OFFICIALLY SELECTED
CASES ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF KANSAS

Reporter:
SARA R. STRATTON

Advance Sheets
2d Series
Volume 65, No. 2

Opinions filed in October - December 2024

Cite as 65 Kan. App. 2d

PUBLISHED 2025

by

Sara R. Stratton, Official Reporter

For the use and benefit of the State of Kansas

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COURT OF APPEALS

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(559 P.3d 1229)

No. 127,123

LINDA S. HENRETTY, *Appellee*, v. HEALTHCENTER NORTHWEST, LLC, *Appellee*, and KANSAS WORKERS COMPENSATION FUND, *Appellant.*

SYLLABUS BY THE COURT

1. WORKERS COMPENSATION ACT—*Application of Kansas Workers Compensation Act to Injuries Outside State—Two Requirements.* The Kansas Workers Compensation Act applies to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides.

2. CONTRACTS—*Contract Made When and Where Last Act Is Done*. It is a general principle of Kansas law that a contract is made when and where the last act necessary for its formation is done.

3. SAME—*Two Types of Conditions Precedent—Conditions Precedent to Formation of Contract and Conditions Precedent to Performance under Existing Contract.* There are two types of conditions precedent: conditions precedent to the formation of a contract and conditions precedent to performance under an existing contract. Conditions precedent to the formation of a contract involve issues of offer and acceptance that precede the formation of a contract. Conditions precedent to performance under an existing contract define an event that must occur before a right or obligation matures under the contract. Whether a condition is a condition precedent to formation of the contract or to performance under an existing contract is determined by the parties' intent.

4. WORKERS COMPENSATION ACT—*Act Contains Choice of Law Rules—Rejecting Doctrine of Law of the Place of Injury*. The Kansas Workers Compensation Act contains its own choice of law rules, rejecting the doctrine of *lex loci delicti*—the law of the place of injury. In deciding choice of law questions when dealing with workers compensation awards, a state's laws control when that state has a significant contact or significant aggregation of contacts that creates state interests. But this choice of its law must be neither arbitrary nor fundamentally unfair.

Appeal from Workers Compensation Board. Oral argument held September 17, 2024. Opinion filed October 18, 2024. Affirmed.

John C. Nodgaard, of Arn, Mullins, Unruh, Kuhn & Wilson, LLP, of Wichita, for appellant.

David H. Farris, of Slape & Howard, Chtd., of Wichita, for appellee.

Before WARNER, P.J., HILL and COBLE, JJ.

HILL, J.: In our highly mobile society, Kansas workers are often hired to work on jobs outside of this state. When they are injured on the job, they may receive workers compensation benefits as allowed by the laws of the state where they are working. But what happens to those benefits when those workers move back to Kansas? This case addresses one of the legal issues that arise from such a scenario.

Linda S. Henretty worked as a nurse in Wichita. She accepted work as a nurse in Montana where she was injured on the job. She received workers compensation benefits for her injuries as well as an award for continuing benefits given the nature of her injury. Henretty has now returned to Kansas.

The legal question raised here is whether the Kansas Workers Compensation Fund is responsible for those continuing treatment expenses. The Workers Compensation Appeals Board ruled the Kansas Fund was liable, ruling Henretty's contract for employment was made in Kansas. The Fund appeals, arguing that it should not be liable.

A nurse in Kansas is offered employment in Montana.

Because of the nature of the issues raised in this appeal, we will delve into the circumstances of the execution of Nurse Henretty's contract.

In 2008, Linda Henretty was working as a scrub tech in the eye field at Wesley Medical Center in Wichita, Kansas. She had worked there for over nine years. She learned about a job opportunity with Healthcenter Northwest in Montana, where her son lived. Henretty spoke with Vicki Johnson, the Northwest administrator, by phone and then faxed her a resume. Northwest flew Henretty out to Montana for interviews. Within two to three days of her return to Wichita, Vicki called Henretty and offered her the position. Vicki said she would be sending something for Henretty to sign stating she had been hired. Vicki advised Henretty to start making plans to move to Montana—they wanted her there as soon as possible.

On July 25, 2008, Susan Stevens, the human resource director of Northwest, faxed Henretty a one-page signed written offer of employment. The letter began, "We are excited to have you join the team of great staff here at HCNW. This letter represents our offer of employment as a Senior OR Tech at HealthCenter Northwest." The letter listed the date of hire as "8/1/08 or shortly after." The letter included details including Henretty's position, wage, benefits, and schedule. Following those details, the letter stated, "Please sign below, make a copy for yourself, and return this original to me at the address below. Upon receipt of your signed letter, your relocation check will be sent to you." Henretty signed the letter the same day, agreeing she "accept[ed] employment as detailed above." She provided her bank information for the transfer of relocation funds. Henretty faxed the signed document back to Northwest. In response, Northwest sent the relocation funds to Henretty. Henretty resigned her position at Wesley, sold her house, and relocated to Montana.

A slip and fall causes ankle injuries and a workers compensation award.

On August 11, 2008, Henretty began work at Northwest. That day, she completed and signed an application for employment, W-4 tax form, security agreement, and other documents. If she had refused to complete those documents, she would not have been employed.

On November 17, 2017, Henretty fractured her right ankle after slipping on ice in the parking lot at Northwest. She underwent surgery and was hospitalized for several days. Henretty received medical and temporary disability benefits under the Montana Workers Compensation Act. Her last medical treatment for the injury was September 27, 2019. She was also awarded compensation for future treatments for her ankle.

In 2020, Henretty moved back to Wichita and went back to work at Wesley. She wanted to get additional medical treatment for her injured ankle in Kansas. She still had hardware in her leg from the surgery in Montana.

In September 2021, the Montana State Fund offered Henretty a settlement of $8,000 for her future medical expenses. She declined the offer. Instead, Henretty filed an application for workers compensation benefits in Kansas. Since Northwest did not have workers compensation insurance coverage in Kansas, the Kansas Workers Compensation Fund was impleaded under K.S.A. 44-532a.

