 219, 236, 62 S. Ct. 280, 86 L. Ed. 166 (1941).

The *Lisenba* Court explained that states were free to apply evidentiary rules testing whether coercion created a risk of a false confession. "But the adoption of the rule of [the state's] choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." 314 U.S. at 236.

Bound as we are by this holding, we overrule *Garcia*, *McCarther*, and other cases that apply K.S.A. 2022 Supp. 60-460(f)(2)(B) for any purpose other than admission of hearsay evidence. This precedent was originally erroneous, and more harm than good would result from continuing the error. See *State v. Larsen*, 317 Kan. 552, 559, 533 P.3d 302 (2023) (discussing exception to stare decisis doctrine when precedent originally erroneous). Neither K.S.A. 2022 Supp. 60-460(f)(2)(B) nor the standard in it apply to an analysis under the Fifth Amendment or the Due Process Clause of the Fourteenth Amendment.

This change in how we apply rules about promises by police officers undermines the Court of Appeals' rationale for rejecting

G.O.'s arguments. We are left with statements by the detective to G.O. that he was "not under arrest. You are not going to be under arrest. . . . This isn't about getting people in trouble."

In addition, as the trial judge also found, throughout the interview the detective emphasized the goal was to help G.O.'s stepsister. The detective began the interview by explaining that while he had investigated crimes, "Now I work a lot with kids, usually young, young kids. Okay. The past few weeks I've been kind of talking to your sister, helping, trying to help her out." When G.O. would express reluctance, the detective would return to the theme of helping G.O.'s stepsister. He continued to build on this after G.O., early in the interview, said, "I just want her to get better." The judge found the detective's statements misled G.O. to believe that was the purpose of the interview.

As we have discussed, a law enforcement officer's false promise, lie, or other deception can negate the *Miranda* advisory and provide the "necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Connelly*, 479 U.S. at 167; see *Schriro*, 548 F.3d at 869; *Ross*, 45 So. 3d at 433-34. Here, the detective not only downplayed the *Miranda* warnings, but he also encouraged a full confession if G.O. wanted to avoid prosecution. The detective also misrepresented the true purpose of the interview by repeatedly telling G.O. the purpose of the interview was not about getting anyone in trouble. The trial court's findings on these points are supported by substantial competent evidence.

- *Detective's Statements—Issue of Law*

In turn, these findings significantly influence our de novo review. The detective's comments to G.O. are remarkably like ones made by the officers in *R.W.* There the Court of Appeals concluded the officers' statements "had the significant potential to confuse a juvenile about the purpose and the gravity of his 'talk' with the officers." 58 Kan. App. 2d at 148. And "the potential for confusion was exacerbated by the fact that the officers did not disclose the true purpose of their 'talk.'" 58 Kan. App. 2d at 149. These conclusions apply equally to the circumstances of G.O.'s interview.

The State argues this potential confusion was offset by the fact the detective read G.O. the *Miranda* advisory. While, as the State argues, the fact an individual received the *Miranda* advisories is a circumstance supporting a holding that a statement was voluntarily made, courts have held that downplaying or contradicting the *Miranda* warnings can negate that support. See *Schriro*, 548 F.3d at 869; *Ross*, 45 So. 3d at 433-34. The trial judge concluded that G.O. believed he was being interviewed because "they were there to talk about what would help his step sister . . . and that nobody was in trouble." The concept that the interview would not be used against G.O. diverges from the *Miranda* warning which gave notice that what G.O. said could be used against him.

Another significant factor arises from the various statements in which the detective suggested—and arguably promised—that G.O. would not be arrested. While that comment alone did not suggest G.O.'s answers would not be used against him for any purpose, the detective also said that the purpose of the interview was not to get anyone in trouble. This could be objectively understood as a broader promise that G.O. would not be harmed by any statements he made. These representations—and arguable promises—were not true. They presented him with the option of helping his stepsister, and the false hope that he was progressing toward reintegrating his family, returning to live with his mother, and relieving his anxiety. And he could gain these benefits without the threat of being arrested or otherwise being in trouble. But now the State seeks to use these statements against him.

These statements are like ones considered in *Garcia*, 297 Kan. 182. There, using a totality-of-the-circumstances approach, we held that a police officer's misrepresentation, delivered through proxy, that Miguel A. Garcia would not be booked for murder was a significant factor weighing toward a conclusion that a confession was involuntary. 297 Kan. at 197. Other courts have also held that promises of nonprosecution were a significant factor weighing toward holding that a confession was involuntary. E.g., *United States v. Lall*, 607 F.3d 1277 (11th Cir. 2010); *United States v. Rogers*, 906 F.2d 189 (5th Cir. 1990); *State v. Tamerius,* 234 Neb. 121, 449 N.W.2d 535 (1989).

In addition, the circumstances of the dual administrative and criminal proceedings surrounding G.O.'s stepsister had the potential to cause confusion. Under similar circumstances, we held inculpatory statements were involuntary in *State v. Morton*, 286 Kan. 632, 186 P.3d 785 (2008). There, a college-educated adult who had experience with law enforcement involuntarily gave a statement. Karin J. Morton was the subject of an administrative investigation into whether she bought federal surplus property for private use. Local police investigated, and during the investigation Morton had an attorney. Later, a General Service Administration investigator contacted Morton for an interview. He did not make it clear that the interview was part of a criminal investigation and in fact made reassurances that it was not "that kind" of interview and encouraged Morton not to bring her attorney. 286 Kan. at 653-54. While all other circumstances of the interview suggested Morton's statement was voluntarily made, the investigator's misleading comments conveying the interview was not part of a criminal investigation led this court to hold that her statements were not the product of her free and independent will.

Likewise, the confusion caused by the detective's comments to G.O. also weigh toward a determination of involuntariness. While the detective did not discourage G.O. from bringing an attorney, the risk of misleading a juvenile with no experience with law enforcement is even greater than what occurred in *Morton*. As held in *R.W.*, "statements made to juveniles that are likely to mislead them regarding the nature and legal consequences of an interrogation have the potential to render a confession involuntary." 58 Kan. App. 2d at 149. Even G.O.'s mother believed they had to visit with officials and thought the efforts related to a plan to reunite the family and were designed to help G.O.'s stepsister.

The detective's misleading statements thus provide the predicate police overreaching. We turn to examining other factors about the interview to determine if those misleading statements support the conclusion that the detective's misleading statements induced G.O.'s confession.

- *Other Factors About the Interview*

We agree with the Court of Appeals that some factors relating to the nature of the interview point to voluntariness. The interview was

comparatively short—just under an hour where, for example, R.W.'s was four hours long. Also, the tone of the interview was friendly, with no raised voices and no threats.

G.O. never asked to speak to his mother, nor did he express concern when the detective told her she could not go with G.O. into the interview room. As the State argues and the Court of Appeals majority concluded, her presence and her knowledge of G.O.'s whereabouts distinguishes *R.W.* But under the circumstances, her presence added to the deceptive nature of the interview. She became a proxy for the detective, confirming his representation that G.O. was not under arrest and that G.O. needed to speak freely and offer details of what had happened. Her introduction of the detective, like the SRO's introduction of the police in *R.W.*, and her facilitation of the interview, while not direct conduct by a state actor, aided and validated the detective's representations that he was just trying to help and had no motive to get anyone in trouble.

Neither the parties nor the Court of Appeals discuss other factors about the nature of the interview, and we see no other relevant circumstance.

In sum, we find substantial competent evidence to support the trial judge's factual finding that a significant factor weighing toward involuntariness was G.O.'s belief that the purpose of the interview was to help his stepsister and was not to get anyone in trouble.

4.2 *G.O.'s Characteristics*

The trial judge found four characteristics that contributed to a conclusion G.O.'s statement was involuntary: his issues with education, his being in therapy, his anxiety diagnosis, and his lack of experience with law enforcement. The Court of Appeals questioned the legal significance of these factors, but it also held that the trial judge's findings of fact about G.O.'s educational issues lacked support from substantial competent evidence.

- *G.O.'s Educational Issues*

Beginning with the substantial competent evidence prong of our standard of review, the Court of Appeals and, before us, the

parties spend considerable energy debating the meaning of the trial judge's findings about G.O.'s education and his progress toward graduation. Our review of the record reveals that G.O.'s statement and his mother's testimony supply substantial competent evidence supporting the trial judge's findings that G.O. had struggled and failed many classes. While his new program offered an opportunity to catch up and graduate on time, there is nothing in the record stating he had caught up on his credit at the time of his interview.

Turning to the second prong and the trial judge's legal conclusion, the Court of Appeals concluded "the record shows no link between G.O.'s mild learning disability and his oral comprehension or his ability to respond during the interview." The majority then noted that the video of the interview showed that G.O.'s responses to the detective "were swift, responsive, and showed no confusion or lack of understanding." 2022 WL 4391366, at *6. The State, in its conditional cross-petition for review, makes the same point. It also contends the detective did not know of G.O.'s educational issues, so could not have used them to coerce G.O. to talk.

These are valid points. But it does not appear that the trial judge weighed this circumstance because she found that G.O. did not understand questions. Rather, the judge seemed to have considered the factor in the context of the overall struggles G.O. faced—the things that made him a wreck in his eyes—rather than as affecting his ability to understand and process what the detective said to him. Overall, the trial judge concluded G.O. was susceptible to the detective's overreaching because of the struggles he had faced, struggles dominated by his emotional and mental health issues.

- *G.O.'s Anxiety Attacks and Ongoing Therapy*

The Court of Appeals likewise noted that G.O.'s mental health problems did not manifest during the interview and no evidence otherwise "show[ed] that any of G.O.'s mental conditions affected his free will at the time he was interviewed." The majority contin-

ued by noting that G.O. had not testified, "so we lack his subjective view of that matter." Nor, the majority added, did a doctor testify. 2022 WL 4391366, at *7.

In this passage, the majority was distinguishing *State v. Swanigan*, 279 Kan. 18, 38, 106 P.3d 39 (2005), a case in which an order of suppression was "heavily influenced by evidence of the defendant's low intellectual functioning and his susceptibility to being overcome by anxiety." *G.O.*, 2022 WL 4391366, at *7. In that case a doctor had testified, although the defendant did not. The distinctions drawn by the Court of Appeals are thus valid. But the Court of Appeals went beyond making distinctions to suggest that G.O. had the burden to prove his mental health affected his waiver of his right to remain silent. This ignores the burden of proof that applies here, which is that it is the State's burden to show by a preponderance of the evidence that G.O. confessed voluntarily. *Vonachen*, 312 Kan. at 464.

The trial judge here made no explicit findings about whether the anxiety manifested during the interview. But the judge found that G.O. had experienced anxiety attacks; had been diagnosed with attention deficit disorder, anxiety, and depression; more than likely was on medication at the time of the interview, although G.O.'s mother could not remember what the medication was; and was in bi-weekly therapy. The judge then concluded there were "certainly a number of parallels" between this case and *R.W.*, 58 Kan. App. 2d 135.

In *R.W.*, the only physical sign of anxiety mentioned by the trial judge was that R.W. ""nervously pick[ed] at his nails at several points."" Even so, the trial judge found that R.W.'s mental state "left him vulnerable." 58 Kan. App. 2d at 150. The Court of Appeals agreed, noting the evidence suggested "mental vulnerability and, therefore, a higher potential for coercion." 58 Kan. App. 2d at 151. *R.W.* illustrates that mental health issues need not manifest during the interview before they can be a factor to be weighed in the totality of the circumstances. While the trial judge here did not make the same explicit findings as did the judge in *R.W.*, she noted the similarity in the circumstances in *R.W.* with those here.

We also note that the trial judge had the opportunity to watch G.O. in person during multiple hearings, including a plea colloquy. She thus had the advantage of in-person observation during several hearings to compare G.O.'s demeanor during the interview. We will not substitute our judgment for her assessment that G.O.'s mental and emotional health issues evidenced a vulnerability to coercion.

We conclude substantial competent evidence supports the factual findings made by the trial judge about G.O.'s anxiety, other diagnoses, medications, and therapy and her legal conclusion—implied from her reliance on *R.W.*—that these increased G.O.'s vulnerability to any coercion.

- *G.O.'s Lack of Experience with Law Enforcement*

The next factor the trial judge cited as influencing her decision was G.O.'s lack of exposure to law enforcement. On this point, the parties' arguments before us concern the legal import of this lack of experience, not its factual basis. We find evidence in the record to support the trial judge's finding of fact on this point.

The Court of Appeals majority discounts G.O.'s lack of experience as important, contrasting his lack of experience to R.W.'s trust in the SRO that was ostensibly transferred to the officers who conducted the interview. But, as we have discussed, G.O.'s mother supplied the connection between G.O. and the detective, and she told G.O. he had to talk to the detective. Her trust and understanding of the purpose of the interview—that is, to help her stepdaughter—if nothing else, illustrates how someone more mature misunderstood the situation. G.O.'s lack of contrary experience weighs into his vulnerability to the detective's misleading comments about the purpose of the interview.

4.3 *Detective's Actions Induced G.O.'s Confession*

Finally, we consider the trial judge's determination that the detective's actions induced G.O.'s confession. The Court of Appeals discounted the trial judge's holding that the detective's misleading conduct was causally related to G.O.'s confession. G.O. argues the Court of Appeals strayed from the standard of review by reweighing the facts.

The Court of Appeals found G.O.'s confession was motivated by his guilty conscience and he "wanted to clear the air and get something off his chest." 2022 WL 4391366, at *9. This inference has some support in the record. But substantial competent evidence supports the trial judge's finding that G.O. attended the interview and talked to the detective to help his stepsister, and that he believed in doing so, "nobody was in trouble." He told the detective he preferred not to talk "but we have to get somewhere," and other statements he made suggested that his motivation to start talking was to help his sister and to allow for family reintegration. G.O.'s subjective belief is not enough to find the detective's comments coercive. But objectively the combination of the detective's comments are circumstances weighing toward a determination that the detective deceptively led G.O. to believe he was not in trouble, would not be arrested, and was just there to help his stepsister.

The totality of the circumstances also weighs toward concluding G.O. involuntarily waived his Fifth Amendment rights and involuntarily made a confession. We have circumstances in which the detective negated the *Miranda* advisory and represented that G.O. was not in trouble and would not be arrested and general confusion by G.O. and his mother about the distinction between a criminal investigation and the ongoing administrative process to reintegrate the family. Substantial competent evidence also supported the trial judge's findings that G.O.'s emotional state, age, and lack of experience with law enforcement made him vulnerable to being misled. Applying these facts de novo, we conclude the detective's statements negated the *Miranda* warnings and misled G.O. into believing the interview's purpose was to help his stepsister. Inducing these false beliefs was coercive and led to G.O. confessing against his expressed free will not to talk about what had happened. Given G.O.'s general anxiety and other circumstances, through this overreaching, the detective overbore G.O.'s will and, through his statements that the interview would help G.O.'s stepsister, provided the primary motivation for G.O. to give a statement he explicitly said he preferred not to make. G.O.'s statements thus were not the product of his free and independent will.

De Novo Determination

As we have noted, under earlier decisions of this court and of the United States Supreme Court, "the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne." *Fenton*, 474 U.S. at 116; *Vonachen*, 312 Kan. at 464; *Sharp*, 289 Kan. at 88-89.

This brings us to the second prong of our review at which we conduct a de novo determination of whether the detective's overreaching was compatible with due process considerations. We conclude it was not. Comparing the facts here with other cases holding a defendant had involuntarily confessed illustrates how this overreaching was incompatible with constitutional principles.

CONCLUSION

Accordingly, the trial judge did not err in holding G.O.'s statements were involuntary and thus must be suppressed. We affirm the trial judge's conclusion that the State did not prove by a preponderance of the evidence that G.O.'s confession was voluntary.

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

* * *

STEGALL, J., concurring: I concur in the reasoning and result of today's decision given that it is dictated by United States Supreme Court precedent. But the longer I sit on this court, the more convinced I become that we must not situate our decisions in the shadows of obscurantist reasoning or amid the distraction of legal pieties. Both are at play here. The Supreme Court's "totality of the circumstances" test by which it conjures a question of "law" out of the factual circumstances of "voluntariness" obscures what is happening—and the popular piety that appellate courts do not find facts or reweigh evidence simultaneously draws attention from the real action.

Indeed, as the Supreme Court makes clear, the crucial question of a defendant's mental state when a confession is made is a question of fact. The "mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference." *Culombe v. Connecticut*, 367 U.S. 568, 605, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961). Circumstantial evidence and the drawing of inferences are quintessential fact-finding tools. And yet the Court insists the question is one of law, not fact. Why? Simply put, it is because appellate courts owe no deference to a lower court's determination of legal questions—and the Court wants to play in the voluntariness sandbox.

There may be good reasons for this. But they can never be explored or plainly stated if appellate courts insist on pretending they are not doing what they plainly are doing. Judges have "convinced many people—including themselves—that they use esoteric materials and techniques to build selflessly an edifice of doctrines unmarred" by things like reweighing evidence in a value-laden way. Posner, *How Judges Think* 3 (2008). But a realistic and pragmatic court can and should do better.

A clear explanation of today's decision (which reflects Supreme Court precedent) might go something like this. Our Constitution does not tolerate coerced confessions. So to be admissible in court, a confession must have been voluntarily made. Voluntariness is an elusive fact and involves the inner workings of a person's mind and will. Since the best we can do is to look at a defendant's inner state from the outside, it is important for a fact-finder to carefully consider all the circumstances and draw reasonable inferences from those circumstances about what must have been happening inside the defendant's mind.

While appellate courts will not normally reweigh the evidence or second guess the trial court fact-finder, we will make an exception in this instance. Indeed, on review, appellate judges must put themselves in the position of fact-finders with respect to this crucial question of voluntariness—that is, we must reweigh the circumstances and inferences carefully. We do this because preventing coerced confessions is so fundamental to our constitutional structure that we cannot leave its enforcement to an inconsistent

quilted patchwork of ad hoc decisions made by trial judges. When we allow appellate courts to be the ultimate arbiters of the fact of voluntariness, our caselaw will establish over time the broad circumstances and inferences to be considered in future cases, all of which will better guide law enforcement and achieve more uniform results.

No. 125,104

STATE OF KANSAS, *Appellee*, v. TODGE ANTON ANDERSON, *Appellant.*

(543 P.3d 1120)

SYLLABUS BY THE COURT

1. EVIDENCE—*Sanction for Discovery Violation—Abuse of Discretion Review—No Due Process Right to Have Evidence Excluded If Violation of Discovery Order*. A district court's decision about whether to impose a sanction for a discovery violation, and which sanction to impose, is reviewed for an abuse of discretion so long as due process rights are not implicated. And generally, defendants do not have a due process right to have evidence excluded when a party violates a discovery order. An abuse of discretion occurs if the decision is arbitrary, fanciful, or unreasonable, or if it is based on an error of law or fact. The party asserting error has the burden to establish an abuse of discretion.

2. SAME—*Statutory Requirement That Defense Be Permitted to Inspect and Copy Certain Evidence upon Request— Discovery Violation if Not Permitted.* K.S.A. 2022 Supp. 22-3212(a) requires that the prosecuting attorney permit the defense to inspect and copy certain evidence upon request by the defense. Thus, to establish a discovery violation under that statute, the record must show the defendant requested inspection or copies of the evidence at issue.

3. TRIAL—*Discretion of Court to Impose Sanctions for Violations of Discovery Statutes—Sanctions.* K.S.A. 2022 Supp. 22-3212(i) grants the district court discretion to impose sanctions for violations of the criminal discovery statutes. Such sanctions may include allowing the opposing party to inspect any materials not previously disclosed, ordering a continuance, excluding any materials not disclosed, or other orders the district court deems just under the circumstances.

4. SAME—*Discovery Violation—Wide Discretion by Trial Court in Imposing Sanctions—Considerations.* The trial court has wide discretion in deciding which, if any, sanctions to impose for a discovery violation. In reaching this decision, the trial court should consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. The court may also consider whether there are recurring problems or repeated instances of intentional failure to disclose or to abide by the court's discovery rulings. Ordinarily, the court should impose the least drastic sanctions which are designed to accomplish the objects of discovery but not to punish.

5. SAME—*Prosecutors Have Wide Latitude Crafting Arguments—Shifting Burden of Proof Is Improper.* Prosecutors generally have wide latitude in crafting arguments and commenting on the weaknesses of the defense. But an argument attempting to shift the burden of proof is improper. A prosecutor does not shift the burden of proof by pointing out a lack of evidence to support a defense or to corroborate a defendant's argument regarding holes in the State's case. Likewise, when the defense creates an inference that the State's evidence is not credible because the State failed to admit a certain piece of evidence, the State may rebut the inference by informing the jury that the defense has the power to introduce evidence. But when discussing the defense's subpoena power, the State crosses the line when it suggests the defendant must disprove the State's case or offer evidence to support a finding of reasonable doubt.

6. EVIDENCE—*Circumstantial Evidence May Be Used to Prove Identity of Controlled Substance.* The identity of a controlled substance may be proven by circumstantial evidence if that evidence supports a reasonable inference that the defendant distributed or possessed the substance in question.

7. CRIMINAL LAW—*Sentencing—BIDS Expenditures Taxed to Defendant—Considerations.* If convicted, K.S.A. 22-4513 provides that the district court shall tax defendant with all expenditures made by the State Board of Indigents' Defense Services to provide counsel and other defense services. In determining the amount and method of payment, district courts must explicitly consider two circumstances on the record: (1) the financial resources of defendant; and (2) the nature of the burden that payment of the award will impose.

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Oral argument held September 12, 2023. Opinion filed March 1, 2024. Affirmed in part, vacated in part, and remanded with directions.

Peter Maharry, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Bates*, of the same office, was with him on the brief for appellant.

Michael R. Serra, deputy district attorney, argued the cause, and *Michael F. Kagay*, district attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: Todge Anton Anderson and two accomplices were involved in the robbery and murder of Christopher McMillon. Trial evidence showed Anderson had been dealing synthetic marijuana in the month before the murder. Anderson obtained his supply of synthetic marijuana from McMillon, but Anderson was in debt to McMillon for a certain quantity of this product. One

evening, Anderson arrived at McMillon's home with the two accomplices. Upon entering McMillon's home, Anderson fatally shot McMillon and directed the accomplices to take items of value from the residence.

A jury convicted Anderson of first-degree felony murder, second-degree intentional murder (as a lesser-included offense of first-degree premeditated murder), aggravated robbery, distributing or possessing with intent to distribute a controlled substance, and criminal possession of a weapon. Anderson was sentenced to a controlling term of life without the possibility of parole for 620 months and ordered to pay the State Board of Indigents' Defense Services (BIDS) $5,000 in attorney fees.

On direct appeal, Anderson raises four claims of error. First, Anderson argues the district court abused its discretion by admitting into evidence a recording of a jail call. In that recording, Anderson talked about getting shorted in a drug distribution operation. The State disclosed this recording days before the start of the trial. Anderson claims the State's late disclosure violated statutory rules of criminal discovery and the district court should have excluded the evidence as a sanction. But even assuming the late disclosure violated a discovery statute, the admission of the evidence was reasonable under the circumstances.

Second, Anderson argues the prosecutor erred in closing argument by shifting the burden of proof to Anderson. During rebuttal, the State mentioned Anderson's subpoena power in conjunction with the reasonable doubt standard and explained that Anderson had failed to produce a specific piece of evidence relevant to his defense. Collectively, these comments obscured how the burden of proof applied to one particular argument, but the error did not affect the trial's outcome.

Third, Anderson argues there was insufficient evidence to support his conviction for distributing synthetic marijuana or possessing synthetic marijuana with intent to distribute in an amount less than 25 grams. But the trial evidence, when viewed in a light most favorable to the State, supports his conviction.

Finally, Anderson argues the district court erred by ordering him to pay $5,000 in BIDS attorney fees. Before imposing this obligation on a defendant, Kansas law requires that the district

court explicitly consider on the record the nature of the burden such payment would impose on the defendant. See K.S.A. 22-4513(b); *State v. Robinson*, 281 Kan. 538, 546, 132 P.3d 934 (2006). Here, the record confirms the district court did not explicitly consider this factor.

Thus, we affirm Anderson's convictions, vacate the order assessing attorney fees against Anderson, and remand for reconsideration on that issue.

FACTS AND PROCEDURAL BACKGROUND

On the morning of October 3, 2020, McMillon was found dead in his home. He had been shot two times, with at least one of the gunshot wounds being fatal.

During their investigation, police obtained video surveillance footage from one of McMillon's neighbors. The video showed a man and two women entering McMillon's home around 12:33 a.m. on October 3 and leaving about seven minutes later. One of the women was carrying a TV on the way out. Police identified the two women in the video as Tishara Moran and Latrelle Praylow. And Moran and Praylow both identified the man as Anderson.

At trial, Moran and Praylow explained the events surrounding McMillon's murder. Moran testified she met and began dating Anderson in early September 2020. During their time together, Anderson sold synthetic marijuana, also known as K2 or tookie. McMillon was Anderson's supplier. McMillon would front K2 to Anderson, and Anderson would repay McMillon after selling the supply. About a week before McMillon's murder, someone robbed Anderson, taking the K2 that McMillon had supplied to Anderson.

Anderson and Moran went to McMillon's home around 8:30 p.m. on the night of the murder and stayed for about 30 minutes. During that time, McMillon told Anderson several times that "I need my money," and Anderson responded, "I know." Moran believed they were talking about the money Anderson owed McMillon for the stolen K2.

About an hour or two before the murder, Praylow and Tony Hunter were in an SUV parked in an alley. They were met by Anderson and Moran, who were in Moran's car. Anderson got into

the SUV with Praylow and Hunter. Praylow overheard Anderson say he knew where to get tookie, and Hunter said he wanted some. Praylow then got out of the SUV, leaving behind her bookbag which contained a .22 caliber gun.

Praylow got into Moran's car, and she and Moran smoked PCP in the car and talked for about 20 or 30 minutes. Anderson then returned to Moran's car and got in the driver's seat. The three of them returned to McMillon's.

Upon entering McMillon's home, McMillon greeted Praylow with a hug. Anderson then reached over Praylow's shoulder and shot McMillon. Praylow recognized the gun in Anderson's hand as the one from her bookbag. Anderson, Moran, and Praylow then went upstairs. Anderson ordered the women to look for items to steal. Praylow grabbed a TV and took it out to the car. Anderson drove them back to the alley where they had met up earlier that evening and dropped Praylow off. Anderson and Moran then went to a hotel with the TV still in Moran's car.

The next morning, Moran overheard Anderson talking on the phone in the bathroom. He kept saying he was "so sorry" and that he "fucked up." Moran said she had little memory of what happened after smoking PCP the previous night. When she asked Anderson what had happened, he told her to tell the police he did it. She said she only later discovered that "it" was McMillon's murder.

After leaving the hotel, Anderson and Moran left the TV behind a dumpster. They then stopped at a sporting goods store and a pawn shop because Anderson kept saying he needed .22 caliber ammunition. At the pawn shop, Anderson pulled a gun out of his pocket. Moran later dropped Anderson off at a location in Topeka.

Moran was pulled over and arrested on a highway near Lawrence a few days after the murder. Two or three weeks later, Praylow flew to Washington under a different name and was eventually arrested in Seattle. Anderson was apprehended in Omaha, Nebraska in early January 2021.

Police found three .22 caliber casings in the living room of McMillon's home and one .22 caliber casing in the backseat of Moran's car. Forensic testing confirmed all four casings were fired from the same gun. But that gun was never recovered.

The week before Anderson's trial, Detective Victor Riggin with the Topeka Police Department discovered a recorded phone call Anderson made from jail in May 2021. During that call, Anderson talked about not getting a fair cut from drug sales and compared the listener's job frustrations to getting shorted in a drug deal. But Anderson made no reference to McMillon specifically. The recording was later admitted into evidence at trial.

As noted, the jury convicted Anderson on several counts. And the district court sentenced him to a controlling term of life without the possibility of parole for 620 months and ordered him to pay $5,000 in BIDS attorney fees.

Anderson appeals his convictions and the attorney fees order directly to our court. We heard oral argument on September 12, 2023. Jurisdiction is proper. K.S.A. 2022 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crimes appeal directly to Supreme Court).

ANALYSIS

I. *The District Court Did Not Abuse Its Discretion by Declining to Exclude a Recording of the Jail Call as a Sanction for a Discovery Violation*

For his first issue on appeal, Anderson argues the district court abused its discretion by failing to exclude the recorded jail call as a sanction for the State's discovery violation. To resolve this issue, we first identify facts relevant to Anderson's challenge. Then, we identify the controlling legal framework governing the issue. Finally, we analyze the facts under that framework and conclude that Anderson has failed to carry his burden to show the district court abused its discretion.

A. *Relevant Facts*

Anderson's trial began in February 2022. On the first day of trial, defense counsel informed the district court that three days earlier, the State had disclosed a recording of the jail call Anderson made in May 2021. Defense counsel confirmed that he had listened to the call with Anderson the previous day. The defense objected to its admission based on relevance and late disclosure. The State argued the evidence was relevant because it captured

Anderson complaining about his share of the proceeds from a drug operation. As for the timing of the disclosure, the State said Detective Riggin did not start listening to Anderson's jail calls until the week before trial. And there was no unfair surprise to Anderson because the recording contained his own statements.

After listening to the recording, the district court ruled that the call was relevant and admissible. Defense counsel again objected, arguing the late disclosure prevented him from finding and interviewing the other person on the call. The court overruled the objection, stating, "[T]hese are the statements of your client. And your client's statements are fully discoverable by you." Anderson now argues the district court abused its discretion by failing to exclude the call as a sanction for a discovery violation.

B. *Standard of Review and Relevant Legal Framework Governing This Discovery Issue*

"Generally, when a party challenges the admission or exclusion of evidence on appeal, the appellate court's first inquiry is relevance." *State v. Miller*, 308 Kan. 1119, 1174-75, 427 P.3d 907 (2018). But here, Anderson does not dispute the relevance of the jail call. Instead, he argues only that the district court should have excluded this evidence as a sanction for the State's discovery violation.

A district court's decision about whether to impose a sanction for a discovery violation, and which sanction to impose, is reviewed for an abuse of discretion, so long as due process rights are not implicated. 308 Kan. at 1175. And generally, defendants do not have a due process right to have evidence excluded when a party violates a discovery order. *State v. Johnson*, 286 Kan. 824, 832, 190 P.3d 207 (2008). "An abuse of discretion occurs if the decision is arbitrary, fanciful, or unreasonable, or if it is based on an error of law or fact." *State v. White*, 316 Kan. 208, 213, 514 P.3d 368 (2022). As the party asserting error, Anderson has the burden to establish an abuse of discretion. *State v. Genson*, 316 Kan. 130, 136, 513 P.3d 1192 (2022).

Anderson argues the State violated the discovery provisions of K.S.A. 2022 Supp. 22-3212. The statute requires that prosecutors permit defendants to inspect and reproduce certain types of

evidence upon request, including recorded statements of the defendant which are in the prosecution's "possession, custody or control" and which the prosecuting attorney knows about or might have learned about through the exercise of due diligence:

> "Upon request, the prosecuting attorney shall permit the defense to inspect and copy or photograph the following, if relevant: (1) Written or recorded statements or confessions made by the defendant, or copies thereof, which are or have been in the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney." K.S.A. 2022 Supp. 22-3212(a).

"Discovery . . . must be completed no later than 21 days after arraignment or at such reasonable later time as the court may permit." K.S.A. 2022 Supp. 22-3212(h).

The statute also obligates parties to produce newly discovered evidence previously requested or subject to a prior discovery order. K.S.A. 2022 Supp. 22-3212(i). Failure to abide by this obligation may result in court-ordered sanctions. Such sanctions may include allowing the opposing party to inspect any materials not previously disclosed, ordering a continuance, or excluding any materials not disclosed:

> "If, subsequent to compliance with an order issued pursuant to this section, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under this section, the party shall promptly notify the other party or the party's attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this section or with an order issued pursuant to this section, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances." K.S.A. 2022 Supp. 22-3212(i).

The district court has wide discretion in deciding which, if any, sanctions to impose. *State v. Jones*, 209 Kan. 526, 528, 498 P.2d 65 (1972); see also *Johnson*, 286 Kan. at 832. In reaching this decision, the "trial court should take into account the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *Jones*, 209 Kan. 526, Syl. ¶ 2. The court may also consider whether "there

is a recurring problem or there are repeated instances of intentional failure to disclose or to abide by the court's discovery rulings." *State v. Winter*, 238 Kan. 530, 534, 712 P.2d 1228 (1986)."Ordinarily, the court should impose the least drastic sanctions which are designed to accomplish the objects of discovery but not to punish." 238 Kan. at 534.

C. *Anderson Fails to Demonstrate the District Court Abused Its Discretion*

Anderson's claim of error is founded on the assumption that the State committed a discovery violation under K.S.A. 2022 Supp. 22-3212. And, in turn, this purported violation authorized the court to impose sanctions. But we question whether any discovery violation can be established on the record before us. See *Holmes v. State*, 292 Kan. 271, 280, 252 P.3d 573 (2011) (party asserting error has burden of furnishing record on appeal showing prejudicial error).

The State's failure to produce the jail call sooner does not, on its own, violate K.S.A. 2022 Supp. 22-3212. The statute requires the State to allow inspection and reproduction of evidence "[u]pon request." K.S.A. 2022 Supp. 22-3212(a). It is the party's request for inspection that triggers the prosecutor's statutory discovery obligations.

Anderson claims he entered a reciprocal discovery agreement with the State on May 26, 2021. But this agreement is not in the record on appeal. Nor does the record contain any other discovery request or order addressing the jail call. Without these records, it is difficult to substantiate whether Anderson requested inspection or copies of the jail call or whether this evidence was otherwise subject to the district court's discovery orders.

Likewise, the record does not reveal any applicable deadlines for discovery. K.S.A. 2022 Supp. 22-3212(h) generally requires discovery to be completed no more than 21 days after arraignment, and Anderson waived formal arraignment on July 27, 2021. But the statute also authorizes the district court to order discovery to be completed more than 21 days after arraignment if the deadline is reasonable. K.S.A. 2022 Supp. 22-3212(h). The parties may

also independently reach agreement on the time, place, and manner of criminal discovery. See K.S.A. 2022 Supp. 22-3212(f) (prosecuting attorney and defense "shall cooperate in discovery and reach agreement on the time, place and manner of making the discovery and inspection permitted"). And as previously noted, the criminal discovery statutes include a procedure for late discovery of information previously requested by a party. This statutory provision requires the discovering party to promptly notify the requesting party or the court of the newly discovered material. See K.S.A. 2022 Supp. 22-3212(i).

Here, we know the jail recording was disclosed only days before the trial. But it is difficult to assess the State's compliance with K.S.A. 2022 Supp. 22-3212 without record access to the discovery requests, orders, and agreements in this case. For these reasons, we merely assume (without deciding) that the State's failure to permit Anderson to inspect the recording of the jail call at some earlier date constituted a discovery violation under K.S.A. 2022 Supp. 22-3212. Even with this assumption, Anderson failed to carry his burden to show the district court abused its discretion.

K.S.A. 2022 Supp. 22-3212(i) grants the district court discretion to determine the "just" sanction for a discovery violation. See *Johnson*, 286 Kan. at 832. The failure to comply with a discovery request, while not to be condoned, "does not require the evidence to be automatically excluded." *State v. Villa & Villa*, 221 Kan. 653, 656, 561 P.2d 428 (1977). Instead, a district court should normally impose the least drastic sanction needed to further the purpose of our discovery statutes—if the court imposes any sanction at all. See *Winter*, 238 Kan. at 534. The least drastic sanction contemplated under K.S.A. 2022 Supp. 22-3212(i) is an order requiring the noncompliant party to allow discovery and inspection of the materials previously requested but not disclosed.

Here, the district court's decision not to exclude the jail call recording from evidence was objectively reasonable. By the time the parties had raised the issue with the district court judge, the State had already produced a copy of the recording to Anderson, and he had reviewed it with counsel. In other words, the State had effectively imposed upon itself the least drastic sanction contemplated by K.S.A. 2022 Supp. 22-3212(i)—permitting inspection.

More severe or additional sanctions were not required to further the purposes of the criminal discovery statutes. There is no evidence suggesting the prosecutor acted in bad faith. Indeed, the State turned the recording over to Anderson shortly after learning of its existence. See *Johnson*, 297 Kan. at 216-17 (absence of bad faith and intentional violation of discovery mitigates against more severe sanctions). And the admission of this evidence produced no undue surprise or prejudice to Anderson. He made the phone call and had actual knowledge of the contents of the recording from the outset. See *Jones*, 209 Kan. at 531 (absence of surprise weighed against imposing harsher sanctions for discovery violation).

Under these circumstances, the district court reasonably decided not to exclude the recording of the jail call from evidence. Anderson has failed to demonstrate that the district court exceeded its wide discretion in resolving this issue.

II. *The Prosecutor Committed Error During Rebuttal Closing Argument, but This Error Did Not Affect the Outcome of the Trial*

Second, Anderson argues the prosecutor committed error during closing argument by shifting the burden of proof. As with the prior issue, we first address the facts and controlling legal framework before outlining our rationale for concluding that any prosecutorial error was harmless.

A. *Additional Facts About the Closing Argument*

While in jail before Anderson's trial, Moran and Praylow exchanged several letters in which they discussed information related to the case. At trial, defense counsel elicited testimony from Detective Riggin that some of those letters appeared to contain more than one person's handwriting. This led Riggin to believe Praylow may have been forging letters to fabricate evidence, and Riggin sent an email informing the prosecutor of his suspicions. Riggin also said the letters mentioned Hunter—the man in the SUV with Praylow on the night of the murder. The allegedly forged letters were not admitted into evidence, though the State did admit two other letters written by Moran to Praylow.

During closing argument, defense counsel argued the State's case relied heavily on assumptions and conjecture. Defense counsel highlighted weaknesses in the State's case, such as inconsistencies between Praylow's testimony and the physical evidence; the State's failure to identify a bystander depicted in the surveillance video; and the absence of Anderson's DNA in McMillon's home. Defense counsel argued the State was asking the jury to "fill in the blanks" or "read between the lines" despite a lack of evidence supporting the State's case.

Defense counsel also challenged Moran's and Praylow's credibility. He pointed out the news had broadcast information about the investigation which Moran and Praylow may have heard before they gave statements to police. He also emphasized that Moran and Praylow had exchanged information about the case through letters, and those letters mentioned Hunter. Defense counsel suggested Moran and Praylow may have simply pinned the murder on Anderson to help themselves or to help the real culprit evade responsibility.

In rebuttal, the prosecutor made the following comments:

"[T]here's been talk about letters throughout the course of this case. Well you guys were writing letters back and forth, right? These women were in the jail, they were writing letters, those letters mentioned [Hunter], didn't they? Now you haven't seen the letters, and this is another important point.

"*If there is a piece of evidence that would prove or would show that . . . there's a reasonable doubt as to the defendant's guilt, the defendant has the same subpoena power that the State has. The defendant can call witnesses to come in here to bring in evidence and to show you things. And if there is some letter out there that indicates that these women are lying or if they—*" (Emphasis added.)

Defense counsel objected on the grounds of burden-shifting. The State responded, "What I have said has been recognized by the Kansas Supreme Court as an appropriate argument when the defense makes the argument that the State has failed to present some piece of evidence." The district court told the prosecutor, "I do believe you're going to get to burden shift. And at this point in time, I would ask that you just move on with this." The State did not return to this line of argument.

On appeal, Anderson argues that the highlighted statements above improperly suggested Anderson had the burden to disprove the State's

case or that a finding of reasonable doubt is contingent on production of evidence by the defense.

B. *Standard of Review and Legal Framework for Prosecutorial Error*

To determine whether prosecutorial error has occurred, this court considers whether the challenged prosecutorial acts "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, this court then determines whether that error prejudiced the defendant's right to a fair trial by considering whether the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. 305 Kan. at 109.

Prosecutors generally have wide latitude in crafting arguments and commenting on the weaknesses of the defense. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021); *State v. Williams*, 299 Kan. 911, 934, 329 P.3d 400 (2014). But an argument attempting to shift the burden of proof is improper. 299 Kan. at 939. The challenge lies in identifying the line between a prosecutor's proper comments on a defense or defendant's evidence and improper burden-shifting.

"[A] prosecutor does not shift the burden of proof by pointing out a lack of evidence to support a defense or to corroborate a defendant's argument regarding holes in the State's case." 299 Kan. at 940. Likewise, "[w]hen the defense creates an inference that the State's evidence is not credible because the State failed to admit a certain piece of evidence, the State may rebut the inference by informing the jury that the defense has the power to introduce evidence." *State v. Blansett*, 309 Kan. 401, 415, 435 P.3d 1136 (2019). But when discussing the defense's subpoena power, the State crosses the line when it suggests the defendant must disprove the State's case or offer evidence to support a finding of reasonable doubt. 309 Kan. at 415; *Williams*, 299 Kan. at 939.

C. *The Rebuttal Argument Fell Outside the Wide Latitude Afforded to Prosecutors, but the Error is Harmless*

The State maintains defense counsel's closing argument gave the prosecution leeway to comment on Anderson's subpoena power. That

is, defense counsel's closing argument focused on evidence the State had failed to produce, so the State could permissibly argue that Anderson had the ability to produce any evidence favorable to him. But we disagree with the State's characterization of its rebuttal argument.

The State did not simply point out that Anderson had the power to present evidence favorable to the defense. Rather, the State's argument coupled the defense's subpoena power with the reasonable doubt standard. It argued: "If there is a piece of evidence that *would prove or would show that . . . there's a reasonable doubt as to the defendant's guilt*, the defendant has the same subpoena power that the State has." (Emphasis added.)

This statement would have sent a mixed message to the jury regarding the burden of proof—it suggested Anderson had the burden to present evidence before the jury could find reasonable doubt as to his guilt. And the State's argument incorrectly faulted the defense for not producing "some letter . . . that indicates that [Moran and Praylow] are lying." Taken together, these comments suggested that Anderson had the burden to prove Moran and Praylow were not credible witnesses. And they further implied that Anderson had failed to carry this burden because he did not produce the allegedly forged letters.