Henretty pursues a Kansas Workers Compensation Fund claim.

After a preliminary hearing order, the Fund paid $288.51 in temporary total disability benefits to compensate for an underpayment based on the higher maximum weekly compensation rate allowed in Kansas compared to the weekly maximum in Montana. The case proceeded to a regular hearing. The Fund stipulated that Henretty met with a compensable injury in Montana. It also stipulated she had a 20% impairment which entitles her to disability benefits and future medical benefits upon proper application.

The parties disputed whether Kansas had jurisdiction over the workers compensation claim. Henretty argued Kansas had jurisdiction because there was a formal contract of employment on July 25, 2008, in Kansas. The Fund argued the last acts necessary for the formation of that contract were that Henretty had to move to Montana and complete certain forms in Montana.

The administrative law judge found Kansas had jurisdiction and awarded Henretty benefits under the Kansas Workers Compensation Act. The ALJ found the employment contract was formed in Kansas. The last act necessary for the formation of the employment contract was that Henretty sign and fax the letter to Northwest stating she was accepting the offer of employment, which she did in Kansas. Henretty's relocation to Montana was not a condition precedent to the formation of the employment contract. Henretty was paid for her moving expenses before she began work in Montana. The paperwork Henretty completed in Montana was like the standard paperwork most employees complete on their first day on the job; it was part of the job rather than a condition precedent to the formation of the contract.

The Workers Compensation Board affirmed the ALJ's decision. In the Board's view, Henretty would not have quit her job in

Wichita and sold her house without a contract in place. Northwest would not have paid Henretty $5,000 without a contract in place.

The Fund appeals, claiming that Henretty's contract of employment was not completed in Kansas and therefore there is no jurisdiction for a Kansas award of workers compensation benefits. The Fund also raises a due process claim asking in its brief for a remand to the Board for a determination of the issue, but in oral argument, the Fund asked us to address the issue for the first time on appeal.

The Workers Compensation Act is designed to promote compensation, not to prevent compensation.

The Kansas Workers Compensation Act is liberally construed to help bring employers and employees within the provisions of the Act. K.S.A. 44-501b(a). The Act applies "to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides." K.S.A. 44-506. In this case, the issue is whether the contract of employment was made in Kansas or Montana.

It is a general principle of Kansas law that a contract is made when and where the last act necessary for its formation is done. *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 209, 4 P.3d 1149 (2000); *Abbey v. Cleveland Inspection Servs., Inc.*, 30 Kan. App. 2d 114, 118, 41 P.3d 297 (2002). The Fund contends that Henretty's contract of employment was contingent on Henretty moving to Montana. In the Fund's view, the last act in the formation of the contract took place in Montana when Henretty moved. Henretty contends the contract of employment was made when she signed and returned the written document to Northwest on July 25, 2008, in Kansas.

When the appellant argues the Board erroneously applied the law to undisputed facts, appellate courts exercise de novo review. *Mera-Hernandez v. U.S.D. 233*, 305 Kan. 1182, 1185, 390 P.3d 875 (2017).

The Board's holding that an employment contract was made in Kansas is a factual finding. We review whether that finding is

supported by substantial competent evidence. See *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000). We do not reweigh the evidence. *Speer v. Sammons Trucking*, 35 Kan. App. 2d 132, 140, 128 P.3d 984 (2006).

The fundamental rule of employment contract formation is simple. Employment is offered and then employment is accepted. And a contract is born. But circumstances change. Each case is unique. Several cases on the law of contract formation show how the law has grown as the facts change.

An employment contract may be formed during a simple phone call where an employer offers employment and the offer is immediately accepted, so long as the parties agree on essential terms. See *Wilkinson*, 269 Kan. at 210, 212-13. The place of contracting is where the acceptor speaks the acceptance. See *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 707, 512 P.2d 438 (1973).

When an acceptance is authorized to be sent by mail, the place of contracting is where the acceptance is mailed. See *Shehane*, 27 Kan. App. 2d at 262; Restatement (First) of Conflict of Laws § 326 (1934).

In contrast, acceptance of an employment contract in some cases must be done by showing up to a particular location. For example, in *Davis v. Jacob Dold Packing Co.*, 140 Kan. 644, 38 P.2d 107 (1934), Davis was offered employment by letter to operate a new territory in New Mexico. Davis was at his home in Oklahoma. The letter told Davis to be in New Mexico on a certain day. In response to the letter, Davis went to New Mexico. The court held Davis manifested acceptance of the employment contract by going to New Mexico. The place of contracting was New Mexico. 140 Kan. at 645-46.

Once again, in *Smith v. McBride & Dehmer Const. Co.*, 216 Kan. 76, 530 P.2d 1222 (1975), a worker had to show up for work to accept employment. Beatty was a construction manager for a job site in Oklahoma. Beatty needed to hire laborers and knew Smith was out of work. Smith lived in Kansas. Beatty told one of his laborers, Bowie, to notify Smith that if Smith wanted to go to work, he needed to show up at the job site in Oklahoma. Bowie so notified Smith. Bowie had no authority to hire Smith. The following day Smith showed up in Oklahoma and was put to work. 216

Kan. at 77-78. The district court held the employment contract was made in Oklahoma. 216 Kan. at 79. The Supreme Court affirmed. Beatty's offer of employment, as relayed through Bowie to Smith, fairly called for acceptance of employment by Smith reporting for work at the Oklahoma job site. 216 Kan. at 79-80.

A panel of this court distinguished the *Smith* holding in *Phillips v. Mann Steel Contractors*, No. 72,552, 1995 WL 18253055 (Kan. App. 1995) (unpublished opinion). In *Phillips*, an agent of Mann Steel Contractors called Phillips and relayed an offer of employment for an ironworker at a site in Missouri. Phillips was in Kansas. Phillips accepted the offer over the telephone. The Board found the employment contract was made in Kansas. Mann argued to a panel of this court that the communication was merely a notification of work and not an offer of employment. And Phillips' presence at the job site was the last act necessary to form the contract. The panel rejected the argument as contrary to the uncontroverted evidence. The contract was formed when Phillips accepted the offer over the telephone while in Kansas. 1995 WL 18253055, at *1, 3.

We distinguish this case from *Davis* and *Smith* because the facts are different. Here, the offer letter to Henretty specifically called for acceptance by signature and return of the document, which Henretty did while in Kansas unlike the facts in *Davis* and *Smith* where the employment offer could be accepted only by the acceptor's physical presence at the job location. Henretty accepted the employment offer by signing and faxing the letter back to Northwest. We see an offer of employment and an acceptance of employment. We see a contract completed in Kansas. The Board was correct.

We reject the Fund's claim that there was a condition precedent here.

The Fund contends a condition precedent to enforcement of the employment contract was that Henretty move to Montana.

A review of the law is helpful at this point. There are two types of conditions precedent: conditions precedent to the formation of a contract and conditions precedent to performance under an existing contract. Conditions precedent to the formation of a contract

involve issues of offer and acceptance that precede the formation of a contract. Conditions precedent to performance under an existing contract define an event that must occur before a right or obligation matures under the contract. Whether a condition is a condition precedent to formation of the contract or to performance under an existing contract is determined by the parties' intent. *M West, Inc. v. Oak Park Mall*, 44 Kan. App. 2d 35, 47-48, 234 P.3d 833 (2010). A condition that occurs after a contract is formed that eliminates a party's obligations under the contract is also called a condition subsequent. *Schaben v. Central Kansas Medical Center*, No. 110,367, 2014 WL 2871389, at *4 (Kan. App. 2014) (unpublished opinion).

Two workers compensation cases offer contrasting views on conditions precedent. In *Shehane*, Shehane verbally accepted a job offer over the telephone from her home in Kansas. There was no mention of a drug test. Within a few days, Shehane received a written contract at her home. 27 Kan. App. 2d at 257-58. The contract stated that if Shehane failed to pass a drug test, the "'agreement shall be considered canceled and terminated.'" 27 Kan. App. 2d at 258. Shehane completed the drug test in Missouri. 27 Kan. App. 2d at 258. The ALJ and the Board found the employment contract was made in Kansas. The drug screen was merely a basis for canceling the contract. 27 Kan. App. 2d at 260. A panel of this court affirmed. Shehane accepted the employment contract on the telephone and signed the contract in her home in Kansas. The drug screening was a condition subsequent to the contract. 27 Kan. App. 2d at 261-63. In other words, under these facts there was a contract, but it would have been voided if the worker later failed the drug screen.

Then, in *Speer*, the worker talked to Otis, a representative of a Montana trucking company, by telephone from his home in Kansas about a job as a truck driver. Speer offered to work for the company, but he said he needed a company truck, benefits, higher pay, and seniority credit. Otis, while in Montana, agreed to Speer's conditions. Speer was required to travel to Montana to pick up a company truck, attend orientation, sign paperwork, and take a drug test. 35 Kan. App. 2d at 134-35. The Board found the employment contract was made in Montana because Otis accepted Speer's conditions of employment in Montana. A panel of this

court affirmed. 35 Kan. App. 2d at 141-42. The panel also found the passing of a drug test, attending orientation, and completing the required paperwork were conditions precedent to the employment contract coming into existence. Speer had admitted that passing the drug test was a condition he had to meet before he would be hired. 35 Kan. App. 2d at 144-45. In other words, under these facts the acceptance came in Montana and that is where the contract was completed.

Here, we hold that substantial competent evidence supports the Board's decision that the contract was made in Kansas. Henretty's relocation to Montana was not a condition precedent to the formation of this contract. Nothing in the offer letter stated that the contract's existence was contingent upon Henretty's move to Montana. She had to be in Montana to perform under the contract. But that does not mean it was not formed in Kansas.

The letter represented a detailed offer of employment. It stated that, "Upon receipt of your signed letter, your relocation check will be sent to you." Northwest paid Henretty the $5,000 in relocation funds promised in the contract before she moved to Montana.

The ALJ correctly stated, "Respondent's act of paying for Claimant's moving expenses is indicative that an employment contract had already been created." If that payment was not per the terms of an existing contract, Henretty could have stayed in Kansas and kept the money. Henretty also quit her job in Kansas and sold her house before moving to Montana. In turn, the Board looked at the intent of the parties and stated, "Claimant would not have quit her job in Wichita without the new job in Montana, she would not have sold her house without a new job, and Respondent would not have paid Claimant $5,000 without the new job in place."

We agree with the ALJ and the Board. This was a Kansas contract.

We will address a due process claim by the Fund.

The Fund argues that we should remand the case to determine whether the Full Faith and Credit Clause of Article IV of the United States Constitution and the Due Process Clause of the 14th

Amendment preclude imposing liability on the Fund because Kansas lacks a sufficient connection to Henretty's injury. In other words, is Kansas required to refrain from hearing Henretty's workers compensation claim to give full faith and credit to the Montana workers compensation law? Henretty argues the Fund cannot raise this issue on appeal because it was not raised before the Board and therefore the Fund waived the issue. The Fund replies that it can raise this issue for the first time on appeal because it involves only a question of law that would be finally determinative of the case and resolution of the issue is necessary to serve the ends of justice and prevent the denial of a fundamental right.

The Fund's argument that this issue involves only a question of law that would resolve the case is belied by its original request for the court to remand the issue. But in its reply brief and at oral argument, the Fund changed its position and asked this court to resolve the issue in this appeal. We will.

At the heart of this appeal is an injured worker entitled to compensation and two states with differing workers compensation systems. Is one state required to submit to the other?

The United States Constitution places very few restraints on a state's ability to apply its own law or administrative process to a case. To satisfy the Due Process and Full Faith and Credit Clauses, Kansas only needs to have a "'significant contact or significant aggregation of contacts'" to the issues, "'creating state interests,'" to ensure that the choice of Kansas law and process is not arbitrary or unfair. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). These contacts do not need to be extensive. In fact, the United States Supreme Court has noted that a person's residence in a state, when that person has ongoing needs related to the litigation, is a meaningful contact that can satisfy due process and full faith and credit. See *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 318-19, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981) (plurality opinion).