In other contexts, we have permitted the State to discuss the defense's failure to produce specific evidence. For example, in *Blansett*, defense counsel emphasized during closing argument that the State had introduced a recording of only one of the defendant's multiple interviews with police. Defense counsel suggested the State was hiding the recordings of the other interviews because they were favorable to the defense. In rebuttal, the State argued the defense had the same power and ability to introduce those recordings into evidence. We held the State's response "fell within the wide latitude to refute the inference that it was hiding evidence from the jury, and it did not suggest the defense bore the burden to disprove the crimes charged." *Blansett*, 309 Kan. at 415.

We have reached the same conclusion under similar circumstances in other decisions. See *State v. Pribble*, 304 Kan. 824, 837-38, 375 P.3d 966 (2016) (prosecutor's comment that defendant could have called alibi witnesses was fair rebuttal to defense counsel's argument that State failed to call witnesses who could corroborate defendant's

account); *State v. Naputi*, 293 Kan. 55, 64, 260 P.3d 86 (2011) (it was not improper for the State to respond to defense counsel's "purported inference" that the State refused to call a witness beneficial to the defense "by pointing out that if the [witness] would have been helpful to the defense, the defense could have subpoenaed him").

But "the line between permissible and impermissible argument is [often] context dependent." *State v. Martinez*, 311 Kan. 919, 923, 468 P.3d 319 (2020). And here, the context distinguishes *Blansett*, *Pribble*, and *Naputi* because defense counsel never faulted the State for failing to introduce the allegedly forged letters. Nor did defense counsel ask the jury to infer the letters would have been favorable to the defense because the State failed to present them. Thus, the State's comment regarding Anderson's failure to produce the letters cannot be characterized as fair rebuttal to any suggested inference.

After considering the unique factual circumstances of this trial and placing both parties' closing arguments in context, we hold that the rebuttal argument fell just outside the wide latitude afforded prosecutors in arguing a case. The prosecutor's comments implied that the burden was on Anderson to rebut the State's witnesses and establish a reasonable doubt as to his guilt. Similarly, they suggested Anderson failed to carry this burden because he did not subpoena the allegedly forged letters. So construed, the argument falls within the category of burden-shifting, which we have consistently deemed improper. See *Blansett*, 309 Kan. at 414; *Williams*, 299 Kan. at 939.

Having concluded there was error, we must now consider whether that error was harmless—that is, whether it prejudiced Anderson's due process rights to a fair trial. *State v. Thomas*, 311 Kan. 905, 910, 468 P.3d 323 (2020). In doing so, we apply the traditional constitutional harmlessness standard identified in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Sherman*, 305 Kan. at 109. Under this standard, "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]).

The State has met its burden to show beyond reasonable doubt that this prosecutorial error did not affect the outcome of the trial. For one,

the State's comments were isolated. See *State v. Hirsh*, 310 Kan. 321, 343, 446 P.3d 472 (2019) (prosecutorial error harmless in part because prosecutor's improper comment "was singular and isolated"). Defense counsel objected just after the prosecutor made the challenged remarks. The district court advised the prosecutor to move on because the argument sounded like burden-shifting. And the State complied with this admonishment.

The State also acknowledged during rebuttal that the law places the burden of proof on the State, not the defendant:

"In this case, the State has the burden of proof; that's the way he [*sic*] works a [*sic*] criminal cases. The defendant is not required to prove that he is innocent. The State must prove that the defendant is guilty."

And while the State's argument may have erroneously suggested Anderson carried the burden to prove Praylow and Moran were lying, the parties' closing arguments made clear the determination of those witnesses' credibility was ultimately up to the jury. The jury instructions reinforced this message. The court instructed jurors that "[i]t is for you to determine the weight and credit to be given the testimony of each witness." The jury also received an accomplice witness instruction, stating it "should consider with caution the testimony of an accomplice who may receive a benefit from the State for her testimony." We presume the jury followed these instructions. *State v. Thurber*, 308 Kan. 140, 194, 420 P.3d 389 (2018). Thus, we hold that the prosecutorial error is harmless.

III. *The State Presented Sufficient Evidence to Support Anderson's Conviction for Distributing or Possessing with Intent to Distribute a Controlled Substance*

In his third issue on appeal, Anderson argues there was insufficient evidence to convict him of distributing K2 or possessing K2 with intent to distribute.

A. *The State's Evidence*

At trial, Moran testified Anderson was selling K2 often in September 2020. She explained K2 and tookie were the same substance—synthetic marijuana. She described its appearance as "green" and "kind of like a potpourri." She also explained the arrangement between Ander-

son and McMillon. McMillon would front K2 to Anderson, and Anderson would repay McMillon after selling it. She recalled being in the car with Anderson while he was delivering drugs in Topeka. And she once picked up some K2 from McMillon's home and took it to Anderson in Kansas City. Moran testified that about a week before the murder, Anderson had been robbed of K2 that he received from McMillon. And, on the day of the murder, McMillon had repeatedly requested payment.

The State also presented a message sent from Moran's phone on September 21, 2020, stating: "[McMillon's address], please go to my cousin's spot and he'll give you some smoke for me. I told him you would pull up. Just video call me when you get there." Moran denied writing this message, explaining that Anderson sometimes had access to her phone.

Another State's witness, Rachel Johnson, testified that "probably a month or two" before the shooting—that is, in August or September 2020—she bought K2 from McMillon, and Anderson had delivered the substance to her home. Johnson also went to McMillon's home to buy K2 the morning after the murder but left when nobody answered the door.

Praylow testified she heard Anderson say he knew where to get some tookie while she was in the SUV with Anderson and Hunter on the night of the murder.

Finally, during a search of McMillon's home following the murder, police found 162.45 grams of marijuana and 168.73 grams of K2 in the kitchen along with some scales and plastic baggies. Chemical analysis confirmed the substances were marijuana and K2.

B. *Standard of Review and Relevant Legal Framework*

When reviewing the sufficiency of the evidence to support a conviction, this court looks at all the evidence in the light most favorable to the State to decide whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In doing so, we do not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Spencer*, 317 Kan. 295, 302, 527 P.3d 921 (2023).

Anderson was charged with distributing or possessing with intent to distribute marijuana or synthetic marijuana in an amount

less than 25 grams under K.S.A. 2020 Supp. 21-5705(a)(4) and (d)(2)(A). The jury instructions told the jury that to convict for this offense the State must prove:

> "1. The defendant distributed or possessed with intent to distribute marijuana or an analog thereof, and/or synthetic marijuana also known as 'K2' or 'Tookie' also known as Methyl 2-{[1-(pente-1-yl) – 1H-indazol-3-yl) carbonyl]amino} – 3,3-dimethylbutanoate (MDMB-en-PINCACA) a controlled idazole-3 carboximide.
>
> "2. The quantity of 'K2' or 'Tookie' distributed or possessed with intent to distribute was less than 25 grams.
>
> "3. This act occurred on or about the 1st day of September through the 3rd day of October, 2020 in Shawnee County, Kansas."

C. *There Was Sufficient Evidence to Sustain a Conviction for Distribution of Less Than 25 Grams of Synthetic Marijuana*

Anderson first challenges the sufficiency of the evidence on the grounds that no witness testified he distributed K2 on a specific date. But Anderson was charged with distribution "[o]n or about the 1st of September, 2020 through the 3rd of October, 2020." Moran's testimony establishes she met Anderson in early September and was in a romantic relationship with him at least through the date of McMillon's murder on October 3. She also detailed Anderson's extensive distribution activity during that time. This activity was corroborated by Johnson, who testified Anderson delivered K2 to her a month or two before the murder—that is, in August or September 2020. Any date discrepancy in this testimony would go to its weight, and we do not reweigh evidence when conducting sufficiency review. See *Spencer*, 317 Kan. at 302. This evidence is sufficient to establish that Anderson distributed K2 within the relevant date range.

Next, Anderson argues the State presented no evidence establishing the amount of K2 he distributed. The amount distributed is relevant because the severity level of the offense of distribution of marijuana or an analog of marijuana is graded by the quantity of material distributed. See K.S.A. 2022 Supp. 21-5705(d)(2). But the lowest severity level of that offense involves distribution of less than 25 grams. See K.S.A. 2022 Supp. 21-5705(d)(2)(A). And

the State charged Anderson under subsection (d)(2)(A). Thus, evidence that Anderson distributed any quantity of K2 would suffice to establish this element. See, e.g., *State v. Scheuerman*, 314 Kan. 583, 592, 502 P.2d 502 (2022) (undisputed evidence of possession of greater quantity of controlled substance than charged crime encompasses is sufficient to establish possession of amount of charged crime).

Finally, Anderson argues there is insufficient evidence to establish the substance he was distributing was K2. Anderson acknowledges the State may prove the identity of a controlled substance through circumstantial evidence if that evidence supports a reasonable inference that the defendant distributed or possessed the substance in question. See *United States v. Baggett*, 890 F.2d 1095, 1096 (10th Cir. 1989); *State v. Northrup*, 16 Kan. App. 2d 443, 452-53, 825 P.2d 174 (1992). Such evidence may include: (1) evidence regarding the physical appearance of the substance; (2) evidence that the substance produced the expected affect when tested by someone familiar with the illegal drug; (3) evidence the substance was used in the same way as the illicit drug; (4) evidence that a high price was paid in cash for the substance; (5) evidence that transactions involving the substance were carried out in secrecy; and (6) evidence that the substance was called by the name of the illegal drug by the defendant or others in his presence. *Baggett*, 890 F.2d at 1096; *Northrup*, 16 Kan. App. 2d at 453.

Anderson argues the circumstantial evidence at trial does not support an inference the substance he distributed was K2. Our review of the record convinces us otherwise. Moran testified Anderson distributed K2, which she explained was synthetic marijuana. She also described the substance's appearance as consistent with synthetic marijuana. Johnson, an experienced consumer, testified Anderson delivered K2 to her. Praylow testified she heard Anderson say he knew where to get tookie, which Moran explained is another term for K2 or synthetic marijuana. Finally, the evidence showed McMillon was Anderson's supplier, and chemical analysis of substances recovered from McMillon's home confirmed they were marijuana and synthetic marijuana.

Viewing this evidence in a light most favorable to the State, as we must under the controlling standard of review, the evidence

is sufficient to establish that Anderson distributed less than 25 grams of synthetic marijuana on or about September 1 through October 3, 2020. We thus affirm his conviction for this offense.

IV. *The District Court Erred by Ordering Anderson to Pay $5,000 in BIDS Attorney Fees Without Expressly Considering the Nature of the Burden That Payment Would Impose*

Finally, Anderson argues the district court erred by failing to comply with K.S.A. 22-4513 when imposing BIDS attorney fees. The statute provides that a district court shall tax a convicted defendant with all expenditures made by BIDS in providing counsel and other defense services. K.S.A. 22-4513(a). When determining the amount and method of payment, district courts must explicitly consider two circumstances on the record: (1) the financial resources of defendant; and (2) the nature of the burden that payment of the award will impose. K.S.A. 22-4513(b); *Robinson,* 281 Kan. at 546.

At sentencing, the State requested the district court require Anderson to reimburse BIDS attorney fees in the amount of $10,225 or to ask about Anderson's ability to pay those fees. The district court later asked if Anderson had any income from any source, and Anderson responded he did not. The court then imposed "a reduced attorney fee in the amount of $5,000 as opposed to [$]10,225 for indigency found."

The district court expressly considered Anderson's financial resources on the record. But both parties agree the district court did not expressly consider the nature of the burden that payment of the award would impose on Anderson. Thus, we vacate the district court's order assessing Anderson with BIDS attorney fees and remand for reconsideration on this issue. See *State v. Garcia-Garcia*, 309 Kan. 801, 824, 441 P.3d 52 (2019) (vacating BIDS attorney fees assessment and remanding for reconsideration of defendant's obligation).

CONCLUSION

None of the issues Anderson raised on appeal warrant reversal of his convictions. The district court's decision to admit the jail

call was reasonable under the circumstances. While the State's rebuttal closing argument fell outside the bounds of proper argument, that error was harmless. And sufficient evidence supports Anderson's conviction for distributing K2. We thus affirm all Anderson's convictions.

But the district court erred by taxing Anderson with BIDS attorney fees without first expressly considering on the record the burden that payment would impose. We thus vacate that order and remand for reconsideration of the attorney fee issue.

Judgment of the district court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.

State v. Brown

No. 125,955

STATE OF KANSAS, *Appellee*, v. KEVIN L. BROWN, *Appellant*.

(543 P.3d 1149)

SYLLABUS BY THE COURT

1. HABEAS CORPUS—*No Second or Successive Motion for Relief under K.S.A. 60-1507—Exceptions.* A district court may not entertain a second or successive motion for relief under K.S.A. 60-1507 unless the alleged errors affect constitutional rights and exceptional circumstances justify raising the successive motion.

2. SAME—*Exceptional Circumstances—Unusual Events or Intervening Changes.* Exceptional circumstances are unusual events or intervening changes in the law.

3. SAME—*Motion May Not Raise Issue Not Raised on Direct Appeal—Exceptional Circumstances.* A K.S.A. 60-1507 motion cannot serve as a vehicle to raise an issue that should have been raised on direct appeal, unless the movant demonstrates exceptional circumstances excusing earlier failure to bring the issue before the court.

4. SAME—*Statutory Vehicle for Collateral Attack on Conviction and Sentence.* K.S.A. 60-1507 provides a statutory vehicle for a collateral attack on a criminal conviction and sentence.

Appeal from Sedgwick District Court; JEFFREY GOERING, judge. Submitted without oral argument December 15, 2023. Opinion filed March 1, 2024. Affirmed.

Sam S. Kepfield, of Hutchinson, was on the brief for appellant.

Julie A. Koon, assistant district attorney, *Marc Bennett,* district attorney, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ROSEN, J.: Kevin L. Brown appeals from the denial of a motion to vacate his conviction based on asserted trial errors. To understand the context of the present proceeding and appeal, it is necessary to review Brown's previous court actions.

Brown was convicted in 2011 of felony murder, aggravated burglary, and aggravated assault for events taking place in 2010. He was sentenced to a hard 20 life sentence for the murder conviction and to a controlling consecutive sentence of 120 months for the other charges. He appealed his convictions, which were affirmed in *State v. Brown*, 299 Kan. 1021, 327 P.3d 1002 (2014).

On March 1, 2012, Brown filed a pro se motion to set aside the verdict and vacate sentence. The district court denied the motion because it was not filed within the statutory time limitations and because he had docketed his direct appeal.

In July 2016, he filed his first pro se motion under K.S.A. 60-1507, asserting ineffective assistance of appellate counsel. The district court ruled it did not have jurisdiction over the belated motion. The Court of Appeals eventually dismissed Brown's appeal from that judgment, holding that it lacked jurisdiction because he did not file his notice of appeal within the requisite 30 days. *State v. Brown*, No. 118,800, 2019 WL 405741, at *3 (Kan. App.) (unpublished opinion), *rev. denied* 310 Kan. 1064 (2019).

On May 8, 2020, Brown filed a second motion seeking relief under K.S.A. 60-1507. He again asserted he received ineffective assistance of appellate counsel when counsel failed to argue the district court erred in denying a request for a jury instruction on lesser included offenses under *State v. Berry*, 292 Kan. 493, 254 P.3d 1276 (2011). He also asserted the district court erred when it allowed a codefendant's statements to be read to the jury without providing Brown with the opportunity to confront the author of the statements. The district court dismissed Brown's second K.S.A. 60-1507 motion as untimely, finding he failed to meet his burden of showing manifest injustice so as to relieve him of the statutory one-year limit. The Court of Appeals affirmed in *Brown v. Young*, No. 123,217, 2021 WL 4501852 (Kan. App. 2021) (unpublished opinion).

On March 4, 2022, Brown filed a motion to set aside his convictions and sentence because witnesses for the State lied when they provided testimony at trial; lesser included offense instructions were not given at his trial; the prosecution engaged in misconduct; certain rulings by the trial judge were prejudicial to his case; he received ineffective assistance of trial counsel; and he received ineffective assistance of appellate counsel. He further argued that the timelines for filing the motion were equitably tolled.

The State responded with a "motion to refile defendant's pro se motion." In its motion, the State argued Brown clearly intended to seek relief under K.S.A. 60-1507, and the motion should have been opened as a separately docketed independent civil action.

On April 13, 2022, Brown responded to the State's motion with a letter addressed to the judge, which reads in relevant part:

> "I'm writing you this letter in regards to the State's attempt to refile my motion in civil court as a 60-1507. I am not a lawyer and do not have the wisdom and knowledge that you have of the law obviously. So I come in all humility to ask you not to do this. The State knows the time limits to file a 60-1507. However there is no time limit for manifest injustice. Although I am not making a claim of actual innocence, that is not the only factor in seeking manifest injustice in a case. There are several issues at stake here, potential perjury and brady violations; potential 6th amendment violations and prosecutorial misconduct all adding up to manifest injustice. I also believe I have standing and was adversely affected by K.S.A. 21-5109(b)(1)."

The district court denied Brown's request for relief, noting that Brown was explicitly electing not to proceed under K.S.A. 60-1507 but that statutory provision is the only permitted means of collaterally attacking a conviction and sentence following conviction. Brown filed a timely notice of appeal. This court assumed jurisdiction under K.S.A. 2022 Supp. 22-3601(b)(3), (4) because the motion was filed in Brown's criminal case, not as a separate civil proceeding.

Brown sought to mount an untimely and successive attack on various aspects of his trial and sentence. He proposes a procedure that avoids the preclusions of the statutory options for such an attack, but he does not articulate a valid alternative approach.

Perhaps for good reason, Brown elected not to use K.S.A. 60-1507 as the vehicle for the instant attack on his conviction. He was unlikely to succeed with such a strategy.

A district court may not entertain a second or successive motion for relief under K.S.A. 2022 Supp. 60-1507 unless the alleged errors affect constitutional rights and exceptional circumstances justify raising the successive motion. See, e.g., *Littlejohn v. State*, 310 Kan. 439, 444, 447 P.3d 375 (2019). Exceptional circumstances have been defined as "unusual events or intervening changes in the law." *Rowland v. State*, 289 Kan. 1076, Syl. ¶ 6, 219 P.3d 1212 (2009). Furthermore, unless there is a showing of manifest injustice, Brown only had one year after this court denied his direct appeal to file a claim for relief under K.S.A. 60-1507. K.S.A. 2022 Supp. 60-1507(f)(1)(A). Finally, a K.S.A. 60-1507 motion cannot serve as a vehicle to raise an issue that should have

been raised on direct appeal, unless the movant demonstrates exceptional circumstances excusing earlier failure to bring the issue before the court. *Rowland*, 289 Kan. 1076, Syl. ¶ 6.

Brown argues that whether he had to proceed under K.S.A. 60-1507 or whether there was another option available to him is a question of law. But that law is settled. This court has held that "K.S.A. 60-1507 provides the exclusive statutory remedy to collaterally attack a criminal conviction and sentence." *State v. Mitchell*, 297 Kan. 118, Syl. ¶ 1, 298 P.3d 349 (2013).

He could not use a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504 because such a motion may not be used to collaterally challenge a conviction. *State v. Trotter*, 296 Kan. 898, 898, 295 P.3d 1039 (2013).

He asks this court to remand this case "to determine the precise avenue for statutory relief which is available to [him]." He also suggests the district court should have appointed counsel to assist him with his filing. He contends such counsel might have been able to demonstrate manifest injustice allowing him to proceed under K.S.A. 60-1507. But, as noted above, his alleged trial errors could have been raised on direct appeal, so K.S.A. 60-1507 would not have been helpful in any event.

Brown has counsel on appeal, and that counsel has not pointed out a course that the district court should have taken, particularly given Brown's explicit rejection of treating his pleading as a K.S.A. 60-1507 motion. And Brown does not point this court to any authority for the proposition that a district court must figure out an avenue by which a pro se party might win.

Brown elected to pursue a remedy that is not available at law. The district court did not err in denying him relief.

Affirmed.

No. 126,479

In the Matter of LEON J. DAVIS JR., *Respondent*.

(543 P.3d 1143)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Two-year Suspension.*

Original proceeding in discipline. Oral arguments held November 2, 2023. Opinion filed March 1, 2024. Two-year suspension stayed after six months, conditioned on successful participation and completion of two-year probation period.

Kathleen J. Selzler Lippert, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

N. Trey Pettlon, III, of Law Offices of Pettlon & Ginie, of Olathe, argued the cause, and *Leon J. Davis Jr.*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Leon J. Davis Jr., of Kansas City, Missouri. Davis was admitted to practice law in Kansas on April 26, 2013.

On February 9, 2023, the Disciplinary Administrator's office filed a formal complaint against Davis alleging violations of the Kansas Rules of Professional Conduct (KRPC). This complaint stemmed from Davis' failure to report a felony DUI charge to the Disciplinary Administrator's office.

On December 5, 2022, the Kansas Supreme Court issued an order of temporary suspension pursuant to Kansas Supreme Court Rule 219(g)(1) (2023 Kan. S. Ct. R. at 274).

On April 24, 2023, the parties entered into a summary submission agreement under Supreme Court Rule 223(b) (2023 Kan. S. Ct. R. at 278) (summary submission is "[a]n agreement between the disciplinary administrator and the respondent," which includes "a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken").

In the summary submission agreement, the Disciplinary Administrator and Davis stipulate and agree that Davis violated the

following Kansas Rules of Professional Conduct and Supreme Court Rules:

- KRPC 207(c) (2020 Kan. S. Ct. R. at 246) (duties of the bar and judiciary);
- KRPC 203(c)(1) (2020 Kan. S. Ct. R. at 234) (duty to report felony charge);
- KRPC 8.3(a) (2023 Kan. S. Ct. R. at 432) (reporting professional misconduct); and
- KRPC 8.4(b) (2023 Kan. S. Ct. R. at 433) (misconduct).

Before us, the parties jointly recommend Davis' temporary suspension imposed based on his felony conviction be lifted, and his license to practice law be suspended for two years, with the suspension stayed pending successful participation and completion of a two-year probation period and compliance with the terms set forth in his submitted probation plan, which would begin upon the filing date of this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

We quote the relevant portions of the parties' summary submission below.

"*Findings of Fact*: The petitioner and the respondent stipulate and agree the respondent engaged in the following misconduct as follows:

. . . .

"16. Supreme Court Rule 207(c) (2020 Kan. S. Ct. R. at 246) (duties of the bar and judiciary) which provides:

'It shall be the further duty of each member of the bar of this state to report to the Disciplinary Administrator any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules.'

"a. The respondent was arrested in December 2019 for DUI. The respondent was charged with a felony DUI in January 2020.

"b. The respondent failed to report his conduct which resulted in a felony criminal charge to the disciplinary[] administrator's office. The respondent's failure to report his conduct violated Rule 207(c).

"17. Supreme Court Rule 203(c)(1) (2020 Kan. S. Ct. R. at 234) (duty to report felony charge) which provides:

"Duty of attorney to report. An attorney who has been charged with a felony crime (as hereinafter defined) or a crime that upon conviction mandates registration by the attorney as an 'offender' as defined by K.S.A. 22-4902(a), or with an equivalent offense in any federal court of the United States or the District of

Columbia or in any other state, territory, commonwealth, or possession of the United States shall within 14 days inform the Disciplinary Administrator in writing of the charge. The attorney shall inform the Disciplinary Administrator of the disposition of the matter within 14 days of disposition. Notice of appeal does not stay the reporting required under this rule.

"a. The respondent was arrested in December 2019 for DUI. The respondent was charged with a felony DUI in January 2020.

"b. In July 2021, approximately a year and a half later, a prosecutor reported the respondent's felony charge to the disciplinary administrator's office.

"c. The respondent failed to report his felony criminal charge to the disciplinary[] administrator's office within 14 days as required by S. Ct. R. 203(c)(1).

"18. KRPC 8.3(a) (2023 Kan. S. Ct. R. at 432) (reporting professional misconduct) which provides:

'A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.'

"a. The respondent was arrested in December 2019 for DUI. The respondent was charged with a felony DUI in January 2020.

"b. The respondent failed to report his conduct which resulted in a felony criminal charge to the disciplinary[] administrator's office.

"c. The disciplinary administrator's office only learned of the respondent's felony charges after it was reported by a third party approximately a year and a half later. The respondent's failure to report his conduct violates Rule 8.3(a).

"19. KRPC 8.4(b), (2023 Kan. S. Ct. R. at 433) (misconduct) which provides 'It is professional misconduct for a lawyer to:

'(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;'

"a. The respondent had two prior convictions for DUI. He was arrested a third time for driving under the influence which resulted in felony DUI charges.

"b. He committed a criminal act, felony DUI, that reflects adversely on his fitness as a lawyer in violation of Rule 8.4(b).

"Applicable Aggravating and Mitigating Circumstances:

"20. Aggravating Circumstances. Factors that may be considered in aggravation by the hearing panel include:

"a. Multiple offenses: The respondent violated 2020 Supreme Court Rule 207(c), 2020 Supreme Court Rule 203(c)(1), KRPC 8.3(a), and KRPC 8.4(b).

"b. Illegal conduct, including that involving the use of controlled substances: The respondent operated a motor vehicle while under the influence of alcohol which is illegal conduct. It was a felony because he had two prior convictions for driving under the influence.

"21. Mitigating Circumstances. Factors that may be considered in mitigation by the hearing panel include:

"a. Absence of a prior disciplinary record: The respondent does not have any prior disciplinary record.

"b. Personal or emotional problems if such misfortunes have contributed to a violation of the Kansas Rules of Professional Conduct: professionals have agreed that Respondent's alcoholism is rooted in tragedy in his life beginning with the untimely death of his father when he was seven years old, and then with the unrelated deaths of two of his closest friends, in 2016 and 2017 including his best friend from law school. One friend struggled with alcoholism and took his own life. The other died from a drug overdose. Respondent was not quick to identify the impact this grief was having on him and began drinking heavily. He did not pursue counseling until he became sober and the relationship between his grief and his alcoholism became apparent.

"c. The present and past attitude of the attorney as shown by his or her cooperation during the hearing and his or her full and free acknowledgment of the transgressions: The respondent did provide a written response to the investigation and admitted that his conduct reflects adversely on the profession and violates the Kansas Rules of Professional Conduct. The respondent entered a plea to the criminal charges. The respondent acknowledged his misconduct in his answer to the formal disciplinary complaint. The respondent has taken steps to address the conditions contributing to his misconduct.

"d. 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: Respondent submitted ten letters attesting to his good character.

"e. Mental disability or chemical dependency including alcoholism or drug abuse when: (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependence or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely. Respondent's substance abuse evaluation categorizes his substance abuse disorder as severe. And his reports reflect complete abstinence from alcohol use since his supervision by the criminal court began January 15, 2020.

"f. Imposition of other penalties or sanctions: Respondent was sentenced to serve 48 hours in jail followed by house arrest for 2,160 hours followed thereafter by 12 months of post-imprisonment supervision in addition to a fine of $1,750.00.

"g. Remorse: Respondent has established his genuine remorse to his AA group, reflected in the report from Michael Belancio, and in open court with an open apology in his criminal case during his sentencing hearing. At the time of his arrest, he had hit 'rock bottom,' and his commitment to changing his life through sobriety, AA, fitness, and counseling for over three years since the incident further establishes his remorse.

"Recommended Discipline:

"22. The respondent's license to practice law in Kansas was suspended on December 5, 2022, pursuant to the Kansas Supreme Court Order of Temporary Suspension as authorized by Rule 219(g)(1). (2023 Kan. S. Ct. R. at 273). Parties recommend:

"a. The temporary suspension imposed based on his felony conviction be lifted.

"b. The respondent shall be suspended for two years; however, the two-year suspension will be stayed and the respondent to be placed on a 24-month probation.

"c. The respondent will comply with the terms of probation as set forth in his 'Final Probation Plan.'

"23. The respondent must comply with Supreme Court Rule 227 related to probation.

"24. The respondent must comply with Supreme Court Rule 228 related to procedure before the Supreme Court.

"Other Stipulations:

"25. The respondent waives his right to a hearing on the formal complaint as provided in Supreme Court Rule 222(c).

"26. The petitioner and the respondent agree that no exceptions to the findings of [f]act and conclusions of law will be taken.

"27. The complainant in this matter will be given notice of the Summary Submission and they will be given 21 days to provide the disciplinary administrator their position regarding the agreement as provided in Supreme Court Rule 223(d).

"28. The respondent understands and agrees that pursuant to Supreme Court Rule 223(f), this Summary Submission agreement is advisory only and does not prevent the Supreme Court from making its own conclusions regarding rule violations or imposing discipline greater or lesser than the parties' recommendations.

"29. The respondent also understands and agrees that after entering into this Summary Submission Agreement he will be required to appear before the Kansas Supreme Court for oral argument under Supreme Court Rule 228(i).

"30. The petitioner and the respondent agree that the exchange and execution of copies of this agreement by electronic transmission shall constitute effective execution and delivery of the agreement and that copies may be used in lieu of the original and the signatures shall be deemed to be original signatures.

"31. A copy of the Summary Submission will be provided to the Board Chair as required by Supreme Court Rule 223(e)."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see also Supreme Court Rule 226(a)(1)(A) (2023 Kan. S. Ct.

R. at 281) (a misconduct finding must be established by clear and convincing evidence). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009).

The Disciplinary Administrator provided Davis with adequate notice of the formal complaint. The Disciplinary Administrator also provided adequate notice of the hearing before the panel. The hearing on the formal complaint was cancelled after the parties agreed to enter into the Summary Submission Agreement. Under Rule 223(b), a summary submission agreement

> "must be in writing and contain the following:
> "(1) an admission that the respondent engaged in the misconduct;
> "(2) a stipulation as to the following:
> (A) the contents of the record;
> (B) the findings of fact;
> (C) the conclusions of law, including each violation of the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the attorney's oath of office; and
> (D) any applicable aggravating and mitigating factors;
> "(3) a recommendation for discipline;
> "(4) a waiver of the hearing on the formal complaint; and
> "(5) a statement by the parties that no exceptions to the findings of fact or conclusions of law will be taken." Rule 223(b) (2023 Kan. S. Ct. R. at 278).

The chair of the Kansas Board for Discipline of Attorneys ultimately approved the summary submission. Thus, the factual findings in the summary submission are deemed admitted. See Supreme Court Rule 228(g)(1) (2023 Kan. S. Ct. R. at 288) ("If the respondent files a statement . . . that the respondent will not file an exception . . . , the findings of fact and conclusions of law in the final hearing report will be deemed admitted by the respondent.").

The summary submission and the parties' stipulations before us establish by clear and convincing evidence the charged conduct violated KRPC 8.3(a) (2023 Kan. S. Ct. R. at 432) and 8.4(b) (2023 Kan. S. Ct. R. at 433). Additionally, respondent's conduct establishes violations of Supreme Court Rules 207(c) (2020 Kan. S. Ct. R. at 246) and 203(c)(1) (2020 Kan. S. Ct. R. at 234). We adopt the findings and conclusions set forth by the parties in the summary submission.

The remaining issue is deciding the appropriate discipline. The parties jointly recommend Davis' license to practice law be suspended for two years, with the suspension stayed pending successful participation and completion of a two-year probation period and compliance with the terms set forth in his submitted probation plan. An agreement to proceed by summary submission is advisory only and does not prevent us from imposing discipline greater or lesser than the parties' recommendation. Rule 223(f) (2023 Kan. S. Ct. R. at 279). After full consideration, we modify the joint recommendation.

At the hearing before this court, the Deputy Disciplinary Administrator, respondent, and his counsel reported on the "miraculous" turnaround respondent has made since his arrest in December of 2019. We acknowledge the commendable strides he has made in his life, including becoming vice president of his A.A. chapter, successful monitoring since January 2020, coupled with the completion of three marathons and six half marathons. Long may you run Mr. Davis.

However, we also noted the severity of the crime underlying the complaint. "Although a felony DUI conviction is not a breach of professional duty to a client, it violates KRPC 8.4(b) because it is a violation of the attorney's 'primary duty to the court and the bar, and it erodes the public confidence in the judicial system.'" *In re Cure*, 309 Kan. 877, 884, 440 P.3d 563 (2019). "It is expected that the 'trust and confidence placed on those that practice law also requires compliance with the law.'" 309 Kan. at 884. The varying sanctions imposed by this court stemming from felony DUI convictions are as a result of careful consideration of mitigating and aggravating circumstances presented in each case. In consideration of those factors present here, we stay the jointly recommended two-year suspension after six months of suspension. The remaining recommendations are adopted.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that the temporary suspension previously imposed based on the respondent's felony conviction be lifted and Leon J. Davis Jr. is hereby disciplined by a two-year suspension in accordance with Supreme Court Rule 225(a)(3)

(2023 Kan. S. Ct. R. at 281). The two-year suspension is stayed after six months, conditioned on successful participation and completion of a two-year probation period. Probation will be subject to the terms set out in the plan of probation referenced in the parties' Summary Submission Agreement. No reinstatement hearing is required upon successful completion of probation.

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

No. 120,994

STATE OF KANSAS, *Appellee*, v. PAUL GUEBARA, *Appellant.*

(544 P.3d 794)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Statutory Crime of Possession of Firearm by Convicted Felon—Stipulation to a Prior Felony Does Not Satisfy Prosecution's Burden.* Because Kansas' statutory possession-of-a-weapon ban applies to people who have committed only certain felonies, a stipulation to only a prior felony does not satisfy the prosecution's burden because it fails to establish that the defendant had committed a felony that prohibited the defendant from possessing a weapon on the date in question.

2. SAME—*Crime of Possession of Firearm by Convicted Felon—Defendant May Request Court Approve Stipulation of Prior Felony*. When requested by a defendant charged with unlawful possession of a weapon, a district court must approve a stipulation that the defendant had committed a prior felony that prohibited the defendant from owning or possessing a weapon on the date in question.

3. APPEAL AND ERROR—*Crime of Possession of Weapon by Felon—Inadequate Stipulation to Establish Prior Felony—Appellate Review.* When a stipulation in a criminal-possession-of-a-weapon case is inadequate to establish that the defendant had committed a prior felony that prohibited the defendant from possessing a weapon on the date in question, appellate courts review under the constitutional harmless-error standard. In doing so, the appellate court may consider a journal entry admitted into the record but withheld from the jury under the procedures governing prior-felony stipulations in criminal-possession cases.

Review of the judgment of the Court of Appeals in an unpublished opinion filed February 24, 2023. Appeal from Finney District Court; ROBERT J. FREDERICK, judge. Submitted without oral argument November 3, 2023. Opinion filed March 8, 2024. Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed.

Paul Guebara, appellant pro se, was on the briefs.

Brian R. Sherwood, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, *Natalie Chalmers*, assistant solicitor general, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Kansas law prohibits people convicted of certain felonies from possessing a weapon for a statutorily prescribed period. K.S.A. 2022 Supp. 21-6304(a)(1)-(4), (d). To support a conviction under that statute, the State must (1) prove the defendant possessed a weapon; and (2) establish the defendant's status as a prohibited felon, meaning the defendant was convicted of a prior felony that made it unlawful to possess a weapon on the date in question.

Persons charged under that statute will often stipulate at trial to their prohibited status for fear that the details of the prior felony conviction would unfairly prejudice the jury against them. In this case, we consider how much detail that stipulation must include to establish the prohibited-status element of the offense.

Guebara was charged with attempted first-degree murder and criminal possession of a weapon by a felon for shooting a man in Garden City. At trial, Guebara stipulated that he had previously been convicted of "a felony crime" without further detail. A jury convicted him of both crimes, but a panel of the Court of Appeals reversed the criminal-possession conviction based on our decision in *State v. Valdez*, 316 Kan. 1, 20, 512 P.3d 1125 (2022). There, we determined that a generic stipulation like Guebara's failed to establish that a defendant had been convicted of one of the felonies that would prohibit him from possessing a weapon.

In a concurring opinion, Judge Malone argued that *Valdez* contradicts an earlier decision of our court, *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999). *State v. Guebara*, No. 120,994, 2023 WL 2194542, at *23-24 (Kan. App. 2023) (unpublished opinion) (Malone, J., concurring). In *Lee*, our court required the district court to approve a defendant's stipulation that acknowledged "the defendant is, without further elaboration, a prior convicted felon." 266 Kan. 804, Syl. ¶ 4.

We disagree that our caselaw is inconsistent. Later decisions—particularly *State v. Mitchell*, 285 Kan. 1070, 179 P.3d 394 (2008)—flesh out our holding in *Lee*. Under those decisions, a stipulation to only a prior felony crime provides insufficient evidence for a criminal-possession conviction. Instead, because only certain felonies trigger the weapons ban, the stipulation must establish that the defendant had a prior felony that prohibited the

defendant from possessing a weapon on the date in question. 285 Kan. 1070, Syl. ¶ 3, 1079. And consistent with that caselaw, we held in *Valdez* that the stipulation was inadequate because it established only that the defendant had been convicted of "a felony." *Valdez*, 316 Kan. at 19-20.

For the same reasons, Guebara's stipulation was inadequate. The district court also failed to secure a jury-trial waiver before accepting Guebara's stipulation, an omission we have recently deemed to be constitutional error. See *State v. Bentley*, 317 Kan. 222, Syl. ¶ 2, 526 P.3d 1060 (2023). Even so, those errors were harmless beyond a reasonable doubt. Guebara did not contest the prohibited-status element of his criminal-possession charge, and if he had, the State was prepared to present conclusive evidence of Guebara's prior conviction to the jury. Evidence establishing Guebara's prohibited-felon status was submitted to and accepted by the district court. But guided by our caselaw, the district court excluded it from the jury's view to avoid the risk of undue prejudice to Guebara.

Guebara, who—by his own choice—represented himself on appeal, has raised many other challenges. But we agree with the Court of Appeals panel that none warrant reversal of his convictions. The State also asked us to reverse a Confrontation Clause holding the panel made, but we decline to do so for prudential reasons. We therefore affirm Guebara's convictions.

FACTS AND PROCEDURAL BACKGROUND

A man was shot in Garden City, and he identified Guebara as the shooter. According to the victim, Guebara had followed him after an argument at a poker game and then shot the victim as he exited his truck. Officers who investigated the shooting eventually enlisted Guebara's daughter and her fiancé to record a series of conversations. In those conversations, Guebara's friends and family discussed how to get rid of the gun Guebara had used. Officers later recovered a stainless-steel .357 revolver that had been concealed in the living room chair of a close friend of Guebara's brother-in-law. The panel below described these facts in greater detail, but we need not restate them to resolve the issues before us. See *Guebara*, 2023 WL 2194542, at *1-5.

The State charged Guebara with one count of attempted first-degree murder and one count of criminal possession of a weapon by a felon. At that time, criminal possession of a weapon was codified at K.S.A. 2014 Supp. 21-6304. One way to violate that statute was by possessing a weapon after being convicted "within the preceding 10 years" of certain enumerated felonies. See K.S.A. 2014 Supp. 21-6304(a)(3)(A). The State alleged that Guebara had violated that provision because he had been released from prison within the past 10 years for first-degree murder, one of the enumerated felonies. See *State v. LaGrange*, 294 Kan. 623, Syl. ¶ 3, 279 P.3d 105 (2012) (10-year statutory weapons ban begins when offender is released from prison). He was convicted of that offense in 1983 and sentenced to life in prison. Our court affirmed his conviction. See *State v. Guebara*, 236 Kan. 791, 799, 696 P.2d 381 (1985). Guebara was later paroled.

Before trial, Guebara conveyed that he would stipulate to his prohibited status as a prior felon. The stipulation that Guebara and the State agreed to was admitted into evidence during Guebara's trial and later included in the jury instructions. It said that Guebara "had been released from prison for a felony crime" within the last 10 years:

"51.020. Stipulations and Admissions:
"The following facts have been agreed to by the parties and are to be considered by you as true:

"1. The defendant within 10 years preceding February 24, 2015, had been released from prison for a felony crime.
"2. The defendant was not found to be in possession of a firearm at the time of the prior crime, and has not had the prior conviction expunged or been pardoned for such crime."

Consistent with the procedures for stipulations in criminal-possession cases that we laid out in *Lee* and *Mitchell*, the State also introduced the certified journal entry of Guebara's 1983 murder conviction outside the jury's presence. See *Mitchell*, 285 Kan. at 1079; *Lee*, 266 Kan. at 815-16. The district court admitted the journal entry "for purposes of completing the record" but stated that it would not "be made available to the jury," which was "consistent with [the court's] understanding of what case law provides for and allows." But the court failed to follow one of the procedures set

out in those cases—it did not consult Guebara "outside the presence of the jury" to secure his "voluntary waiver of the right to have the State otherwise prove [the defendant's felon] status beyond a reasonable doubt to the jury." *Mitchell*, 285 Kan. at 1079 (citing *Lee*, 266 Kan. at 815-16).

At the end of a 7-day trial that included more than 100 exhibits and testimony from 23 witnesses, the jury found Guebara guilty as charged. A slew of posttrial motions were filed by Guebara's trial attorney, by a new attorney appointed by the court, and by Guebara himself—so many, in fact, that sentencing did not take place until three years after his conviction.

Two sets of those motions are relevant to the issues before us. First, Guebara and his new attorney filed motions for a new trial based on ineffective assistance of trial counsel. After a two-day evidentiary hearing, the district court denied the motion in a 63-page decision that scrutinized each of the many claims Guebara had made. Second, Guebara and his attorney filed motions for a new trial based on the State's disclosure that, starting about 14 months after the trial, the lead detective began a sexual relationship with Guebara's daughter, who had been a confidential informant in the investigation and a key witness at trial. Guebara believed the relationship had started during the investigation. The district court found that portions of two police files contained discoverable information and ordered they be provided to Guebara. At a hearing on the motion, the court said that once Guebara's attorney reviewed the second file, he could decide whether there was evidence to "get this motion off the ground to a point where you really want to pursue it." The attorney did not pursue the motion.

At sentencing, the district court imposed a controlling 586-month prison sentence for attempted first-degree murder. It imposed a concurrent eight-month prison sentence for criminal possession of a weapon. Guebara appealed to the Court of Appeals.

After a sequence of events discussed below, a motions panel of the Court of Appeals allowed Guebara to proceed pro se. As a result, Guebara prepared all the relevant appellate filings here without the help of an attorney. His brief raised many challenges.