Various factors are relevant to a choice-of-law determination, including the procedural or substantive nature of the question involved, the residence of the parties involved, and the interest of the state in having its law applied. *In re K.M.H.*, 285 Kan. 53, 60, 169 P.3d 1025 (2007).

Courts do not balance the opposing state interests to resolve conflicts under the Full Faith and Credit Clause. Rather, "'it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.' [Citation omitted.]" *Franchise Tax Bd. of California v. Hyatt*, 538 U.S. 488, 496, 123 S. Ct. 1683, 155 L. Ed. 2d 702 (2003). A state need not "'substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' [Citations omitted.]" *Franchise Tax Bd. of California v. Hyatt*, 578 U.S. 171, 179, 136 S. Ct. 1277, 194 L. Ed. 2d 431 (2016).

We adopt those principles to guide our ruling. The Supreme Court has allowed states to give affirmative relief to injured workers despite due process and full faith and credit arguments. For example, in *Carroll v. Lanza*, 349 U.S. 408, 409-10, 75 S. Ct. 804, 99 L. Ed. 1183 (1955), it did not offend the Full Faith and Credit Clause for Carroll to seek common-law damages for an injury in Arkansas after receiving workers compensation in Missouri. Carroll was a resident of Missouri and the employment contract was made in Missouri. However, the work was done in Arkansas and the injury occurred in Arkansas. The court reasoned that "Arkansas, the State of the forum, is not adopting any policy of hostility to the public Acts of Missouri. It is choosing to apply its own rule of law to give affirmative relief for an action arising within its borders." 349 U.S. at 413. We note the importance of the contacts with each state that can affect the courts' decisions.

Then, in *Alaska Packers Assn v. Comm'n*, 294 U.S. 532, 537-38, 55 S. Ct. 518, 79 L. Ed. 1044 (1935), neither the Due Process Clause nor the Full Faith and Credit Clause prevented California from awarding compensation to an injured employee who was not a resident of California and where the work and injury occurred in Alaska. The contract of employment was entered into in California and the employer did business in California. The company employed workers in California for seasonal work in Alaska. 294 U.S. at 543, 550.

Here, the fact that the employment contract was made in Kansas is a significant contact with this state and should be sufficient on its own. See *Allstate Ins. Co.*, 449 U.S. at 312-13. A state must

have *a significant contact* or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair. We see nothing unfair under these circumstances. It has been the law of Kansas since 1927 that the Workers Compensation Act applied to injuries occurring outside the state where the contract of employment was made within the state. K.S.A. 44-506. The Fund was thus aware of the possibility, and it is not fundamentally unfair to impose liability on the Fund.

Kansas also has an interest in Henretty's claim because Henretty is a Kansas resident once again and intends to get medical care in Kansas for her injury. While a post-injury change of residence to the forum state is insufficient in and of itself to confer power on the forum state to choose its law, such a change of residence is relevant to the analysis. *Allstate Ins. Co.*, 449 U.S. at 319. After all, the state where the employee lives is where the impact of the injury will be most likely felt. *Crider v. Zurich Ins. Co.*, 380 U.S. 39, 41, 85 S. Ct. 769, 13 L. Ed. 2d 641 (1965).

With all of the contacts with Kansas, we hold that it does not offend the Constitution for Kansas law to apply here. The Kansas Workers Compensation Act contains its own choice of law rules, rejecting the doctrine of *lex loci delicti*—the law of the place of injury—governs. See K.S.A. 44-506; *Morrison*, 212 Kan. at 707; 99 C.J.S. Workers' Compensation § 83. And a forum state's application of its own workers compensation laws in an action involving multistate contacts and involving injury to a covered employee does not offend the Full Faith and Credit Clause. 82 Am. Jur. 2d Workers' Compensation § 32.

We see no full faith and credit problems here and find no due process concerns.

Affirmed.

(560 P.3d 586)

Nos. 125,721
126,184

ALENCO, INC., *Appellee*, v. WILLIAM WARRINGTON and TRINA LEMASTER, *Appellants*.

SYLLABUS BY THE COURT

1. CONTRACTS—*Compliance with Terms of Agreement—Requirements that Essential Purpose of Contract Accomplished and Good-Faith Attempt to Comply with Terms.* Not every breach of an agreement justifies rescinding the entire contract. When a person fails to precisely meet every contract term, their performance may still be considered complete if the essential purpose of the contract is accomplished and they have made a good-faith attempt to comply with the terms of the agreement.

2. SAME—*Substantial Performance of Contract Provides Essential Benefits of Contract*. Substantial performance of a contractual obligation is performance that, despite deviation or omission, provides the important and essential benefits of the contract.

3. SAME—*Substantial Material Breach of Contract Defeats Object of Parties*. A material breach of contract is so substantial as to defeat the object of the parties in making the agreement. When a party materially breaches a contract, they are precluded from enforcing the contract against the nonbreaching party until the material breach has been cured.

4. SAME—*Substantial Performance by Contractor under Construction Contract—Entitled to Contract Price Less Damages*. When a contractor has substantially performed their obligations under a construction contract, they are entitled to be paid the contract price, less damages for any minor deficiencies.

5. SAME—*Jury Determines if Party Substantially Performed Contractual Obligations or Breached Agreement*. Whether a party has substantially performed their contractual obligations or has materially breached the agreement is a factual determination resolved by the jury. Only when all the relevant facts are undisputed does this inquiry become a legal decision for the court.

6. CONSUMER PROTECTION ACT—*Purpose to Discourage Suppliers from Engaging in Deceptive Acts or Practices*. The Kansas Consumer Protection Act (KCPA), K.S.A. 50-623 et seq., was enacted to discourage suppliers from engaging in deceptive or unconscionable acts or practices when doing business with consumers.