After Guebara filed that brief, we decided *Valdez*. That case was largely about K.S.A. 2022 Supp. 21-5705's rebuttable intent-

to-distribute presumption, but it also addressed whether a generic prior-felony stipulation like the one here was sufficient to support a criminal-possession conviction under the enumerated-felonies subsection. *Valdez*, 316 Kan. at 17-20. We determined that a generic stipulation was insufficient. Chief Judge Arnold-Burger—the presiding judge on the panel assigned to hear Guebara's appeal—ordered Guebara and the State to address *Valdez*. Guebara argued that the generic stipulation provided insufficient evidence; the State argued that the stipulation was sufficient under *Lee* and the United States Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).

In an opinion written by Chief Judge Arnold-Burger, the panel applied *Valdez* and reversed Guebara's criminal-possession conviction, but it otherwise rejected his challenges and affirmed his attempted first-degree-murder conviction. *Guebara*, 2023 WL 2194542, at *18-19, 23. The panel decided that resentencing was unnecessary because the 8-month criminal-possession sentence ran concurrent to Guebara's 586-month attempted-murder sentence. 2023 WL 2194542, at *19; see *Valdez*, 316 Kan. at 20 (remand for resentencing unnecessary when controlling sentence and applicable postrelease term not affected). Judge Malone wrote a concurrence acknowledging that *Valdez* controlled this appeal. But he wrote separately "to state [his] view that the holding in *Valdez* is misguided and conflicts with the Kansas Supreme Court's own precedent." 2023 WL 2194542, at *23 (Malone, J., concurring). In his view—which we expand on below—*Valdez* and *Lee* are irreconcilable, and he urged this court to resolve the conflict.

The State petitioned our court for review. It argued that we should affirm Guebara's conviction under *Old Chief* and *Lee*. And it asked us to reverse *Valdez* or at least clarify how it fits into the *Lee* framework. Guebara—who is still acting pro se—also petitioned for review, renewing many challenges he had raised in his appellate brief. Finally, the State also filed a conditional cross-petition for review. In that filing, the State argued that the panel was wrong to declare one of the trial witnesses "unavailable" under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

We granted review of the three petitions and placed the case on the November 2023 summary-calendar docket. As a result, we decide this case based on the petitions for review and the briefs. See Supreme Court Rule 7.01(c)(4) (2023 Kan. S. Ct. R. at 42) ("When a case is placed on the summary calendar, it is deemed submitted to the court without oral argument unless a party's motion for oral argument is granted."). Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

The principal issues here involve stipulations to prior felonies in criminal-possession-of-a-weapon cases, so we begin our discussion there. First, we explain how *Valdez* aligns with our caselaw. Then, we apply our caselaw to Guebara's stipulation. We agree with the Court of Appeals panel that Guebara's generic stipulation was inadequate. But we do not agree that Guebara's criminal-possession conviction should be reversed.

After resolving the issues related to the stipulation, we turn our attention to the many challenges Guebara raises in his pro se briefing. We agree with the panel that none of them warrant reversal of Guebara's convictions. Finally, we address the State's cross-petition and explain why prudential considerations support our decision not to reach the merits of the panel's Confrontation Clause holding.

I. Valdez *Does Not Contradict Our Caselaw on Prior-Felony Stipulations in Criminal-Possession-of-Weapon Cases*

The State asks us to reverse the Court of Appeals panel and reinstate Guebara's criminal-possession conviction. In its view, Guebara's generic stipulation to "a felony crime" provides sufficient evidence to satisfy the prohibited-status element because *Lee* requires the parties to stipulate that the defendant is "a prior convicted felon" without "further elaboration" and without disclosing "the number and nature of the prior convictions." *Lee*, 266 Kan. 804, Syl. ¶ 4. Thus, the State argues we contradicted our earlier caselaw when we held in *Valdez* that a generic stipulation to "a felony" was inadequate. Judge Malone agreed in his concurring

opinion. But we believe the State and Judge Malone's concurring opinion focus too narrowly on *Lee* without accounting for our court's later caselaw, especially *Mitchell*.

Stipulations are commonplace in criminal-possession-of-a-weapon cases because, otherwise, "the State would prove a defendant's [prohibited-felon] status by [introducing] court records showing a defendant's prior felony," and those records might include details that "run the risk of unfairly prejudicing the jury against the defendant based on his or her past crimes." *State v. Housworth*, No. 115,836, 2017 WL 2834502, at *15 (Kan. App. 2017) (unpublished opinion). As the United States Supreme Court has recognized, that risk of unfair prejudice is "especially obvious" when, as here, "a prior conviction was for a gun crime or one similar to other charges" in the case. *Old Chief*, 519 U.S. at 185. In fact, the Court has held that the risk of unfair prejudice is so acute that prosecutors are *required* to accept defendants' offers to stipulate to their prohibited-felon status in most cases. See 519 U.S. at 191-92. And our court adopted that same position in *Lee*. 266 Kan. at 815-16.

The controlling question in *Lee*, like *Old Chief*, was whether the prosecution's evidence establishing the defendant's prior felony was admissible under the rules of evidence, notwithstanding the defendant's offer to stipulate to his prohibited status as a convicted felon. The issue in *Lee* pitted K.S.A. 60-445, which allows a district court to exclude evidence that unfairly prejudices the jury, against the common-law rule entitling the prosecution "'to prove its case free from any defendant's option to stipulate the evidence away.'" 266 Kan. at 810. *Lee* recognized that both a defendant's stipulation and a copy of his prior felony conviction are equally probative of the defendant's prohibited-felon status under the criminal-possession statute, but only the former avoids the risk of undue prejudice to the defendant. Thus, *Lee* held that the district court abused its discretion by rejecting the defendant's offer to stipulate and allowing the State to introduce evidence of his prior felony conviction under K.S.A. 60-445. 266 Kan. at 813-15.

Owing to that limited focus, *Lee* did not closely address the adequacy of the stipulation—that issue was not before the court.

Instead, it adopted procedures the Florida Supreme Court, following *Old Chief*, had laid out in *Brown v. State*, 719 So. 2d 882, 889 (Fla. 1998). Those procedures required a district court to (1) approve the defendant's requested stipulation, (2) allow the State to place the prior judgment and sentence into the record, (3) prevent the State from disclosing that information to the jury, (4) obtain a voluntary waiver of the defendant's right to have the State prove the prohibited-status element beyond a reasonable doubt to the jury, (5) recognize that the stipulation satisfied the prosecution's burden of proof for the prohibited-status element, and (6) instruct the jury that it may consider the prohibited-status element proven by agreement of the parties. *Lee*, 266 Kan. 804, Syl. ¶ 4. But *Lee* adopted those procedures without addressing the differences between the Kansas criminal-possession statute and the comparable Florida and federal statutes.

Those differences are crucial when considering the adequacy of the stipulation. The federal criminal-possession statute at issue in *Old Chief* prohibited (with limited exceptions) possession of a firearm by any person convicted of "'a crime punishable by imprisonment for a term exceeding one year.'" *Old Chief*, 519 U.S. at 174 (quoting 18 U.S.C. § 922[g][1]). And the Florida statute prohibited possession by a person "[c]onvicted of a felony." Fla. Stat. § 790.23(1)(a) (1995). But the relevant section of the Kansas statute was narrower, prohibiting possession by a person convicted of only certain felonies. K.S.A. 21-4204(a)(4)(A) (Furse). So while a stipulation to "a felony crime" would have been sufficient to establish that the defendant was prohibited from possessing a weapon under the federal or Florida statutes, the holdings from *Old Chief* and *Brown* did not map neatly onto Kansas law.

But nine years after *Lee*, our court decided *Mitchell*. There, we held that the prosecution's burden of proof is satisfied when the defendant stipulates that a prior conviction "prohibited [the defendant] from owning or possessing a firearm on the date in question." *Mitchell*, 285 Kan. at 1079. Although our court did not expressly depart from *Lee*, that language makes clear the stipulations under the Kansas criminal-possession statute must be to something more than "a felony crime." That is, because only certain

felonies trigger the Kansas statute, the stipulation must establish that the defendant has committed a prior felony *that prohibited them from possessing a weapon on the date in question*. Without that extra detail, a jury cannot conclude beyond a reasonable doubt that the State had proved the prohibited-status element of the criminal-possession charge.

And since then, the stipulations in many of the criminal-possession cases we have heard have included language in line with *Mitchell*. See, e.g., *State v. Johnson*, 310 Kan. 909, 910, 453 P.3d 281 (2019) (stipulation provided that prior juvenile adjudication "'prohibited him from owning and possessing a firearm on October 14, 2013'"); *State v. Sims*, 308 Kan. 1488, 1495, 431 P.3d 288 (2018) (The defendant stipulated that he was "'convicted of a felony offense . . . within the ten years preceding'" and that he "'was prohibited [] from owning or possessing a firearm on June 9, 2013.'"); *State v. Logsdon*, 304 Kan. 3, 14, 371 P.3d 836 (2016) ("The parties stipulated Logsdon was a felon and was prohibited from possessing a firearm."); *State v. Burnett*, 300 Kan. 419, 444, 329 P.3d 1169 (2014) ("[H]e was released from prison for a felony, which prohibited him from lawfully possessing a firearm on July 7—a fact that he stipulated to and was an essential element of the crime of criminal possession of a firearm charged in this case."); *State v. Dobbs*, 297 Kan. 1225, 1231, 308 P.3d 1258 (2013) ("Dobbs stipulated he had a prior felony conviction and was prohibited from possessing a firearm on the date of the shooting.").

Then in *Valdez*, we concluded that insufficient evidence supported a criminal-possession conviction because the stipulation said only that the defendant had committed "'a felony,'" and thus "there is no factual basis or inference to convince us the jury could have found the essential—yet missing—element from what it was given." 316 Kan. at 20. That holding tracks *Mitchell*. Because Kansas' possession-of-a-weapon ban applies to people who have committed only certain felonies, the generic stipulation in *Valdez* to "a felony" did not satisfy the prosecution's burden because it failed to establish that the defendant was prohibited from possessing a firearm on the date in question. So we disagree that *Valdez* deviates from our earlier caselaw.

Of course, we acknowledge that we did not explain these nuances in *Valdez*. And as Judge Malone pointed out, *Valdez* included language inconsistent with *Lee*. *Guebara*, 2023 WL 2194542, at *24 (Malone, J., concurring). For example, *Valdez* faulted the district court for not instructing the jury "what [the defendant's] prior crime was" and for withholding the certified journal entry of the defendant's prior conviction from the jury. *Valdez*, 316 Kan. at 19-20. In *Lee*, however, our court had said that "[n]either [those] documents nor the number and nature of the prior convictions should be disclosed to the trial jury." *Lee*, 266 Kan. at 815-16. Despite those passing comments, the essential holding in *Valdez* is that a generic stipulation to a prior felony provides insufficient evidence to support a conviction under the Kansas criminal-possession statute because only certain felonies trigger the weapons ban. Even so, we recognize that our failure to spell all this out has generated uncertainty about the law governing prior-felony stipulations in criminal-possession cases. We have endeavored to resolve that uncertainty here.

Finally, before applying this framework to Guebara's trial proceedings, it is useful to address the procedures for prior-felony stipulations, which our court adopted in *Lee* and largely reiterated in *Mitchell*. See *Mitchell*, 285 Kan. at 1079. We are inclined to address those procedures here because they, too, have generated some confusion. For example, a Court of Appeals panel has questioned whether they amount to only "'best practices.'" *State v. Brooks*, No. 113,636, 2017 WL 839793, at *10 (Kan. App. 2017) (unpublished opinion). And during the trial proceedings here, the attorneys and district court appeared unsure of the applicable procedures and controlling law. As a result, we wish to emphasize three points.

First, when requested by a defendant charged with unlawful possession of a weapon, a district court must approve a stipulation that the defendant had committed a prior offense that prohibited the defendant from owning or possessing a weapon on the date in question. See *Mitchell*, 285 Kan. at 1079. That stipulation is evidence that satisfies the prosecution's burden of proving the prohibited-status element of the criminal-possession charge. See *Old Chief*, 519 U.S. at 186 (a defendant's "proffered admission would,

in fact, [be] not merely relevant but seemingly conclusive evidence of the element"). The district court should instruct the jury that it can consider that fact proven by agreement of the parties and ensure that the nature and number of the prior felonies is not otherwise disclosed to the jury.

Second, the district court must obtain a jury-trial waiver before accepting a "prohibited-felon" stipulation in a criminal-possession case. Arguably, *Lee* and *Mitchell* already required that, since those cases instructed the district court to consult the defendant "outside the presence of the jury" to secure "his voluntary waiver of the right to have the State otherwise prove his [prohibited-felon] status beyond a reasonable doubt to the jury." *Mitchell*, 285 Kan. at 1079 (citing *Lee*, 266 Kan. at 815-16). But even if our court were insufficiently clear in those cases, we expressly held in *Johnson* that a stipulation to the prohibited-status element of a criminal-possession charge requires a jury-trial waiver. 310 Kan. at 918-19.

And third, the State *may*, but is not required to, submit a certified journal entry of the prior felony outside the presence of the jury. See *Lee*, 266 Kan. 804, Syl. ¶ 4 ("[T]he State may place into the record, at its discretion, the actual judgment(s) and sentence(s) of the prior felony conviction(s)."). The purpose of that document is not to furnish the jury with evidence establishing the prior-felony element; as we have said above, the stipulation itself provides sufficient evidence. Instead, the journal entry protects the State's legitimate interest in developing a record for appeal that, in the event of errors, would allow the State to argue that it was prepared to put forth conclusive evidence of the defendant's status as a prohibited felon had the defendant contested that element. See *Mitchell*, 285 Kan. at 1077 (*Lee* "specifically requires the district court to admit the actual judgment(s) and sentence(s) of the prior felony conviction(s) into the record without disclosing them to the jury, thereby protecting the State's interest in proving all of the elements of the defendant's status.").

With this framework in mind, we now consider whether the trial proceedings involving Guebara's stipulation involved any errors and, if so, whether reversal is warranted.

II. *Guebara's Prior-Felony Stipulation Was Inadequate, and the District Court Failed to Obtain a Jury-Trial Waiver Before Accepting the Stipulation, but Those Errors Are Harmless Beyond a Reasonable Doubt*

Guebara stipulated that within the previous 10 years, he had been "released from prison for a felony crime." Based on the framework we just outlined, Guebara's generic stipulation was inadequate because it failed to establish that he had been convicted of a felony that would have prohibited him from owning or possessing a weapon on the day of the shooting. But there was another error. As Guebara points out—and as the State concedes—the district court failed to obtain a jury-trial waiver before accepting his stipulation. As we held in *Johnson*, that waiver is required when a defendant stipulates to an element of a crime because "the defendant has effectively given up" his or her federal constitutional right to a jury trial on that element. 310 Kan. at 918-19.

The district court's failure to obtain a jury-trial waiver does not require reversal. In *Bentley*, we decided that such an error was not "structural" (which would require automatic reversal of the conviction) but was instead a constitutional error that appellate courts should review under the constitutional harmless-error standard. *Bentley*, 317 Kan. at 233-34. We determined that courts should conduct that harmless-error analysis "through a more focused lens" and decide whether there is a "reasonable possibility" that the failure to inform the defendant "of his right to jury trial led to his decision to enter the stipulation." 317 Kan. at 234. We conclude that Guebara would have offered a stipulation even if the court had advised him of his right to a jury trial on the element. The State was prepared to present conclusive evidence of Guebara's prior murder conviction that prohibited him from possessing a firearm on the date in question, and he would have had no defense if the State had offered this evidence to the jury. Nor is there any suggestion that Guebara meant to defend his case on that ground.

But what about the inadequate stipulation? When "an appellate court holds that evidence to support a conviction is insufficient as a matter of law, the conviction must be reversed." *State v. Scott*, 285 Kan. 366, Syl. ¶ 2, 171 P.3d 639 (2007). And in *Valdez*,

we held that a stipulation to "a felony" provided insufficient evidence for a conviction under the Kansas criminal-possession statute, so we reversed the defendant's conviction. 316 Kan. at 20. The Court of Appeals panel here followed suit, reversing Guebara's conviction.

In *Valdez*, however, the State had not addressed the proper remedy for a stipulation error. And there was no indication from the record on appeal that the State had offered a journal entry, outside the presence of the jury, establishing Valdez' prohibited-felon status. *Valdez*, 316 Kan. at 19 (if the district court received evidence of Valdez' prohibited-felon status, "it is not in the appellate record"). But here, the State argues that the stipulation errors are harmless and the record includes a journal entry confirming Guebara's prohibited-felon status.

We are persuaded that this is not a typical sufficiency-of-the-evidence situation. A conviction based on insufficient evidence violates a defendant's due-process rights under the Fourteenth Amendment to the United States Constitution. *State v. Switzer*, 244 Kan. 449, 450, 769 P.2d 645 (1989). As the United States Supreme Court has explained, "an appellate reversal" for insufficient proof at trial "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks v. United States*, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). And in that case, the prosecution has no grounds to complain, "for it has been given one fair opportunity to offer whatever proof it could assemble." 437 U.S. at 16.

By contrast, the State *did* assemble conclusive proof of Guebara's prior conviction for first-degree murder, which establishes Guebara's prohibited-felon status. The State was prepared at trial to call Guebara's parole officer, who had testified at his preliminary hearing. The parole officer would have testified to Guebara's prohibited-felon status but for Guebara's offer to stipulate. And the State submitted the certified journal entry of the conviction into evidence outside the presence of the jury, a procedure our court expressly contemplated in *Lee* and *Mitchell*. See *Mitchell*, 285 Kan. at 1077; *Lee*, 266 Kan. 804, Syl. ¶ 4. In fact, the only thing stopping that evidence from reaching the jury was Guebara's offer to stipulate to the prior conviction rather than contest it. See

Lee, 266 Kan. at 815 (evidence of the "type and nature of the prior crime" may be admitted when the defendant disputes the status of the prior conviction). We need not turn a blind eye to these facts and conclude that the evidence here was so lacking that the charge should not have even been submitted to the jury. As a result, although the stipulation was inadequate, we believe the procedures for prior-felony stipulation in criminal-possession-of-a-weapon cases are unsuited for a standard sufficiency-of-the-evidence analysis.

Instead, the circumstances here are more "akin to a court's failure to submit an element of the charged crime to the jury," which we discussed in *Bentley*. 317 Kan. at 233-34. As we recognized there, a constitutional harmless-error standard is appropriate when the trial court "fails to secure a verdict on *some* elements of the crime, rather than all of them" and the element "was not contested by the defendant and would not be contested if the conviction were vacated and a new trial ordered." 317 Kan. at 233 (citing *Neder v. United States*, 527 U.S. 1, 7, 119 S. Ct. 1827, 144 L. Ed. 2d 35 [1999]). Here, although the inadequate stipulation prevented the jury from finding Guebara guilty beyond a reasonable doubt on one element of the criminal-possession charge, there was adequate evidence supporting the remaining elements. And as we have emphasized, Guebara did not contest his prior felony. Moreover, the stipulation procedures adopted in *Lee* and *Mitchell* seemingly contemplate appellate review for harmlessness. Under those procedures, the State may introduce the journal entry of the prior conviction "into the record [but outside the presence of the jury], thereby protecting the State's interest in proving all of the elements of the defendant's status." *Mitchell*, 285 Kan. at 1077.

A constitutional error is harmless only if the party benefitting from the error demonstrates "beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record, *i.e.,* when there is no reasonable possibility the error contributed to the verdict." *State v. Corey*, 304 Kan. 721, 731-32, 374 P.3d 654 (2016). In our view, the State has met that standard. The language of the stipulation was inadequate to establish that Guebara had committed a prior felony that prohibited him from possessing a weapon on the day of the shooting in Garden City. But had there been no faulty stipulation (e.g., if Guebara had contested his prior conviction), the record shows beyond

a reasonable doubt that the State would easily have proved that element at trial through the journal entry included in our record. And unlike *Valdez*, here, the State has included the journal entry establishing Guebara's prohibited-felon status in the record on appeal. This demonstrates that the stipulation error was harmless.

Having concluded that both stipulation errors were harmless beyond a reasonable doubt, we reverse the panel's decision vacating Guebara's conviction for criminal possession of a weapon and affirm the judgment of the trial court.

III. *The Other Issues Raised by Guebara and the State Do Not Warrant Reversal*

Guebara's petition for review raises many issues he raised in the Court of Appeals. He argues that his trial counsel was constitutionally ineffective. He argues that the prosecutor erred during closing argument by misdescribing the evidence. He argues that the district court improperly allowed hearsay evidence. He argues that the State failed to disclose exculpatory evidence. He argues that his right to appellate counsel has been violated. And he argues that cumulative error denied him the right to a fair trial. The State also raises another issue. In its view, the panel erred by concluding that one of the trial witnesses was "unavailable" for Confrontation Clause purposes based on his limited testimony and frequent failure to recall information.

Because we conclude that Guebara has either inadequately briefed or abandoned several issues, we begin by addressing his right-to-appellate-counsel claim. Had he been denied that right, he could hardly be blamed for those deficiencies. But as we explain below, the reason Guebara is acting pro se is that he chose that path after the Court of Appeals reasonably denied his motion for a third appellate attorney. We then address the remaining issues raised by the parties and conclude that none of those challenges warrant reversal of the panel's decision.

A. *Guebara's Right to Appellate Counsel Was Not Violated, and the Court of Appeals Did Not Abuse Its Discretion by Denying Guebara's Motion for a Third Appellate Attorney*

In his petition for review, Guebara argues that the Court of Appeals denied him appellate counsel. The Appellate Defender's Office

was at first appointed to represent Guebara. The appellate defender filed a brief, but Guebara was unhappy with the arguments that attorney made, so he moved for substitute counsel. Neither the State nor the appointed attorney responded. "In the absence of a response," the motions panel of the Court of Appeals granted Guebara's motion. The panel struck the appellate defender's brief, and the Finney County District Court appointed a private-practice attorney.

Guebara's dissatisfaction persisted. He filed another motion to remove appellate counsel, this time asserting that his attorney refused to make the arguments that he wanted her to. The motions panel denied that request, concluding that Guebara had not shown "justifiable dissatisfaction." See *State v. Pfannenstiel*, 302 Kan. 747, Syl. ¶ 3, 357 P.3d 877 (2015) ("A defendant who files a motion for new counsel must show justifiable dissatisfaction with his or her appointed counsel."). The panel said that it would not appoint a third attorney and that Guebara could proceed pro se or retain private counsel if he could not work with his attorney. Guebara filed a second motion to remove this attorney. The panel again denied Guebara's request, reiterating that he could proceed pro se or retain private counsel. In response to one of those motions, the appointed attorney said that she was willing and able to continue representing Guebara. Guebara filed a third request, saying that he wanted different counsel but that he accepted the panel's condition to proceed pro se "under sever[e] duress." The panel granted Guebara's motion to remove his counsel.

Although his arguments are not fully delineated, it appears that Guebara is raising two distinct arguments. See *State v. Richardson*, 314 Kan. 132, Syl. ¶ 4, 494 P.3d 1280 (2021) (pro se pleadings must be liberally construed to give effect to the document's content). First, he appears to argue that the panel violated his federal equal-protection rights under *Douglas v. California*, 372 U.S. 353, 354-55, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963), by denying him the help of appellate counsel only because he is indigent. Second, he appears to argue that the Court of Appeals erred by failing to appoint him substitute counsel. Neither argument is convincing.

Douglas involved a challenge to a California criminal-procedure rule about an indigent appellant's right to appellate counsel. Under that rule, an indigent appellant was entitled to appellate

counsel only if the appellate court conducted "'an independent investigation of the record'" and concluded that appellate counsel "'would be helpful to the defendant or the court.'" 372 U.S. at 355 (quoting *People v. Hyde*, 51 Cal. 2d 152, 154, 331 P.2d 42 [1958]). The United States Supreme Court held that California's scheme violated the Equal Protection Clause of the Fourteenth Amendment by discriminating based on indigency, and it determined that states must provide counsel to indigent defendants on their first appeal. 372 U.S. at 353-58.

Douglas is inapplicable here. The record in *Douglas* showed that the appellants had requested and were denied counsel, leaving them no choice but to proceed pro se. But Guebara was twice appointed appellate counsel, so there is no equal-protection violation under *Douglas*.

As for Guebara's second argument, a defendant has no right to be represented by a particular lawyer. See *State v. Brown*, 305 Kan. 413, 424, 382 P.3d 852 (2016). "Only if the defendant demonstrates justifiable dissatisfaction with his or her current counsel does the Sixth Amendment require a court to appoint new counsel." 305 Kan. at 424. A defendant can show "justifiable dissatisfaction" through "a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication." 305 Kan. at 424-25.

Like he did in the Court of Appeals, Guebara argues only that his appointed counsel would not raise the issues he wanted her to and that "it's [his] appeal not appellate counsel[']s." The panel found that he had not shown "justifiable dissatisfaction," a finding that we review for abuse of discretion. See 305 Kan. at 423-28. The panel did not abuse its discretion. As we have recognized, appellate counsel, not the defendant, is responsible for determining which claims to raise on appeal:

"In an appeal from a criminal conviction, appellate counsel should carefully consider the issues, and those that are weak or without merit, as well as those which could result in nothing more than harmless error, should not be included as issues on appeal. Likewise, the fact that the defendant requests such an issue or issues to be raised does not require appellate counsel to include them. Conscientious counsel should only raise issues on appeal which, in the exercise of reasonable professional judgment, have merit." *Baker v. State*, 243 Kan. 1, 10, 755 P.2d 493 (1988).

Guebara is not acting pro se in the appellate courts because he was denied the help of appellate counsel—he was appointed appellate counsel who asserted that she was willing and able to represent him. Instead, he is proceeding pro se because he disagreed with appellate counsel's strategy. But he has not shown that he was "justifiably dissatisfied" with the attorney. Nor has he asserted that appellate counsel provided constitutionally ineffective assistance.

B. *The District Court Did Not Err by Denying Guebara's Ineffective-Assistance-of-Counsel Claims*

Guebara next argues that the district court erred when it denied his motions for a new trial based on ineffective assistance of trial counsel. Ineffective-assistance-of-counsel claims are analyzed under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by this court in *Chamberlain v. State*, 236 Kan. 650, 656-57, 694 P.2d 468 (1985). Under the first prong, a defendant must establish deficient performance by showing that defense counsel's representation fell below an objective standard of reasonableness. *Khalil-Alsalaami v. State*, 313 Kan. 472, 485-86, 486 P.3d 1216 (2021). As the panel noted, "[j]udicial scrutiny of counsel's performance . . . must be highly deferential." *Guebara*, 2023 WL 2194542, at *7 (citing *Khalil-Alsalaami*, 313 Kan. at 485). Under the second prong, the defendant must establish prejudice by showing "with reasonable probability that the deficient performance affected the outcome of the proceedings, based on the totality of the evidence." 313 Kan. at 486.

The district court conducted a 2-day evidentiary hearing on Guebara's motions and then denied relief in a 63-page decision that scrutinized the many claims Guebara had raised. When a district court conducts an evidentiary hearing on an ineffective-assistance-of-counsel claim, appellate courts review the district court's factual findings for substantial competent evidence. The appellate court's review of the district court's legal conclusions is unlimited. 313 Kan. at 486.

In the district court, Guebara alleged that his trial counsel, Douglas Spencer, was ineffective in 20 ways. The decision of the panel below shows that Guebara raised nine ineffective-assistance

allegations in that court. But even liberally construed, Guebara's petition for review has significantly narrowed the issues. See Supreme Court Rule 8.03(i)(1) (2023 Kan. S. Ct. R. at 59) ("[T]he issues before the Supreme Court include all issues properly before the Court of Appeals that the petition for review . . . allege[s] were decided erroneously."). He alleges that Spencer was ineffective for failing to conduct a thorough investigation and to prepare for the case, for failing to object when the stainless-steel revolver found in the armchair was presented to the jury, and for allowing false testimony from Nathan Cook (the fiancé of Guebara's daughter).

1. *The District Court's Finding That Spencer Did Not Fail to Investigate or Prepare for the Case Is Supported by Substantial Competent Evidence*

Like the district court, the Court of Appeals panel carefully analyzed Guebara's argument, and it concluded that the district court's factual findings were supported by substantial competent evidence:

"A major recurring point in Guebara's argument below and on appeal is that Spencer failed to investigate the case and interview witnesses. Had he done this, Guebara claims, Spencer would have been able to better cross-examine the witnesses, lodge more appropriate objections, and preserve Guebara's confrontation rights under the Sixth Amendment.

"Although Guebara claims that the district court did not make findings about whether Spencer effectively investigated the case and interviewed witnesses this claim conflicts with the record. Guebara did not testify or provide an alibi witness, so the case was wholly based on what the State knew and how they knew it. From reviewing Spencer's cross-examination and the evidence he presented, the district court found it evident that Spencer spent a proper amount of time with Guebara, the investigative reports prepared in the case, and the audio recordings the State presented at trial. The court then noted numerous ways in which Spencer 'mudd[ied] the waters of the State's case.'

"The district court's factual findings on this point are supported by substantial competent evidence. Spencer testified about the steps he took before the trial to investigate and prepare for the case. Most of his preparation involved reviewing the extensive paper discovery and audio recordings from the State. He provided the discovery to Guebara and met with Guebara several times to talk about the discovery and evidence in this case. Spencer subpoenaed all important witnesses. He also sought to interview Rios and Fajardo before trial. Though he did not succeed, the district court correctly noted that the State was building its case

around the materials disclosed in discovery, not around what the witnesses may state in their testimony." *Guebara*, 2023 WL 2194542, at *7.

After reviewing the record on appeal, we agree with the Court of Appeals panel and adopt its analysis.

2. *Spencer Was Not Ineffective for Failing to Object When the Stainless-Steel Gun Was Presented to the Jury and for Failing to Object to Cook's "Perjured" Testimony*

Guebara first argues that Spencer should have objected when the stainless-steel gun recovered from Randy Miller's (a friend of Guebara's brother-in-law) house was shown to the jury during Miller's testimony. The panel acknowledged that the district court failed to rule on this issue. 2023 WL 2194542, at *8. But the panel held that "[t]here was ample evidence to support the relevance of the stainless-steel gun" at trial and that, despite having "no basis for objecting" to the gun, Spencer "was able to effectively point out" facts about its limited evidentiary value:

> "There was ample evidence to support the relevance of the stainless-steel gun to Guebara's charges of attempted first-degree murder and criminal possession of a weapon by a convicted felon. [The victim] identified Guebara as the shooter. Andrade heard Guebara on the phone with Fajardo just before Guebara was arrested describing where he
>
> put the gun. When Andrade told Silvia Cordes, she found it in the location described. Silvia Cordes gave the gun to Scott who brought it to Miller where it was found by the police.
>
> "Spencer had no basis for objecting to the evidence presented about the stainless-steel gun. Even so, he was able to effectively point out problems to the jury with the State's evidence. For example, he elicited testimony from Officer Smith that Cook could have planted the gun and shell casings when they first went out to search for the gun. During closing, Spencer highlighted Silvia Cordes' contradictory testimony at trial—which was the only testimony given under oath—that she got the gun from her [uncle], not a woodpile. And he noted that none of the forensic evidence tied the stainless-steel revolver to the shooting or to Guebara." 2023 WL 2194542, at *8.

Guebara does not explain how the panel's analysis was incorrect. He does not offer a basis for an objection other than to assert the gun was "tainted evidence" and that it had been planted. Guebara has failed to establish that Spencer's representation in this regard was objectively unreasonable.

Guebara then argues that Spencer should have objected to the testimony of Nathan Cook, who was the fiancé of Guebara's daughter and who, along with Guebara's daughter, worked as a confidential informant in the case. Guebara does not explain the basis for an objection except to say that Cook committed perjury because it was Cook who planted the gun to frame Guebara. Guebara points to no evidence Cook was lying except to point out that Cook testified he had been wearing a t-shirt and jeans while the relevant police report states he was "wearing a tan canvas coat." And in any event, as the panel noted, Spencer "elicited testimony from Officer Smith that Cook could have planted the gun and shell casings when they first went out to search for the gun" and otherwise challenged the weight the jury should give the evidence about the gun. 2023 WL 2194542, at *8. We see no deficient performance in this regard.

C. *The State Did Not Commit Prosecutorial Error During Closing Argument*

Guebara next argues that the State erred during closing argument when discussing the elements of premeditation and intent. The prosecutor argued that the evidence showed Guebara had been jealous of the victim, had gotten somebody to buy ammo for him the day of the shooting, had flashed his lights at the victim to get him to pull over, and had fired five bullets at the victim. The prosecutor also asserted that there was evidence that, on the day of the shooting, "'he was thinking, I want to kill somebody today'":

"We've got this evidence—we also have evidence that we've presented to you from [his daughter] that he was thinking, [']I want to kill somebody today.['] He wanted Silvia to go get some ammo on the date before this happened—on the day that it happened. She didn't do it because she didn't want to. She didn't feel comfortable with it so she didn't do it."

At trial, Guebara's daughter had testified that on the morning of the shooting, her father had said he "needed some bullets for his new gun" and "felt like killing somebody":

"Q. And did you later have a conversation with your father that kind of alarmed you?

"A. At the house?

"Q. Yes.

"A. Yes.
"Q. What statements did your father make to you that caused you alarm?
"A. He said that he needed some bullets for his new gun.
"Q. I'm going to stop you there. You said his new gun. Did he already have a gun?
"A. He said that he had a 1911.
"Q. And did he tell you anything that he had done with that 1911?
"A. He said he traded it for a .357.
"Q. Did he give you any more information than that?
"A. No.
"Q. What—let's go back to what he talked about, the bullets. Can you tell the jury about that?
"A. Um, he said he felt like killing somebody.
"Q. Did you agree to buy him ammunition that day?
"A. No, ma'am."

According to Guebara, the prosecutor misstated the evidence because his daughter did not testify that he felt like killing somebody "today." Although Guebara alleged several other closing-argument errors to the Court of Appeals, this is the only one he renewed in his petition for review. See Rule 8.03(i)(1) (2023 Kan. S. Ct. R. at 59) ("[T]he issues before the Supreme Court include all issues properly before the Court of Appeals that the petition for review . . . allege[s] were decided erroneously.").

Guebara's trial counsel did not object to the alleged errors at trial, but appellate courts will review a claim of prosecutorial error even without a timely objection. *State v. Shields*, 315 Kan. 814, 835, 511 P.3d 931 (2022). Appellate courts apply a two-step analysis when evaluating such claims. First, they "'decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.'" 315 Kan. at 835-36. Then, if the appellate court finds error, it reviews under the constitutional harmless-error standard, which we discussed above. Under that standard, the State must show that "'there is no reasonable possibility that the error contributed to the verdict.'" 315 Kan. at 836.

Because there was an evidentiary foundation for the prosecutor's factual inference, there was no error. See *State v. Watson*, 313 Kan. 170, 179, 484 P.3d 877 (2021) ("[A] prosecutor errs by arguing a fact or factual inference with no evidentiary foundation.").

As the panel below noted, based on his daughter's testimony, "it can be reasonably inferred that Guebara was describing a present state of mind, meaning one that he had that day. So the way the prosecutor phrased the testimony was not a stretch from the record." *Guebara*, 2023 WL 2194542, at *20.

D. *Guebara Has Inadequately Briefed His Allegation That the District Court Abused Its Discretion by Allowing Hearsay Testimony*

Next, Guebara argues that the district court erred by allowing hearsay testimony. Guebara does not specify the witness testimony he is objecting to, but he is likely renewing his argument made to the Court of Appeals that the district court improperly allowed hearsay statements from Silvia Cordes (Guebara's sister), Silvia Gillespie (Guebara's daughter), Cook, and Gabriel Andrade (the boyfriend of Guebara's aunt). Guebara seems to argue that the district court erred by allowing those statements under K.S.A. 2022 Supp. 60-460(d) without making the findings necessary under that subsection.

But Guebara has not identified the specific statements he is objecting to. When a party "fails to identify the specific statements" in a hearsay challenge, "[w]e will not speculate as to the statements [the defendant] seeks to challenge." *State v. Robinson*, 293 Kan. 1002, 1027, 270 P.3d 1183 (2012). As a Court of Appeals panel recently put it, "without more specific guidance on which portions of [the] testimony were allegedly hearsay, this court cannot even begin to engage in a proper analysis of whether the court improperly admitted hearsay evidence." *In re K.L.*, No. 124,873, 2022 WL 4391222, at *7 (Kan. App. 2022) (unpublished opinion). Nor does Guebara identify where in the record his attorney objected to statements made by those witnesses on hearsay grounds. See *State v. Mays*, 277 Kan. 359, 384-85, 85 P.3d 1208 (2004) (to preserve hearsay challenge for appeal, the defendant must make contemporaneous objection to complained-about evidence). To the contrary, Guebara alleged in the Court

of Appeals that his trial counsel had been constitutionally ineffective for *failing* to object to hearsay statements made by these witnesses. *Guebara*, 2023 WL 2194542, at *15. Guebara is not entitled to relief on this issue.

E. *There Is No Evidence that the State Failed to Disclose Exculpatory Evidence*

Guebara next argues that the State failed to disclose exculpatory evidence. After Guebara was convicted, his attorney filed a motion for a new trial based on a *Brady/Giglio* disclosure by the State. See *State v. Robinson*, 309 Kan. 159, 160, 432 P.3d 75 (2019) ("[U]nder *Brady v. Maryland* . . . and *Giglio v. United States* . . . the State has a continuing duty to disclose evidence favorable to the defense, even after conviction."). The State had informed Guebara's attorney that the lead detective had been in a sexual relationship with Guebara's daughter—who had been a confidential informant in the investigation and a key witness in the trial—between April or May 2017 (about 14 months after the trial) and August 2018. The motion said that Guebara believed the relationship may have started during the investigation. Guebara also filed several pro se motions on the issue.

After an in-camera review, the district court found portions of two Garden City Police Department files contained discoverable information and ordered that the information be provided to Guebara. When the court took up the motion at the beginning of the sentencing hearing, Guebara's attorney had not yet received the second file, so he was not ready to go forward on the motion. But he said that he did not yet have an evidentiary basis to proceed on the claim that the detective and Guebara's daughter began their relationship earlier than the State reported. The district court said that once the attorney reviewed the second file, he could decide whether there was evidence to "get this motion off the ground to a point where you really want to pursue it." Guebara's counsel did not pursue the motion.

As the panel correctly concluded, "Guebara never moved for new trial" on this basis, and he "presented no evidence to support his claims. His conclusory assertion that the State withheld evidence fails because it is not supported by the record." *Guebara*,

2023 WL 2194542, at *22. Guebara has not remedied that deficiency in our court. He simply says the dates had not yet been solidified, but he points to no evidence that the relationship had started before or during the investigation.

F. *Cumulative Error Did Not Deprive Guebara of a Fair Trial*

In the analysis above, we concluded that two stipulation errors occurred: the district court failed to obtain a jury-trial waiver before accepting Guebara's stipulation to an element, and the stipulation did not establish that Guebara had committed a felony that prohibited him from possessing a weapon on the day of the shooting. We analyzed both errors under the constitutional harmless-error standard, and we determined that neither warranted reversal individually. For his last argument, Guebara contends that the errors in the district court collectively require reversal, even if individually they do not.

The cumulative effect of 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. Hirsh*, 310 Kan. 321, 345, 446 P.3d 472 (2019). In assessing the cumulative effect of errors during the trial, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. 310 Kan. at 345-46. If any of the errors being aggregated are constitutional, their cumulative effect must be harmless beyond a reasonable doubt. *State v. Robinson*, 306 Kan. 1012, 1034, 399 P.3d 194 (2017).

As we emphasized when discussing harmlessness for the errors individually, Guebara stipulated to his prior felony because he knew that the State had conclusive evidence to establish that element, and he did not want the jury in his trial for attempted first-degree murder and criminal possession of a weapon to learn that he had previously been convicted of first-degree murder for shooting his wife. Guebara's offer to stipulate prevented the State from presenting that evidence to the jury, but the journal entry of

the conviction was still placed into the record outside the jury's presence. See *Mitchell*, 285 Kan. at 1079. And if Guebara had instead contested the prior felony, there is no question that the State could have presented that journal entry to the jury and easily proved Guebara's status as a prohibited felon. So even when the two stipulation errors are considered together, we conclude beyond a reasonable doubt that there is no reasonable possibility the errors contributed to the verdict.

G. *We Decline to Reach the Merits of the State's Confrontation Clause Issue*

As part of his ineffective-assistance-of-counsel claims, Guebara argued that his attorney should have objected to testimony by one of the witnesses, Jacob Fajardo. In Guebara's view, Fajardo was "unavailable" for Confrontation Clause purposes. See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."). A defendant's rights under the Confrontation Clause are violated "if an unavailable declarant's testimonial statements are brought into evidence against a person without a prior opportunity to cross-examine that declarant." *Logsdon*, 304 Kan. at 36. So to violate that right, the declarant must be unavailable *and* the out-of-court statements must be "testimonial."

The panel determined that Fajardo was "unavailable" because the evidence showed that he "refused to answer all questions related to the subject matter of his out-of-court statements." *Guebara*, 2023 WL 2194542, at *13. But it held that Fajardo's statements either were nontestimonial or were harmless because another witness provided the same testimony. 2023 WL 2194542, at *14. In its conditional cross-petition, the State now argues that the panel's holding on unavailability conflicts with our caselaw addressing whether a witness who answers some questions, but refuses to answer others, is "available" for Confrontation Clause purposes. See, e.g., *State v. Carter*, 278 Kan. 74, 79-80, 91 P.3d 1162 (2004); *State v. Osby*, 246 Kan. 621, 632-33, 793 P.2d 243 (1990).

We decline to reach the merits of the State's challenge for prudential reasons. First, as the panel acknowledged "Guebara does

not identify the specific Fajardo statements" that his attorney should have objected to. *Guebara*, 2023 WL 2194542, at *13. Even so, the panel reviewed the record and determined that "several salient facts [were] provided through Fajardo's statements." 2023 WL 2194542, at *13. But as we noted above, appellate courts should "not speculate as to the statements [the defendant] seeks to challenge" when the defendant has failed to identify them. *Robinson*, 293 Kan. at 1027. And we will not perpetuate Guebara's failure to preserve the issue by addressing the merits of the State's petition.

Second, the panel already concluded that Guebara's ineffective-assistance claim ultimately failed because, even if Fajardo were unavailable, his statements were either nontestimonial or harmless. And Guebara challenged neither holding on appeal. As a result, even if we addressed the merits and agreed with the State that the panel's Confrontation Clause analysis was incorrect, the result would be the same.

CONCLUSION

Because we have determined that the errors relating to Guebara's stipulation were harmless beyond a reasonable doubt, we affirm his convictions. Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed.

No. 123,797

STATE OF KANSAS, *Appellee,* v. TYLER BRANDON MCDONALD, *Appellant.*

(544 P.3d 156)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fourth Amendment Right to Protection from Unreasonable Searches and Seizure by Government.* The Fourth Amendment to the United States Constitution protects the right of an individual to be secure in his or her person and not subject to unreasonable searches and seizures by the government. Section 15 of the Kansas Constitution Bill of Rights offers the same protections.

2. SEARCH AND SEIZURE—*Public Safety Stop Is Exception to Warrant Requirement.* A public safety stop is a seizure and an exception to the Fourth Amendment warrant requirement.

3. SAME—*Warrantless Traffic Stop Justified for Public Safety Reasons—Must Be Based on Specific and Articulable Facts.* A warrantless traffic stop can be justified for public safety reasons if the safety reasons are based upon specific and articulable facts. Suspicion of criminal activity is not a legitimate basis for a public welfare stop. In this case, the facts are insufficient to allow a warrantless seizure and do not support a valid public safety stop.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 75, 524 P.3d 448 (2023). Appeal from Geary District Court; CHARLES A. ZIMMERMAN, magistrate judge. Oral argument held September 11, 2023. Opinion filed March 8, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Kristen B. Patty, of Wichita, argued the cause and was on the brief for appellant.

Natalie Chalmers, assistant solicitor general, argued the cause, and *Tony Cruz*, assistant county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: After dark on a late summer evening in Geary County, a sheriff's deputy initiated a public welfare stop of Tyler Brandon McDonald. The deputy was patrolling the Outlet Park area near Milford Lake when he observed McDonald's vehicle parked in a parking space near the entrance of the park. The deputy

could see that McDonald was alone and alert in his vehicle. Relying on his prior knowledge of a murder-suicide in the area, the deputy decided to initiate a public welfare stop.

The deputy pulled in behind McDonald's vehicle, activated his rear emergency lights, and ran McDonald's license plate. As he was approaching McDonald's car, the deputy heard voices and believed McDonald was having a phone conversation via Bluetooth. When McDonald rolled down his window, the deputy smelled marijuana. The deputy asked for McDonald's license, called for backup, and initiated a search of McDonald's car, finding marijuana and a grinder.

McDonald filed a motion to suppress evidence obtained from the vehicle search, arguing that the public safety stop violated his Fourth Amendment rights. The district court denied his motion and convicted him for possession of marijuana and possession of drug paraphernalia. McDonald timely appealed and the Court of Appeals affirmed. *State v. McDonald*, 63 Kan. App. 2d 75, 524 P.3d 448 (2023). Because we hold this was an invalid public safety stop, we reverse.

"On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). 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. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). The State has the burden to prove a search or seizure was legal. *State v. Cleverly*, 305 Kan. 598, 605, 385 P.3d 512 (2016).

The Fourth Amendment to the United States Constitution protects the right of an individual to be secure in his or her person and not subject to unreasonable searches and seizures by the government. *State v. Ryce*, 303 Kan. 899, 909, 368 P.3d 342 (2016). Section 15 of the Kansas Constitution Bill of Rights offers the same protections. 303 Kan. at 909; *State v. Williams*, 297 Kan. 370, 376, 300 P.3d 1072 (2013).

There are generally four types of encounters between individuals and police: (1) voluntary or consensual encounters, (2) investigatory detentions, (3) public safety or public welfare stops, and (4) arrests. *State v. Guein*, 309 Kan. 1245, 1253, 444 P.3d 340 (2019). Here the parties both argue—and testimony confirms—that the deputy was attempting to execute a public safety stop. The deputy even testified that McDonald would only have been free to leave, *after* he finished the public safety stop.

As far as the Fourth Amendment is concerned, a public safety traffic stop is a seizure. *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 636, 176 P.3d 938 (2008), *overruled on other grounds by City of Atwood v. Pianalto*, 301 Kan. 1008, 350 P.3d 1048 (2015). Any warrantless search or seizure is presumptively unreasonable unless it falls within a recognized exception to the warrant requirement. *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014). Public safety or community caretaking reasons may justify a warrantless seizure even when no civil or criminal infractions have occurred, so long as the encounter is based on specific and articulable facts. *Hanke*, 307 Kan. at 827-28.

The public safety exception was first discussed by the United States Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). *Cady* involved a warrantless search, not a seizure. But we have cited *Cady*'s underlying public safety rationale as persuasive in adopting the public safety exception to the Fourth Amendment warrant requirement in *State v. Vistuba*, 251 Kan. 821, 824, 840 P.2d 511 (1992), *disapproved on other grounds in State v. Field*, 252 Kan. 657, 847 P.2d 1280 (1993). In that case, we held that a warrantless traffic stop can be justified for public safety reasons "*if the safety reasons are based upon specific and articulable facts*." *Vistuba*, 251 Kan. at 824; see *State v. Ellis*, 311 Kan. 925, 929-30, 469 P.3d 65 (2020).

Instances of courts policing the limits on law enforcement's use of public welfare stops is nothing new. We have previously said "[d]espite repeated admonitions to the State that police may not use public welfare checks as a basis for conducting background investigations and warrant checks . . . such conduct persists." *Ellis*, 311 Kan. at 942; see also *State v. Gonzales*, 36 Kan. App. 2d 446, 453, 141 P.3d 501 (2006) ("Once safety stops are

permitted, then there must be limits placed upon them; otherwise, any pretext could serve as a reason to stop."). A valid public-safety stop therefore requires an officer to believe such a stop is necessary to protect the individual or the public based on the specific and articulable facts of the particular situation. *Ellis*, 311 Kan. at 929-30. Several Kansas cases provide examples as to what can constitute sufficient specific and articulable facts.

In *Vistuba*, we recognized the legitimacy of a lawful public welfare stop when an officer pulled over a moving vehicle because the person was driving erratically, driving slowly, hugging the curb, swerving on the shoulder, and the officer had a reasonable belief that the driver was either ill or falling asleep. 251 Kan. at 822, 824. The officer testified that while she believed the driver was not committing any crime, the driver was posing a danger to himself and others on the road. 251 Kan. at 822; see also *State v. Messner*, 55 Kan. App. 2d 630, 631-32, 634, 419 P.3d 642 (2018) (valid public welfare stop when defendant had spent eight hours incoherent in a grocery store and police followed and stopped him after he was asked to leave the store out of concern for his own safety); *State v. McKenna*, 57 Kan. App. 2d 731, 731-32, 740, 459 P.3d 1274 (2020) (valid public welfare stop when police viewed a driver slumped over and unresponsive in her car); *Nickelson v. Kansas Dept. of Revenue*, 33 Kan. App. 2d 359, 360, 365, 102 P.3d 490 (2004) (valid public safety stop when, pursuant to standard highway patrol procedures, officer observed defendant pull off the highway onto a secluded farm plug and turn off his lights); *State v. Tilson*, No. 108,253, 2013 WL 2920147, at *1, 3 (Kan. App. 2013) (unpublished opinion) (valid public welfare stop when police observed defendant walking in the street at 3:30 a.m. near his overturned car with scratches and blood on his hands and defendant's friend had reported he was likely a danger to himself).

In this case, however, the facts do not support a valid safety stop. The deputy stated he was concerned because it was dark, it was late, the car was parked in a "secluded" area, there was a single occupant inside the car, there had been prior safety incidents in the area in past years, people often do illegal activity in that area, and that he didn't know what McDonald was thinking. On

examination, we find these facts insufficient to allow a warrantless seizure.

First, it was approximately 9 p.m., the park was still open to the public, and McDonald was legally parked near the entrance. None of these facts indicate something is wrong or that McDonald is in danger. Next, we assign no value to the bare fact McDonald was alone. Upon approaching the vehicle, the deputy could even hear what he believed was McDonald speaking on the phone. And the fact there had been past issues in the park with criminal activity is irrelevant because the deputy admitted he did not suspect any criminal activity, and suspicion of criminal activity is not a legitimate basis for a public welfare stop.

Finally, turning to the deputy's concern based on his experiences working prior instances of self-harm, we find no specific and articulable facts in the record to support those concerns here. The deputy had not received any calls, reports, or other information that McDonald was in any type of danger. McDonald did not appear to be in an adverse physical state or doing anything which would indicate he was at any risk of self-harm. Sitting alone, talking on the phone via Bluetooth, while legally parked in an open public park is simply not enough. Moreover, the deputy not knowing what McDonald was thinking is not a specific and articulable fact giving rise to public safety concerns.

We hold the stop unconstitutional in violation of the Fourth Amendment. Accordingly, we reverse the lower courts and reverse McDonald's convictions.

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

No. 124,946

JEANNINE WILLIAMS-DAVIDSON and JEFFREY DAVIDSON, *Appellants*, v. DR. NASON LUI, STORMONT-VAIL HEALTHCARE, INC., STORMONT-VAIL, INC., d/b/a COTTON-O'NEIL, and OTHER DOE CORPORATIONS, *Appellees*.

(544 P.3d 854)

SYLLABUS BY THE COURT

APPEAL AND ERROR—*Equally Divided Appellate Court—Lower Court's Ruling Stands.* When an appellate court is equally divided, the lower court's ruling stands.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 28, 2023. Appeal from Douglas District Court; JAMES R. MCCABRIA, judge. Oral argument held January 31, 2024. Opinion filed March 8, 2024. Judgment of the Court of Appeals reversing the district court stands. Judgment of the district court is reversed, and the case is remanded with directions.

Jason W. Belveal, of Belveal Law Office Inc., of Holton, argued the cause and was on the briefs for appellants.

Cynthia J. Sheppeard, of Goodell, Stratton, Edmonds & Palmer, LLP, of Topeka, argued the cause, and *Cameron S. Bernard*, of the same firm, was with her on the briefs for appellees.

PER CURIAM: Jeannine Williams-Davidson went to Stormont-Vail Hospital in Topeka to have an adrenal gland removed, but Dr. Nason Lui removed part of her pancreas instead. Another procedure and an extended hospital stay were required. The hospital allegedly charged Williams-Davidson for both surgeries, her extra hospital stay, and all follow-up care. About two years later, she and her husband sued Dr. Lui and the hospital for medical malpractice, other common-law claims, and violations of the Kansas Consumer Protection Act, K.S.A. 50-623 et seq.

Because jurors and lay witnesses are not conversant with medical science, Kansas courts have long required a plaintiff to offer expert testimony to support a medical-malpractice allegation. See *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, Syl. ¶ 17, 228 P.3d 1048 (2010); *Tefft v. Wilcox*, 6 Kan. 46, 59, 1870 WL 458 (1870). But because medical professionals do not have "a monopoly on common sense," Kansas courts have also long recognized a "common knowledge exception," which allows a plaintiff to proceed without expert

testimony. *Webb v. Lungstrum*, 223 Kan. 487, 490, 575 P.2d 22 (1978); see *Pettigrew v. Lewis*, 46 Kan. 78, 81-82, 26 P. 458 (1891). That exception applies when the "diagnosis, treatment, and care of a patient is so obviously lacking in reasonable care and the results are so bad that the lack of reasonable care would be apparent to and within the common knowledge and experience" of an average person. *Webb*, 223 Kan. at Williams-Davidson and her husband believed the common-knowledge exception applied, so they pursued their claims without retaining an expert witness. The district court disagreed and granted summary judgment to the defendants. But on appeal, a majority of a Court of Appeals panel held that the exception applied to Dr. Lui's removal of the wrong organ. In the panel majority's view, "when a surgeon misidentifies and removes a healthy organ, leaving the organ intended to be operated on untouched, the outcome is so patently bad that the lack of reasonable care can be apparent and within the common knowledge of a layperson to establish a breach of the standard of care." *Williams-Davidson v. Lui*, No. 124,946, 2023 WL 4832666, at *9 (Kan. App. 2023) (unpublished opinion). The panel majority therefore reversed the district court's order and remanded for further proceedings. 2023 WL 4832666, at *11-12.

The defendants petitioned our court for review. They argued that the panel majority had erred by applying the common-knowledge exception and by remanding rather than evaluating other challenges the defendants had raised. Justice Rosen recused from any participation. We granted review, but we are equally divided. Justice Biles, Justice Wall, and Justice Standridge would vote to affirm the panel majority and reverse the district court's order granting summary judgment to the defendants. Chief Justice Luckert, Justice Stegall, and Justice Wilson would vote to reverse the panel's decision and affirm the district court's judgment. When an appellate court is equally divided, the lower court's ruling stands. See *State v. Buchhorn*, 316 Kan. 324, 325, 515 P.3d 282 (2022); see also Kan. Const. art. 3, § 2 ("[T]he concurrence of a majority of the justices sitting and of not fewer than four justices shall be necessary for a decision.").

Judgment of the Court of Appeals reversing the district court stands. Judgment of the district court is reversed, and the case is remanded with directions.

ROSEN, J., not participating.

No. 123,650

STATE OF KANSAS, *Appellee*, v. CAROL SUE BURRIS, *Appellant.*

(544 P.3d 841)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Legal Duty of Care by Common Law or Legislative Enactment—Liability for Failure to Act.* A person may be held criminally liable for a failure to act if that person owes a legal duty of care. Legal duties of care can arise out of either common law or legislative enactment.

2. MARRIAGE—*Legal Duty of Care Imposed by Marriage—Voluntary Assumption to Care for Another.* A legal duty of care is imposed at common law when a person is in a special relationship with another. One such relationship is marriage. A legal duty of care also arises when a person has voluntarily assumed the care of another and has prevented others from rendering aid.

3. CRIMINAL LAW—*Statute Imposes Legal Duty of Care on Primary Caregiver of Dependent Adult.* K.S.A. 2022 Supp. 21-5417 imposes a legal duty of care on the primary caregivers of dependent adults.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 250, 528 P.3d 565 (2023). Appeal from Coffey District Court; TAYLOR J. WINE, judge. Oral argument held December 14, 2023. Opinion filed March 15, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Kasper Schirer, of Kansas Appellate Defender Office, argued the cause, and *Caroline M. Zuschek*, of the same office, was with him on the briefs for appellant.

Steven J. Obermeier, deputy solicitor general, argued the cause, and *Kris W. Kobach*, attorney general, was with him on the briefs for appellee.

The opinion of the court was delivered by

STEGALL, J.: Carol Sue Burris was charged with mistreatment of a dependent adult and the second-degree reckless murder of Michael Burris, Burris' husband of over 45 years. Michael suffered from dementia and other significant health issues and relied on Burris—as Michael's sole caregiver—to tend to his needs. Yet trial evidence showed that Burris not only did not adequately care for Michael, but also actively prevented others from assuming or providing his care. Burris did not tend to his wounds, did not give him his required medications, did not bathe him or help him use

the toilet, and did not provide him with enough food and water to survive. Michael ultimately died of pneumonia with severe emaciation as a significant underlying factor, and a jury convicted Burris of both charges. Burris' convictions were affirmed by the Court of Appeals, and we granted her petition for review. She argues that her conviction for reckless but unintentional second-degree murder must be reversed, as it is based only on a *failure* of care—that is, on omissions (things she did not do) rather than affirmative acts (things she did do). Her argument is premised on the idea that she had no duty to act—to provide the care at issue—under these facts. She also claims the prosecutor committed three reversible errors during closing arguments.

Today we conclude that Burris owed a clearly defined legal duty of care to summon or provide medical care for Michael based on their marital relationship, Burris' voluntary assumption of Michael's care, and her role as Michael's sole caregiver under K.S.A. 2022 Supp. 21-5417. We also find no prosecutorial error occurred. As such, we affirm Burris' convictions.

FACTS

As the parties do not dispute the facts as recited by the panel in *State v. Burris*, 63 Kan. App. 2d 250, 251-56, 528 P.3d 565 (2023), we adopt them for use here:

"A. *Carol's neglect and Michael's deteriorating health*

"In April 2016, two paramedics were dispatched to the home of Carol and Michael Burris after receiving a report that Michael fell and needed assistance. When paramedics arrived, Carol directed them to a back room of the home where they found Michael on the floor in underwear stained yellow, smelling of urine, and with sores on his legs that suggested he lay on the floor for an extended period of time. One of the paramedics, Roy Rickel, also observed that Michael was very thin, appeared to be dehydrated, and had several cuts across his arms in various stages of healing. After Carol left the room, Michael told Rickel that he remained on the floor for about two weeks after falling and resorted to cutting himself with the hope it would induce Carol to call for help. He said Carol provided him with doughnuts and water and occasionally cleaned his urine and feces off the floor.

"Michael was transported to the hospital where doctors diagnosed an infection in his leg, an ulcer caused by a pressure sore, low potassium levels, and dehydration. Michael informed a nurse that he had not eaten recently because Carol would not cook for him, but he could not call for help because Carol took

his cell phone away. He also told his sister, Terry Taylor, that Carol refused to give him his cell phone and left him on the floor for several days after he asked her to call for help. Michelle Gast, a social worker for the Department for Children and Families, investigated allegations that Carol subjected Michael to neglect. Carol told Gast she felt responsible for caring for Michael, providing his meals, assisting with his toileting needs, and transporting him to medical appointments. Yet when Gast asked whether Carol gave Michael his prescribed medications, Carol said she gave him her own medications instead because she could not get him out of the house to see the doctor. Carol acknowledged Michael remained on the floor for an unknown duration after his fall but remarked that it was not possible for her to move him given the disparity in their respective sizes. When Gast inquired why Michael cut himself Carol refused to answer.

"Dr. John Shell recommended Michael be discharged to Life Care Center, a nursing home facility, so he could increase his strength, ambulate on his own, and care for himself more independently before returning home. Michael believed that Life Care presented a good option but told Lucas Markowitz, a social worker, that he wanted to speak with Carol first. Following his conversation with Carol, Michael expressed a change of heart about his care and requested to return home immediately. He did agree to receive home health services.

"Michael remained in the hospital for nine more days and was then transported home by paramedic Aaron Williams. Upon their arrival, Carol cautioned Williams to not disturb their dogs and to get Michael inside as quietly as possible. Williams tried to give Carol the necessary instructions for Michael's care, but she grew annoyed and spoke over him. The hospital's home health department called the Burrises to speak with Williams while he was at the house, but Carol refused to allow the communication. Williams left the residence fearing that Michael was at risk of neglect, so he filed a report with the Kansas Department for Children and Families.

"Paramedics returned to the home nine days later in response to a call from Carol that Michael fell again. Roy Rickel was again among the responders and found Michael in a position much like that he was in following his first fall. This time, Michael apparently fell out of his chair three or four hours before the paramedics arrived. They transported him back to the hospital, and Dr. Shell diagnosed him with high levels of potassium. Michael was discharged to Life Care Center and treated for elevated potassium levels, diabetes, and hypothyroidism. He was also diagnosed with mild-to-moderate dementia. The facility discharged Michael roughly three weeks later and sent him home with prescriptions for Synthroid, Metformin, Mirtazapine, and Amlodipine to be taken daily. Carol told Life Care that home health assistance was unnecessary because she planned to care for Michael herself.

"Michael's sister, Terry, called from time to time to check on his health after he returned home, but no one answered her calls for days at a time, so she finally left a message in which she threatened to call the police for a welfare check. About 10 minutes after Terry left that message, Carol called back and permitted her to speak with Michael. Terry offered to allow the couple to move into her guest house so they could be closer to her, but Carol declined. Carol also complained to Terry that she could not even take care of herself well because of the

constant care and attention Michael required from her. Terry encouraged her to explore government-funded home healthcare programs, but Carol dismissed the suggestions because neither she nor her dogs liked when healthcare professionals visited the home.

"Around this time, Gast visited the Burris' home to check on Michael's well-being, but Carol slammed the door in her face. As Gast returned to her car, Carol yelled from the porch that they were tired of people coming to their house and wanted to be left alone. Gast again requested to see Michael, but Carol claimed he did not have any clothing on. When Gast suggested that she simply cover him with a blanket, Carol asserted that if Gast came inside she did not have a place to put her dogs. Gast persisted but Carol remained steadfast in her refusal and then claimed that a visit was not possible because Michael was asleep, and she needed to leave to get his medication. Gast finally left without seeing Michael. She advised Adult Protective Services (APS) that she substantiated the allegations of Carol's abuse of Michael, and that Carol 'failed to obtain medical services for [Michael] after he fell on the floor despite his request for assistance and [that he cut] himself to get medical attention.' APS sent notices of the report to Carol and Michael.

"B. *Michael's third trip to the hospital and death*

"Paramedics were ultimately dispatched to the Burris' home for a third and final time. When they entered Michael's room at the back of the house, they were over-whelmed by the stench of stale urine and feces. When one of the paramedics, Jared Saiz, reached for a light switch, Carol shoved his hand away and told him not to turn the light on. Michael was lying on the couch wrapped in layers of blankets, with his eyes closed, and mouth open gasping for air. Saiz peeled back the blankets and observed that Michael was severely thin with his flesh sucked up under his rib cage. He assessed Michael for a possible intubation and noticed Michael's mouth was completely dry. Carol claimed that Michael ate four meals—which consisted of her pouring juice into his mouth—and spoke with her just the day before. When Saiz loaded Michael onto the stretcher to take him to the hospital, he noticed Michael's blankets were caked in feces.

"Dr. Christopher Jarvis treated Michael at Coffey County Hospital and immediately observed Michael was extremely emaciated and covered in human waste. Jarvis, who had practiced medicine in the area for 20 years, had never witnessed a person as emaciated as Michael. Once Michael was stabilized, Jarvis ordered his transfer to Stormont Vail Hospital in Topeka as it was equipped to provide a higher level of care. A charge nurse who examined Michael upon his arrival at Stormont Vail noted a litany of health problems including several pressure injuries, open peeling areas on his back, dirt covering his body, matted hair on his head, foul-smelling exposed necrotic tissue, round open wounds on his buttocks and legs, bruises on his right forearm, and severe emaciation. Terry traveled to Topeka to visit Michael and then called Carol who remarked that she thought Michael had already passed. Carol never visited Michael before he died.

"Michael died only a few hours after his arrival in Topeka. He was returned to the Coffey County Hospital, where Dr. Jarvis declared pneumonia to be the official cause of death and that it was the product of his critically emaciated state.

Michael's driver's license reflected he weighed 250 pounds in 2012; at his autopsy, he weighed only 124 pounds. Jarvis classified Michael's death as a homicide because given his severe emaciation 'it seemed appropriate that whoever was caring for him would have sought care long before he reached that point so [*sic*] neglect.' Dr. Erik Mitchell, a forensic pathologist, later found a breakdown of Michael's skin surface consistent with long periods of immobility and determined that he failed to sustain an adequate caloric intake over a significant period of time as required to maintain his physical structure.

"C. *Criminal investigation, pretrial proceedings, and trial of Carol Burris*

"The Coffey County Sheriff's Department executed a search warrant on the Burris' home and Undersheriff Thomas Johnson interviewed Carol. During their discussion, Carol was consistently distracted by her dogs' need to be kenneled and commented that she refused home healthcare services because her dogs did not like them. Carol also told Johnson that she did not give Michael his prescribed medications because she could not get to the doctor to have them filled. Officers recovered Michael's discharge summaries and care instructions from Carol's bedroom.

"In September 2018, the State charged Carol with one count each of mistreatment of a dependent adult and reckless second-degree murder. . . .

"The case proceeded to trial, and the State presented testimony from paramedics, hospital staff, medical examiners, Michelle Gast, Terry Taylor, and law enforcement personnel. It also admitted the photographs from Michael's autopsy and various items obtained from the search of the Burris' home into evidence.

. . . .

"The jury returned guilty verdicts for both charged offenses, and the district court sentenced Carol to a prison term of 125 months." 63 Kan. App. 2d at 251-56.

The panel affirmed Burris' convictions, concluding that Burris' failure to provide life-sustaining care for Michael after unequivocally assuming the responsibility to do so properly subjected her to prosecution for both charged offenses. 63 Kan. App. 2d at 263-64. The panel further found that the prosecutor's closing argument did not contain reversible error. 63 Kan. App. 2d at 273. We granted Burris' petition for review. Jurisdiction is proper. K.S.A. 60-2101(b) (this court has jurisdiction to review Court of Appeals decisions upon petition for review).

DISCUSSION

Burris acknowledges she did not argue below that she had no legal duty to care for Michael. But she claimed the panel could still review the issue because it presented only a legal question

arising on proved or admitted facts. See *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021).

The panel agreed to review the first part of her claim—that she had no legal duty to care for Michael and thus could not be convicted of a crime based on a failure to act—on the grounds that an appellate court may consider issues raised for the first time on appeal when the newly asserted claim is a purely legal one. *Burris*, 63 Kan. App. 2d at 256-57 (citing *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 [2021]). The panel did, however, decline to reach the merits of Burris' related due process claim (that if there was a legal duty to act, she did not have sufficient notice of that duty). 63 Kan. App. 2d at 264-65. The parties continue to dispute whether we ought to consider the merits of the due process argument.

We need not split the preservation hairs too finely in this case, however, as the lawfulness of a conviction premised on proven acts of omission rises or falls upon the resolution of the question of duty. And a duty imposed without sufficient notice is no duty at all. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 461-62, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001) (courts cannot impose a retroactive application that is unexpected and indefensible by reference to the expressed law prior to the conduct at issue); *Com. v. Morris*, 142 S.W.3d 654, 662-63 (Ky. 2004) (adopted new definition which criminalized defendant's conduct, but reversed defendant's conviction because he had no notice of articulated duty at the time he committed the crime). Given this, we consider the notice question fairly subsumed within the question of duty and will therefore consider the argument on its merits.

These preservation questions settled, we will exercise unlimited review in determining whether Burris' acts of omission in failing to care for Michael place her within the scope of our second-degree murder statute. See *State v. Busch*, 317 Kan. 308, 310-11, 528 P.3d 560 (2023). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, we will not

speculate about the legislative intent behind that clear language. 317 Kan. at 310-11.

Burris was convicted for "the killing of a human being committed . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 2016 Supp. 21-5403(a)(2). Burris argues this statute requires a voluntary act, and that she cannot be found guilty by omission in the absence of a statutorily-defined duty to act. She anchors her argument in K.S.A. 2022 Supp. 21-5201 and *State v. Dinkel*, 311 Kan. 553, 558-61, 465 P.3d 166 (2020).

In *Dinkel*, the defendant was convicted of statutory rape. Dinkel claimed, however, that in fact she had been the victim of forcible rape at the hands of the child. We contemplated, then, whether, if Dinkle's allegations were true, she had committed the necessary actus reus of the crime of statutory rape. 311 Kan. at 558-59. Dinkel, like Burris, relied on K.S.A. 2012 Supp. 21-5201, which requires a voluntary act before criminal liability may be imposed.

K.S.A. 2022 Supp. 21-5201 provides:

"(a) A person commits a crime only if such person voluntarily engages in conduct, including an act, an omission or possession.

"(b) A person who omits to perform an act does not commit a crime unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act."

Dinkel evaluated what it means for conduct to be "voluntary," explaining:

"Black's Law Dictionary defines 'voluntary' as '[d]one by design or intention.' Black's Law Dictionary 1886 (11th ed. 2019). It defines 'conduct' as '[*p*]*ersonal behavior*, whether by action or *inaction*, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds.' Black's Law Dictionary 369 (11th ed. 2019). According to these definitions, 'voluntary conduct' is 'personal behavior' 'done by design or intention.'

"Black's Law Dictionary also provides a definition of a 'voluntary act,' which is a term included in the title of the statute. A 'voluntary act' is:

"'A willed bodily movement; esp., the type of act that is necessary for the imposition of criminal liability when such liability is not predicated on an omission. Under both the common law and the Model Penal Code, a person cannot be held liable for a crime without engaging in a prohibited *voluntary* act *or omission*. A bodily movement that is a product of the effort or determination of the actor,

either conscious or habitual, is a voluntary act. Reflexes, convulsions, and movements made while unconscious, asleep, or under the influence of hypnosis are not voluntary acts.' Black's Law Dictionary 32 (11th ed. 2019)." (Emphases added.) 311 Kan. at 559.

Burris suggests *Dinkel* supports her claim that her "murder conviction can only be supported by an *act*." But crucially, Burris confuses the distinct concepts of omission and voluntariness and blurs them together, suggesting that an omission can never be a voluntary act. This is simply wrong, both as a matter of logic and statutory interpretation. A decision *not* to do something may be just as much a voluntary act as a decision *to* do something. A fact the statute makes clear. "A person commits a crime only if such person *voluntarily engages in conduct, including . . . an omission*." K.S.A. 2022 Supp. 21-5201(a) (emphasis added); see also K.S.A. 2022 Supp. 21-5111(a) (providing an "'Act' includes a failure or omission to take action").

In other words, while Burris grounds her argument in *Dinkel*'s holding that a voluntary act is required as part of the actus reus of a crime, this holding does not actually help her. *Dinkel* never suggested that an omission was not or could not be a voluntary act. The crucial question in this case is not voluntariness—Burris never presented any argument or evidence below that her omissions were involuntary—but rather the existence or absence of a duty to act.

We have a specific, clear, and unambiguous statutory framework for deciding cases such as this. K.S.A. 2022 Supp. 21-5201(b) instructs that a "person who omits to perform an act does not commit a crime unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act." The panel concluded that a "formal duty of care is unnecessary to sustain a conviction under K.S.A. 2022 Supp. 21-5403(a)(2)" and that "a failure to act is included within its reach." *Burris*, 63 Kan. App. 2d at 263. We disagree and disapprove this language. Because K.S.A. 2022 Supp. 21-5403(a)(2) does not explicitly criminalize omissions, the existence of a formal duty to act is indeed required in order to sustain a conviction based on voluntary failures to act. But in these circumstances, we do not find it difficult to locate multiple sources of law imposing a legal duty

on Burris to have provided or summoned medical care for Michael. Thus, we affirm the panel as right for the wrong reason. See *State v. McCroy*, 313 Kan. 531, 539, 486 P.3d 618 (2021) (affirming Court of Appeals as right for the wrong reason).

Generally, citizens are under no obligation to aid one another, though some common-law exceptions have long been recognized. One clear exception exists when a person is in a special relationship with another—such as a marital relationship. Another exception involves circumstances when a person has voluntarily assumed the care of another and prevented others from rendering aid. See, e.g., *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962); Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 Am. J. Crim. L. 385, 394-95 (1998). And in Kansas, the common law continues to apply unless explicitly modified. See K.S.A. 77-109 (common law as modified by constitution, statute, and judicial decisions shall remain in force in aid of the general statutes of the state); *Gonzales, Administrator v. Atchison, T. & S. F. Rly. Co.*, 189 Kan. 689, 695, 371 P.2d 193 (1962) ("From the beginning of our history as a state [Territorial Laws 1855, ch. 96, Laws 1862, ch. 135, G.S. 1935, 77-109] the common law of England has been the basis of the law of this state, and except as modified by constitutional or statutory provisions, by judicial decisions, or by the wants and needs of the people, it has continued to remain the law of this state."); *City of Haven v. Gregg*, 244 Kan. 117, 122, 766 P.2d 143 (1988) ("In Kansas, the common law remains in force, unless modified by constitutional amendment, statutory law, or judicial decision.").

Burris tries to claim she had no duty to care for her spouse because there was "no evidence in this case that [Burris] accepted legal responsibility for Michael's care." But our common law makes clear that she accepted legal responsibility for Michael's care the moment they were married. "Unquestionably there is a common-law marital duty to provide medical attention to one's spouse." *People v. Robbins*, 83 A.D. 2d 271, 272, 443 N.Y.S.2d 1016 (1981); see also *Reardon v. King*, 310 Kan. 897, 903, 452 P.3d 849 (2019) (Kansas common law recognizes a special rela-

tionship between employers and third parties who come into contact with their employees); *McGee v. Chalfant*, 248 Kan. 434, 438, 806 P.2d 980 (1991) ("A special relationship may exist between parent and child, master and servant, the possessor of land and licensees, persons in charge of one with dangerous propensities, and persons with custody of another."); *Westrup v. Commonwealth*, 123 Ky. 95, 93 S.W. 646, 646 (1906) ("Where the husband neglects to provide necessaries for his wife, or medical attention in case of her illness, he will be guilty of involuntary manslaughter, provided it appear that she was in a helpless state and unable to appeal elsewhere for aid, and that the death, though not intended nor anticipated by him, was the natural and reasonable consequence of his negligence."); *State v. Smith*, 65 Me. 257, 258 (1876) (husband criminally liable for wife's death for neglecting to provide protection from winter weather); *Territory v. Manton*, 8 Mont. 95, 19 P. 387, 392 (1888) (same); *State v. Mally*, 139 Mont. 599, 609-10, 366 P.2d 868 (1961) (husband had a duty to summon medical aid for his injured and ill wife—who was "as helpless as [a] newborn" and "could not have consciously or rationally denied medical aid"—and breach of that duty resulted in criminal liability); Collins, Leib & Markel, *Punishing Family Status*, 88 B.U. L. Rev. 1327, 1335-36 (2008) (spousal relationship is a "paradigmatic example[] of status relationships in which one owes a duty to rescue sufficient to trigger criminal responsibility").

Burris then claims that "simply attempting to provide Michael care did not create a legal duty for [Burris] to care for him. There is simply no such duty in the law." Again, her claim is incorrect. Our common law has long been that "once a person steps into the role of caregiver, such that others are discouraged or precluded from filling that role, that person has a duty to act reasonably in fulfilling the adopted role." *State v. Wilson*, 267 Kan. 550, 562, 987 P.2d 1060 (1999) (citing LaFave and Scott, 1 Substantive Criminal Law § 3.3[a][1], [4], and [5] pp. 282-88 [1986]); see also Stewart, 25 Am. J. Crim. L. at 396 ("The reason for this exception is that one who voluntarily assists another might worsen the victim's position by subjecting him to other dangers or by preventing someone else from undertaking the rescue."); *State v. Gargus*, 462

S.W.3d 417, 418-24 (Mo. Ct. App. 2013) (daughter moved in to care for elderly mother; mother eventually became septic and died due to gangrene and extreme neglect; daughter's conviction for involuntary manslaughter affirmed because she undoubtedly had a duty to act after voluntarily assuming care of her mother, which "created criminal liability for the negligent performance of that duty"); *Davis v. Commonwealth*, 230 Va. 201, 205, 335 S.E.2d 375 (1985) (affirming daughter's conviction for involuntary manslaughter in the death by starvation of her elderly mother; the court found a common-law duty existed based on the evidence in the case that the daughter had "accepted sole responsibility for the total care" of her mother); *Com. v. Pestinikas*, 421 Pa. Super. 371, 398-99, 617 A.2d 1339 (1992) (Tamilia, J., concurring) (citing *Regina v. Hughes*, 7 Cox C.C. 301, 302 [1857]) ("What makes the . . . assumption of care a duty imposed by law is assumption of a responsibility for the care of a dependent person who thereby loses the protection he would have for being cared for by others with more specific legal responsibility. The history of homicide by omission to provide care, primarily is traced through English law, and American cases that clearly followed English law."); *State v. Shrout*, 415 S.W.3d 123, 125 (Mo. Ct. App. 2013) ("[A] duty of care arises, sufficient to support an involuntary manslaughter conviction, when one 'voluntarily assumes the care of a mentally handicapped individual, being fully aware of the individual's physical and mental condition and the care challenges created by those conditions.'"); cf. *Sickel v. State*, 363 P.3d 115, 117 (Alaska Ct. App. 2015) ("It is true that the cruelty to animals statute fails to specify which persons have a duty to care for particular animals. But we are authorized to look to the common law to remedy this omission. . . . [T]he statute applies to all persons who have undertaken responsibility for the care of an animal.").

Finally, in addition to common-law duties of care, Burris was also compelled by a statutory duty of care. As the sole caregiver for Michael, K.S.A. 2016 Supp. 21-5417 imposed a statutory duty of care on Burris. See *State v. James*, 276 Kan. 737, 746, 79 P.3d 169 (2003) ("[A]dults in Kansas who are unable to protect their own interest are dependent upon their caretakers. It logically follows that their *caretakers possess an affirmative duty* to provide

this protection." [Emphasis added.]). As Michael's self-proclaimed and exclusive caregiver, Burris had a legal duty to protect his interests under K.S.A. 2016 Supp. 21-5417.

Burris has conceded that her omissions—failing to provide resources, failure to feed, and failure to otherwise properly care for Michael—could lawfully result in criminal responsibility for Michael's death "if she had a *legal* duty to provide care and resources to him." We conclude Burris undoubtedly had such a legal duty—springing from multiple sources of law—to provide care and resources to her husband.

Finally, Burris challenges these legal duties to care for Michael on the grounds of notice (whether a failure of sufficient notice renders the imposition of the duty a violation of constitutional due process or simply a nullity is irrelevant for our purposes today). The fundamental principle underlying a sufficient notice requirement is that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939). Yet ignorance of the law or mistake of law is never a valid defense. *State v. Watson*, 273 Kan. 426, 434-35, 44 P.3d 357 (2002) (citing *Cheek v. United States*, 498 U.S. 192, 199, 111 S. Ct. 604, 112 L. Ed. 2d 617 [1991] ["The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."]). And though it is perhaps unlikely that individuals will "carefully consider the text of the law," still it remains important "that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 75 L. Ed. 816 (1931). When examining whether the criminal law has provided fair notice, the touchstone is whether the decision is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Rogers*, 532 U.S. at 461-62.

In this case, application of longstanding traditional common-law duty rules is not at all "unexpected and indefensible." Not only

has Kansas explicitly affirmed a continued adherence to the common law as "the basis of the law[s] of this state" that remains in effect unless specifically modified, *Gonzales*, 189 Kan. at 695, virtually every state makes it clear that there is "[u]nquestionably . . . a common-law marital duty to provide medical attention to one's spouse." *Robbins*, 83 A.D. 2d at 272. Furthermore, the legal duty arising from the voluntary assumption of care is widely utilized and understood. And of course, the application of a Kansas statute is also not "unexpected and indefensible." See *Rogers*, 532 U.S. at 461-62.

In short, a husband and wife of 45 years lived alone together outside of town. The wife knew her husband needed intensive, round-the-clock care; yet she secluded him, did not give him required medication, did not adequately feed him, did not treat his wounds, left him in squalor and inhumane conditions from which he was incapable of escaping, refused access to home health services, prevented others from caring for him, and repeatedly turned down all offers of help from family and social workers. In a civilized society with deeply entrenched notions of the duties citizens may and do owe to their fellow human beings, we do not find it difficult to conclude that Carol Burris had "fair warning" that these voluntary acts—whether of omission or commission—subjected her to criminal liability for violating her plain legal obligations of care toward her husband. See *McBoyle*, 283 U.S. at 27.

We now turn to Burris' claims of prosecutorial error. Burris did not object to any of the prosecutor's comments that she challenges on appeal. But a defendant need not contemporaneously object to a prosecutor's comments to preserve claims of error for appellate review. *State v. Slusser*, 317 Kan. 174, 184, 527 P.3d 565 (2023). However, "the presence or absence of an objection may figure into the analysis of the alleged error." *State v. Sean*, 306 Kan. 963, Syl. ¶ 5, 399 P.3d 168 (2017).

We employ a two-step analysis when reviewing prosecutorial error claims. First, we determine whether error occurred. Under the first step, we analyze whether the prosecutor's acts fell outside the wide latitude afforded prosecutors. In doing so we consider the context in which the statement was made, rather than analyzing the statement in isolation. *State v. Becker*, 311 Kan. 176, 182, 459

P.3d 173 (2020). A defendant meets the first prong by establishing the prosecutor misstated the law or argued a fact or factual inferences outside of what the evidence showed. *State v. Ballou*, 310 Kan. 591, 596, 448 P.3d 479 (2019). If we find the prosecutor erred, we then determine whether prejudice resulted. At this second step we focus on whether the error prejudiced the defendant's due process rights to a fair trial. *Slusser*, 317 Kan. at 184-85. Burris raises three claims of prosecutorial error. We conclude that each claim fails at the first step, so we need not conduct a prejudice analysis.

Burris first claims that the prosecutor improperly commented on her decision not to testify. But she does not fairly characterize the prosecutor's statement—the prosecutor was discussing Burris' two-and-a-half-hour-long interview with law enforcement that was played for the jury, and referring to her lack of explanation to law enforcement during that interview. Burris attempts to divorce the comment from its context, but "[c]ourts do not isolate the challenged comments; they consider them in the context they were made." *State v. Butler*, 307 Kan. 831, 865, 416 P.3d 116 (2018).

The prosecutor's full statement in context about that interview is illustrative:

> "You heard no evidence from her. *She had two and a half hours*. You heard that she said—well, there was questions from the defense insinuating that he said that he had a loss of appetite, refused food, right? You heard no evidence of that. None. Not one person testified to that, that that happened. And more importantly if that had happened, *in two and a half hours she talked about everything. In two and a half hours, don't you think that would have been the first thing*, look, he wanted to die. Look, he didn't want to eat. Look, he had a loss of appetite. She doesn't say that. She says he didn't have a problem other than his teeth but I just chopped it up into small bits.
>
> "Mr. Markowitz provides training and education to her about what is available.
>
> "Aaron Williams attempts to provide her education. She won't listen. She talks over him just like she continued to talk over Mr. Johnson *many, many times during that interview*. She ignores all of them.
>
> . . . .
>
> ". . . What does *she say multiple times at the end of that interview?* I need my money to hire people to do things." (Emphases added.)

Upon considering the statement in the context in which it was made, it is clear that the prosecutor was not commenting on Burris'

invocation of her right not to testify. The panel highlighted this, and Burris does not offer any argument why the panel erred. She simply reiterates that it was an improper comment. We conclude there was no error in this statement.

Burris' next claim of error results from the prosecutor's commentary on her marriage and wedding vows, which she asserts were improper as they only served to inflame the jury.