7. SAME—*Determination Whether Supplier Engaged in Deceptive Practices Is Fact Question for Jury—KCPA Penalty*. Whether a supplier has engaged in deceptive practices penalized by the KCPA is a factual question for the jury. A supplier engages in deceptive acts or practices when it makes false or misleading statements or insinuations to consumers that it knew or should have known were untrue. The KCPA penalizes deceptive acts or practices in consumer transactions, regardless of whether the targeted consumer was ever actually misled.

8. SAME—*Determination Whether Unconscionable Practices by Supplier to Be Resolved by Court—Definition of Unconscionable Practices*. Whether a supplier engaged in unconscionable practices penalized by the KCPA is a mixed question of law and fact to be resolved by a court. Unconscionable practices typically involve conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits of a related consumer transaction.

9. TRIAL—*Impeaching Verdict Based on Juror Misconduct—Requires Misconduct Occurred and Misconduct Substantially Prejudiced Right to Fair Trial*. A party seeking to impeach a verdict based on juror misconduct must demonstrate both that misconduct occurred and that the misconduct substantially prejudiced that party's right to a fair trial.

10. APPEAL AND ERROR—*Burden on Appellant to Designate Record Showing Claimed Error—Presumption that Action of Court Proper if No Record Shown*. An appellant has the burden to designate a record that affirmatively establishes the claimed error. Without such a record, an appellate court presumes the action of the district court was proper.

Appeal from Johnson District Court; JAMES F. VANO, judge. Oral arguments held May 21, 2024. Opinion filed October 25, 2024. Affirmed in part, reversed in part, vacated in part, and remanded with directions.

Stanley B. Bachman and *Sue L. Becker*, of Morefield Speicher Bachman, LC, of Overland Park, for appellants.

Michelle M. Suter, of Commercial Law Group, P.A., of Leawood, for appellee.

Before PICKERING, P.J., MALONE and WARNER, JJ.

WARNER, J.: This consolidated appeal arises from a contract for exterior renovation work between Alenco, Inc., and the owners of a home in Olathe. Alenco sued the homeowners for breach of contract after they refused to pay $27,000 due under the contract, claiming the siding Alenco installed on their home had a lesser insulation rating than the contract called for. After a trial, the jury found for Alenco, concluding that the homeowners had breached

the contract by not satisfying their bill. The jury rejected the homeowners' claims that Alenco had violated the Kansas Consumer Protection Act (KCPA) and that it breached the contract first by providing the wrong siding.

The homeowners requested a new trial, asserting that the jury's verdict on their KCPA counterclaim was against the weight of the evidence. The district court disagreed and denied the motion. But the court then essentially reweighed the evidence and, despite the jury's earlier assessments, found that Alenco had made several misrepresentations during the course of the transaction in violation of the KCPA. The court imposed a $10,000 civil penalty against Alenco and ordered the company to pay $40,000 of the homeowners' attorney fees.

The homeowners and Alenco each challenge aspects of that trial and the district court's posttrial rulings. After carefully reviewing the record and the parties' arguments, we find that the district court erred by effectively substituting its factual findings for the jury verdict on the KCPA claim. We also vacate the attorney-fees award that was based on that same finding, but we affirm the district court's discovery sanction for certain pretrial conduct. We thus affirm in part, reverse in part, vacate in part, and remand for entry of judgment in Alenco's favor on the consumer-protection claim.

FACTUAL AND PROCEDURAL BACKGROUND

Trina LeMaster and Bill Warrington own a home in Olathe. Alenco is a Kansas corporation that supplies and installs home improvement products. In 2019, LeMaster and Warrington (the homeowners) hired Alenco to perform construction work on their home, including installing new siding.

Before hiring Alenco, the homeowners met with one of Alenco's sales representatives. The representative inspected the homeowners' existing siding and identified it as hollow vinyl. After discussing Alenco's products and services and the work the homeowners sought, the representative prepared a proposal for the work. The homeowners later went to Alenco's showroom to view siding options and chose a siding product called "Cedar Ridge,"

manufactured by Westlake Royal Building Products. Alenco purchases this siding product through a distributer.

The homeowners entered into a contract with Alenco to replace their siding and perform other construction work, including installing custom shutters and new guttering. This contract included several handwritten specifications about various aspects of the work to be completed and the products to be used. For example, the contract stated Alenco would install a siding product with "R-value 4" insulation—that is, siding with a particular thickness of pre-attached insulation. The contract also stated that Alenco would use "Cedar Ridge" solid core siding, type "Triple 6" with a "horizontal" style in a "slate" color. The total cost of the job was $30,000. The homeowners made a $3,000 downpayment upon execution of the contract, and construction began a few months later.

The parties' disagreement over the siding product and insulation rating

When the project was nearly complete, the homeowners were observing the worksite and noticed a few pieces of scrap siding. They thought these pieces of siding looked different from the siding they previewed at the showroom; the box in their yard contained siding labeled as "CraneBoard 6" with an R-value of 2.2. The homeowners contacted an Alenco representative and told him that they believed the wrong siding was being installed on their home. In the meantime, Alenco placed an invoice on the homeowners' door for $27,000 due under the contract. The homeowners refused to pay.

The homeowners and Alenco exchanged texts, phone calls, and emails about the siding that had been installed. The homeowners also had several meetings with representatives of Alenco, including the company's vice president and sales manager, as well as its retired president, who was called in to help resolve the dispute.

In these meetings, the Alenco representatives explained that the confusion about the siding stemmed from a problem with the marketing materials it received from the manufacturer and from a change in the way the R-value was rated for energy-saving tax credits. They indicated that the product that had been installed on

the homeowners' property was the same in all essential details as the product the homeowners had chosen and that the siding on the home had the highest R-value available for siding product the homeowners had requested. The representatives noted that Cedar Ridge is a "white label" brand for a siding called CraneBoard, meaning the Cedar Ridge siding the homeowners selected is also labeled and marketed as CraneBoard.