The prosecutor began his closing argument in the following manner:

> "I take thee to be my wedded husband, to have and to hold from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish till death do us part.
>
> . . . .
>
> "But here's the thing, whether you're married 45 years, 30 years, or ten minutes, a marriage is defined by certain things. Lot of people think it's defined by that wedding day, right, when the dress is so pretty, when the suit is all pressed, when the flowers smell so good, and the cake tastes so sweet, right. The reality is the marriage isn't defined by that day.
>
> "The marriage is defined by when one is at their lowest, the darkest moments, when they are in despair, when they are vulnerable, and when they are in their most need. That's when a marriage is defined because then the question is those hands that held each other on that wedding day, are they still holding each other. That's a question you should ask as you deliberate when considering whether [Mrs.] Burris had extreme indifference to the human life of Mr. Burris."

The Court of Appeals, 63 Kan. App. 2d at 269, determined that the reference to the Burris' wedding vows was error, because "[c]omments from a prosecutor in closing arguments that inflame the passions or prejudices of a jury are prohibited." *State v. Nesbitt*, 308 Kan. 45, Syl. ¶ 6, 417 P.3d 1058 (2018). The panel concluded that the comments in this case fit squarely among the types of comments this court has previously found to be error, but that the error was harmless as there was no reasonable probability it contributed to the verdict. *Burris*, 63 Kan. App. 2d at 271.

The State conditionally cross-petitioned for review on the panel's conclusion that this statement was error, preserving it for our review. See Supreme Court Rule 8.03(b)(6)(C)(i) (2023 Kan. S. Ct. R. at 56) (this court only considers issues raised in a petition, cross-petition, or conditional cross-petition). The State asserts the panel erred in finding the prosecutor's comments erroneous because both parties frequently mentioned the Burris' marriage, and

the prosecutor explicitly told the jurors they must not decide the case on sympathy.

In light of our discussion of the common-law duty doctrines above—significantly, the longstanding traditional duty of care owed between spouses—we conclude the prosecutor did not commit error. We find the reference to the Burris' marriage vows served a legal purpose and did not impermissibly stoke the passions of the jury. Rather, the statement went to an element of the crime—i.e., whether Burris had a duty to act. See K.S.A. 2022 Supp. 21-5201(b). The prosecutor did not err in discussing Burris and Michael's marriage vows.

The final comment Burris challenges came at the end of the prosecutor's closing argument where he asserted that Burris undoubtedly acted recklessly with extreme indifference to human life, claiming: "There is just no other way to see it. The evidence is overwhelming just like the smell was when those EMTs went into that room."

Burris argues that this comment was an "unchecked and inflammatory opinion" and that "only the jury can decide whether evidence is 'overwhelming.'" But as the panel explained, we have previously held it "permissible for a prosecutor to argue that the evidence demonstrates a defendant's guilt," as long as the prosecutor says "something akin to 'the evidence shows defendant's guilt'" and not phrased in a way that expresses the prosecutor's personal opinion. *State v. Peppers*, 294 Kan. 377, 399-400, 276 P.3d 148 (2012); *Burris*, 63 Kan. App. 2d at 272-73. This is very nearly what happened here.

Moreover, colorful language is not erroneous in and of itself. Dramatic and theatrical language is permissible in crafting a closing argument. "'The wide latitude permitted a prosecutor in discussing the evidence during closing argument in a criminal case includes at least limited room for rhetoric and persuasion, even for eloquence and modest spectacle.'" *State v. Chandler*, 307 Kan. 657, 688, 414 P.3d 713 (2018); see also *State v. Hilt*, 299 Kan. 176, Syl. ¶ 9, 322 P.3d 367 (2014) (prosecutor "may use analogies, similes, allusions, and other rhetorical devices"). Prosecutors "may indulge in impassioned bursts of oratory and may use picturesque speech as long as he or she does not refer to facts not

disclosed by the evidence." *State v. Rodriguez*, 269 Kan. 633, 643, 8 P.3d 712 (2000).

The rhetoric by the prosecutor indeed used vivid speech, but it did not go beyond the facts disclosed by the evidence. The EMT testified that the first thing he noticed when the door to Michael's room was opened was the "strong smell of feces and stale urine. . . . as soon as that door opened it hit you. It was like walking straight into a wall of it." The prosecutor did not err.

CONCLUSION

We conclude that Burris owed a clearly defined legal duty of care to summon or provide medical care for Michael based on their marital relationship, Burris' voluntary assumption of Michael's care, and her role as Michael's sole caregiver under K.S.A. 2016 Supp. 21-5417. We also find no prosecutorial error occurred. As such, we affirm Burris' convictions.

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

No. 124,412

CITY OF WICHITA, KANSAS, *Appellee*, v. GABRIELLE GRIFFIE, *Appellant*.

(544 P.3d 776)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Constitutionality of Statute or Ordinance—Question of Law—Burden on Challenging Party.* The constitutionality of a statute or ordinance is a question of law subject to unlimited review. The party challenging the statute or ordinance as unconstitutionally overbroad has the burden to establish its overbreadth.

2. SAME—*First Amendment Facial Overbreadth Doctrine—Departure from Traditional Rule of Standing*. The First Amendment facial overbreadth doctrine departs from the traditional rule of standing that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court.

3. SAME—*First Amendment Facial Overbreadth Analysis—Three Step Review.* A First Amendment facial overbreadth analysis consists of three steps. First, the court interprets the language of the challenged law to determine its scope. If the scope of the law extends to prohibit protected activity, the court next decides whether the law prohibits a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep. Finally, if the court finds substantial overbreadth, the court looks to see whether there is a satisfactory method of severing the law's constitutional provisions from its unconstitutional provisions.

4. SAME—*Unconstitutional Provisions May Be Severed From a Law Leaving Remainder in Force—Requirements.* A court may sever unconstitutional provisions from a law and leave the remainder in force and effect if, after examining the law, it can conclude (1) the Legislature would have passed the law without the objectionable portion and (2) the law would operate effectively to carry out the intention of the Legislature with the objectionable portion stricken.

Review of the judgment of the Court of Appeals in an unpublished opinion filed November 18, 2022. Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Oral argument held September 12, 2023. Opinion filed March 15, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed.

Kurt Harper, of Depew Gillen Rathbun & McInteer, LC, of Wichita, argued the cause, and *Dylan P. Wheeler*, of the same firm, was on the briefs for appellant.

Nathaniel Johnson, assistant city attorney, argued the cause, and *Jan Jarman*, assistant city attorney, and *Jennifer Magana*, city attorney, were with him on the briefs for appellee.

Anthony J. Powell, solicitor general, *Ryan J. Ott*, assistant solicitor general, and *Kris W. Kobach*, attorney general, were on the brief for amicus curiae State of Kansas.

Sharon Brett, of ACLU Foundation of Kansas, of Overland Park, was on the brief for amicus curiae American Civil Liberties Union Foundation of Kansas.

The opinion of the court was delivered by

STANDRIDGE, J.: This case requires us to decide whether the provision within Wichita Municipal Code of Ordinances (W.M.O.) § 5.24.010(c) criminalizing "noisy conduct tending to reasonably arouse alarm, anger or resentment in others" is unconstitutionally overbroad under the First Amendment. Both the district court and the Court of Appeals held the provision constitutional. We disagree. Applying the substantial overbreadth doctrine used by Kansas courts to adjudicate First Amendment overbreadth challenges, we conclude the noisy conduct provision within W.M.O. § 5.24.010(c) is unconstitutionally overbroad because it prohibits a substantial amount of protected activity in relation to the provision's plainly legitimate sweep. But our conclusion does not require us to strike subsection (c) in its entirety because there is a satisfactory method of severing the unconstitutional "noisy conduct" provision from the constitutional "fighting words" provision within the same subsection.

FACTS

In July 2020, Project Justice ICT (ICT) organized a protest against police brutality in downtown Wichita following the May 2020 murder of George Floyd. Gabrielle Griffie served as the executive director of ICT. She helped coordinate food drives, protests, and community events. *City of Wichita v. Griffie*, No. 124,412, 2022 WL 17072292, *1 (Kan. App. 2022) (unpublished opinion).

ICT promoted the protest on Facebook, informing interested participants to "[b]ring shields, umbrellas, and other protective gear. We will be marching." ICT did not obtain a community event

permit to close off streets for the march. But the Wichita Police Department monitored the group's online activity and prepared for the event by blocking off the streets around the group's planned route to limit the amount of contact with motorists. 2022 WL 17072292, at *1.

Between 40 and 60 people showed up to participate in the protest. While marching, they chanted slogans such as, "No justice, no peace," and, "Black lives matter." 2022 WL 17072292, at *1. They also chanted, "Whose streets? Our streets." The streets were "almost entirely empty." 2022 WL 17072292, at *1. Griffie marched at the front, leading the group with a megaphone and a homemade shield. 2022 WL 17072292, at *1.

For part of the march, protesters walked in the two middle lanes of the four lanes of traffic along the route. Despite the police traffic diversion, there were some open streets providing access to the marching route. On one of these open streets, Jeremy McTaggart drove a white Chevy Tahoe north on the route into the march.

"LJ," an independent journalist, recorded a video of the protest for an independent group called "Liberty ICT" and posted it to Facebook. Liberty ICT is not part of Project Justice ICT. LJ's recording shows McTaggart honking, slowing his Tahoe, honking again, and then continuing to drive his vehicle until it collided with a protester. The video shows the protester McTaggart hit with his Tahoe becoming visibly irritated with McTaggart. At first, she did not move out of the way. Another protester in the group grabbed her and dragged her out of the way.

The rest of the two-hour recording shows no other traffic confrontations. But the protesters yelled the following at police: "get a real job," "you fascist people," "learn to code," "useless piece of shit," "go home," "fuck you, fascist," "I didn't know pigs knew how to ride bikes," "pigs are smarter than cops," and more.

When the protestors arrived at the federal courthouse, they stood on the front steps and gave speeches to the crowd over megaphones for about 30 minutes. One megaphone- equipped speaker quoted a chant that previously had been used during a protest in Portland, Oregon, "There is no riot here, why are you in riot gear . . . ." A speaker also said, "What did we do, block some fucking

streets?" The same speaker mentioned an armed officer's appearance within the courthouse behind them and said, "He's moving to a different tactical position . . . so he can come and fucking blast us if he wants to . . . . What are they going to do? Teargas us when we're just standing around? . . . We need to be out here every fucking day." Based on exhibits the State later presented at trial, this speaker may have been Griffie.

Several days after the protest, Detective Marianna Hoyt reviewed the videotape posted on Facebook. Lieutenant Drew Sielor helped Detective Hoyt identify Griffie out of the crowd of protestors. Detective Hoyt ultimately issued Griffie a citation for unlawful assembly under W.M.O. § 5.73.030. The complaint alleged Griffie violated W.M.O. § 5.73.030(1) when she "participat[ed] in the meeting or coming together of at least five persons for the purpose of engaging in *conduct constituting disorderly conduct* . . . by blocking traffic." (Emphasis added.) *Griffie*, 2022 WL 17072292, at *2. To support the unlawful assembly charge, the City of Wichita relied on its disorderly conduct ordinance, W.M.O. § 5.24.010:

"Disorderly conduct is, one or more of the following acts that the person knows or should know will alarm, anger or disturb others or provoke an assault or other breach of the peace:

"(a) Engaging in brawling or fighting; or

"(b) Disturbing an assembly, meeting, or procession, not unlawful in its character; or

"(c) Using fighting words or engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others.

"As used in this section, 'fighting words' means words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of peace.

"Every person convicted of violating this section shall be punished by imprisonment of a term not to exceed 30 days or a fine of not more than $500.00 or both such imprisonment and fine."

PROCEDURAL HISTORY

Griffie appeared for a bench trial in Sedgwick County Municipal Court. The court found Griffie guilty of violating W.M.O. § 5.73.030(1) as charged.

Griffie appealed the municipal court's decision to the Sedgwick County District Court and requested a jury trial. Before trial, the City clarified its theory of the case: Griffie violated the unlawful assembly ordinance by meeting with five or more persons with the intent to engage in "noisy conduct tending to reasonably arouse alarm, anger or resentment in others." In response, Griffie argued that over 40 years ago, the Kansas Supreme Court examined a state statute mirroring the Wichita ordinance and, in order to avoid holding the entire statutory subsection unconstitutional, construed the language in subsection (c) narrowly to mean only "fighting words." See *State v. Huffman*, 228 Kan. 186, 612 P.2d 630 (1980). Based on the holding in *Huffman*, Griffie argued the "noisy conduct" provision in subsection (c) is unenforceable. The district court was not persuaded by Griffie's argument.

The case proceeded to trial. McTaggart testified first, followed by Lieutenant Sielor and Detective Hoyt. The two-hour videotape of the protest was played for the jury. The City rested its case, and Griffie moved for acquittal. The district court denied her motion. Griffie's attorney asked for permission to submit a trial brief for reconsideration, which the court granted. On reconsideration, Griffie argued the "noisy conduct" part of the disorderly conduct definition in subsection (c) is unconstitutionally overbroad and should be struck from the ordinance because it prohibits all noisy conduct, even if the conduct is protected under the First Amendment. The court remained unpersuaded and denied Griffie's motion for reconsideration.

Griffie testified last. She acknowledged her role as the executive director of ICT, though she denied having chosen the position. She believed she was given the position "because nobody else really wanted to do the work" and that it was "forced upon [her]." Griffie testified that ICT's decisions were made as a group. Griffie's time on the stand established that she had told other protestors to bring shields as defensive and symbolic tools, that she wished she would have tried "to keep people more compact or organized," and that she felt Wichita police targeted her because she was the face of ICT. Griffie also testified about the impact on her

resulting from the City's decision to prosecute her for participating in the protest:

> "I don't think in the future I would ever organize any more protests, like, that's just not really my jam. But I think, yeah, eventually I would like to get involved in some other, like, I really enjoyed doing, like, distributions. I really enjoyed, you know, speaking to people on these things, but I don't think protest is the way for me."

A jury found Griffie guilty of unlawful assembly. The court imposed $346.50 in fines and costs. At sentencing, the prosecutor noted Griffie was "a great asset to the community and does a lot of things," and suggested Griffie could do community service rather than paying the fine. The court held Griffie could perform community service, credited at $5 an hour.

Griffie appealed. She argued W.M.O. § 5.24.010(c) was facially unconstitutional under the overbreadth doctrine. While her appeal was pending, we issued a decision in *City of Wichita v. Trotter*, 316 Kan. 310, 514 P.3d 1050 (2022). Griffie submitted a timely Rule 6.09 letter addressing the *Trotter* decision shortly before her Court of Appeals oral argument date.

A divided panel affirmed the district court, finding W.M.O. § 5.24.010(c) survived Griffie's constitutional overbreadth challenge. *Griffie*, 2022 WL 17072292, at *8. Senior Judge Timothy G. Lahey disagreed with the majority:

> "The constitutional problem with the 'noisy conduct' form of disorderly conduct is not that the ordinance was passed with the intention of targeting a specific political message. The problem is that it is overbroad and includes within its scope, without exception, protected First Amendment speech and conduct. Under the ordinance, a criminal penalty attaches to noisy conduct whether it occurs in a private home or in the public square—it applies to political debates, meetings, and conventions, and at all times of the day or night. The scope is constitutionally significant and unmistakably chills free speech and expressive conduct." *Griffie*, 2022 WL 17072292, at *9.

Griffie petitioned for review, asking this court to reverse the Court of Appeals and adopt Judge Lahey's reasoning. The Attorney General and ACLU filed briefs as amicus curiae, supporting the City and Griffie respectively.

Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for review of Court of Appeals' decisions); K.S.A. 60-2101(b) (Supreme Court can correct, modify, vacate, or reverse Court of Appeals' decisions).

ANALYSIS

Griffie claims the "noisy conduct" provision of W.M.O. § 5.24.010(c)—which defines the disorderly conduct element on which her unlawful assembly conviction was based—is overbroad on its face such that it unconstitutionally infringes on freedom of speech and expression protected by the First Amendment. Griffie reiterates she brings only a facial challenge to the constitutionality of the ordinance and is not challenging the constitutionality of the ordinance as applied to her conduct here.

A. *Standard of review*

The constitutionality of a statute or ordinance is a question of law subject to unlimited review. *Trotter*, 316 Kan. at 312. As the party challenging the ordinance as unconstitutionally overbroad, Griffie has the burden to establish its overbreadth. See 316 Kan. at 314.

B. *Standing*

Before addressing the merits of Griffie's overbreadth claim, we first consider whether Griffie has standing to challenge W.M.O. § 5.24.010(c) as unconstitutionally overbroad. Although the parties do not raise it, "standing is a component of subject matter jurisdiction" and "may not be waived." *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 459-60, 447 P.3d 959 (2019).

Under Kansas' traditional standing test, parties must demonstrate they *personally* "suffered a cognizable injury" and "a causal connection between the injury and the challenged conduct." *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021). As such, a party generally has standing to challenge the constitutionality of an ordinance or statute only to the extent it adversely impacts that party's own rights. So "if there is no constitutional defect in the application of the statute to a litigant, [the litigant] does not have standing to argue that it would be unconstitutional if applied to

third parties in hypothetical situations." *Ulster County Court v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

But the United States Supreme Court recognizes an exception to traditional standing rules when a litigant claims that a statute broadly prohibits speech protected by the First Amendment. *City of Wichita v. Wallace*, 246 Kan. 253, 267, 788 P.2d 270 (1990) (citing *Young v. American Mini Theatres*, 427 U.S. 50, 60, 96 S. Ct. 2440, 49 L. Ed. 2d 310 [1976] [citing *Broadrick v. Oklahoma*, 413 U.S. 601, 611-14, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973)]). This exception grew out of the notion that violations of the First Amendment impact society as a whole by exerting a chilling effect on the free and open exchange of ideas. See *Wallace*, 246 Kan. at 267. Therefore, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612. This court first applied the relaxed standing rules for First Amendment overbreadth challenges in *Moody v. Board of Shawnee County Comm'rs*, 237 Kan. 67, 75, 697 P.2d 1310 (1985), and most recently applied the exception in *Trotter*, 316 Kan. at 312.

Here, Griffie brings an overbreadth challenge to an ordinance seeking to protect First Amendment rights. Thus, her claim fits squarely within the exception to general standing requirements, and she has standing to argue on behalf of third parties that W.M.O. § 5.24.010(c) is unconstitutionally overbroad on its face.

C. *Overbreadth*

Griffie claims the "noisy conduct" provision of W.M.O. § 5.24.010(c) is facially overbroad and thus unconstitutional. To determine whether the ordinance is overbroad, we apply the facial overbreadth standard as developed in Kansas cases. The Kansas standard evolved over several decades, incorporating criteria from legal treatises and several United States Supreme Court cases along the way. Perhaps this extended evolution is why our current overbreadth standard appears, at least on its face, to be internally incongruous. In practice, however, Kansas courts have reconciled

the incongruity. To place the current overbreadth standard in context so that we can apply it here, we begin with a chronological review of key substantial overbreadth legal principles as developed in the Supreme Court and in Kansas.

Evolution of the United States Supreme Court substantial overbreadth doctrine

Without labeling it as such, the United States Supreme Court first recognized what is now known as the facial overbreadth doctrine in *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S. Ct. 736, 84 L. Ed. 1093 (1940). In that case, Thornhill was arrested under a statute broadly criminalizing all picketing, including labor-management disputes. In response, Thornhill alleged violations of his constitutional right to free speech, to peacefully assemble, and to petition for redress. The State argued the law was vital in keeping the community safe and maintaining the peace. Finding no merit to his constitutional claims, the trial court convicted Thornhill as charged.

In reversing the lower court, the Supreme Court established some significant legal principles of lasting importance. First, the Court held a First Amendment overbreadth challenge to a statute must be "judged upon its face" and not as applied to the particular facts of a case. 310 U.S. at 96. Next, the Court held a law is overbroad when it "does not aim specifically at evils within the allowable area of [governmental] control, but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." 310 U.S. at 97. Finally, and probably most significantly, the Court created an exception to ordinary standing requirements in First Amendment overbreadth cases by permitting facial challenges to overbroad statutes even if a more narrowly drawn statute would have been valid as applied to the challenging party. 310 U.S. at 97-98.

Thirty years after *Thornhill*, the Supreme Court defined the limits of the facial overbreadth doctrine in the seminal case of *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). The case involved a challenge to the provision of a statute restricting political activities of the state's classified civil servants. The Court held the overbreadth doctrine inapplicable,

noting it generally does not apply to a law that may only incidentally have an impact on expression. In so holding, the Court established the "substantial overbreadth" doctrine, declaring that "particularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. at 615. This inquiry necessarily involves a comparative analysis between the law's effect on protected versus unprotected activity and requires that the unconstitutional applications of the law be disproportionately "substantial" in relation to the constitutional applications. 413 U.S. at 609-18.

Not long after *Broadrick*, the Supreme Court incorporated the substantiality requirement into all overbreadth challenges, whether the statute applies to conduct, speech, or conduct plus speech. *New York v. Ferber*, 458 U.S. 747, 770-71, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (recognizing the substantiality requirement applies equally to overbreadth challenges involving pure speech or speech-related conduct); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 n.12, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985) (reiterating *Ferber*'s holding that the substantial overbreadth doctrine applies to pure speech).

Fifty years after *Broadrick*, the United States Supreme Court continues to adhere to the substantial overbreadth doctrine. See *United States v. Hansen*, 599 U.S. 762, 770, 143 S. Ct. 1932, 216 L. Ed. 2d 692 (2023) ("If the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep,' then society's interest in free expression outweighs its interest in the statute's lawful applications, and a court will hold the law facially invalid.").

Evolution of the Kansas substantial overbreadth doctrine

The first Kansas case setting forth specific standards in a First Amendment overbreadth challenge is *State ex rel. Murray v. Palmgren*, 231 Kan. 524, 646 P.2d 1091 (1982). In *Palmgren*, the Attorney General sought to recover civil penalties against county officials for violating the Kansas Open Meetings Act (KOMA). The county officials argued KOMA was unconstitutionally overbroad in that it "has a potential inhibiting effect on the 'rights of public officials to assemble and discuss public affairs'" and thwarts the rights of Kansans to engage in "unfettered discussion

of governmental affairs in private while retaining anonymity." 231 Kan. at 533-34.

The *Palmgren* court began its overbreadth analysis by setting forth the existing, and rather general, legal standard for overbreadth: "[A]n overbroad statute makes conduct punishable which under some circumstances is constitutionally protected." 231 Kan. at 533 (citing *State v. Huffman*, 228 Kan. 186, 189, 612 P.2d 630 [1980]; *State v. Stauffer Communications, Inc.*, 225 Kan. 540, 547, 592 P.2d 891 [1979]). The court went on to note, however, that "almost every law is potentially applicable to constitutionally protected acts." 231 Kan. at 533. Thus, the court clarified that a successful overbreadth challenge can be made only when "1) the protected activity is a significant part of the law's target, and 2) there exists no satisfactory method of severing the law's constitutional from its unconstitutional applications." 231 Kan. at 533. *Palmgren* derived these prerequisites to a successful overbreadth challenge from a discussion on the standing component of overbreadth challenges by Professor Lawrence Tribe in his treatise, American Constitutional Law. *Palmgren*, 231 Kan. at 533 (citing Tribe, American Constitutional Law § 12-24, 711 [2d ed. 1978]). Notably, Tribe also discussed *Broadrick* and its comparative substantiality requirement. But the *Palmgren* court did not discuss the substantial overbreadth standard or cite *Broadrick* for this legal principle.

Almost two decades after *Palmgren*, we applied the United States Supreme Court's comparative substantial overbreadth doctrine for the first time. *State v. Whitesell*, 270 Kan. 259, 271, 13 P.3d 887 (2000) ("An overbreadth challenge will be successful if the challenged statute trenches upon a substantial amount of First Amendment protected conduct in relation to the statute's plainly legitimate sweep.") (citing *Staley v. Jones*, 108 F. Supp. 2d 777, 786 [W.D. Mich. 2000] [citing *Broadrick*, 413 U.S. at 612-15]). Since *Whitesell*, Kansas appellate courts have consistently held that a statute is overbroad only when it prohibits a substantial amount of protected expressive activity when judged in relation to the statute's plainly legitimate sweep. See *Trotter*, 316 Kan. at 314; *State v. Jones*, 313 Kan. 917, 932, 492 P.3d 433 (2021); *State v.*

Williams, 299 Kan. 911, 920, 329 P.3d 400 (2014); *State v. Zabrinas*, 271 Kan. 422, 428, 24 P.3d 77 (2001); *City of Wichita v. Trotter*, 60 Kan. App. 2d 339, 361, 494 P.3d 178 (2021); *Griffie*, 2022 WL 17072292, at *4; *State v. Neloms*, No. 110,391, 2016 WL 463362, at *9 (Kan. App. 2016) (unpublished opinion); *State v. Bland*, No. 108,272, 2014 WL 1362644, at *4 (Kan. App. 2014) (unpublished opinion); *State v. Gile*, No. 108,279, 2014 WL 1302608, at *7 (Kan. App. 2014) (unpublished opinion).

But alongside the comparative substantial overbreadth doctrine, our courts have also continued to cite *Palmgren*'s overbreadth standard, derived from Tribe's treatise. Because the two standards use different criteria to assess overbreadth, we question whether using them together can be reconciled. A plain reading of the language in the two standards shows the difference between them. Under the substantial overbreadth doctrine, a law is overbroad if it prohibits a *substantial* amount of protected activity *as compared to* the amount of unprotected activity it prohibits. Under the Tribe overbreadth doctrine, a law is overbroad if the protected activity is a *significant* part of the law's target, *with no comparison* to the amount of unprotected activity it prohibits.

Although they may be irreconcilable in the abstract, we find Kansas courts have reconciled the two standards in practice by incorporating the secondary Tribe standard into the primary substantial overbreadth doctrine. For example, in *Williams* we held

> "[w]here conduct and not merely speech is involved, the United States Supreme Court requires that 'the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' *Broadrick*, 413 U.S. at 615. This court has divided this burden into a two-part test. The party attacking the constitutionality of a statute on the basis of overbreadth must establish '(1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory method of severing that law's constitutional from its unconstitutional applications.'" 299 Kan. at 920 (citing *Whitesell*, 270 Kan. 259, Syl. ¶ 6).

This excerpt from *Williams* reflects that, at least where conduct and not merely speech is involved, we have construed Tribe's "significant part of the law's target" standard as a legal equivalent to the Supreme Court's substantial overbreadth doctrine. See *Broadrick*, 413 U.S. at 615 ("[P]articularly where conduct and not merely speech is involved, . . . the overbreadth of a statute must

not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."). This construction may suggest we are not applying the required Supreme Court's substantial overbreadth doctrine. See *Arizona v. Evans*, 514 U.S. 1, 8-9, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995) ("State courts . . . are not free from the final authority of" the Supreme Court when interpreting the U.S. Constitution.); *State v. Tatro*, 310 Kan. 263, 272, 445 P.3d 173 (2019) ("[T]his court must follow the United States Supreme Court's interpretation of the United States Constitution."). To clarify that we are, indeed, applying United States Supreme Court precedent on questions of federal law, we no longer will express the substantial overbreadth doctrine as a standard requiring protected activity be a "significant part of the law's target." Instead, we will apply the doctrine using the same language as the Supreme Court to determine whether the law prohibits "a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep." Consistent with Supreme Court precedent, we will apply the substantial overbreadth doctrine not just to conduct, but also to overbreadth challenges involving conduct, speech-related conduct, and pure speech. *Ferber*, 458 U.S. at 770-71 (recognizing the substantiality requirement applies not just to conduct, but equally to overbreadth challenges involving pure speech and speech-related conduct); *Brockett*, 472 U.S. at 503 n.12 (reiterating *Ferber*'s holding that the substantial overbreadth doctrine applies to pure speech).

Thus, the First Amendment facial overbreadth analysis consists of three steps. First, we interpret the language of the challenged law to determine its scope. See *United States v. Williams*, 553 U.S. 285, 293, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). If the scope of the law extends to prohibit protected activity, we next decide whether the law prohibits a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep. *Williams*, 299 Kan. at 920; see also *Williams*, 553 U.S. at 297; *Ferber*, 458 U.S. at 771 (recognizing the substantiality require-

ment applies not just to conduct, but equally to overbreadth challenges involving pure speech and speech-related conduct). Finally, if we find substantial overbreadth, we look to see whether there is a satisfactory method of severing the law's constitutional provisions from its unconstitutional provisions. *Trotter*, 316 Kan. at 320-21.

Having clarified the substantial overbreadth doctrine as applied by Kansas appellate courts, we now apply the overbreadth analysis to the noisy conduct provision of W.M.O. § 5.24.010(c).

1. *Interpreting the language of the ordinance to determine its scope*

The most fundamental rule of statutory interpretation is that the intent of the Legislature governs if that intent can be determined. To determine intent, we look first to the plain language of the statute, giving common words their ordinary meanings. When a statute is plain and unambiguous, we do not speculate about the legislative intent behind that clear language, and we avoid reading something into the statute not readily found in its words. *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023). Our court applies the same rules to interpreting a municipal ordinance as we would when interpreting a statute. *Robinson v. City of Wichita Employees' Retirement Bd. of Trustees*, 291 Kan. 266, 272, 241 P.3d 15 (2010).

Using these rules of statutory interpretation, we review W.M.O. § 5.24.010(c) to determine the scope of activity prohibited by the ordinance:

"Disorderly conduct is, one or more of the following acts that the person knows or should know will alarm, anger or disturb others or provoke an assault or other breach of the peace:

. . . .

"(c) Using fighting words or engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others."

Neither the ordinance nor the identical state statute, K.S.A. 21-6203, define "noisy conduct." And no case interpreting the ordinance or statute has defined the phrase either. But Kansas courts interpreting statutes often look to dictionaries to explain the ordinary meaning of common words. See *Eckert*, 317 Kan. at 29-30.

"Noisy" means "making noise." Noisy, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/noisy. In turn, noise is defined as "sound" . . . "especially: one that lacks an agreeable quality or is noticeably unpleasant or loud." Noise, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/noise.

"Conduct" is defined as "a mode or standard of personal behavior especially as based on moral principles." Conduct, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/conduct. Black's Law Dictionary further defines "conduct" as "[p]ersonal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves." Black's Law Dictionary 369 (11th ed. 2019).

Using these dictionary definitions to construe the "noisy conduct" provision of W.M.O. § 5.24.010(c), the ordinance criminally punishes a person who makes disagreeable, unpleasant, or loud sounds that the person knows or should know would tend to reasonably arouse alarm, anger, or resentment in others. By its plain language then, the "noisy conduct" provision of W.M.O. § 5.24.010(c) necessarily criminalizes conduct previously deemed by the United States Supreme Court as protected by the First Amendment, if accompanied by a disagreeable, unpleasant, or loud sound:

- picketing a military funeral of a soldier killed in the line of duty with signs stating, "Thank God for Dead Soldiers," and, "America is Doomed," while singing hymns and reciting Bible verses, *Snyder v. Phelps*, 562 U.S. 443, 448, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011);

- burning a cross while playing religious hymns, such as "Amazing Grace," over loudspeakers, without an intent to intimidate, *Virginia v. Black*, 538 U.S. 343, 349, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003);

- burning an American flag during a protest rally, while protesters chant: "America, the red, white, and blue, we spit on you," *Texas v. Johnson*, 491 U.S. 397, 399, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989);

- giving a lengthy and aggressive religious speech and loudly singing "The Star Spangled Banner" and other patriotic and religious songs while stamping feet and clapping hands, *Edwards v. South Carolina*, 372 U.S. 229, 233, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963); and

- peaceful labor picketing, including assembling and discussing publicly the nature and causes of a labor dispute. *Thornhill v. State of Alabama*, 310 U.S. 88, 104, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

Given Supreme Court precedent and the plain language of the ordinance, we conclude the scope of the ordinance extends to constitutionally protected activity.

2. *Whether the ordinance prohibits a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep*

Having concluded the scope of the law extends to prohibit constitutionally protected activity, the next step in our analysis is to determine whether the ordinance is substantially overbroad and therefore unconstitutional. A law is overbroad if it prohibits a substantial amount of protected activity judged in relation to the law's plainly legitimate sweep. The overbreadth inquiry necessarily involves a comparative analysis between the law's effect on protected versus unprotected activity and requires that the unconstitutional applications of the law be disproportionately "substantial" in relation to the constitutional applications.

We begin by looking at the effect of the ordinance on protected activity. On top of activity deemed by the Supreme Court as protected by the First Amendment set forth in the preceding section, the plain language of the ordinance reflects that the "noisy conduct" provision W.M.O. § 5.24.010(c) criminalizes a broad range of other constitutionally protected activities—whether expressed in public or private settings and whether expressed at any time during the day or the night. If expressed in a disagreeable, unpleasant, or loud way that would tend to reasonably arouse alarm, anger, or resentment in others, the following nonexclusive

list of conduct will be criminal in a considerable number of cases under the noisy conduct provision of the ordinance:

- Speaking, marching, and demonstrating;
- Using profane language in front of, or directed to, another person;
- Being insolent and disrespectful to another person;
- Cheering, booing, or taunting at a sporting event or other occasion
    - See Calvert & Richards, *Fans and the First Amendment: Cheering and Jeering in College Sports*, 4 Va. Sports & Ent. L.J. 1, 3, n.9 (2004) (analyzing the constitutionality of efforts to restrict spectators' offensive speech at sporting events held at public colleges and universities and concluding that any policy drafted and implemented by public universities would face an uphill court battle if challenged by free-speech advocates);
- Talking on the phone in public;
- Playing disagreeable or unpleasant music;
- Honking a horn;
- Talking during a movie at the theater; and
- Revving the engine of a vehicle or motorcycle.

Although the list above establishes the noisy conduct provision unconstitutionally applies to a considerable amount of protected activity, our substantial overbreadth standard requires further inquiry. We must determine whether the unconstitutional applications of the noisy conduct provision are substantial when compared to legitimate applications involving unprotected activity. *Williams*, 299 Kan. at 920; see also *Williams*, 553 U.S. at 297.

A review of Kansas cases construing K.S.A. 21-6203(a)(3)—the statute identical to the "noisy conduct" provision in W.M.O. § 5.24.010(c)—leads us to conclude that legitimate applications of the "noisy conduct" provision involving unprotected activity are limited to ones where the disagreeable, unpleasant, or loud conduct consists of threatening behavior that poses a risk of provoking physical confrontation. See *State v. Hughs*, No. 118,281, 2018 WL 2374766, at *1, 4 (Kan. App. 2018) (unpublished opinion)

(affirming defendant's disorderly conduct conviction based on evidence of screaming and cursing that resulted in fighting and brawling); *State v. Mead*, No. 115,989, 2017 WL 4082240, at *4-5, 12 (Kan. App. 2017) (unpublished opinion) (affirming disorderly conduct conviction based on evidence that defendant advanced toward others while flailing his arm in the air as he yelled and screamed in an out-of-control, belligerent, threatening, and aggressive manner, after which he battered the witness); *City of Paola v. Ammel*, No. 96,301, 2007 WL 2767953, at *3 (Kan. App. 2007) (unpublished opinion) (affirming disorderly conduct conviction based on evidence that defendant screamed insults at police officers at the top of his voice in a public library, which was heard throughout the building, and physically resisted arrest by fighting the officers); *State v. Heyder*, No. 82,810, 2000 WL 36745844, at *1-2 (Kan. App. 2000) (unpublished opinion) (affirming disorderly conduct conviction based on evidence that defendant exited his vehicle at a toll booth, angrily advanced toward the collector while flailing his arms, and spewed profanity in a raised voice at the collector while blocking traffic until he was forcibly taken down and handcuffed by law enforcement); cf. *State v. Kiraly*, No. 125,190, 2023 WL 2941555, at *2, 5-6 (Kan. App. 2023) (unpublished opinion) (holding defendant's use of the phrase "stupid bitch" during an argument where defendant was yelling and woman was sobbing and both were speaking in loud, upset voices did not support arrest for disorderly conduct based on "fighting words" or "noisy conduct tending to reasonably arouse alarm, anger or resentment in others").

The list of cases cited above reveals the narrow scope of legitimate applications, involving unprotected activity, of the "noisy conduct" provision of W.M.O. § 5.24.010(c): noisy conduct consisting of threatening behavior that poses a risk of provoking physical confrontation. The State agrees, citing these same cases to assert that the "'plainly legitimate sweep'" of the "'noisy conduct'" provision is "preventing verbal and physical confrontations between citizens in public places regardless of speech content." The Court of Appeals panel majority also agreed, at least to a certain extent, as shown by its concession that prohibiting "noisy conduct" on its own likely would be constitutionally overbroad. Yet

the majority concluded the ordinance survived a facial overbreadth challenge because the ordinance includes actus reus and mens rea components, which the majority believed would significantly curtail its application to protected activity. *Griffie*, 2022 WL 17072292, at *6.With less applications to protected activity, the majority posited the scope of the law's unconstitutional applications would no longer be substantial when compared to its legitimate sweep. But the majority provided no accompanying analysis or other discussion to support its summarily stated belief. 2022 WL 17072292, at *8.We provide that analysis below.

Actus reus

The panel majority held the law's application to protected activity is reined in by what it viewed as restrictive language modifying the actus reus component of the law: "noisy conduct *tending to reasonably arouse alarm, anger or resentment in others*." (Emphasis added.) W.M.O. § 5.24.010(c). *Griffie*, 2022 WL 17072292, at *6. But we fail to see how the modifying language places any meaningful restriction on the law's application to protected activity. This is especially true given the descriptive modifier is expressed as only "tending" to reasonably arouse alarm, anger or resentment. "Tend" means: "1. To be disposed toward (something). 2. To serve, contribute, or conduce in some degree or way; to have a more or less direct bearing or effect. 3. To be directed or have a tendency to (an end, object, or purpose)." Black's Law Dictionary 1770 (11th ed. 2019). That others may experience alarm, anger, or resentment in response to noisy conduct does not justify the wholesale restriction of free expression. The United States Supreme Court has repeatedly held that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414; see *Coates v. City of Cincinnati*, 402 U.S. 611, 615, 91 S. Ct.

1686, 29 L. Ed. 2d 214 (1971) ("[M]ere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.").

We also disagree with the panel majority that the objective component of the law—tending to *reasonably* arouse alarm, anger, or resentment in others—places any meaningful restriction on the law's application to protected activity. See *Griffie*, 2022 WL 17072292, at *6. As the United States Supreme Court recognized long ago, "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Johnson*, 491 U.S. at 408-09 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 [1949]); see *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975) ("Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Cohen v. California*, 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("[T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense.").

Mens rea

The panel majority believed that adding an intent requirement—"knows or should know"—to the ordinance significantly curtails the law's application to protected activity. *Griffie*, 2022 WL 17072292, at *6.

A general intent mens rea element does not curtail the law's application to protected activity. Whether a person knows (or should know) that such person's noisy conduct is inclined to arouse alarm, anger, or resentment in others does nothing to narrow the scope of the law's application to only unprotected activity. Looking at the broad swath of the law's application to protected activity as described above, it is clear that in most, if not all, cases,

the person intentionally, knowingly, or recklessly engaged in the protected activity constituting noisy conduct.

In sum, neither the actus reus nor the mens rea components limit the application of W.M.O. § 5.24.010(c) to protected activity. Given the broad scope of protected activity criminalized by the law, as well as the limited scope of legitimate applications of the provision, we conclude the application to legitimate activity is substantially overcome by the vast amount of protected activity the provision prohibits. As such, we deem the provision unconstitutional.

Time, Place, and Manner

Before moving to severance, the final step in our analysis, we consider the dissent's challenge to our conclusion that the noisy conduct provision is unconstitutionally overbroad because it prohibits a substantial amount of protected conduct relative to its plainly legitimate sweep. The dissent does not question the legal framework for conducting a substantial overbreadth analysis. Instead, the dissent argues that a substantial overbreadth analysis is premature until we determine whether the provision lawfully imposes reasonable restrictions on time, place, and manner of protected activity.

The government may impose reasonable restrictions on the time, place, and manner of protected speech. The analysis referred to by the dissent requires that the government's time, place, and manner restrictions (1) be content-neutral, (2) be narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (applying intermediate scrutiny to time, place, and manner restrictions). The narrowly tailored requirement prevents the government from imposing time, place, and manner restrictions that prohibit substantially more protected conduct than necessary to further the government's legitimate interests. 491 U.S. at 799. Notably, the language used by the Court to describe the purpose of the narrowly tailored requirement in a time, place, and manner analysis is strikingly similar to the language used by the Court to describe the purpose of the substantial overbreadth

doctrine. Compare *Ward*, 491 U.S. at 799 (restrictions must be narrowly tailored so time, place, and manner restrictions do not prohibit substantially more protected conduct than necessary to further the government's legitimate interests), with *Broadrick*, 413 U.S. at 615 (substantial overbreadth analysis requires the court to determine whether the challenged law prohibits a substantial amount of protected conduct relative to its plainly legitimate sweep).

Notwithstanding this similarity, the dissent claims our determination that the noisy conduct provision is substantially overbroad is fatally flawed because we failed to first undertake a *Ward* intermediate scrutiny analysis. The dissent's claim focuses on our failure to analyze whether the provision imposed a permissible "manner" restriction on protected conduct. This analysis would require us to decide whether the noisy conduct provision—which criminally punishes a person who makes disagreeable, unpleasant, or loud sounds that the person knows or should know would tend to reasonably arouse alarm, anger, or resentment in others—is narrowly tailored to serve a significant governmental interest. Given the procedural posture of this case, however, the dissent's proposed scrutiny analysis is not possible. The parties have never alleged in these proceedings that the noisy conduct provision is a "manner" restriction on protected speech subject to scrutiny analysis. Because the issue was never litigated, the facts necessary to engage in a scrutiny analysis on appellate review were never developed. Specifically, there is no evidence of the significant governmental interest served by criminally punishing a person who makes disagreeable, unpleasant, or loud sounds that the person knows or should know would tend to reasonably arouse alarm, anger, or resentment in others. Obviously, we cannot evaluate whether restrictions on the manner in which protected activity is expressed are narrowly tailored to serve an unspecified and factually unsupported significant governmental interest.

Yet the dissent suggests we can engage in appellate review because the provision is really just a typical noise ordinance intended to govern sound, similar to the many that are challenged in other courts under an intermediate scrutiny analysis. But there is

no evidence to suggest the noisy conduct provision here was enacted to govern sound. To the contrary, the City's noise ordinances governing sound are provided in detail under sections within the Noise Chapter of the Municipal Code. W.M.O. Chapter 7.41 - Noise. The sections in this chapter enumerate a non-exclusive list of noise nuisances, identify the tests for measuring noise, and set forth the decibel levels for time periods and zones at which noises will be declared excessive, unusual, loud, and unnecessary. W.M.O. § 7.41.010-§ 7.41.060.

Simply put, we are precluded from engaging in a sua sponte scrutiny analysis of the noisy conduct provision as proposed by the dissent. Thus, we remain resolute in concluding that the noisy conduct provision is unconstitutionally overbroad because it prohibits a substantial amount of protected conduct relative to its plainly legitimate sweep.

3. *Severance*

Because we have declared unconstitutional the "noisy conduct" provision of W.M.O. § 5.24.010(c), we now must decide whether there is a satisfactory method of severing the law's constitutional provisions from its unconstitutional provisions. The touchstone for severability is legislative intent, which is determined by applying our well-established two-part test. Under this test, the court may sever the unconstitutional provisions from the law and leave the remainder in force and effect if, after examining the law, we can conclude (1) the Legislature would have passed the law without the objectionable portion and (2) the law would operate effectively to carry out the intention of the Legislature with the objectionable portion stricken. *Trotter*, 316 Kan. at 321 (quoting *Gannon v. State*, 304 Kan. 490, 519, 372 P.3d 1181 [2016]).

In this case, the introductory General Provisions of the Wichita, Kansas, Code include a catchall severability clause. See W.M.O. § 1.04.050 ("If for any reason any part, section, subsection, sentence, clause or phrase of this Code, or the application thereof to any person or circumstance, is declared to be unconstitutional or invalid such decision shall not affect the validity of the remaining portions of this Code."). Although a severability clause

is not dispositive, it is a strong indication of legislative intent and creates a presumption of severability. *Gannon*, 304 Kan. at 520 (citing *State v. Next Door Cinema Corp.*, 225 Kan. 112, 118-19, 587 P.2d 326 [1978]).

We begin the severability analysis by examining what W.M.O. § 5.24.010(c) would look like without the unconstitutional provision:

"Disorderly conduct is, one or more of the following acts that the person knows or should know will alarm, anger or disturb others or provoke an assault or other breach of the peace:
"(a) Engaging in brawling or fighting; or
"(b) Disturbing an assembly, meeting, or procession, not unlawful in its character; or
"(c) Using fighting words. ~~or engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others.~~
"As used in this section, 'fighting words' means words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of peace."

By its plain language, the ordinance reflects the City's intent to protect physical safety and preserve public peace (preventing "an assault or other breach of the peace"). If we sever the unconstitutional provision criminalizing "noisy conduct tending to reasonably arouse alarm, anger or resentment in others" from subsection (c), the subsection still criminalizes unprotected "fighting words" as an act of disorderly conduct. The ordinance defines "fighting words" as ones which "by their very utterance inflict injury or tend to incite the listener to an immediate breach of peace." Because fighting words, by their very nature, tend "to reasonably arouse alarm, anger or resentment in others," the fighting words provision necessarily embraces what we found above as the legitimate sweep of the "noisy conduct" provision: threatening behavior that poses a risk of provoking physical confrontation.

For this reason, we conclude (1) the lawmakers would have passed the ordinance without the "noisy conduct" provision and (2) the ordinance will operate effectively to carry out the intention of the lawmakers—protecting physical safety and preserving public peace—with the "noisy conduct" provision stricken. Having met the two-part test, we sever the "or engaging in noisy conduct tending to reasonably arouse alarm, anger or resentment in others" language from W.M.O. § 5.24.010(c).

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

* * *

STEGALL, J., dissenting: In my view, the majority's analysis is sound, with one crucial exception. After describing the appropriate overbreadth test, the majority fumbles the ball when determining whether the challenged portion of the ordinance sweeps up protected speech in its net. The extent of the analysis is simply the conclusory statement that "[b]y its plain language then, the 'noisy conduct' provision of W.M.O. § 5.24.010(c) necessarily criminalizes conduct previously deemed by the United States Supreme Court as protected by the First Amendment, if accompanied by a disagreeable, unpleasant, or loud sound." *City of Wichita v. Griffie*, 318 Kan. 510, 524, 544 P.3d 776 (2024).

At first glance, this sounds reasonable enough. But couldn't the same be said of every time, place, or manner restriction on speech? Indeed, it could. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 731-32, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) ("[I]t is not disputed that the regulation affects protected speech activity; the question is thus whether it is a 'reasonable restrictio[n] on the time, place, or manner of protected speech.' Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive. . . . [The statute] simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements. It merely regulates the places where communications may occur. [Citation omitted.]"); *Boos v. Barry*, 485 U.S. 312, 331, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (applying a narrowing construction to limit application of the law to regulate the place and manner of demonstrations directed at an embassy rather than a general breach of the peace law); *Carew-Reid v. Metropolitan Transp. Authority*, 903 F.2d 914, 916-19 (2d Cir. 1990) (finding a regulation banning use of amplifiers by musicians on subway platforms a permissible time, place, and manner restriction, despite the fact that "music, as a form of expression, is protected by the First Amendment," because the First Amendment "does not guarantee appellees access

to every or even the best channels or locations for their expression"; even though the regulation banned a particular medium, it remained "neutral with regard to the expression's content," and though the "incidental effect of the amplifier ban, obviously, is that those musicians who previously used amplifiers on subway platforms will be forced to alter their performances or to perform elsewhere . . . this restriction on the manner of their expression is justified because it is the manner itself that produces the evil that is the object of regulation").

Time, place, or manner restrictions on speech occupy a unique place in our First Amendment jurisprudence. Where there is a legitimate time, place, or manner restriction, even though it will of course have the effect of limiting otherwise protected speech, it cannot as a matter of law infringe on that speech. The phenomenon of a valid time, place, or manner restriction reaching otherwise protected activity is nothing new, and the Supreme Court has addressed this reality for decades. See, e.g., *Hill*, 530 U.S. at 731-32 (evaluating regulations under a time, place, and manner analysis and acknowledging that while some regulations will obviously "affect[] protected speech activity" they may pass constitutional muster as a content neutral time, place, and manner restriction that lacks any "discriminatory governmental motive"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791-93, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (noting that while plaintiff's arguments about government interference in "artistic judgment may have much force in other contexts"—because "[a]ny governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns"—"they are inapplicable to the facts of this case" because the record clearly showed the city had only content-neutral goals). For a law to be unconstitutionally overbroad, we must consider whether a law reaches a substantial amount of protected activity. *Hill*, 530 U.S. at 731-32 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 [1973] ["[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."]). Otherwise, no time, place, or

manner restriction could survive the kind of overbreadth challenge plaintiff brings in this suit.

But the majority never conducts an analysis of W.M.O. § 5.24.010(c) as a time, place, or manner restriction. Maybe it would fail to meet the necessarily high threshold required for such restrictions. Indeed, "noise ordinances" are widely categorized as "fall[ing] into the category of time, place or manner regulations." *Sharkey's, Inc. v. City of Waukesha*, 265 F. Supp. 2d 984, 994 (E.D. Wis. 2003). And even very broad noise ordinances—similar to the one at hand—have been upheld as legitimate "manner" restrictions. See *Costello v. City of Burlington*, 632 F.3d 41, 44 (2d Cir. 2011) (upholding city noise ordinance that made it "unlawful for any person to make or cause to be made any loud or unreasonable noise," defined as noise that "disturbs, injures or endangers the peace or health of another or when it endangers the health, safety or welfare of the community"); *Howard Opera House Assocs. v. Urb. Outfitters, Inc.*, 131 F. Supp. 2d 559, 563 (D. Vt. 2001) (upholding city noise ordinance that banned "any loud or unreasonable noise," defined as noise which "disturbs, injures or endangers the peace or health of another, or which endangers the health, safety or welfare of the community"), *aff'd* 322 F.3d 125 (2d Cir. 2003); *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1267-68 (11th Cir. 2007) (upholding city noise ordinance that proscribed unreasonably loud noise "in such a manner as to disturb the peace, quiet and comfort of neighboring inhabitants, or at any time louder that is necessary for convenient hearing for the person or persons who are in the room"); *City of Beaufort v. Baker*, 315 S.C. 146, 149, 432 S.E.2d 470 (1993) (upholding city ordinance that made it "unlawful for any person to willfully disturb any neighborhood or business in the City by making or continuing loud and unseemly noises, or by profanely cursing and swearing, or using obscene language"); *State v. Holcombe*, 145 S.W.3d 246, 248 (Tex. App. 2004) (upholding a city noise ordinance that made it illegal for one to "unreasonably disturb or interfere with the peace, comfort and repose of neighboring persons of ordinary sensibilities"), *aff'd* 187 S.W.3d 496 (Tex. Crim. App. 2006).

Other courts have come down differently, so the answer is not at all self-evident. See *Deegan v. City of Ithaca*, 444 F.3d 135, 144 (2d Cir. 2006) (regulations prohibiting sound that could be heard 25 feet

from its source in downtown pedestrian mall were not narrowly tailored to serve city's legitimate interest in preventing unreasonably injurious, annoying, or disturbing sound because mall was a public forum already "bustling with the sounds of recreation, celebration, commerce, demonstration, rallies, music, poetry, speeches, and other expressive undertakings," and therefore its application to a street preacher "unreasonably burden protected speech"); *United States v. Doe*, 968 F.2d 86, 87 (D.C. Cir. 1992) (a national park's regulation that prohibited sounds from "audio devices" generating a higher than prescribed decibel level was not a constitutional time, place, and manner restriction); *Campa v. City of Birmingham*, 662 So. 2d 917, 918-19 (Ala. Crim. App. 1993) (finding a noise ordinance "unduly restrictive because the only restriction it places on the offending sounds is that they not 'disturb the peace, quiet and comfort of neighboring inhabitants'" and these factors were not limited to a "specific time frame, a specific place, or a specific manner in which sound can be emitted").

The majority responds to this criticism by quite rightly asserting that the State has never defended the ordinance as a manner restriction and has proffered no significant government interest as its rationale. I don't begrudge the majority's refusal to do the State's work for it; however, I would exercise our discretion to order the parties to provide supplemental briefing on the question. After all, when important issues such as this arise affecting major questions that will likely have ramifications on the law outside any particular dispute, our recent practice has been to do just that. See, e.g., *State v. Patton*, 315 Kan. 1, 5, 503 P.3d 1022 (2022) (ordering supplemental briefing on whether application of statutory amendments violated the Ex Post Facto Clause); *State v. Sayler*, 306 Kan. 1279, 1280, 404 P.3d 333 (2017) (ordering supplemental briefing to address what effect new Kansas caselaw regarding sufficiency of charging documents may have).

In my view, our refusal to do so here may not do much damage in today's case, but it may do a real disservice to legitimate time place or manner restrictions on the books in towns and counties across our state. This is so because how this particular noise restriction—which is admittedly quite broad—would fare under a proper time, place, or manner review is uncertain at best. And as I have explained, the question must be answered before any overbreadth analysis can proceed. Given all this, I am left with only the option to dissent.

State v. Martin

No. 124,607

STATE OF KANSAS, *Appellee*, v. MILES LOREN MARTIN, *Appellant.*

(544 P.3d 820)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Double Jeopardy Clause—Prohibits Court from Imposing Multiple Punishments under Different Statutes for Same Conduct.* The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding when the Legislature did not intend multiple punishments.

2. CRIMINAL LAW—*Double Jeopardy Challenge Based on Multiple Punishments—Two-Part Test.* When a defendant brings a double jeopardy challenge based on multiple punishments imposed in one case, courts conduct a two-part test to determine whether the convictions giving rise to those punishments are for the same offense. First, courts consider whether the convictions arose from unitary conduct. Second, courts consider whether by statutory definition there are two crimes or only one. In cases involving convictions under different statutes, this second part of the analysis requires courts to apply what has been called the "same-elements test." Under that test, courts consider if each statute requires proof of an element not necessary to prove the other offense.

3. SAME—*Sentencing—Statute Prohibits Multiple Punishments for Crime Charged and Lesser Included Crime Arising from Same Conduct.* In K.S.A. 2019 Supp. 21-5109(b), the Kansas Legislature has identified a specific circumstance in which it did not intend multiple punishments. Under the statute, a defendant cannot be convicted of (and thus punished for) both the crime charged and a lesser included crime arising from the same conduct in the same prosecution.

4. SAME—*Lesser Included Crime under Statute—Lesser Crime Than Crime Charged.* To be a lesser included crime under K.S.A. 2019 Supp. 21-5109(b)(2), a crime must be a "lesser" crime than the crime charged—meaning it carries a lesser penalty. And that "lesser" crime must also be "included" in the crime charged—meaning all elements of the lesser crime must be identical to some elements of the crime charged.

5. SAME—*Possession of Meth Not a Lesser Included Crime of No Drug-Tax Stamp*. Possession of methamphetamine is not a lesser included crime of no drug-tax stamp under K.S.A. 2019 Supp. 21-5109(b)(2) because the former carries a greater penalty than the latter.

6. SAME—*Failing to Affix Drug-Tax Stamp Not a Lesser Included Crime of Possession of Methamphetamine*. The crime of failing to affix a drug-tax stamp is not a lesser included crime of possession of methamphetamine under K.S.A. 2019 Supp. 21-5109(b)(2) because not all elements of the former are identical to some elements of the latter.

7. STATUTES—*Double Jeopardy Analysis—Same-Elements Test Is Rule of Statutory Construction—Consideration of Legislative Intent—Factors.* Under a Fifth Amendment double jeopardy analysis, the same-elements test is a rule of statutory construction, and the rule should not be controlling where there is a clear indication of contrary legislative intent. In determining whether there is contrary legislative intent, courts consider factors such as the language, structure, and legislative history of the statutes as well as the social evil each statute seeks to address.

8. SAME—*Statutory Offenses of Possession of Meth and Failure to Affix Drug-Tax Stamp—Consideration of Legislative Intent—Multiple Punishments under Different Statutes.* Based on the targeted conduct and objectives of the statutory offenses of possession of methamphetamine and failure to affix a drug-tax stamp, as well as the language and structure of the relevant statutes, the Legislature intended to impose multiple punishments under the different statutes.

9. SEARCH AND SEIZURE—*Warrantless Search Unreasonable under Fourth Amendment and Section 15 Unless Recognized Exception—Exceptions.* A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights unless the search falls within a recognized exception to the warrant requirement. Those recognized exceptions are: consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses.

10. SAME—*Recognized Exception to Warrant Requirement— Incident to Lawful Arrest*. Incident to a lawful arrest, an arresting officer may search the arrestee's person and the area within the arrestee's immediate control, including personal property immediately associated with the person of the arrestee.

11. SAME—*Recognized Exception to Warrant Requirement—Warrantless Search Preceding Arrest Is Valid—Requirement*s. A warrantless search preceding an arrest is a valid search incident to arrest if (1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search.

12. APPEAL AND ERROR—*Appellate Review of District Court's Denial of Pretrial Motion to Suppress—Consideration of Evidence from Suppression*

Hearing and Trial. When reviewing a district court's ruling denying a pretrial motion to suppress, an appellate court may consider both the evidence presented at the suppression hearing and the evidence adduced at trial.

Review of the judgment of the Court of Appeals in an unpublished opinion filed March 17, 2023. Appeal from Geary District Court; COURTNEY D. BOEHM and RYAN W. ROSAUER, judges. Opinion filed March 15, 2024. Oral argument held November 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Patrick H. Dunn, of Kansas Appellate Defender Office, argued the cause, and *Bryan W. Cox*, of the same office, was on the brief for appellant.

Kristafer Ailslieger, deputy solicitor general, argued the cause, and *Tony Cruz*, assistant county attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: This appeal raises two constitutional challenges: one implicating the Double Jeopardy Clauses of the United States and Kansas Constitutions and the other implicating the government's search and seizure authority under the Fourth Amendment.

The Double Jeopardy Clauses of the United States and Kansas Constitutions protect our citizens from twice being placed in jeopardy of losing their liberty for the same offense. Among other applications, these constitutional safeguards can protect a citizen from multiple punishments under different statutes for the same conduct, unless the Legislature intended to impose multiple punishments under the circumstances. We often refer to this application of the Double Jeopardy Clause as a "multiplicity" challenge.

The Legislature enacted K.S.A. 2019 Supp. 21-5109 to identify some situations in which it does not intend to impose multiple punishments for the same conduct. Most relevant to this appeal, the statute provides that a defendant cannot be convicted of (and thus punished for) both a charged crime and a lesser included crime. K.S.A. 2019 Supp. 21-5109(b). The statute defines a "lesser included crime" to include "a crime where all elements of the *lesser crime* are identical to some of the elements of the crime charged." (Emphasis added.) K.S.A. 2019 Supp. 21-5109(b)(2).

Miles Loren Martin was convicted of two offenses—possession of methampheta-mine and possession of a controlled substance with no drug-tax stamp—after a police officer found him

in possession of 17.51 grams of methamphetamine during a traffic stop. Martin argues his convictions violate K.S.A. 2019 Supp. 21-5109(b)(2), thus placing him in double jeopardy, because all elements of possession of methamphetamine are the same as some elements of no drug-tax stamp.

However, to be a lesser included crime under K.S.A. 2019 Supp. 21-5109(b)(2), a crime must be a "lesser" crime than the crime charged—meaning it carries a lesser penalty. And that "lesser" crime must also be "included" in the crime charged—meaning all elements of the lesser crime must be identical to some elements of the crime charged. Martin's convictions do not violate K.S.A. 2019 Supp. 21-5109(b)(2) because possession of methamphetamine (the alleged lesser crime) carries a greater penalty than the offense of no drug-tax stamp (the charged crime).

This does not completely resolve Martin's double-jeopardy challenge—it simply means the Legislature did not prohibit multiple punishments under K.S.A. 2019 Supp. 21-5109(b)(2). We must also examine the statutory offenses of possession of methamphetamine and possession of a controlled substance without a drug-tax stamp to determine whether the Legislature intended to punish Martin for both crimes. We conclude that the language and structure of the relevant statutes, as well as their targeted conduct, show the Legislature intended to impose multiple punishments. Thus, Martin's convictions and sentences do not violate double jeopardy.

Martin also challenges the lawfulness of the warrantless search that led to the discovery of methamphetamine. The officer found the methamphetamine in a pill bottle Martin had been carrying in his pocket, but she conducted that search before his arrest. Nevertheless, the search falls within the search-incident-to-arrest exception to the warrant requirement because the officer had a legitimate basis to arrest Martin before the search and his arrest followed soon after the search. In reaching this conclusion, we also hold that an appellate court may consider both evidence presented at a suppression hearing and evidence adduced at trial when reviewing a district court's order denying a pretrial motion to suppress. Finally, we conclude that the search of the pill bottle did not

exceed the permissible scope of a search incident to arrest as delineated by United States Supreme Court precedent. We thus affirm Martin's convictions and sentence.

FACTS AND PROCEDURAL BACKGROUND

After stopping Martin for a defective tag light, Detective Cayla Da Giau caught sight of an open container of alcohol in the backseat of Martin's car. Da Giau asked Martin to get out of the car so she could search it. She found several open containers of alcohol, a straw with white residue on it, and a butane lighter.

Detective Da Giau then overheard Martin complaining to a backup officer about the heat. Da Giau offered to let Martin sit in her air-conditioned patrol car. But before placing Martin in the car, she asked if he had anything on him. He handed her a pill bottle. After getting Martin comfortable, Da Giau opened the bottle and found 17.51 grams of methamphetamine.

The State charged Martin with possession of methamphetamine with the intent to distribute within 1,000 feet of a school zone and possession of a controlled substance with no drug-tax stamp. Before trial, Martin moved to suppress the methamphetamine found in the pill bottle, but the district court denied his motion.

A jury convicted Martin of possession of methamphetamine as a lesser included offense of possession of methamphetamine with intent to distribute within 1,000 feet of a school zone. The jury also convicted Martin of possession of methamphetamine without a drug-tax stamp. The district court sentenced Martin to 20 months in prison for possession of methamphetamine and 6 months in prison for no drug-tax stamp. The district court ordered the sentences to run concurrently.

Martin appealed, arguing that (1) his convictions for possession of methampheta-mine and no drug-tax stamp were multiplicitous in violation of K.S.A. 2019 Supp. 21-5109(b)(2); and (2) the district court erred by denying his motion to suppress. The Court of Appeals affirmed Martin's convictions and sentences for both crimes. *State v. Martin*, No. 124,607, 2023 WL 2558563, at *6 (Kan. App. 2023) (unpublished opinion).

We granted Martin's petition for review, and we heard oral argument on November 14, 2023. 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

I. *Martin's Convictions for Possession of Methamphetamine and No Drug-Tax Stamp Are Not Multiplicitous in Violation of Kansas Statute and the Double Jeopardy Clauses of the Federal and State Constitutions*

First, Martin argues his convictions for possession of methamphetamine and no drug-tax stamp are multiplicitous. "[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). And multiplicitous convictions implicate constitutional double-jeopardy protections against multiple punishments for the same offense. 287 Kan. at 244.

While Martin invokes the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights, he mainly bases his argument on a state statute, K.S.A. 2019 Supp. 21-5109(b)(2). That statute prohibits convictions for both a charged crime and a lesser included crime. K.S.A. 2019 Supp. 21-5109(b). In other words, under the statute, a charged crime and its lesser included crimes are the "same offense" for multiplicity purposes. The statute defines lesser included crimes to include "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 2019 Supp. 21-5109(b)(2).

Martin contends possession of methamphetamine is a lesser included offense of no drug-tax stamp under K.S.A. 2019 Supp. 21-5109(b)(2) because all elements of the former are identical to some elements of the latter. As a result, he argues his convictions and sentences for possession of methamphetamine and no drug-tax stamp are for the same offense, and thus they violate statutory and constitutional protections against multiplicity.

The State contends possession of methamphetamine is not a lesser included crime of no drug-tax stamp under K.S.A. 2019 Supp. 21-5109(b)(2). The State does not contest that all elements

of possession of methamphetamine are identical to some elements of no drug-tax stamp. Instead, the State's argument turns on the phrase "lesser crime" as used in subsection (b)(2). According to the State's reading of the statute, a "lesser crime" is a crime with a lesser penalty than the charged offense. Thus, to be a lesser included crime under K.S.A. 2019 Supp. 21-5109(b)(2), the State argues a crime must have a lesser penalty than the charged crime *and* all elements of the crime must be the same as some elements of the charged crime. Possession of methamphetamine would fail to meet the State's definition of a "lesser crime" because it carries a greater penalty than no drug-tax stamp.

Though it did not engage in a developed statutory interpretation of K.S.A. 2019 Supp. 21-5109(b)(2), the Court of Appeals sided with the State. It held in conclusory fashion that possession of methamphetamine was not a "lesser crime" of no drug-tax stamp because it carried a greater penalty, and thus did not meet the definition of a lesser included offense under K.S.A. 2019 Supp. 21-5109(b)(2). *Martin*, 2023 WL 2558563, at *6. The panel also held that no drug-tax stamp did not meet the definition of a lesser included offense under K.S.A. 2019 Supp. 21-5109(b)(2) because that offense has elements not included in the crime of possession of methamphetamine. 2023 WL 2558563, at *6. Thus, the panel rejected Martin's multiplicity challenge. 2023 WL 2558563, at *6.

On review, Martin argues the panel erred when it considered the penalties for possession of methamphetamine and no drug-tax stamp in determining whether the former is a lesser included offense of the latter under K.S.A. 2019 Supp. 21-5109(b)(2). According to Martin, the statute defines lesser included crimes only in terms of the elements of the concerned offenses and not their respective penalties, and thus the term "lesser crime" simply means "a crime with fewer elements."

To analyze Martin's claim, we first review the relevant law regarding multiplicity and double jeopardy. We then consider whether Martin's convictions are multiplicitous under K.S.A. 2019 Supp. 21-5109(b)(2). This will require us to interpret the term "lesser crime" as used in that subsection. After concluding that the term "lesser crime" means a crime with a lesser penalty,

we hold that Martin's convictions are not multiplicitous under the statute. Finally, we consider whether the Legislature intended to punish Martin for both offenses (possession of methamphetamine and no drug-tax stamp) even though neither offense is a lesser included offense of the other under K.S.A. 2019 Supp. 21-5109(b)(2). Ultimately, we hold that the Legislature intended to impose multiple punishments and Martin's convictions are not multiplicitous in violation of federal and state constitutional protections against double jeopardy.

A. *Standard of Review and Relevant Legal Framework*

We exercise unlimited review over double-jeopardy and multiplicity challenges. *State v. Hensley*, 298 Kan. 422, 435, 313 P.3d 814 (2013). Likewise, we exercise unlimited review over any questions of statutory interpretation necessary to resolve these challenges. *State v. Hirsh*, 310 Kan. 321, 338, 446 P.3d 472 (2019).

The Double Jeopardy Clauses of the United States and Kansas Constitutions prohibit a criminal defendant from being "twice put in jeopardy." U.S. Const. amend. V; Kan. Const. Bill of Rights, § 10; see also *State v. Miller*, 293 Kan. 535, 544, 264 P.3d 461 (2011) (double-jeopardy provisions of federal and state Constitutions equal in scope and protection). In part, these clauses protect against multiple punishments for the same offense. *State v. Schoonover*, 281 Kan. 453, 463, 474, 133 P.3d 48 (2006). More specific to this case, they "prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding when the legislature did not intend multiple punishments." *Hensley*, 298 Kan. at 435. Multiplicity implicates these double-jeopardy protections because it creates the potential for multiple punishments for the same offense. *Thompson*, 287 Kan. at 244.

When a defendant brings a double-jeopardy challenge based on multiple punishments imposed in one case, the overarching question is whether the convictions giving rise to those punishments are for the same offense. *Schoonover*, 281 Kan. at 496. In *Schoonover*, we identified a two-part analysis to answer this ques-

tion. First, courts consider whether the convictions arose from unitary conduct. Second, courts consider whether by statutory definition there are two crimes or only one. 281 Kan. 453, Syl. ¶ 15. In cases involving convictions under different statutes, this second part of the analysis requires courts to apply what has been called the "same-elements test." Under that test, courts consider if each statute requires proof of an element not necessary to prove the other offense. 281 Kan. 453, Syl. ¶¶ 12, 15.

The same-elements test, however, "is merely a rule of construction that courts use to divine legislative intent." *Hensley*, 298 Kan. at 435; see also *Schoonover*, 281 Kan. at 504. That is, if one statute shares all its elements with another, it creates a presumption that the Legislature did not intend to impose multiple punishments. *Hensley*, 298 Kan. at 435-36. But this presumption is not dispositive and may be superseded by clear legislative intent to the contrary. See *Schoonover*, 281 Kan. at 468-71.

To assist courts in their double-jeopardy analysis, the Kansas Legislature, in K.S.A. 2019 Supp. 21-5109(b), has identified specific circumstances in which it did not intend to impose multiple punishments. Under subsection (b)(2) of the statute, a defendant cannot be convicted of (and thus punished for) both the crime charged and a lesser included crime arising from the same conduct in the same prosecution:

> "(a) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. Each of such crimes may be alleged as a separate count in a single complaint, information or indictment.
>
> "(b) *Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both. A lesser included crime is:*
>
> (1) A lesser degree of the same crime, except that there are no lesser degrees of murder in the first degree under subsection (a)(2) of K.S.A. 21-5402, and amendments thereto;
>
> (2) *a crime where all elements of the lesser crime are identical to some of the elements of the crime charged*;
>
> (3) an attempt to commit the crime charged; or
>
> (4) an attempt to commit a crime defined under paragraph (1) or (2)." (Emphases added.) K.S.A. 2019 Supp. 21-5109(a) and (b).

Because subsection (b) is a clear declaration of legislative intent, it removes the need to appeal to canons of construction or

legislative history. Thus, in this sense, it supplants the same-elements test in multiplicity challenges involving greater and lesser included offenses. See *Hensley*, 298 Kan. at 436.

B. *Martin's Convictions Are Not Multiplicitous Under K.S.A. 2019 Supp. 21-5109(b)(2)*

Martin argues his convictions are multiplicitous in violation of K.S.A. 2019 Supp. 21-5109(b)(2). To analyze this claim, we must first consider whether his convictions arose from unitary conduct. We must then consider whether possession of methampheta-mine is a lesser included offense of no drug-tax stamp as defined under K.S.A. 2019 Supp. 21-5109(b)(2).

Martin's convictions can only violate protections against multiplicity if those convictions arose from unitary conduct. See *Schoonover*, 281 Kan. at 464. As part of this analysis, we would normally consider factors such as whether the acts occurred at the same time, in the same location, and whether there was an intervening event or a fresh impulse motivating some of the conduct. 281 Kan. at 497. But here, the Court of Appeals held Martin's convictions arose from unitary conduct. *Martin*, 2023 WL 2558563, at *6. And the State did not seek review of this holding. Thus, this point remains settled in Martin's favor. See Supreme Court Rule 8.03(b)(6)(C)(i) (2023 Kan. S. Ct. R. at 56); see also *State v. Boettger*, 310 Kan. 800, 804, 450 P.3d 805 (2019) ("When a party does not cross-petition for review on an issue decided adversely to that party by the Court of Appeals, we deem it as settled on review.").

Next, we determine whether Martin was convicted of a charged crime and a lesser included crime in violation of K.S.A. 2019 Supp. 21-5109(b)(2). That subsection defines a lesser included offense as "a crime where all elements of the lesser crime are identical to some of the elements of the crime charged." K.S.A. 2019 Supp. 21-5109(b)(2).

Martin was convicted of possession of methamphetamine under K.S.A. 2019 Supp. 21-5706(a), which provides, "It shall be unlawful for any person to possess any opiates, opium or narcotic drugs, or any stimulant designated in K.S.A. 65-4107(d)(1), (d)(3) or (f)(1), and amendments thereto, or a controlled substance ana-

log thereof." See also K.S.A. 2019 Supp. 65-4107(d)(3) (designating methamphetamine a controlled substance). Possession of methamphetamine is a drug severity level 5 felony. K.S.A. 2019 Supp. 21-5706(c)(1).

Martin was also convicted of possessing a controlled substance with no drug-tax stamp under K.S.A. 79-5204(a) and K.S.A. 79-5208. Under K.S.A. 79-5204(a), "[n]o dealer may possess any . . . controlled substance upon which a tax is imposed pursuant to K.S.A. 79-5202, and amendments thereto, unless the tax has been paid as evidenced by an official stamp or other indicia." And K.S.A. 79-5208 provides that "a dealer distributing or possessing . . . controlled substances without affixing the appropriate stamps, labels or other indicia is guilty of a severity level 10 felony."

We have previously considered whether simple possession of an illegal drug is a lesser included offense of no drug-tax stamp. In *Hensley*, we held possession of marijuana was a lesser included offense of no drug-tax stamp because every element of the former offense was found in the latter. 298 Kan. at 437-48. But the defendant in *Hensley* was convicted of misdemeanor possession of marijuana, which carried a lesser penalty than the maximum penalty for the felony offense of no drug-tax stamp. See *State v. Hensley*, No. 102,055, 2010 WL 3211709, at *1 (Kan. App. 2010) (unpublished opinion); see also K.S.A. 2006 Supp. 65-4162(a) (first conviction for possession of marijuana is misdemeanor). Thus, *Hensley* did not consider whether a crime with a greater penalty could nevertheless be a lesser included offense under K.S.A. 2019 Supp. 21-5109(b)(2).

Here, we are faced with a different scenario. At any given criminal history score, the presumptive sentence for a drug severity level 5 felony (such as possession of methamphetamine) is greater than the sentence for a nondrug severity level 10 felony (such as no drug-tax stamp). See K.S.A. 2019 Supp. 21-6804(a); K.S.A. 2019 Supp. 21-6805(a). And the parties disagree whether a crime with a greater penalty than the crime charged can ever be a "lesser included crime" under K.S.A. 2019 Supp. 21-5109(b)(2). Again, that subsection defines a lesser included crime as "a crime where all elements of the *lesser crime* are identical to some of the

elements of the crime charged." (Emphasis added.) Resolution of the parties' disagreement depends on the meaning of the phrase "lesser crime" as used in this provision. And answering this question requires us to engage in statutory interpretation.

1. *We Interpret the Term "Lesser Crime" as Used in K.S.A. 2019 Supp. 21-5109(b)(2) to Mean "a Crime with a Lesser Penalty"*

"The guiding principle in statutory interpretation is that legislative intent governs if that intent can be ascertained." *State v. Strong*, 317 Kan. 197, 203, 527 P.3d 548 (2023). The statute's plain language is the starting point for discerning the Legislature's intent, and we normally give common words their ordinary meaning. But if the statute's language is ambiguous, we may consult legislative history and canons of construction to resolve the ambiguity. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). We determine the plainness or ambiguity of a statute by referencing the language at issue, the context in which that language is used, and the broader context of the statute. *Strong*, 317 Kan. at 203. Generally, "'[a] statute is ambiguous when two or more interpretations can fairly be made.'" *Glaze v. J.K. Williams*, 309 Kan. 562, 564, 439 P.3d 920 (2019).

Here, there are two plausible meanings for the term "lesser crime" as used in K.S.A. 2019 Supp. 21-5109(b)(2). "Lesser" is defined as "of less size, quality, degree, or significance: of lower status." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/lesser; see also *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017) (courts assume words in statute bear ordinary meanings and dictionary definitions are good sources of ordinary meanings). Consistent with this definition, the term could mean "a crime with fewer elements," as Martin posits. On the other hand, it could also mean "a crime with a lesser penalty," as the State argues. And we see nothing in the context of the specific provision or the rest of the statute that clarifies which meaning the Legislature intended. Because the term "lesser crime" can fairly be interpreted in two ways, the statutory language is ambiguous,

and we may look to legislative history and canons of construction to resolve this ambiguity.

In carrying out our task, we begin with the history surrounding the language at issue. In 1998, the Legislature amended K.S.A. 2019 Supp. 21-5109 (previously codified at K.S.A. 21-3107) to include the language in subsection (b)(2). Before then, K.S.A. 21-3107 prohibited convictions for both the crime charged and an "included" crime. It defined "included" crime as "a crime necessarily proved if the crime charged were proved." K.S.A. 21-3107(2)(d) (Furse 1995). The earlier version of the statute also provided that when the crime charged "may include some lesser crime," the trial court had a duty to instruct on both the crime charged and "all lesser crimes of which the accused might be found guilty under the information or indictment and upon the evidence adduced." K.S.A. 21-3107(3) (Furse 1995).

Before the 1998 amendments, our caselaw recognized a distinction between the terms "included crimes," "lesser crimes," and "lesser included crimes" within the context of K.S.A. 21-3107. For instance, in *State v. Fike*, 243 Kan. 365, 367, 757 P.2d 724 (1988), we noted that K.S.A. 21-3107 did not refer to lesser included crimes. Instead, the statute mentioned only "included" crimes and "lesser" crimes. But we explained that "[i]f a lesser crime is included in the crime charged, it is commonly referred to as a lesser included offense under [K.S.A.] 21-3107." 243 Kan. at 367. And particularly relevant here, we defined "[a] lesser offense [as] a crime which carries a lesser penalty than the penalty for the crime charged." 243 Kan. at 367. Thus, *Fike* indicates an understanding that to be "lesser included" a crime must be "lesser"—that is, carrying a lesser penalty than the charged crime. And the crime must also be "included"—which, under *Fike*'s interpretation of K.S.A. 21-3107, meant either a crime sharing all its elements with the crime charged or a crime necessarily proved by the factual allegations in the complaint and the evidence adduced at trial.

Other pre-amendment decisions also utilized this same understanding of "lesser included offense"—that is, a crime that is both "lesser" (in terms of penalty) and "included" (in terms of the elements of the offenses). See *State v. Anthony*, 242 Kan. 493, 497, 749 P.2d 37 (1988) (possession of cocaine is included in offense

of possession of cocaine with intent to sell but is "not a *lesser* included offense . . . because both offenses are found under the same statute, are of the same degree, and carry the same penalty"); *State v. Newell*, 226 Kan. 295, 297, 597 P.2d 1104 (1979) ("Possession of a narcotic drug contains all the required ingredients of a lesser included offense of possession with intent to sell, except one; each offense is of the same dignity; they are equal.").

In 1998, the Legislature revamped K.S.A. 21-3107. L. 1998, ch. 185, § 1. Subsection (2) was amended to prohibit convictions for the crime charged and a "lesser included" crime (rather than an "included" crime). The Legislature also eliminated the language in K.S.A. 21-3107(2)(d) (Furse 1995) ("a crime necessarily proved if the crime charged were proved") and replaced it with the language now codified at K.S.A. 2019 Supp. 21-5109(b)(2) ("a crime where all elements of the lesser crime are identical to some of the elements of the crime charged").

"Upon prosecution for a crime, the defendant may be convicted of either the crime charged or ~~an~~ *a lesser* included crime, but not both. ~~An~~ *A lesser* included crime ~~may be any of the following~~ *is*:

"(a) A lesser degree of the same crime;

"(b) *a crime where all elements of the lesser crime are identical to some of the elements of the crime charged*;

"*(c)* an attempt to commit the crime charged; *or*

"~~(c)~~ *(d)* an attempt to commit a ~~lesser degree of the crime charged; or~~ *crime defined under subsection (2)(a) or (2)(b).*

"~~(d) a crime necessarily proved if the crime charged were proved.~~" L. 1998, ch. 185, § 1 (additions indicated by italics; deletions indicated by strikethrough text).

We presume that when drafting the 1998 amendments, the Legislature acted "with full knowledge of the statutory subject matter, including prior and existing law and judicial decisions interpreting the same." *In re M.M.*, 312 Kan. 872, 875, 482 P.3d 583 (2021). Thus, we presume the Legislature knew of the caselaw defining "lesser crime" as a crime carrying a lesser penalty. We also presume the Legislature knew Kansas courts considered the severity level or penalty of the respective crimes in determining whether a crime was a lesser included offense of another crime. And these presumptions weigh in favor of interpreting the term

"lesser crime" in K.S.A. 2019 Supp. 21-5109(b)(2) to mean "a crime with a lesser penalty."

This interpretation is also consistent with the rule that a "'court should avoid interpreting a statute in such a way that part of it becomes surplusage.'" *State v. Sedillos*, 279 Kan. 777, 782, 112 P.3d 854 (2005). Martin's interpretation of K.S.A. 2019 Supp. 21-5109(b)(2) grants no significance to the term "lesser" in that provision. He claims subsection (b)(2) simply requires all the elements of one crime to be the same as some of the elements of the charged crime. This interpretation renders the terms "lesser" and "included" synonymous. And the Legislature could have omitted the word "lesser" from subsection (b)(2) altogether and the provision would still conform to Martin's interpretation. Thus, Martin's interpretation renders the statutory language surplusage in a way that the State's interpretation would not.

We recognize another canon of construction—the rule of lenity—may weigh in favor of adopting Martin's interpretation of K.S.A. 2019 Supp. 21-5109(b)(2). Under the rule of lenity, courts strictly construe statutory provisions and resolve any reasonable doubt as to their meaning in favor of the defendant. *State v. Newman-Caddell*, 317 Kan. 251, 259-60, 527 P.3d 911 (2023). But the rule of lenity "'is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative intent.'" 317 Kan at 260. And we find the State's proposed interpretation to be the more sensible reading—that is, that a "lesser included" crime must be both "lesser" and "included." Moreover, we need not appeal to the rule of lenity to clarify any lingering ambiguity because other canons of construction allow us to resolve any reasonable doubt as to the meaning of the term "lesser crime" in the statute. See *United States v. Richter*, 796 F.3d 1173, 1188 (10th Cir. 2015) (rule of lenity is rule of last resort courts apply only if ambiguity remains after exhausting all other tools of interpretation).

2. *Neither Possession of Methamphetamine Nor No Drug-Tax Stamp Are a Lesser Included Offense of the Other Under K.S.A. 2019 Supp. 21-5109(b)(2)*

The statutory interpretation above confirms that to be a lesser included crime under K.S.A. 2019 Supp. 21-5109(b)(2), a crime

must be a lesser crime than the crime charged—meaning carrying a lesser penalty—and must be included in the crime charged—meaning all elements of the lesser crime are identical to some elements of the crime charged. Possession of methamphetamine is not a lesser included crime of no drug-tax stamp under subsection (b)(2) because the former carries a greater penalty than the latter. In other words, possession of methamphetamine is not a "lesser" crime compared to the charged crime of no drug-tax stamp.

And no drug-tax stamp is not a lesser included crime of possession of methamphetamine under K.S.A. 2019 Supp. 21-5109(b)(2) because not all elements of the former are identical to some elements of the latter. The offense of possession of methamphetamine makes it illegal for any person to possess methamphetamine. K.S.A. 2019 Supp. 21-5706(a). The offense of no drug-tax stamp makes it illegal for a dealer to possess a controlled substance, including methamphetamine, without affixing the appropriate stamp. K.S.A. 79-5204(a); K.S.A. 79-5208. And a dealer is defined as "any person who, in violation of Kansas law . . . possesses more than . . . one gram of any controlled substance." K.S.A. 79-5201(c). The charged crime of no drug-tax stamp requires two elements that possession of methamphetamine does not: failure to affix the appropriate stamp and possession of more than one gram of a controlled substance. Thus, the offense of no drug-tax stamp is not an "included" offense of possession of methamphetamine.

Because neither possession of methamphetamine nor failure to affix a drug-tax stamp are a lesser included offense of the other under K.S.A. 2019 Supp. 21-5109(b)(2), Martin's convictions are not multiplicitous under that statute.

C. *Martin's Convictions Do Not Violate Federal and State Constitutional Protections Against Double Jeopardy*

Our conclusion that Martin's convictions are not multiplicitous under K.S.A. 2019 Supp. 21-5109(b)(2) does not fully resolve Martin's double-jeopardy challenge. While Martin primarily rests his argument on that statute, he also argues that his convictions violate the Double Jeopardy Clauses of the United States and

Kansas Constitutions. And those provisions prohibit multiple punishments for the same offense. K.S.A. 2019 Supp. 21-5109(b)(2) is a clear declaration that the Legislature did not intend to impose multiple punishments for both a charged crime and a lesser included crime. But it is also possible that the Legislature did not intend to impose multiple punishments even if possession of methamphetamine is not a lesser included offense of no drug-tax stamp under that statute.