Alenco proposed a few possible solutions to remedy the disagreement. For example, Alenco offered to temporarily remove the siding and add insulation to achieve the equivalent of the R-value 4 rating for no additional cost. Alternatively, it offered to discount the price of the work by $2,000—the amount that the homeowners would be expected to save in energy costs over 20 years with R-value 4 siding. The homeowners rejected both these offers, however, and informed Alenco that they did not intend to pay for the siding or the other work beyond the $3,000 downpayment since they had not received the product listed in the contract.

The lawsuit and eventual jury verdict in favor of Alenco

When the parties could not resolve their disagreement after several months, Alenco filed this lawsuit, alleging the homeowners owed it $27,000 under the contract, plus court costs and attorney fees. The homeowners counterclaimed, asserting that Alenco breached the contract first when it installed the wrong siding. The homeowners also alleged that Alenco had engaged in deceptive and unconscionable acts in violation of the KCPA.

Most of the parties' claims and counterclaims were tried to a jury over the course of a four-day trial. The jury thus heard evidence relating to each party's assertations about who breached the contract and when they had allegedly done so, as well as the homeowners' claim that Alenco had violated the KCPA by engaging in several deceptive practices. (The homeowners' final counterclaim—that Alenco violated the KCPA by engaging in unconscionable consumer practices—was not presented at trial because whether a practice is unconscionable is a legal question to be determined by the court, not a factual question to be resolved by the jury. See K.S.A. 50-627[b].) The homeowners and several repre-

sentatives from Alenco testified about the parties' contract, the nature of the siding industry, and the cause of the parties' disagreement, as well as their negotiations to resolve that disagreement.

After hearing all the evidence, the jury found that the homeowners had breached their contract with Alenco by refusing to pay the invoice. It awarded Alenco $25,000 in damages—essentially the offer Alenco had previously presented with $2,000 deducted from the remaining amount due under the contract. The jury also found that Alenco had neither materially breached the contract nor engaged in any deceptive acts proscribed by the KCPA.

The crux of this appeal—the district court's posttrial rulings

After trial, the homeowners filed several motions with the district court. Three of these requests make up the heart of this appeal. The homeowners requested either judgment as a matter of law or a new trial, claiming the jury's verdict was against the great weight of the evidence and thus could not be upheld. They also asked the district court to rule in their favor on their remaining counterclaim—that Alenco should be subject to civil penalties under the KCPA because it had engaged in unconscionable consumer practices.

The district court held a hearing on the homeowners' posttrial motions. It later denied their request for judgment as a matter of law and for a new trial, finding there was evidence submitted at trial to support the jury's verdict.

The court then turned to the homeowners' remaining KCPA claim based on unconscionability. While the court found that the homeowners were not protected or particularly vulnerable persons under the KCPA—typically a finding necessary to prove unconscionability—the court nevertheless found Alenco had engaged in an unconscionable practice. The court explained that even though the jury had found Alenco had not engaged in deceptive practices and that finding was supported by evidence at trial, the court had reviewed the evidence and would make findings "independent of those of the jury." The court then found that Alenco had engaged in several deceptive actions during the siding transaction despite the jury rejecting each of these allegations at trial. The court concluded that, when taken together, these actions constituted one

"multifaceted unconscionable practice" under the KCPA. The court then imposed a $10,000 civil penalty against Alenco.

In its written journal entry memorializing its decision, the district court acknowledged that its KCPA findings were in direct conflict with the jury's verdict. It explained, however, that this difference was simply a disagreement between the court's and jury's assessment of the facts:

> "It is unknown to the Court how or why the jury reached the verdict that it did on all of the KCPA deceptive acts claims submitted. It could be they were offended by something that was said in testimony or in argument. It could be they misunderstood the facts. They might have been offended that the Defendants kept and are using the siding. As we have known for some time, it has always been within the raw power of the jury to 'fly in the teeth of both fact and law.' [*State v. McClanahan*, 212 Kan. 208, 213, 510 P.2d 153 (1973).] That is part of the risk of trial to a jury and why the Court was not inclined to set aside its verdict. We have not been made aware of any corruption to impeach the verdict. On the other hand, in trying the unconscionable practices counterclaim, the Court was making findings on its own based upon its hearing of the evidence unpersuaded, separate and independent from the jury. The verdict in this case is not against the great weight of the evidence. It is simply that the Court heard the case and resolved it differently."

In the same order, the court awarded the homeowners $40,000 in attorney fees for their successful KCPA counterclaim—less than a quarter of the $175,000 the homeowners had requested. And the court imposed a $2,500 discovery sanction against Alenco on an unresolved pretrial discovery matter. The court also found that Alenco was not entitled to attorney fees under the KCPA, although Alenco had not yet submitted a request for fees under the Act. The court did award 15% of the total judgment as attorney fees to Alenco under the contract, as well as prejudgment interest.

The parties' consolidated appeals

For reasons unimportant to our analysis, the homeowners and Alenco filed separate notices of appeal, docketed their respective appeals under separate appellate case numbers, and provided full briefing in each case. This court consolidated the separate appeals on our own motion before oral argument.

The parties' respective appeals raise several issues arising from the tension between the jury's verdict and the district court's posttrial rulings:

- Alenco asserts that the jury's verdict was supported by evidence at trial. It argues that, despite the district court's denial of the homeowners' motions for a new trial and judgment as a matter of law, the court's unconscionability ruling under the KCPA was truly a reweighing of the evidence as it related to the homeowners' deceptive-acts claim—a claim the jury found to be unsupported by the evidence.
- The homeowners assert that the district court's statements in its KCPA ruling demonstrate that it used an incorrect standard when assessing their other posttrial motions, as the court essentially stated that it did not understand the evidentiary basis for the jury's verdict. They assert that the court should have granted them judgment as a matter of law, or at least granted a new trial. They also argue that the district court erred when it found that Alenco had engaged in only one unconscionable practice under the KCPA since the court listed eight actions during the posttrial hearing that it found were deceptive.

The parties also raise other issues relating to attorney fees, the actions of a juror during deliberations, and the discovery sanction.