Thus, we must also consider whether Martin's convictions are multiplicitous under the two-part test identified in *Schoonover*. As already mentioned, the first part of this test (whether the convictions arose from unitary conduct) is already settled in Martin's favor. So, we proceed to the second part of the test to determine whether there are two offenses or one by statutory definition. *Schoonover*, 281 Kan. 453, Syl. ¶ 12.

Our analysis under the second part of the *Schoonover* test requires us to consider whether both the statutory offense of possession of methamphetamine and the statutory offense of no drug-tax stamp each require proof of an element that the other does not. 281 Kan. at 498. As explained above, no drug-tax stamp requires two elements that possession of methamphetamine does not: failure to affix the appropriate stamp and possession of more than one gram of a controlled substance. See K.S.A. 79-5201(c); K.S.A. 79-5204(a); K.S.A. 79-5208. But possession of methamphetamine has no elements not included in no drug-tax stamp. See K.S.A. 2019 Supp. 21-5706(a). So, even though the elements of the two crimes are not identical, they could still be said to be the "same offense" for double-jeopardy purposes. See *United States v. Isabella*, 918 F.3d 816, 847 (10th Cir. 2019) ("In general, statutes punish the 'same offense' when one offense contains all the elements of another even if it contains additional elements."). Thus, we would not presume the Legislature intended to impose punishments for both crimes. See *Hensley*, 298 Kan. at 435 ("[I]f each statute contains an element not found in the other statute, presumably the legislature intended punishment for both crimes.").

But our analysis does not end here. As already noted, the same-elements test is merely a rule of construction courts use to determine whether the Legislature intended to impose multiple

punishments. *Hensley*, 298 Kan. at 435-36; see *Schoonover*, 281 Kan. 453, Syl. ¶¶ 6, 7. And "the rule should not be controlling where there is a clear indication of contrary legislative intent." 281 Kan. 453, Syl. ¶ 7. In determining whether there is contrary legislative intent, we consider the language, structure, and legislative history of the statutes as well as the social evil each statute seeks to address. See 281 Kan. at 469-70, 504.

We begin by noting that even though all elements of possession of methampheta-mine are included in no drug-tax stamp, these statutes do not proscribe the same conduct. K.S.A. 2019 Supp. 21-5706(a) focuses on the affirmative act of possessing an illegal narcotic. On the other hand, K.S.A. 79-5204 and K.S.A. 79-5208 target the omission of failing to pay the tax imposed on marijuana and controlled substances.

Indeed, we have previously distinguished these offenses on these grounds. In *State v. Jensen*, 259 Kan. 781, 915 P.2d 109 (1996), we considered whether the imposition of the 100% penalty for failure to pay the drug tax under K.S.A. 79-5208 barred a subsequent criminal prosecution for possession of the illegal drug. We concluded the penalty for failure to pay the tax was not a punishment for purposes of double jeopardy. 259 Kan. at 792, 796. But we also recognized that failure to pay the drug tax was a different offense than possession of the illegal drug. 259 Kan. at 796. As we explained, "[t]he express language of 79-5208 supports the understanding that what is being penalized is the failure to pay the drug tax" and not the possession of the drug. 259 Kan. at 796. Thus, we concluded multiple punishments imposed for the two different offenses would not implicate double-jeopardy protections. 259 Kan. at 796.

Further, the statutes are designed to achieve different goals. See *Schoonover*, 281 Kan. at 504 (finding Legislature intended to impose multiple punishments because concerned statutory offenses targeted separate evils). The offense of simple possession serves as a deterrent to drug usage. But no drug-tax stamp, while also serving as a deterrent to drug usage, specifically targets "those possessing illegal drugs in larger quantities in response to legislative concern that this flourishing underground economy not operate on a tax-free basis." *State v. Gulledge*, 257 Kan. 915, 919,

924, 896 P.2d 378 (1995); see also *State v. Matson*, 14 Kan. App. 2d 632, 640, 798 P.2d 488 (1990) (discussing legislative history behind drug tax).

The language and structure of the relevant statutes provide further indication that the Legislature intended to impose multiple punishments. For one, no drug-tax stamp is part of the Kansas Drug Tax Act, K.S.A. 79-5201 et seq. (the Act), which is included in the Kansas tax code. In contrast, simple possession is one of several offenses separately enacted as part of the Kansas criminal code. The Act authorizes a conviction and sentence for failure to affix a drug-tax stamp. K.S.A. 79-5208. And the sentence imposed for no drug-tax stamp is determined under the nondrug sentencing grid, while the sentence for simple possession is determined under the drug sentencing grid.

In sum, we hold Martin's convictions for possession of methamphetamine and no drug-tax stamp are not multiplicitous in violation of K.S.A. 2019 Supp. 21-5109(b)(2). Possession of methamphetamine is not a lesser crime of no drug-tax stamp because it carries a greater penalty. Thus, possession of methamphetamine is not a lesser included crime of no drug-tax stamp under subsection (b)(2). And the crime of no drug-tax stamp has elements not included in possession of methamphetamine. Thus, the crime of no drug-tax stamp is not a lesser included offense of possession of methamphetamine under subsection (b)(2).

We also hold Martin's convictions are not multiplicitous in violation of the Double Jeopardy Clauses of the federal and state Constitutions. While all elements of possession of methamphetamine are included in the charged crime of no drug-tax stamp, other indicators of legislative intent show the Legislature intended to impose multiple punishments under the different statutes. Thus, Martin's convictions and sentences are not multiplicitous and do not violate constitutional double-jeopardy protections.

II. *The District Court Did Not Err by Denying Martin's Motion to Suppress the Methamphetamine Found in the Pill Bottle*

Next, Martin argues the district court erred by denying his motion to suppress, and the Court of Appeals erred by affirming the district court's judgment. First, he argues we should reverse the

district court's ruling on the suppression motion because it failed to identify any exception justifying Detective Da Giau's warrantless search of the pill bottle. Second, he argues the State failed to carry its burden to prove the search fell within the search-incident-to-arrest exception to the warrant requirement. Finally, he claims the search exceeded the permissible scope of a search incident to arrest. Before reaching the merits of Martin's claims, we first set forth additional facts relevant to the analysis and then identify the controlling legal framework.

A. *Additional Facts*

Before trial, Martin moved to suppress the methamphetamine Detective Da Giau discovered in the pill bottle. He argued the search of the bottle was unlawful because Da Giau did not have a warrant, the contents of the bottle were not in plain view, and Martin was not under arrest at the time of the search.

At the evidentiary hearing on Martin's motion, Detective Da Giau testified she pulled Martin over for a defective tag light and asked him to step out of the car after she saw an open container of alcohol in the backseat. Officers conducted a pat down search of Martin, removing two knives. Da Giau then searched the car. She found a straw with a white powdery substance on it, which she knew to be drug paraphernalia. She also found five open containers of alcohol and a butane lighter. Da Giau said she planned to arrest Martin after finding those items.

Detective Da Giau then offered to let Martin sit in her patrol car after hearing him complain about the heat. Before he got in her patrol car, she asked if he had anything else on him. He handed her some cash and a cell phone. She asked if he had anything else, and he grabbed an opaque pill bottle from his pocket and handed it to her. Martin told her the bottle contained his heartburn medication.

After getting Martin situated, Detective Da Giau opened the bottle and discovered methamphetamine. She opened the bottle because when the bottle shifted in her hand, it did not feel like it contained the pills depicted on the outside of the bottle. Instead, the contents felt "more scratchy."

Based on the evidence presented at the suppression hearing, the district court denied Martin's motion to suppress. The court found Detective Da Giau had already found multiple open containers of alcohol, a straw with white powdery residue, and a butane lighter in Martin's car before she searched the pill bottle. It also found misdemeanor transportation of an open container is an arrestable offense, and Da Giau already knew she was going to place Martin under arrest when she opened the pill bottle.

At trial, the district court granted Martin a continuing objection to the admission of evidence challenged in the motion to suppress before Detective Da Giau took the stand. Da Giau testified that she placed Martin under arrest after seeing the contents of the pill bottle but before collecting the items of evidence that she had identified during the search of Martin's car.

On appeal, the Court of Appeals affirmed the district court's denial of Martin's motion to suppress. The panel held the search was a valid search incident to a lawful arrest. *Martin*, 2023 WL 2558563, at *3-4. And the panel held the search was also within the scope of a search incident to arrest. 2023 WL 2558563, at *5.

B. *Standard of Review and Relevant Legal Framework*

Appellate courts apply a bifurcated standard of review to a district court's ruling on a motion to suppress. "[T]he factual underpinnings of the district court's decision are reviewed for substantial competent evidence and the ultimate legal conclusion is reviewed de novo." *State v. Parker*, 309 Kan. 1, 4, 430 P.3d 975 (2018).

A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights unless the search falls within a recognized exception to the warrant requirement. *State v. Bates*, 316 Kan. 174, 176, 513 P.3d 483 (2022). "Those recognized exceptions are: 'consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses.'" *State v. Sanchez-Loredo*, 294 Kan. 50, 55, 272 P.3d 34 (2012). When a defendant moves to suppress evidence obtained as the result of a warrantless search, the State bears the burden of showing

the lawfulness of the search. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018).

C. *The District Court's Order is Adequate for Appellate Review*

To begin with, Martin asks us to reverse the district court's ruling on his motion to suppress because the court did not identify a specific exception to the warrant requirement that applied to the search. But Martin cites no authority that the remedy for such an omission is reversal of the ruling. And we have previously reviewed and affirmed a district court's ruling on a motion to suppress even though the district court did not specifically identify the applicable exception. See *State v. Conn*, 278 Kan. 387, 394, 99 P.3d 1108 (2004) (finding statements in written order denying motion to suppress sufficiently broad to enable court to review whether probable cause plus exigent circumstances exception applied to search).

Additionally, parties have an obligation to object to inadequate fact-findings and legal conclusions to preserve issues for appeal. *Fischer v. State*, 296 Kan. 808, 825, 295 P.3d 560 (2013). Where no objection is made, we presume the trial court found all the facts necessary to support its judgment. *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006). Even so, we may consider a remand for additional fact-findings and legal conclusions if the district court's ruling is inadequate to disclose the controlling facts or basis for the court's findings. *State v. Rodriguez*, 302 Kan. 85, 91, 350 P.3d 1083 (2015); *Progressive Products, Inc. v. Swartz*, 292 Kan. 947, 961-62, 258 P.3d 969 (2011).

Here, the district court's order was adequate to disclose the legal basis of its ruling—that the search of the pill bottle was a search incident to arrest. Indeed, this is how Martin and the Court of Appeals interpreted the order. And because neither party objected to inadequate fact-findings, we can presume the district court made all findings necessary to support its judgment.

D. *The Search Fell Within the Search-Incident-To-Lawful-Arrest Exception*

Martin argues the search of the pill bottle was not a valid search incident to a lawful arrest because it occurred before his formal arrest

and the record does not show his arrest followed shortly after the search.

Incident to a lawful arrest, an arresting officer may search the arrestee's person and the area within the arrestee's immediate control, including personal property immediately associated with the person of the arrestee. *United States v. Chadwick*, 433 U.S. 1, 15, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991); *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). Such a search is justified by the officer's need to "remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." 395 U.S. at 763.

To be a valid search incident to arrest, the search must generally be contemporaneous with the arrest—that is, the search cannot be "'remote in time or place from the arrest.'" *United States v. Pacheco*, 884 F.3d 1031, 1039 (10th Cir. 2018); see also *State v. Wissing*, 52 Kan. App. 2d 918, 922, 379 P.3d 413 (2016). But the arrest need not occur before the search to fall within this exception to the warrant requirement. A warrantless search preceding an arrest is a valid search incident to arrest if "'(1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search.'" *Conn*, 278 Kan. at 393 (quoting *United States v. Anchondo*, 156 F.3d 1043, 1045 [10th Cir. 1998]); see also *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

The parties do not dispute that the search of the pill bottle occurred before Martin's arrest. Thus, to determine whether the search was a valid search incident to arrest, we must answer two questions: Was there a legitimate basis to arrest Martin before the search? And did Martin's arrest occur shortly after the search?

Substantial competent evidence supports a finding that Detective Da Giau had a legitimate basis to arrest Martin before she searched the pill bottle. Da Giau stopped Martin for a defective

tag light and found several open containers of alcohol in Martin's vehicle. Her discovery of the containers provided probable cause that Martin had committed the crime of transportation of an open container under K.S.A. 2019 Supp. 8-1599(b). See *Smith v. Kansas Dept. of Revenue*, 291 Kan. 510, 515, 242 P.3d 1179 (2010) (probable cause exists where officer's knowledge of surrounding facts and circumstances creates reasonable belief that defendant committed a specific crime). And under Kansas statute, Da Giau had authority to arrest Martin because he committed the crime within Da Giau's view. See K.S.A. 22-2401(d) (police may arrest a person for "[a]ny crime, except a traffic infraction or a cigarette or tobacco infraction, [that] has been or is being committed by the person in the officer's view").

While Detective Da Giau had a legitimate basis to arrest Martin before the search, the State must also show that Martin's arrest occurred shortly after the search. *Conn*, 278 Kan. at 393; see also *Knowles v. Iowa*, 525 U.S. 113, 116-17, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) (warrantless search during traffic stop not justified on basis that officer technically could arrest for traffic infraction when officer did not actually make an arrest). Martin argues the record does not show he was arrested or that his arrest occurred shortly after the search. He highlights that the State presented no evidence regarding the timing of his arrest at the suppression hearing. But Detective Da Giau testified at trial that to the best of her recollection, she arrested Martin after searching the pill bottle and before collecting the items of evidence that she identified during the search of Martin's car. The Court of Appeals held Da Giau's trial testimony supported a finding that Da Giau arrested Martin shortly after searching the pill bottle. *Martin*, 2023 WL 2558563, at *3-4.

We agree with Martin that the State failed to present any evidence at the suppression hearing establishing the timing of Martin's arrest relative to the search. But we also agree with the Court of Appeals that Detective Da Giau's trial testimony provides substantial competent evidence that Martin's arrest occurred shortly after the search. Thus, the outcome of this issue turns on whether we may consider evidence presented at trial when reviewing a district court's ruling denying a pretrial motion to suppress.

We addressed an adjacent scope-of-review issue in *State v. Jones*, 300 Kan. 630, 333 P.3d 886 (2014). There, we declined to consider evidence presented at a first suppression hearing before a district magistrate judge when reviewing the district court judge's order suppressing evidence after a second hearing. We reasoned that the State was not entitled to a "second bite of the apple" to meet its evidentiary burden to show a search and seizure was lawful by relying on evidence presented at the earlier suppression hearing. 300 Kan. at 645. But we cited no authority for this assertion. We thus decline to rely on *Jones* to craft a more general rule limiting our scope of review in all cases to the evidence presented at the suppression hearing.

The well-established federal rule is that an appellate court may consider both evidence presented at a suppression hearing and evidence presented at trial when reviewing a district court's denial of a motion to suppress. See, e.g., *United States v. Montemayor*, 55 F.4th 1003, 1008 (5th Cir. 2022); *United States v. Gondres-Medrano*, 3 F.4th 708, 713 n.1 (4th Cir. 2021); *United States v. Brown*, 996 F.3d 998, 1002 n.1 (9th Cir. 2021); *United States v. Santillan*, 902 F.3d 49, 58 n.3 (2d Cir. 2018); *United States v. House*, 825 F.3d 381, 388 (8th Cir. 2016); *United States v. Fonseca*, 744 F.3d 674, 680 (10th Cir. 2014); see also *State v. Henning*, 975 S.W.2d 290, 297 (Tenn. 1998) ("[T]he majority rule is that appellate courts may consider evidence adduced at trial in evaluating the correctness of a pretrial ruling on a motion to suppress. This rule is well established and uniformly followed by the federal courts.").

Many state courts also follow the same rule. See, e.g., *State v. Randall*, 94 Ariz. 417, 419, 385 P.2d 709 (1963); *People v. Caballero*, 102 Ill. 2d 23, 36, 464 N.E.2d 223 (1984); *Commonwealth v. Young*, 349 Mass. 175, 178, 206 N.E.2d 694 (1965); *State v. Sharp*, 217 Mont. 40, 43, 702 P.2d 959 (1985); *State v. Huffman*, 181 Neb. 356, 357-58, 148 N.W.2d 321 (1967); see also *Henning*, 975 S.W.2d at 297-98 (listing cases).

We are persuaded by two rationales that support this rule. First, if the admissibility of the challenged evidence is ultimately established at trial, then the defendant is not prejudiced by the denial of a motion to

suppress. See *Young*, 349 Mass. at 178. Second, a district court's pretrial ruling on a motion to suppress is not final and may be changed after hearing trial testimony. See *People v. Braden*, 34 Ill. 2d 516, 520, 216 N.E.2d 808 (1966); *Sharp*, 217 Mont. at 43.

Indeed, this second rationale dovetails with our contemporaneous-objection rule. Under that rule, when a district court denies a pretrial motion to exclude evidence, we require the defendant to contemporaneously object to the admission of the challenged evidence at trial to preserve the issue for appellate review. K.S.A. 60-404; *State v. Richard*, 300 Kan. 715, 726, 333 P.3d 179 (2014). The purpose of this rule is to enable district courts to reconsider pretrial evidentiary rulings after hearing how the evidence unfolds at trial. *State v. Kelly*, 295 Kan. 587, 590, 285 P.3d 1026 (2012). Because we require parties to give district courts an opportunity to reconsider pretrial evidentiary rulings based on the evidence adduced at trial, it is both logical and consistent that appellate courts likewise consider the trial evidence on review.

When considering the evidence presented at the suppression hearing along with the evidence adduced at trial, we find substantial competent evidence supports a finding that Martin's arrest occurred shortly after the search. Detective Da Giau did not testify at trial as to the exact amount of time that elapsed between the search and the arrest. But she did testify that the next thing she did after finding the methamphetamine was to arrest Martin, and she then proceeded to complete her search of the car. This testimony establishes the search and Martin's arrest were sufficiently contemporaneous for purposes of the search incident to arrest exception. See *United States v. Torres-Castro*, 470 F.3d 992, 998 (10th Cir. 2006) (noting "that courts have found that a search may be incident to an arrest in cases where the search and arrest were separated by times ranging from five to sixty minutes"); cf. *Conn*, 278 Kan. at 393-94 (arrest did not follow shortly after a search when State presented no evidence of time of arrest and record showed only that defendant was booked into jail three hours later).

E. *The Search Was Within the Scope of a Search Incident to Arrest*

Having concluded the search-incident-to-arrest exception applies to Detective Da Giau's search of the pill bottle, we now consider whether the search exceeded its permissible scope. Martin argues he

had a heightened privacy interest in the pill bottle because it had a lid, and thus Detective Da Giau needed to obtain a search warrant before opening the bottle. He also urges us to reconsider the general scope of searches incident to arrest.

In *Chimel*, the United States Supreme Court limited the scope of a search incident to arrest to the arrestee's person and the area within the arrestee's immediate control. 395 U.S. at 762-63. This limitation corresponds to the justifications supporting the exception—protecting the safety of the arresting officers and preventing the destruction of evidence. 395 U.S. at 762-63.

Later, in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Court applied *Chimel* to the search of a cigarette pack found on the arrestee's person. In *Robinson*, an officer arrested the defendant for driving with a revoked license. While patting down the defendant, the officer felt something in the defendant's coat pocket that he could not identify. He pulled out the object, which turned out to be a crumpled-up cigarette pack. The officer could tell the pack did not contain cigarettes, so he opened it and found capsules of heroin. On review, the Court held the officer's search of the cigarette pack was a lawful search incident to arrest under the Fourth Amendment. *Robinson*, 414 U.S. at 236. The Court reasoned the risks identified in *Chimel* are present in all custodial arrests, and thus a lawful arrest authorizes a full search of the arrestee's person regardless of any specific concerns about officer safety or destruction of evidence. 414 U.S. at 235-36.

While the *Robinson* court drew no line between the search of the arrestee's person and the search of the cigarette pack, the Court later clarified that "this exception was limited to 'personal property . . . immediately associated with the person of the arrestee.'" *Riley v. California*, 573 U.S. 373, 384, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014) (quoting *Chadwick*, 433 U.S. at 15). And lower federal courts have upheld searches of various items or containers found on an arrestee's person incident to arrest. See, e.g., *United States v. Armstrong*, 16 F.3d 289, 294 (8th Cir. 1994) (search of wallet on person); *United States v. Ziller*, 623 F.2d 562, 563 (9th Cir. 1980) (search of wallet on person); *United States v. Ouedraogo*, 824 Fed. Appx. 714, 720 (11th Cir. 2020) (unpublished opinion) (search of notebook inside arrestee's purse).

However, in *Riley*, the Court declined to extend *Robinson* to permit warrantless searches of cell phones found on an arrestee's person. The *Riley* decision rested on two grounds. First, digital data on cell phones does not present the two risks identified in *Chimel* (harm to officers and destruction of evidence). *Riley*, 573 U.S. at 386. Second, cell phones, "as a category, implicate privacy concerns far beyond those implicated by" the search of other physical objects typically found on an arrestee's person. 573 U.S. at 393.

We find the outcome here is controlled by *Robinson*. Like the officer in *Robinson*, Detective Da Giau searched a container, a pill bottle, Martin had placed in a pocket of his clothing around the time of his arrest. See 414 U.S. at 222-23. Also like in *Robinson*, the feel of the container aroused Da Giau's suspicions regarding its contents. See 414 U.S. at 223. While the record suggests a short delay between the time Da Giau secured the bottle and when she searched it, we do not find this delay significant enough to render the search invalid. Indeed, the record suggests the delay lasted only long enough for Da Giau to complete her task of trying to make Martin more comfortable in the heat. See *Greene v. State*, 585 S.W.3d 800, 808 (Mo. 2019) (lawful arrest justified reasonably delayed search of cigarette pack found in arrestee's pocket at time of arrest).

Martin asserts his case is more like *Riley* than *Robinson.* He claims that like the defendant in *Riley*, who had a heightened privacy interest in his cell phone, Martin had a heightened privacy interest in the pill bottle because the bottle had a lid. He claims this distinguishes the bottle from the cigarette pack in *Robinson*, the contents of which could have fallen out by happenstance.

But the *Riley* decision undercuts Martin's comparison. There, the Court reaffirmed that *Robinson* "strikes the appropriate balance" between individual privacy and law enforcement interests "in the context of physical objects." *Riley*, 573 U.S. at 386. An arrestee has, at best, a marginally greater privacy interest in a closed, unlocked container concealed in his or her clothing than a cigarette pack. This is far different from the privacy interest in a cell phone, which contains vast quantities of information literally in the hands of an arrestee. For this reason, a cell phone differs in

both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. See 573 U.S. at 386, 393.

Martin also implores us to reconsider the permissible scope of a search incident to a lawful arrest given the technological advances that have enabled officers to secure warrants much more quickly now than in the past. But we are not persuaded this development undermines the rationale behind an officer's authority to search an arrestee's person without first acquiring a warrant. As the *Robinson* Court explained, "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." *Robinson*, 414 U.S. at 235. Moreover, "unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Riley*, 573 U.S. at 387. Even though police can attain warrants more quickly now, an officer's decision on how and where to search an arrestee's person remains a quick on-the-spot judgment, and unknown physical objects (as opposed to digital data) continue to pose the same risks justifying the search-incident-to-arrest exception.

Thus, we hold Detective Da Giau's search of the pill bottle did not exceed the permissible scope of a search incident to arrest because, like in *Robinson*, she searched only a physical container carried within Martin's clothing around the time of arrest.

We affirm Martin's convictions and sentence.

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

State v. Edwards

No. 125,632

STATE OF KANSAS, *Appellee*, v. JEROME EDWARDS, *Appellant*.

(544 P.3d 815)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Forensic DNA Testing Statute—Court May Act on Filings after Docketed Appeal.* The plain language of K.S.A. 21-2512 grants the district court jurisdiction to consider and act on filings made under the statute even after an appeal has been docketed.

2. SAME—*Forensic DNA Testing Statute—Application of Law of Case Doctrine.* The law of the case doctrine applies to motions for DNA testing under K.S.A. 21-2512 and prevents a party from relitigating an issue already decided in the same proceeding.

Appeal from Shawnee District Court; C. WILLIAM OSSMANN, judge. Submitted without oral argument November 3, 2023. Opinion filed March 15, 2024. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, was on the briefs for appellant.

Michael R. Serra, deputy district attorney*, Michael F. Kagay,* district attorney, and *Kris W. Kobach,* attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: In 2011, 2018, and 2022, Jerome Edwards filed motions in the district court under K.S.A. 21-2512 seeking DNA testing of various biological material on evidence. His 2018 and 2022 motions asked for testing of biological materials on the same two items—a cigarette butt and a bullet. The district court denied both motions, and Edwards now appeals the denial of his 2022 motion.

On appeal, Edwards argues the district court erred in applying the law of the case doctrine to deny his 2022 motion and in finding that the motion was an attempt to relitigate issues already settled through Edwards' unsuccessful 2018 motion. Edwards contends the order denying his 2018 motion can have no preclusive effect under the law of the case doctrine because the district court did not have jurisdiction over his case when it denied the motion, which means the order was void. His jurisdiction argument relies on the fact that he had an appeal pending in the same case when

the judge ruled on the 2018 motion. He cites the general rule that a district court loses jurisdiction when an appeal is filed.

While we recognize this general rule, we disagree that it applies to a district court's consideration of motions under K.S.A. 21-2512. In *State v. Thurber*, 313 Kan. 1002, 492 P.3d 1185 (2021), we recognized K.S.A. 21-2512 is an exception to the general rule. We noted that K.S.A. 21-2512(a) allowed a defendant in custody for certain crimes to seek DNA testing "at any time" and "[n]otwithstanding any other provision of law." We held this plain language granted the district court jurisdiction to consider and act on a motion seeking DNA testing under K.S.A. 21-2512 even after an appeal has been docketed. 313 Kan. 1002, Syl. ¶ 5.

Today, we hold that *Thurber* controls our decision and, applying it here, we conclude the district court had jurisdiction to deny Edwards' 2022 motion. The order denying Edwards' 2018 motion became the law of the case and, because Edwards' 2018 and 2022 motions sought DNA testing of the biological material on the same evidence, the district court properly applied the law of the case doctrine to deny Edwards' 2022 motion. We thus affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying Edwards convictions, which arise from the shooting of a marijuana dealer in a robbery attempt turned deadly, are developed in his prior appeals. *State v. Edwards*, 311 Kan. 879, 467 P.3d 484 (2020) (affirming denial of motion for new trial based on results of DNA testing); *State v. Edwards*, 264 Kan. 177, 955 P.2d 1276 (1998) (affirming conviction on direct appeal and remanding for nunc pro tunc correction of journal entry of sentencing). Edwards was convicted of felony first-degree murder, conspiracy to possess with intent to sell hallucinogenic drugs, and aggravated robbery.

Multiple witnesses testified they saw Edwards arrive at the residence of the victim, Donnie Smart. A struggle ensued between the two, and witnesses heard gunshots and saw Smart slump to his knees and then to the ground.

After this court affirmed Edwards' conviction and sentences on direct appeal, he mounted several collateral attacks. See *Edwards v. Roberts*, 479 Fed. Appx. 822, 2012 WL 1573619 (10th

Cir. 2012); *Edwards v. State*, No. 99,868, 2009 WL 1858243 (Kan. App. 2009) (unpublished opinion), *rev. denied* May 18, 2010; *Edwards v. State*, 31 Kan. App. 2d 778, 73 P.3d 772 (2003); *Edwards v. State*, No. 83,575, 2000 WL 36746174 (Kan. App. 2000) (unpublished opinion).

After filing those cases, Edwards filed a motion in 2011 seeking DNA testing of blood samples, clothes, drug paraphernalia, and a broken watch. The district court granted the motion. DNA testing of some items was inconclusive or "effectively excluded" Edwards as a source of the DNA. Edwards then asked for a new trial based on the DNA results. The district court conducted an evidentiary hearing, but ultimately denied relief. The court recognized that the DNA test results favored Edwards and that no physical evidence had been admitted at trial linking Edwards to the murder. Even so, the court denied Edwards a new trial after noting that Edwards' attorney emphasized the lack of physical evidence throughout the trial, but the jury convicted him despite knowing no physical evidence linked him to the crime. The court held it was not reasonably probable the DNA test results would change the outcome of his trial because the eyewitness accounts and overall totality of the evidence provided strong evidence that Edwards committed the crimes.

Edwards filed a notice of appeal in which he sought appellate review of the district court order denying his motion for a new trial "and all other adverse or partially adverse rulings made in the course [of] the pursuit of his motion for DNA testing filed September 20, 2011." This court affirmed the district court. *Edwards*, 311 Kan. at 892.

In 2018, while Edwards' appeal of his 2011 motion was pending, he filed another pro se motion for DNA testing. This time he requested testing of two additional untested items—a bullet and a cigarette butt. The district court denied the motion, reasoning the new tests results would be cumulative and nonexculpatory even if they favored Edwards because the jury knew there was no implicating physical evidence, including DNA evidence, admitted at trial. Edwards did not appeal this denial.

In early 2022, Edwards filed yet another motion for DNA testing, which was functionally identical to the 2018 motion. The district court denied the motion, holding that "Edwards' present petition is identical to his Second Petition, which was denied by this Court in April 2019. This Court will not relitigate this issue and relies on the doctrine of the law of the case to deny Edwards' request."

Edwards now appeals that ruling.

ANALYSIS

Edwards argues the law of the case doctrine cannot be applied to preclude his request for new testing. He contends the district court lost jurisdiction over his case when he filed his notice of appeal in May 2018 and thus lacked jurisdiction to deny his November 2018 motion. For support, he cites the general rule that an appeal divests the district court of jurisdiction over the case. See *State v. Thomas*, 307 Kan. 733, 749, 415 P.3d 430 (2018) ("Once the case is appealed and the appeal is docketed, the district court loses jurisdiction."). Second, he argues the statute does not restrict successive motions and does not say that res judicata or other preclusion principles apply to K.S.A. 21-2512 motions.

Questions of jurisdiction, interpretation of statutes, and application of preclusion doctrines—all of which come into play in this analysis—present issues of law. *State v. Smith*, 311 Kan. 109, 111, 456 P.3d 1004 (2020); *State v. Parry*, 305 Kan. 1189, 1194, 390 P.3d 879 (2017). Exercising our de novo review of questions of law, we reject both of Edwards' arguments.

The District Court had Jurisdiction over the 2018 Motion

In *Thurber*, 313 Kan. 1002, we rejected an argument like Edwards'. There, we held a district court did not lose jurisdiction over another defendant's DNA testing motion even though an appeal was underway. The *Thurber* court acknowledged the general rule, subject to several exceptions, that "'once a district court enters a valid judgment and the time for appeal has expired, a district court lacks jurisdiction to consider a postconviction motion. [Citations omitted.]' *State v. Smith*, 309 Kan. 977, 981-82, 441 P.3d 1041 (2019)." *Thurber*, 313 Kan. at 1007; but see *Harsch v. Miller*, 288

Kan. 280, 285-87, 200 P.3d 467 (2009) (listing cases where district courts retained jurisdiction over portions of case even while other parts were on appeal).

The *Thurber* court held the language of the DNA testing statute created an exception to that general rule:

"Twice, K.S.A. 2020 Supp. 21-2512 authorizes action 'notwithstanding any other provision of law'—a phrase that, when combined with the absence of any limitation on the timing of a petition ('at any time after conviction') or the timing of the district court's authority to appoint counsel for a petitioner ('at any time'), leads us to conclude that the Legislature intended to carve out K.S.A. 2020 Supp. 21-2512 as a special extension of the district court's jurisdiction." 313 Kan. at 1007.

This holding suggests that the district court had jurisdiction over Edwards' 2018 motion. But Edwards argues *Thurber* can be distinguished. He notes that *Thurber* involved a direct appeal raising issues separate from whether DNA testing should be performed. Here, both the appeal of his 2011 motion and his 2018 motion relate to DNA testing. He adds that "[n]owhere in the reasoning of *Thurber* is the suggestion that the district court retains jurisdiction of the same subject matter under appellate review." He also contends the general divestiture rule must apply when the subject of the appeal is also presented in the motion pending in the district court. Otherwise, conflicting rulings could result, creating confusion.

The *Thurber* court recognized the same concerns Edwards now raises. But the language of K.S.A. 21-2512, and the policy behind it, led the court to conclude the district court had authority to hear a motion even when a case is on appeal:

"The risk of procedural confusion or uncertainty—or for a district court's ruling under K.S.A. 2020 Supp. 21-2512(f) to render moot an entire ongoing direct appeal—is not insignificant. But the Legislature has decided to expand the district court's jurisdiction to proceedings under K.S.A. 2020 Supp. 21-2512, irrespective of ongoing appellate proceedings.

"We further recognize the policy goals behind such an expansion in the case of DNA evidence, which, by its very nature, is impermanent. A discussion of the likelihood of such degradation—or of the methods used by law enforcement to prevent such degradation—is far beyond the purview of this opinion. Suffice it to say that we, like the Legislature, recognize the risk that an innocent individual convicted of a crime covered by the statute could lose the ability to establish

innocence via postconviction procedures due solely to the caprice of fate and time.

"Consequently, we conclude that K.S.A. 2020 Supp. 21-2512 grants continuing jurisdiction to 'the court that entered the judgment' to consider a petition for DNA testing 'at any time' following conviction and to appoint counsel 'at any time,' *regardless of other ongoing appellate proceedings*." (Emphasis added). 313 Kan. at 1008-09.

Granted, the *Thurber* court continued by restating its holding in the context of the case before it—a direct appeal without appellate finality. But that statement merely reflected the facts of the case. It did not derive from language in the statute, for there is no such limitation expressed by the Legislature. Rather, the Legislature chose broad, unrestricted language—language about "notwithstanding any other provision of the law" and "at any time." Imposing the limitation Edwards seeks would require us to add words creating an exception that would say something like "anytime, except when a case is on appeal." But courts do not add or delete words to plain language written by the Legislature, and the words of K.S.A. 21-2512 are clear. 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).

Applying *Thurber*, we hold that the district court had jurisdiction to deny Edwards' November 2018 motion. This means the court's order became the law of the case. The remaining question is whether the district court erred by applying the law of the case doctrine to a successive motion under K.S.A. 21-2512.

Law of the Case Can Apply to a K.S.A. 21-2512 Motion

Edwards argues the law of the case doctrine should not be applied because K.S.A. 21-2512 does not expressly limit successive motions. In contrast, the Legislature has explicitly stated in another postconviction statute that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." K.S.A. 2023 Supp. 60-1507(c). His argument, which presumes a statute must authorize use of the doctrine, presents a legal question over which an appellate court exercises unlimited review. *Parry,* 305 Kan. at 1194. Our unlimited review is guided by the history and purpose of the doctrine.

In general, the law of the case doctrine is a discretionary preclusion doctrine courts employ to avoid indefinitely relitigating the matter at issue. *Parry*, 305 Kan. at 1194; see *State v. Collier*, 263 Kan. 629, 631-34, 952 P.2d 1326 (1998) (discussing the doctrine and its history). *Collier* explains that the doctrine derives from court decisions that date back at least to the 1800's. 263 Kan. at 631 (citing *Himely v. Rose*, 9 U.S. [5 Cranch] 313, 3 L. Ed. 111 [1809]; *Headley v. Challiss*, 15 Kan. 602, 605-06 [1875]). The doctrine applies not only to matters decided in prior proceedings, but also to matters in prior proceedings for which the party failed to seek review. *Parry*, 305 Kan. at 1195 (citing *Smith v. Bassett*, 159 Kan. 128, Syl. ¶ 3, 152 P.2d 794 [1944]). And Kansas appellate courts have applied the doctrine in many criminal cases. See 305 Kan. at 1194 (discussing variety of cases).

Contrary to Edwards' argument, we do not see the Legislature's inclusion of the successive motion provision in K.S.A. 60-1507 as an indication that K.S.A. 21-2512 needed a statement like that in K.S.A. 2023 Supp. 60-1507(c) before a court could apply the law of the case doctrine. Edwards presents no legal or policy reasons suggesting courts cannot apply the doctrines in the absence of a statute. And we see nothing in K.S.A. 21-2512 that would prevent application of a preclusion doctrine. While the statute allows a motion to be filed at any time, thus freeing the filings from temporal limitations and from restrictions on the procedural postconviction stage at which a motion can be filed, no language explicitly permits relitigating settled issues. Further, Edwards' requested limitation would be contrary to another case in which we recognized that preclusion doctrines applied to motions under K.S.A. 21-2512.

In *State v. Bailey*, 315 Kan. 794, 510 P.3d 1160 (2022), the petitioner sought DNA testing of materials alleged to be in the State's possession. The State no longer had those materials, and the question of what was in the State's possession had already been litigated and resolved. Under those circumstances, *Bailey* held the defendant was barred from relitigating prior judicial determinations by the application of the doctrine of res judicata. 315 Kan. at 803. While the decision rested on res judicata, the *Bailey* court included language covering the law of the case doctrine as well.

The court recognized that "[r]es judicata is one of three doctrines—the other two being law of the case and collateral estoppel—that put into practice the policy that courts generally will not reopen matters already decided by a court." 315 Kan. at 797.

We extend *Bailey* to hold the law of the case doctrine applies to K.S.A. 21-2512 motions and prevents a party from relitigating an issue already decided in the same proceeding. Here, Edwards' 2022 motion for DNA testing under K.S.A. 21-2512 is identical to his 2018 motion. The district court denied the motion, and it became the law of the case. The district court correctly held the law of the case doctrine precluded Edwards from relitigating the same issue through his 2022 motion for DNA testing.

Affirmed.

WILSON, J., not participating.

No. 125,637

STATE OF KANSAS, *Appellee*, v. D.W., *Appellant.*

(545 P.3d 26)

SYLLABUS BY THE COURT

1. EVIDENCE—*Contemporaneous Objection Rule—Requires Timely and Specific Objection at Trial to Preserve Challenge for Appellate Review.* 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—*Review of Admission of Video Evidence—Determination Whether Challenged Evidence Is Relevant—Appellate Review.* An appellate court reviews the admission of video evidence by first determining whether the challenged evidence is relevant. If the video evidence is relevant, and a challenging party's objection is based on a claim that the video evidence is overly repetitious, gruesome, or inflammatory, i.e., unduly prejudicial, the standard of review is abuse of discretion. The burden of showing an abuse of discretion rests with the party asserting the error.

3. CRIMINAL LAW—*Sentencing—Sentence Effective When Pronounced from Bench.* A sentence is effective when pronounced from the bench, which means a district court generally may not change its mind about a sentence after orally pronouncing it. But the court is not precluded from correcting or clarifying a sentence at the same hearing after misspeaking or miscalculating.

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Oral argument held December 15, 2023. Opinion filed March 15, 2024. Affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, argued the cause and was on the brief for appellant.

Jodi Litfin, deputy 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

WALL, J.: D.W. sat in the passenger seat of a car while his accomplice in the backseat shot and killed the 16-year-old driver of the car they were pursuing. For his participation in that shooting, a jury convicted D.W. of premeditated first-degree murder and criminal discharge of a firearm at an occupied vehicle. D.W.

received a life sentence with no chance of parole for 50 years (often called a "hard 50" sentence), and he now appeals directly to our court. He argues that the district court's decision to admit bodycam footage that showed the victim's dying moments warrants a new trial. He also argues that the district court imposed an illegal sentence by ordering lifetime postrelease supervision on his murder conviction.

We disagree and affirm D.W.'s convictions and sentence. The district court correctly ruled that the bodycam footage was relevant and that the risk of undue prejudice did not substantially outweigh the probative value of the footage. And the record shows that the district court imposed a term of lifetime parole, not lifetime postrelease supervision. That sentence is legal because it conforms with the applicable sentencing statute.

FACTS AND PROCEDURAL BACKGROUND

In July 2019, officers responded to reports of a shooting in southeast Topeka. The first officer on the scene found a white car that had veered off the road and come to a stop. Two bystanders were helping a minor in the driver's seat who had been shot in the back of the head; he was later identified as J.M. According to the officer's testimony, J.M. was still breathing and making small noises, but he was not alert. J.M. would later be pronounced dead at the hospital. The officer would also testify that there was blood and matter seeping from J.M.'s head wound. At some point, one bystander said that there had been a gun up front with the driver and that she had placed it on the hood of the car. This graphic scene was captured on the officer's bodycam.

According to the State, D.W. and two others had given pursuit after the victim fired shots into the air and sped off in a car. When the car with D.W. caught up to the victim's car, the backseat passenger fired about 20 rounds from a rifle. Two bullets struck the victim. The State charged D.W. and the two other occupants with premeditated first-degree murder, criminal discharge of a firearm at an occupied vehicle, and first-degree felony murder (i.e., a killing committed during an "inherently dangerous felony," alleged here as the criminal discharge of the firearm). See K.S.A. 2022 Supp. 21-5402(a)(2).

The district court held a four-day jury trial in March 2022. The State presented considerable eyewitness testimony and physical evidence that D.W. was involved in the pursuit and shooting. And D.W. does not challenge that evidence on appeal. At the end of the responding officer's testimony, the State also introduced an abridged version of the officer's bodycam footage. The district court admitted the footage over what it perceived as defense counsel's objection, ruling that the footage was "relevant to the charges in this case" and "more probative than prejudicial." At the beginning of the next day of trial, the defense moved for a mistrial, arguing that the video had no probative value and was introduced solely to inflame the passions of the jury. The district court denied the motion, finding that "[w]hile the video evidence is prejudicial, the Court does find that it is more probative than prejudicial." D.W. did not testify or put on any evidence.

The jury convicted D.W. on all counts. The court sentenced D.W. to a hard 50 for premeditated first-degree murder and 61 months in prison for criminal discharge of a weapon at an occupied vehicle. The court at first said it was imposing lifetime postrelease supervision for the murder conviction, but it quickly clarified that D.W. would be subject to lifetime parole for that conviction and 36 months of postrelease supervision for the firearm conviction. The court ordered the sentences to run concurrent.