DISCUSSION

The jury trial "is a central foundation of our justice system and democracy." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210, 137 S. Ct. 855, 197 L. Ed.2 d 107 (2017). Our courts entrust jurors with the responsibility to observe witnesses' demeanor and listen to their testimony to determine what versions of events are credible. And once jurors have been instructed on the law, we rely on them to weigh the evidence presented in the context of each party's arguments, make factual findings, and render a verdict. In this way, each jury is "a tangible implementation of the principle that the law comes from the people." 580 U.S. at 210.

Out of respect for the jury's solemn responsibility, Kansas law recognizes that a jury's verdict, when based on the correct law and supported by evidence, should not be set aside lightly. For this reason, courts tend to view posttrial motions like the two the homeowners filed here—a motion for a new trial under K.S.A. 60-259 and a motion for judgment as a matter of law under K.S.A. 60-250—with some degree of skepticism, as these motions seek to set aside the jury's assessment of the evidence.

A motion for judgment as a matter of law allows a district court to vacate findings and awards made by a jury after a full presentation of the evidence if there is not "a legally sufficient evidentiary basis to find for the party on that issue." K.S.A. 2023 Supp. 60-250(a)(1); see *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015). When presented with such a motion, the district court must "'resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. Where reasonable minds could reach different conclusions based on the evidence, the motion must be denied.'" *Wilkinson v. Shoney's, Inc*., 269 Kan. 194, 202, 4 P.3d 1149 (2000). Appellate courts apply this same standard on appeal. *National Bank of Andover v. Kansas Bankers Surety Co*., 290 Kan. 247, 267, 225 P.3d 707 (2010).

Motions for a new trial present a similar inquiry but offer a different remedy: a new trial of one or more of the questions decided by the jury, rather than a directed judgment. See K.S.A. 2023 Supp. 60-250(b) (recognizing that a new trial is an alternative remedy for a request for judgment as a matter of law). A district court has discretion to grant a new trial if some error in the proceedings called into question the fairness of the process or the soundness of the outcome. See K.S.A. 2023 Supp. 60-259(a) (listing potential bases for a new trial). Appellate courts will only set aside the decision to grant or deny such a motion when the district court has abused its discretion—that is, if the court acted in a way that no reasonable court would under the circumstances or based its decision on a factual or legal error. See *Wiles v. American Family Life Assurance Co*., 302 Kan. 66, 74, 350 P.3d 1071 (2015).

Our review of the record shows that the district court appropriately denied the homeowners' posttrial motions because the jury's verdict was supported by evidence—albeit *disputed* evidence—at trial. The district court erred, however, when it then reweighed that evidence to reach a conclusion on the remaining KCPA claim that was irreconcilable with the jury's findings. This ruling, and the accompanying attorney-fees award, must be reversed.

1. *The jury's findings regarding the parties' respective breach-of-contract claims were supported by evidence presented at the trial.*

The first disputed findings on appeal concern the jury's verdict as it related to the parties' contract. As we have noted, the jury found that the homeowners had breached the contract with Alenco and owed Alenco $25,000 in damages. The jury also found that Alenco had not materially breached its contract with the homeowners. The homeowners now assert that the jury's verdict cannot be reconciled with the undisputed fact that Alenco installed a siding with a lower R-value than the parties had agreed upon. The homeowners argue that they had no duty to pay for Alenco's work or for the products used because Alenco used different siding than what they had chosen. Our review shows that the jury's verdict is supported by evidence presented at trial. Thus, the district court did not err when it denied the homeowners' request to set aside the verdict.

Kansas law generally holds people responsible for the agreements they make. But not every breach of an agreement justifies rescinding the entire contract. *Whiteley v. O'Dell*, 219 Kan. 314, 316, 548 P.2d 798 (1976). When a person "fails to precisely meet" every contract term, their performance "may still be considered complete if the essential purpose of the contract is accomplished" and they have made "a good-faith attempt to comply with the terms of the agreement." *Dexter v. Brake*, 46 Kan. App. 2d 1020, 1033, 269 P.3d 846 (2012). The guiding question is whether a person has *substantially performed* their contractual obligations or whether they have *materially breached* the agreement in a way that eviscerates the purpose of the contract.

Substantial performance is "'performance which, despite deviation or omission, provides the important and essential benefits of the contract.'" *Almena State Bank v. Enfield*, 24 Kan. App. 2d 834, 840, 954 P.2d 724 (1998) (quoting *Ujdur v. Thompson*, 126 Idaho 6, 9, 878 P.2d 180 [App. 1994]). Courts have found that technical breaches of an agreement may be excused if the parties performed the essence of their contractual obligations. See *Almena State Bank*, 24 Kan. App. 2d at 839. In these instances, the "'technical breach of the terms of the contract is excused not because compliance with the terms of the contract . . . is objectively impossible, but because the actual performance is so similar to the required performance that "any breach is immaterial."'" 24 Kan. App. 2d at 839 (quoting *Phoenix Mut. Life Ins. Co. v. Adams*, 828 F. Supp. 379 [D.S.C. 1993]).

Conversely, a material breach is "so substantial as to defeat the object of the parties in making the agreement." *Federal Land Bank of Wichita v. Krug*, 253 Kan. 307, 313, 856 P.2d 111 (1993). When a party materially breaches a contract, they are precluded from enforcing the contract against the nonbreaching party until the material breach has been cured. *Bank of America v. Narula*, 46 Kan. App. 2d 142, Syl. ¶ 3, 261 P.3d 898 (2011). In this situation, the nonbreaching party is entitled to "suspend or terminate performance under that contract" until the previous breach is resolved. 46 Kan. App. 2d 142, Syl. ¶ 3.

The tension between substantial performance and material breaches often arises in construction contracts. See *Almena State Bank*, 24 Kan. App. 2d at 840; 15 Williston on Contracts § 44:57 (4th ed.) (May 2024 Supp.). Several considerations are relevant to this assessment, including

> "whether the contractor performed the construction substantially as promised, and whether the owner can use the property for the purposes it intended when contracting with the builder in the first instance, even though there are minor matters that must be completed or corrected, so that it can be said that the owner obtained substantially that for which it bargained." 15 Williston on Contracts § 44:57.