D.W. appealed directly to our court. We heard arguments from the parties on December 15, 2023. We have subject-matter jurisdiction over the direct appeal. K.S.A. 2022 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crimes appeal directly to Kansas Supreme Court).

ANALYSIS

D.W. raises two issues in this appeal. He first argues that the district court erred by admitting the bodycam footage into evidence. Then he argues that the district court imposed an illegal sentence by ordering lifetime postrelease supervision for his first-degree murder conviction. As we explain below, we disagree with both arguments.

I. *The District Court Properly Admitted the Bodycam Footage*

D.W. argues that the bodycam footage was not relevant, that it was unduly prejudicial because it was too gruesome, and that the district

court abused its discretion by not personally reviewing the footage before letting the jury see it. The State insists that D.W.'s arguments face preservation obstacles and that, in any event, the footage was relevant and not unduly prejudicial. We address preservation first, then we move to the merits.

Before trial, defense counsel filed a "motion to exclude the admissibility of gruesome photographs," arguing that the court should exclude "gruesome photographs of the decedent [meant to] inflame the passions of the jury." At a pretrial motions hearing, the district court deferred ruling on the motion until and unless D.W. raised it at trial. At trial, defense counsel asked to approach the bench when the State moved to admit the bodycam footage. Defense counsel mentioned the pending pretrial motion and said that "this is a body-cam video, which I'm going to anticipate is going to be pretty graphic." Counsel for the State acknowledged that the footage showed the victim's head wound, but he said the wound was "covered mostly by the shirt or the gauze" and that the video was "relevant" because "it does show [J.M.'s] position in the vehicle" and that "he's been injured." The court admitted the video, ruling that the footage was "relevant to the charges in this case" and "more probative than prejudicial."

Under the contemporaneous-objection rule codified at K.S.A. 60-404, a party must make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. That rule has the practical effect of confining a party's appellate arguments to the grounds presented to the district court. *State v. Scheetz*, 318 Kan. 48, Syl. ¶ 1, 541 P.3d 79 (2024). The State contends that the only contemporaneous objection that D.W. lodged at trial was that the video was unduly prejudicial because it was too gruesome. So in its view, the relevance of the footage is not a question properly before us.

We disagree. In *State v. Randle*, 311 Kan. 468, 480, 462 P.3d 624 (2020), another appeal addressing the admission of a crime-scene video, we held that defense counsel's objections were preserved despite misstating the specific grounds for the objection and saying only that he would like to "'renew [his] antemortem objection,'" which referred to a motion addressing only pre-death photos of the victim. But under the facts of that case, the district

court "knew the issue associated with the video and had the opportunity to rule on it," so we held that "the purposes of the contemporaneous objection rule under K.S.A. 60-404 were fulfilled." 311 Kan. at 480. The facts here also show that the contemporaneous-objection rule was satisfied. There was a pending motion to exclude the footage as overly gruesome, the State argued relevance when defense counsel objected at trial, and the district court ruled on relevance and undue prejudice. We will therefore address the merits of D.W.'s arguments.

When reviewing a district court's decision to admit video evidence, an appellate court first determines whether the evidence is relevant. 311 Kan. at 478. To be relevant, evidence must be material and probative. Evidence is material when the fact it supports is disputed or at issue in the case. Evidence is probative if it tends to prove a material fact. *State v. Shields*, 315 Kan. 814, 831, 511 P.3d 931 (2022). D.W. argues that there was no dispute about how J.M. had been killed or who had shot him—he was shot and killed by the backseat passenger with the rifle. So in his view, nothing in the video was material to "the only issue in dispute at trial"—whether D.W. had "criminal responsibility as an aider and/or abettor" for the actions of the codefendants.

D.W. is incorrect. The State "had the burden to prove beyond a reasonable doubt all elements of the crime charged, including the fact and manner of the death and its violent nature, even if those limited aspects of the case were undisputed." *Randle*, 311 Kan. at 479. Because the State did not admit any autopsy photos, the footage was the only visual evidence showing the nature and location of the fatal injury. And because the video showed the vehicle was occupied and a weapon was discharged into it, the footage also established elements of the unlawful-discharge-of-a-firearm charge (and thus the felony-murder charge). See K.S.A. 2022 Supp. 21-6308(a)(1)(B) (defining criminal discharge of a firearm as the "reckless and unauthorized discharge of any firearm at . . . a motor vehicle in which there is a human being"). Moreover, in the video, the bystander helping the officer render aid to J.M. says that she picked a gun up from the driver's side floor and placed it on the hood. That statement supports the State's theory that J.M. initially fired shots out of his car and sped off, which initiated the

pursuit and retaliation. The district court properly ruled that the footage is relevant.

After an appellate court decides the challenged video is relevant, it then considers whether the district court still abused its discretion by admitting the evidence because its probative value is substantially outweighed by the risk of undue prejudice. See K.S.A. 60-445 (granting trial court discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by the risk that its admission will unfairly and harmfully surprise a party). A video may be unduly prejudicial when it is too repetitious, particularly gruesome, or inflammatory. The burden of showing an abuse of discretion rests with the party asserting the error. See *Shields*, 315 Kan. at 832.

D.W. argues that the bodycam footage was unduly prejudicial because it was a "gruesome depiction of the victim as he was dying." We have reviewed the bodycam footage, and there is no doubt it is graphic. But unless the State presents "gruesome evidence simply to inflame the jury," there is no error. *Randle*, 311 Kan. at 479. After all, "[g]ruesome crimes result in gruesome photographs." 311 Kan. at 479. And because the State did not introduce autopsy photos, the footage was the only visual evidence showing the cause and manner of J.M.'s death. The State also significantly cut down the footage—the video shows the officer in J.M.'s car for about two minutes, and—while there is quite a bit of blood—the wound is visible only for a few seconds. Given the relevance of the footage and the State's efforts to minimize undue prejudice by editing the video and not admitting potentially cumulative autopsy photos, we cannot conclude that the State presented the footage simply to inflame the jury.

Finally, we also disagree with D.W. that a district court per se abuses its discretion when it admits a gruesome video before personally reviewing its contents. District courts regularly and properly rely on a party's proffer about what is depicted in photographs or videos. That is especially true when, as here, the objection is lodged in the midst of trial and on the brink of showing the video to the jury. Granted, it may have been better practice to review the video outside the jury's presence before ruling on its admissibility. See, e.g., 311 Kan. at 479 ("In Randle's case, the court

reviewed all 128 autopsy photographs before admitting the eight."); *State v. Tague*, 296 Kan. 993, 1003, 298 P.3d 273 (2013) ("The trial judge examined all the photographs and noted that some of the photographs depicted the victim's body and wounds but noted 'there is no particular significant blood shown.'"). But D.W. has cited no authority suggesting that such a practice is compulsory or that the failure to employ it constitutes error per se. Thus, he has failed to demonstrate error and we affirm the district court's evidentiary ruling.

II. *D.W. Has Not Established That He Is Serving an Illegal Sentence*

District courts lack statutory authority to impose lifetime postrelease supervision when imposing an off-grid indeterminate life sentence for a first-degree murder. See, e.g., *State v. Newman*, 311 Kan. 155, 160, 457 P.3d 923 (2020). Such sentences are illegal because they fail to conform to the applicable statutory provision. K.S.A. 2022 Supp. 22-3504(c)(1) (defining "illegal sentence"). D.W. received an off-grid indeterminate life sentence for first-degree murder, but he insists that the district court also imposed lifetime postrelease supervision for that crime. He therefore asks us to vacate that portion of his sentence. See K.S.A. 2022 Supp. 22-3504(a) ("The court may correct an illegal sentence at any time while the defendant is serving such sentence.").

A sentence is effective when pronounced from the bench, which means a district court generally may not change its mind about a sentence after orally pronouncing it. See *State v. Howard*, 287 Kan. 686, 694-95, 198 P.3d 146 (2008). But that does not mean that the court is precluded from correcting or clarifying a sentence at the same hearing after misspeaking or miscalculating. 287 Kan. at 694-95. And the record here shows that the district court misspoke and never intended to impose lifetime postrelease supervision for D.W.'s off-grid conviction for premeditated first-degree murder.

At sentencing, the court initially said it was imposing "post release . . . for the period of your lifetime" for D.W.'s murder conviction and 36 months of postrelease supervision for his criminal-

discharge-of-a-weapon conviction. But it quickly sought to "clarify the sentence," saying that it was imposing "life without the possibility of parole before 50 years" on the murder conviction and 36 months of postrelease supervision on the firearms conviction:

> "For Count 3 there would be a 36-month period of post release. For Count 1, the post release would be for the period of your lifetime. You shall receive credit for time served as provided by law, and you can—well I've already indicated the good time.
>
> "The Court does make a deadly weapon finding as to Counts 1, 2, and 3. You're directed to register as a violent offender for [a] period of 15 years. You're directed to submit to DNA testing based upon this conviction. You're also prohibited from carrying a firearm based upon this conviction.
>
> "The Court would direct that you pay court costs in the amount of $171, a $22 surcharge fee, and a $200 DNA database fee. The Court would waive the BIDS application fee and the attorney fee for indigency found.
>
> "Let me clarify the sentence. In Count 1, your sentence would be a term of life without the possibility of parole before 50 years. For Count 2 [sic], which is concurrent, the term would be 61 months with Kansas Secretary of Corrections, 15 percent good time, 36-month[s] post release. If I wasn't clear on that before, I apologize."

The journal entry also reflected this clarified sentence—that the court imposed a term of lifetime parole for the premeditated first-degree murder conviction. See *State v. Jackson*, 291 Kan. 34, 36, 238 P.3d 246 (2010) (appellate court may rely on journal entry that "clarifies an ambiguous or poorly articulated sentence pronounced from the bench"), *abrogated on other grounds by State v. Marinelli*, 307 Kan. 768, 415 P.3d 405 (2018). As a result, we conclude that the district court did not impose lifetime postrelease supervision and then improperly modify D.W.'s sentence.

D.W. also asserts in passing that even the clarified sentence is illegal because it includes a term of postrelease supervision. The district court imposed a 61-month sentence with 36 months of postrelease supervision for D.W.'s criminal-discharge-of-a-firearm conviction (an on-grid offense), and the court ran that sentence concurrent to the indeterminate life sentence it imposed for first-degree murder (an off-grid offense). We read D.W.'s passing comment to assert that a district court lacks authority to impose a term of postrelease supervision for an on-grid conviction that runs

concurrent to an indeterminate life sentence for an off-grid conviction. That is an issue we have not addressed before.

We acknowledge that there may be something incongruent about imposing a term of postrelease supervision concurrent to an indefinite life sentence for the off-grid crime of premeditated first-degree murder. That sentence consists of a mandatory term of imprisonment followed by parole eligibility, meaning that if the defendant "ever leaves prison it will be because the successor to the parole board has granted [the prisoner] parole, not because the sentencing court ordered postrelease supervision." *State v. Cash*, 293 Kan. 326, 330, 263 P.3d 786 (2011). And because "the terms 'parole' and 'postrelease' have separate meanings," it is not immediately clear how a term of postrelease supervision could run concurrent to lifetime parole. 293 Kan. at 330.

But D.W. does not develop his argument beyond his single-sentence assertion that the sentence is illegal because it includes a term of postrelease supervision. He does not explain why such a sentence would fail to "conform to the applicable statutory provision." K.S.A. 2022 Supp. 22-3504(c)(1). Nor does he cite any of the many statutes or appellate decisions that address parole and postrelease supervision. Points raised only incidentally and not adequately briefed are considered abandoned. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020). As a result, we conclude that D.W. has waived this illegal-sentence claim.

Affirmed.

In re Wiske

No. 127,056

In the Matter of JASON P. WISKE, *Respondent.*

(545 P.3d 33)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Ninety-day Suspension.*

Original proceeding in discipline. Oral argument held February 1, 2024. Opinion filed March 15, 2024. Ninety-day suspension stayed pending completion of a 12-month period of probation.

Alice Walker, Deputy Disciplinary Administrator, argued the cause, and *Gayle B. Larkin*, Disciplinary Administrator, was with her on the formal complaint for the petitioner.

Peggy Wilson, of Wichita, argued the cause, and *Jason P. Wiske,* respondent, argued the cause pro se.

PER CURIAM: This is an attorney discipline proceeding against Jason P. Wiske, of Pittsburg, who was admitted to practice law in Kansas in September 1997.

On September 18, 2023, the Disciplinary Administrator's office filed a formal complaint against Wiske alleging violations of the Kansas Rules of Professional Conduct.

The parties entered into a summary submission agreement under Supreme Court Rule 223 (2023 Kan. S. Ct. R. at 277). Wiske admitted that he violated the Kansas Rules of Professional Conduct (KRPC)—specifically KRPC 1.1 (2023 Kan. S. Ct. R. at 327) (competence), KRPC 1.3 (2023 Kan. S. Ct. R. at 331) (diligence), KRPC 3.2 (2023 Kan. S. Ct. R. at 390) (expediting litigation), and KRPC 8.4(d) (2023 Kan. S. Ct. R. at 433) (conduct prejudicial to the administration of justice). The parties also stipulated to the content of the record, the findings of fact, the conclusions of law, and the applicable aggravating and mitigating circumstances. They additionally agreed to waive a formal hearing and to recommend staying the sanction of a 90-day suspension, with Wiske being placed on probation for 12 months under terms specified in the Summary Submission Agreement. See Rule 223(b).

The chair of the Board for Discipline of Attorneys approved the summary submission and cancelled a hearing on the formal

complaint. See Supreme Court Rule 223(e). The summary submission was filed with this court for hearing.

Before us, the parties recommend a finding of misconduct and the imposition of a sanction of a 90-day suspension from the practice of law. They also recommend the suspension be stayed and the respondent be placed on probation for 12 months.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant portions of the Summary Submission Agreement follow.

"*Findings of Fact: Petitioner and respondent stipulate and agree that respondent engaged in the following misconduct as follows:*

. . . .

"4. In 2021, the respondent entered his appearance to represent D.T. in an appeal from the Crawford County District Court's termination of D.T.'s parental rights (Case No. 2017-JC-155).

"5. On January 23, 2021, the respondent filed a notice of appeal on behalf of D.T.

"6. Pursuant to Supreme Court Rule 2.04 (docketing an appeal) (2023 Kan. S. Ct. R. at 15), '[n]o later than 60 days after a notice of appeal is filed in a district court, the appellant must complete or obtain and file with the clerk of the appellate courts: (A) the docketing statement required by Rule 2.041' and other documents. The docketing deadline for the appeal was March 24, 2021.

"7. The respondent did not file a docketing statement, or any other documents on behalf of D.T. by March 24, 2021.

"8. On November 1, 2021, the State filed a motion to dismiss the appeal in Crawford County District Court, noting that '[t]o date, nothing has been filed with the Court of Appeals.'

"9. The motion to dismiss was granted and the appeal was dismissed on January 6, 2022.

"10. On February 7, 2022, the respondent filed a motion to reinstate the appeal indicating that he had 'heard that filing deadlines had been suspended due to the COVID pandemic, and, additionally counsel for Appellant has had health issues and concerns since late January which caused counsel for Appellant to not perfect the appeal in his case.'

"11. The respondent's motion was granted. In its order, the court of appeals instructed the appeal to be docketed immediately. A brief deadline was set for April 13, 2022.

"12. The Court of Appeals (COA) issued an order on March 14, 2022, which stated the case would be expedited and that without a 'showing of exceptional circumstances, no extensions of time for filing briefs will be granted.'

"13. On April 21, 2022, after no brief had been filed by the respondent, the COA issued an order instructing the respondent to 'file a brief by May 5, 2022, or the appeal will be dismissed without further notice for failure to comply with the rules of the court.'

"14. On May 12, 2022, the COA issued an order of dismissal stating the respondent 'has filed no brief and has not responded to this court's order.'

"15. Following the dismissal by the COA, Chelsey Langland, Director of Special Projects at the Kansas COA submitted a complaint to the Office of the Disciplinary Administrator (ODA).

"16. In his attorney response to the complaint, the respondent self-reported failures to properly file appeals in two additional cases dealing with termination of parental rights in Crawford County District Court. The respondent reported diligence issues in representing A.H. in Case No. 2017-JC-000172 (Appellate Case No. 125,199); and in representing A.F. in four CINC cases: 2019-JC-000033-G, 2019-JC-00003[5]-G, 2019-JC-000034-G, and CRG-2021-JC-000066.

"Representation of A.H. (125,199)

"17. The respondent represented A.H., natural father whose parental rights were terminated on February 1, 2021.

"18. On March 25, 2021, the respondent filed a notice of appeal on behalf of A.H.

"19. In February 2022, the State filed a motion to dismiss the appeal. The motion was granted, and the appeal was dismissed.

"20. On May 31, 2022, the respondent filed a motion to reinstate the appeal, again claiming that he had 'heard that filing deadlines had been suspended due to the COVID pandemic, and additionally counsel for Appellant has had health issues and concerns since late January which caused counsel for Appellant to not perfect the appeal in his case.'

"21. On June 9, 2022, the motion to reinstate was granted and the matter was docketed immediately. The respondent was given a deadline of July 19, 2022, to file a brief.

"22. On June 15, 2022, the ODA received the respondent's attorney response to the pending disciplinary complaint. In the response, the respondent noted that 'the Court of Appeals did grant a motion to docket the appeal out of time on June 9, 2022, and the appellate process is expediated.'

"23. The COA issued an order on July 14, 2022, expediting the case and stating that '[i]n the absence of a showing of exceptional circumstances, no extensions of time for filing briefs will be granted.'

"24. On July 15, 2022, the respondent was interviewed by the disciplinary investigator. The respondent indicated that he thought it was best for someone else to represent A.H., and therefore had filed a motion to withdraw in district court. He did indicate that if it was not granted, he would be able to handle the appeal.

"25. The respondent did not file a brief by July 19, 2022. The respondent did not file any other motion or request for an extension of time with the COA based on his request to withdraw in district court.

"26. On July 20, 2022, Ms. Langland notified the disciplinary investigator that the respondent had not filed his brief and that the court had not heard anything from him.

"27. On July 21, 2022, the COA issued an order noting that no brief had been filed and ordering the respondent to 'file a brief by August 11, 2022, or the appeal will be dismissed without further notice for failure to comply with the rules of the court.'

"28. The respondent filed a brief on August 11, 2022, avoiding a dismissal of the appeal. The case was ultimately dismissed on the merits.

"Representation of A.F.

"29. The respondent represented A.F. in four separate CINC cases where her parental rights were terminated in January 2022.

"30. The respondent filed a notice of appeal in each case. However, due to a clerical mistake, the notice of appeals did not have the required verification.

"31. The State filed a motion to dismiss the appeals, which was granted by the District Court on June 6, 2022.

"32. In his response to the disciplinary complaint, the respondent indicated he was 'attempting to get the notarized docketing statement back from [A.F.] so that [he] can docket the appeal with a motion to reinstate the appeal.' Although the respondent made numerous attempts by email to obtain the docketing statement back from [A.F.] he did not obtain one prior to withdrawing from the case on July 1, 2022.

"33. Pursuant to Kansas Supreme Court Rule 5.051 (dismissal of appeal by district court) (2023 Kan. S. Ct. R. at 33) the respondent had 30 days from the entry of the order to file a motion for reinstatement.

"34. On July 1, 2022, the respondent withdrew from representation of A.F. The respondent had not filed a motion to reinstate the appeal.

"35. On July 13, 2022, another attorney was appointed to represent A.F. The attorney attempted to file the appeal on behalf of A.F. A hearing was set, at which A.F. did not appear and the district court concluded the time for appeal had lapsed and the appeal could not be docketed.

"Conclusions of Law: Petitioner and respondent stipulate and agree that respondent violated the following Supreme Court Rules and Kansas Rules of Professional Conduct, respondent engaged in misconduct as follows:

"36. KRPC 1.1 (competence) (2023 Kan. S. Ct. R. at 327) regarding D.T. and A.F.;

"37. KRPC 1.3 (diligence) (2023 Kan. S. Ct. R. at 331) regarding D.T. and A.F.;

"38. KRPC 3.2 (expediting litigation) (2023 Kan. S. Ct. R. at 390) regarding DT, AH and A.F.;

"39. KRPC 8.4(d) (conduct prejudicial to the administration of justice) (2023 Kan. S. Ct. R. at 433).

"Applicable Aggravating and Mitigating Circumstances:

"40. Aggravating circumstances include:

"a. *Prior disciplinary offenses*: DA 13,506: Diversion for violations of KRPC 1.3 (diligence) and KRPC 1.4 (communication).

"i. Facts: On June 17, 2019, the respondent was appointed to represent D.Y. in a K.S.A. 60-1507 proceeding. On July 14, 2019, the respondent entered a limited entry of appearance in the matter to allow him to review the file. D.Y. sent letters to the respondent on August 22, 2019, November 13, 2019, and February 6, 2020. The respondent did not respond to any of these correspondences. On March 24, 2020, D.Y. filed a motion with the District Court seeking a new attorney given that the respondent had taken no action on the matter. On March 30, 2020, the Office of the Disciplinary Administrator (ODA) received a complaint from D.Y. In response to the docketed complaint, the respondent acknowledged his lack of action on D.Y.'s case, explained health conditions and a heavy case load contributed to the misconduct, and provided a copy of his motion to withdraw from D.Y.'s case. The respondent requested to be considered for diversion.

"ii. Diversion Agreement: On November 3, 2020, the respondent was placed on diversion stipulating his conduct violated KRPC 1.3 and KRPC 1.4. The period of diversion was for twelve (12) months. The terms of diversion included:

"1. The respondent was to complete five (5) hours of additional Continuing Legal Education. Three (3) hours were to be from course instruction about Law Practice Management, and two (2) hours were to be on Attorney Well-Being.

"2. The respondent was to read and report to the ODA on one book regarding Law Practice Management.

"3. The respondent was to review law office practices using the Self-Audit Check List provided by the ODA and return a completed copy.
"4. The respondent was to enter into a Monitoring Agreement and authorization for disclosure and release of information with KALAP.
"iii. In November 2021, the respondent had not completed the terms of diversion, therefore he requested an extension. A 90-day extension was granted.
"iv. In January 2022, the respondent provided proof of completion of the terms of diversion.
"v. Although the diversion was completed in January 2022, the paperwork to formally dismiss the diversion was not processed until January 2023.
"b. *A pattern of misconduct*: The respondent lacked diligence in three cases, resulting in either delay in resolution on appeal or dismissal of the appeal.
"c. *Multiple offenses*: The respondent violated KRPC 1.1, KRPC 1.3, KRPC 3.2, and KRPC 8.4(d).
"d. *Substantial experience in the practice of law*: The respondent has been licensed to practice law since 1997.

"41. Mitigating circumstances include:

"a. *Absence of a dishonest or selfish motive*: The respondent's misconduct arose out of a combination of poor law practice management coupled with mental and physical health diagnosis that were not being properly managed. There is no evidence the respondent acted in a dishonest or selfish manner.
"b. *Personal or emotional problems if such misfortunes have contributed to violation*: In approximately 2004, the respondent was diagnosed with Bipolar disorder and depression, requiring medication management for treatment. The respondent is currently in counseling and being treated for depression. In December 2016, the respondent suffered a stroke and has made a full physical recovery. The respondent has further been diagnosed with diabetes and at the time of the misconduct leading to this case, was not properly caring for himself. This resulted in a lack of energy and lack of focus, worsening his depression. In January and February of 2022, the respondent suffered from COVID like symptoms, and twisted his knee in March 2022 requiring medication and time off work. The respondent reported feeling overwhelmed and stressed with his workload through May 2022.
"c. *The present and past attitude of the attorney as shown by their cooperation during the proceeding and their full and free acknowledgment of the transgressions*: The respondent provided a written response to the investigator in this case. In the response, the respondent acknowledged his lack of diligence in the representation of D.T. and self-reported similar conduct in two other cases. He further indicated he had relinquished his contract with Crawford County to represent parents in child in need of care cases. The respondent admitted to the misconduct as outlined in the formal complaint. The respondent reports working with his therapist and his primary car[e] physician to manage both his mental and physical health. The respondent has implemented new practices, such as a different calendaring method, to

improve his case management. Further, the respondent has begun working with a local attorney, John Mazurek, on a probation plan to improve his law practice management, assist him in managing his case load, and helping to keep him accountable for his physical and mental health.

"d. *Previous good character and reputation in the community*: The respondent submitted two letters attesting to his good character and reputation.

"e. *Remorse*: The respondent has accepted responsibility for his actions and expressed genuine remorse.

"Recommendations for Discipline:

"42. Petitioner and respondent jointly recommend respondent be suspended from the practice of law for 90 days. The parties further recommend the suspension be stayed and the respondent be placed on probation for a period of twelve (12) months.

"43. Terms of probation shall include:

"a. Compliance with Rules of Professional Conduct:

"i. The respondent shall not engage in conduct that violates the Rules of Professional Conduct;

"ii. Receipt of a complaint by the Office of the Disciplinary Administration ('ODA') during the probation term alleging that the respondent has violated the Rules of Professional Conduct does not, in itself, constitute a violation of the terms of probation; and

"iii. In the event that the ODA receives a complaint during the respondent's participation in the probation program or otherwise opens or commences a disciplinary investigation, the term of the probation shall be extended until such charge has been investigated and a determination made by the ODA or regional disciplinary committee regarding disposition of such matter.

"b. Proposed Supervisor**:** John G. Mazurek is 58 years old and a full-time lawyer in private practice located in Pittsburg Kansas and has practiced law in excess of 32 years. Mr. Mazurek is a Kansas lawyer in good standing. He graduated from Washburn University School of Law in 1991. Mr. Mazurek has also been the City Prosecutor/Legal Advisor for the City of Pittsburg, Kansas since 1997. Several years ago, local attorneys and Mr. Mazurek formed their own version of KALAP—helping attorneys when in need. Mr. Mazurek and the respondent have known each other for approximately 25 years.

"c. Conditions of Probation:

"i. The conditions of the probation shall be satisfied prior to termination of the probation. The conditions are:

"ii. The respondent's practice will be supervised by John G. Mazurek ('Supervising Attorney'), a Kansas licensed attorney, in good standing, practicing in Crawford County, Kansas.

"iii. The respondent shall allow Supervising Attorney access to his files, calendar, and case management system.

"iv. The respondent shall comply with any requests made by the Supervising Attorney.
"v. During the twelve (12) months of supervision, the respondent shall meet with the Supervising Attorney monthly. Said meetings shall be face-to-face, by phone or via Zoom.
"vi. The respondent will maintain an accurate report of all open and active cases with reports to be provided to the Supervising Attorney during each monthly meeting.
"vii. The respondent will maintain a case file in either his case management system or by hard files and maintain case notes and other records in each file.
"viii. The respondent will respond to client communications within a week or less.
"ix. When the respondent is anticipated to be unavailable to respond to client emails or phone calls for more than a week, he will use the out of office function on his email to notify clients of the duration of his absence.
"x. The respondent will update the closure status of cases in his document management system not less frequently than monthly.
"xi. The Supervising Attorney shall conduct an immediate and detailed audit of the respondent's files.
"xii. Thereafter, quarterly, Supervising Attorney shall make a report regarding same to the Disciplinary Administrator's Office and a final report accompanied by an affidavit stating that the respondent has complied with all terms of probation.
"xiii. Should Supervising Attorney discover any violations of the Kansas Rules of Professional Conduct, he shall include such information in each report to the Disciplinary Administrator's Office in order for the Disciplinary Administrator's Office to investigate these violations.
"xiv. Supervising Attorney shall provide the respondent with a copy of each audit report and each report to the Disciplinary Administrator's Office.
"xv. The respondent shall follow all recommendations of his Supervising Attorney and shall immediately correct all deficiencies noted in the periodic reports and audit reports.
"xvi. The respondent has implemented a new calendaring system for maintaining deadlines for case management. The Supervising Attorney shall aid in prioritizing tasks and monitoring case progress in general.
"xvii. Supervising Attorney, in consultation with the respondent, shall determine the number of active cases that can be handled in a competent manner by the respondent while giving his clients a proper defense.
"xviii. Supervising Attorney shall determine if the Office Manager/ administrative assistant could aid the respondent further in the performance of his duties to include the opening of mail, reading and responding to emails, setting up a tickler file that includes court dates and response dates, if not already in place.
"xix. The respondent has been under the care of a psychologist, Blake Webster, Ph.D. and participated in counseling already at the time of the inception

of probation and will continue his current treatment. Specifically, the respondent will comply with the treatment recommendations and counseling program prescribed by Dr. Webster. The respondent shall remain under the care of Dr. Webster for depression and anxiety or any other mental health issues that are identified throughout the term of his probation. The respondent will also sign releases so that any records can be provided to his Supervising Attorney and/or to the Disciplinary Administrator's Office at any time. The respondent will provide documentation confirming his compliance with treatment recommendations as directed by his Supervising Attorney or the assigned Deputy Disciplinary Administrator. Prior to any change of treatment providers, Respondent shall obtain the approval of his Supervising Attorney.

"xx. The respondent has also been under the care of Eric Vonholten, D.O., an internal medicine specialist and has participated in treatment for his diabetes already at the time of the inception of probation and will continue his current treatment. Specifically, [t]he respondent will comply with the treatment recommendations prescribed by Dr. Vonholten. The respondent shall remain under the care of Dr. Vonholten, for diabetes or other health issues that are identified throughout the term of his probation. The respondent shall comply with any medication and treatment directives. He will also sign releases so that any records can be provided to his Supervising Attorney and/or to the Disciplinary Administrator's Office at any time. The respondent will provide documentation confirming his compliance with treatment recommendations as directed by his Supervising Attorney or the assigned Deputy Disciplinary Administrator. Prior to any change of treatment providers, the respondent shall obtain the approval of his Supervising Attorney.

"xxi. Supervising Attorney shall be acting as an officer and agent of the Court while supervising the probation of the respondent and during the monitoring process of the legal practice of the respondent. The Supervising Attorney shall be afforded all immunities by Supreme Court Rule 238 during the course of this activity.

"xxii. The respondent shall continue to cooperate with the Disciplinary Administrator's Office. If the Disciplinary Administrator requires any further information, the respondent shall timely provide said information.

"xxiii. The respondent shall not violate the provisions of his probation or the Kansas Rules of Professional Conduct. In the event the respondent violates any of the terms of his probation or any of the terms of the Kansas Rules of Professional Conduct during the probationary period, the respondent shall immediately report such violations to his Supervising Attorney and the Disciplinary Administrator.

"xxiv. The respondent shall pay the costs in an amount to be certified by the Disciplinary Administrator's Office.

"xxv. To further protect the public and the respondent's clients, The respondent shall maintain malpractice insurance in amount of not less than $100,000 per occurrence and an aggregate amount of not less than $300,000. Respondent shall provide the Supervising Attorney with proof of

insurance within thirty (30) days of the date of commencement of the probation term.

"xxvi. For additional protection to the respondent's clients, in the event of a death, personal problem, or natural disaster that prohibits the respondent from practicing law, Supervising Attorney has agreed to serve as the 'assisting attorney' to finish up and close the respondent's practice and act on behalf of the respondent."

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). We have defined clear and convincing evidence as "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 Wiske had adequate notice of the formal complaint, to which he filed an answer. He waived formal hearing after entering into a summary submission agreement. In this agreement, the parties agreed they would not take exceptions to the findings of facts and conclusions of law. By Supreme Court rule, the parties thus admitted the factual findings and conclusions of law in the summary submission. See Supreme Court Rule 228(g)(1) (2023 Kan. S. Ct. R. at 288).

We adopt the findings of fact and conclusions of law in the summary submission, which considered with the parties' stipulations, establish by clear and convincing evidence that Wiske's conduct violated KRPC 1.1, KRPC 1.3, KRPC 3.2, and KRPC 8.4(d).

The parties' summary agreement recommending discipline is advisory only and does not prevent us from imposing a greater or lesser discipline. Kansas Supreme Court Rule 223(f) (2023 Kan. S. Ct. R. at 279). Here, after full consideration of the stipulated findings of facts and conclusions of law, we adopt the joint recommendation of a 90-day suspension that is stayed contingent on the respondent's successful completion of a 12-month probationary period.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Jason P. Wiske's license to practice law in Kansas is suspended for 90 days but that suspension is stayed contingent upon the respondent's successful completion of a 12-month period of probation that begins on the filing of this opinion. Supreme Court Rule 225(a)(2) (2023 Kan. S. Ct. R. at 281). The respondent's probation will be subject to the terms in the plan of probation set out in the parties' Summary Submission Agreement. No reinstatement hearing is required upon the respondent's successful completion of probation.

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.

Bar Docket No. 20340

In the Matter of CHARLES CLINTON BAYLOR, *Respondent.*

(545 P.3d 41)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Voluntary Surrender of License—Disbarment.*

This court admitted Charles Clinton Baylor to the practice of law in Kansas on September 28, 2001. The court administratively suspended Baylor's license on October 8, 2019, due to his noncompliance with registration and continuing legal education requirements. The court notes that as of the date of this order, Baylor had not paid any of the annual registration and continuing legal education fees related to the administrative suspension of his license.

In a letter signed by Baylor on December 13, 2023, addressed to the Office of Judicial Administration, Baylor requested to voluntarily surrender his license under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). At the time, a formal disciplinary hearing had been held and the hearing panel concluded there existed clear and convincing evidence Baylor violated Kansas Rules of Professional Conduct 8.4(g) (2023 Kan. S. Ct. R. at 433) (misconduct: adversely reflects on fitness to practice), Supreme Court Rule 210 (2023 Kan. S. Ct. R. at 263) (duty to cooperate), and Supreme Court Rule 219 (2023 Kan. S. Ct. R. at 273) (duty to report criminal charges). On November 28, 2023, the Disciplinary Administrator docketed that case in this court under Supreme Court Rule 228 (2023 Kan. S. Ct. R. at 287), *In re Baylor*, No. 127,013. Baylor filed exceptions to the final hearing report and moved to strike petitioner's pleadings due, in pertinent part, to this voluntary surrender of his license.

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

The court orders the Office of Judicial Administration to strike the name of Charles Clinton Baylor 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), Baylor's pending disciplinary case before this court in *In re Baylor*, No. 127,013, and any other pending board proceeding or case terminates effective the date of this order. The Disciplinary Administrator may direct an investigator to complete a pending investigation to preserve evidence.

Finally, the court directs that this order be published in the official Kansas Reports, that the costs herein be assessed to Baylor, and that Baylor comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292).

Dated this 22nd day of March 2024.

No. 120,875

In the Matter of KEVIN P. SHEPHERD, *Respondent.*

(545 P.3d 614)

ORDER OF DISCHARGE FROM PROBATION

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

On September 27, 2019, the court suspended Kevin P. Shepherd's Kansas law license for a two-year period. The court ordered that following one year of suspension, Shepherd could petition for an early reinstatement and undergo a reinstatement hearing. *In re Shepherd*, 310 Kan. 739, 448 P.3d 1049 (2019).

On March 4, 2021, the court granted Shepherd's petition for reinstatement of his law license following a reinstatement hearing. The court stayed the remainer of the two-year suspension and placed Shepherd on three years' probation. *In re Shepherd*, 312 Kan. 827, 483 P.3d 1046 (2021).

On March 6, 2024, Shepherd motioned the court to discharge him from probation. See Supreme Court Rule 227(g)(1) (2023 Kan. S. Ct. R. at 284) (probation discharge). The Office of the Disciplinary Administrator (ODA) responded that Shepherd has complied with his probation, confirmed Shepherd's eligibility to be discharged from probation, and voiced no objection to such discharge.

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

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

Dated this 29th day of March 2024.

ROSEN, J., not participating.

No. 121,208

In the Matter of ANDREW M. DELANEY, *Respondent.*

(545 P.3d 616)

ORDER OF DISCHARGE FROM PROBATION

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

On November 26, 2014, the court suspended respondent Andrew Delaney's Kansas law license for six months. The court then suspended the imposition of that suspension and placed Delaney on two years' probation. *In re Delaney*, 300 Kan. 1090, 1101, 338 P.3d 11 (2014).

On December 6, 2019, while Delaney was still on probation, the court again suspended Delaney's law license, this time for one year. The court also again stayed imposition of that suspension and extended Delaney's probation for two years. See *In re Delaney*, 310 Kan. 1001, 453 P.3d 333 (2019).

On February 29, 2024, Delaney motioned the court for discharge from probation. See Supreme Court Rule 227(g)(1) (2023 Kan. S. Ct. R. at 284) (probation discharge). The Office of the Disciplinary Administrator (ODA) responded that Delaney has complied with his probation, confirmed Delaney's eligibility to be discharged from probation, and voiced no objection to such discharge.

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

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

Dated this 29th day of March 2024.

No. 122,053

In the Matter of LAUREL R. KUPKA, *Respondent.*

(545 P.3d 615)

ORDER OF DISCHARGE FROM PROBATION

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

On February 28, 2020, the court suspended Laurel R. Kupka's Kansas law license for a two-year period. The court ordered that following nine months of suspension, Kupka could petition for an early reinstatement and undergo a reinstatement hearing. *In re Kupka*, 311 Kan. 193, 458 P.3d 242 (2020).

On November 8, 2021, the court granted Kupka's petition for reinstatement of her law license following a reinstatement hearing. The court stayed the remainer of the two-year suspension and placed Kupka on two years' probation. *In re Kupka*, 314 Kan. 290, 497 P.3d 573 (2021).

On February 20, 2024, Kupka motioned the court to discharge her from probation. See Supreme Court Rule 227(g)(1) (2023 Kan. S. Ct. R. at 284) (probation discharge). The Office of the Disciplinary Administrator (ODA) responded that Kupka has complied with her probation, confirmed Kupka's eligibility to be discharged from probation, and voiced no objection to such discharge.

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

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

Dated this 29th day of March 2024.

WILSON, J., not participating.

State v. Jones

No. 124,174

STATE OF KANSAS, *Appellee*, v. DEANTE LAPAKA WATLEY JONES, *Appellant.*

(545 P.3d 612)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Statute Prohibits Appeals by Defendants who Plead Guilty or Nolo Contendere with Exceptions—No Direct Appeal of Ruling on Self-Defense Immunity Claim.* K.S.A. 2022 Supp. 22-3602(a) prohibits most appeals by criminal defendants who plead guilty or nolo contendere except motions attacking a sentence under K.S.A. 60-1507 and its amendments by prisoners in custody. It does not permit direct appeal of a district court's ruling on a self-defense immunity claim under K.S.A. 2022 Supp. 21-5231 when a defendant subsequently pleads guilty or nolo contendere in the same proceeding.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 6, 2023. Appeal from Reno District Court; JOSEPH L. MCCARVILLE III, judge. Oral argument held January 31, 2024. Opinion filed March 29, 2024. Judgment of the Court of Appeals dismissing the appeal is affirmed on the issue subject to review.

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

Andrew R. Davidson, deputy district attorney, argued the cause, and *Thomas Stanton*, district attorney, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: Deante Lapaka Watley Jones pled guilty to two counts of aggravated battery after the district court rejected his self-defense immunity claim. He appeals, arguing the district court was wrong to reject his self-defense argument. A Court of Appeals panel dismissed the appeal after concluding it lacked appellate jurisdiction because of his guilty plea. *State v. Jones*, No. 124,174, 2023 WL 119911, at *2-3 (Kan. App. 2023) (unpublished opinion). On review, we agree with the panel.

FACTUAL AND PROCEDURAL BACKGROUND

Jones shot two people during a confrontation. The State charged him with two felony counts of aggravated battery. Jones

sought to dismiss the charges based on self-defense immunity. The district court rejected his argument after an evidentiary hearing. He eventually pled guilty to those two counts.

After sentencing, Jones appealed, raising two issues: whether the court erred in denying his self-defense claim, and whether the Kansas Offender Registration Act, K.S.A. 22-4901 et seq., violates the compelled speech doctrine under the First Amendment to the United States Constitution. The panel dismissed the first issue for lack of appellate jurisdiction and declined to reach the second claim as unpreserved. *Jones*, 2023 WL 119911, at *6.

Unsatisfied, Jones sought review from this court, which we granted on the first issue only. Our jurisdiction is proper. K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

Jones argues the panel had jurisdiction to consider the district court's denial of his immunity claim, even though he later pled guilty. Whether appellate jurisdiction exists is a question of law subject to unlimited review. *State v. Clark*, 313 Kan. 556, 560, 486 P.3d 591 (2021). Similarly, statutory interpretation presents a question of law subject to unlimited review. *State v. Newman-Caddell*, 317 Kan. 251, 259, 527 P.3d 911 (2023).

Discussion

K.S.A. 2022 Supp. 22-3602(a) prohibits most appeals by defendants who plead guilty or nolo contendere "*except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507, and amendments thereto*." (Emphasis added.) Jones argues his appeal falls within this jurisdictional exception. He claims the district court lost its authority to accept his plea because it wrongfully denied his self-defense immunity motion. See K.S.A. 2022 Supp. 21-5231. His logic seems to require an appellate court to affirm such a denial before a district court can continue with the case or accept a plea. We disagree.

In *State v. Smith*, 311 Kan. 109, 456 P.3d 1004 (2020), the court rejected a somewhat similar claim when the defendant pled guilty to refusing to submit to an alcohol or drug test and driving while a habitual violator. There, the defendant's plea came after the district court rejected his constitutional challenge to the statute criminalizing test refusal. He appealed the convictions, arguing the court did not have jurisdiction to convict him under an unconstitutional statute. A Court of Appeals panel declined to consider this claim finding it lacked appellate jurisdiction. The *Smith* court affirmed the panel, stating that K.S.A. 2022 Supp. 22-3602(a)'s language generally prohibits appeals from pleas but allows prisoners in custody to still file motions under K.S.A. 60-1507. 311 Kan. at 121-22. It held permitting appellate jurisdiction over any "jurisdictional or other grounds going to the legality of the proceedings" would make it too easy to evade the statutory prohibition against appeals after a guilty plea. 311 Kan. at 114.

Similarly, Jones was convicted after he pled guilty, and now he directly appeals from his convictions. *Smith*'s interpretation of K.S.A. 2022 Supp. 22-3602(a) controls. We do not have appellate jurisdiction to review the merits of his claim.

Judgment of the Court of Appeals dismissing the appeal is affirmed on the issue subject to review.