See also *Zhitlovsky v. Valeo Behavioral Health Care, Inc.*, No. 98,272, 2008 WL 1847814, at *7 (Kan. App. 2008) (unpublished opinion) (quoting the nonexhaustive considerations listed in the

Restatement [Second] of Contracts § 241 [1979]). When a contractor has substantially performed their obligations under a construction contract, they are entitled to be paid "the contract price, less damages for any minor deficiencies." 15 Williston on Contracts § 44:57.

This question—whether a party has substantially performed their obligations or has materially breached the agreement—is a factual determination resolved by the jury. See *Waste Connections of Kansas, Inc. v. Ritchie Corp*., 296 Kan. 943, 964, 298 P.3d 250 (2013); *First Nat'l Bank of Omaha v. Centennial Park*, 48 Kan. App. 2d 714, 725, 303 P.3d 705, *rev. denied* 297 Kan. 1244 (2013). Only when all relevant facts are undisputed does this inquiry become a legal decision for the court. 48 Kan. App. 2d at 725.

The jury here was instructed on the law relating to substantial performance and material breaches. After hearing all the evidence presented, the jury found that Alenco did not materially breach the contract when it installed siding with an R-value of 2.2 instead of 4.0. This finding was supported by evidence presented at trial. And although there was conflicting evidence on this point, we do not reweigh that evidence on appeal. *State v. Betancourt*, 301 Kan. 282, 302, 342 P.3d 916 (2015).

The homeowners point out that it was undisputed that the parties' contract stated Alenco would install Cedar Ridge siding with an R-value of 4.0, and yet the company instead installed CraneBoard siding with an R-value of 2.2. They argue that the siding's type and insulation were crucial reasons for their decision to hire Alenco to perform the work on their home. And "'there can be no "substantial performance" where the part unperformed touches the fundamental purpose of the contract and defeats the object of the parties entering into the contract.'" *Almena State Bank*, 24 Kan. App. 2d at 840. Thus, they assert, the jury's finding that Alenco substantially performed its contractual obligations was contrary to the evidence and cannot stand.

Alenco acknowledges on appeal, as it did at trial, that it had installed siding on the homeowners' property with a different R-value than that listed on the contract. But Alenco asserts that ample evidence presented to the jury showed that this difference

was not a material breach that vitiated the contract in its entirety. After reviewing the trial record, we agree with Alenco.

The homeowners, along with Alenco's sales representative, agree the R-value of the siding was an important consideration for the homeowners in the construction project. But this was not the only evidence pertinent to the jury's charge. Rather, the parties also presented evidence about the nature of the R-value rating, the reasons why the siding installed had a different R-value rating than what the parties had originally anticipated, and the ways the differences in siding types could be compensated without defeating the purpose of the contract. All these considerations were relevant to the question of whether Alenco had substantially performed its obligations under the contract.

For example, the jury heard evidence that the R-value is essentially a designation about the degree to which the siding insulates a house. Alenco's vice president and sales manager both testified that the difference in the siding installed on the homeowners' house was partly a branding issue (Cedar Crest was also marketed as CraneBoard under a different label) and partly a mix-up due to erroneous marketing materials that Alenco received from the siding's manufacturer (Alenco had not previously known that the product it received had a lower R-value than what was listed in the manufacturer's brochure). Alenco's witnesses explained that the company had offered to compensate for the difference in R-value in other ways, such as supplementing the insulation behind the siding (which it was willing to do at no additional cost) or reducing the contract price to account for the difference in energy savings. But the homeowners were not amenable to these proposals. Based on this evidence, the jury found Alenco substantially performed under the contract and made a good-faith effort to comply with the contract terms, meaning it did not completely forfeit its right to compensation under the contract.

This finding is bolstered by other evidence before the jury demonstrating that the parties' contract was not limited to the installation of siding with a particular R-value. The old siding on the homeowners' house had been removed, and the house had been prepared for the new siding by removing wood rot and installing a moisture wrap. Alenco had also removed the old gutters and had

installed new ones. And it had ordered and received custom shutters, but the homeowners had refused to allow it to install them after the homeowners discovered the issue with the R-value of the siding. The homeowners had refused to pay for any of this work.

In a last effort to undermine the jury's findings, the homeowners point to the district court's ruling that Alenco had engaged in unconscionable acts by installing a different siding, which cannot be squared with the jury's finding that Alenco had not materially breached the parties' contract. As we discuss in the next section, we agree that the court's ruling—which in essence found that Alenco had committed several deceptive acts—cannot be reconciled with the jury's finding that Alenco had not knowingly committed any deceptive acts. But that juxtaposition was not the result of a lack of evidence presented to the jury on the breach-of-contract claim. Instead, it was the result of the district court's improper reweighing of the evidence after trial. Whether a party has materially breached a contract is a question of fact for the jury. *Waste Connections of Kansas, Inc.*, 296 Kan. at 964. And there was evidence to support the jury's finding here.

Indeed, the verdict demonstrates that the jury took all of this evidence into consideration. The jury ultimately found that the homeowners must pay Alenco $25,000—the amount due under the contract minus the $2,000 in savings the homeowners would lose out on over the next 20 years without the more insulated siding.

There was evidence presented at trial to support the jury's finding that the difference in the siding's R-value did not defeat the purpose of the parties' contract. The district court did not err when it denied the homeowners' posttrial motions seeking to set aside the jury's verdict.

2. *Evidence at trial supported the jury's verdict that Alenco committed no deceptive acts in violation of the KCPA, and the district court erred when it essentially reweighed that evidence to conclude Alenco had engaged in an unconscionable practice.*

As we have noted, the homeowners also brought counterclaims against Alenco under the KCPA, asserting that Alenco had

engaged in deceptive and unconscionable practices in violation of the Act. After hearing all the evidence presented at trial, the jury found that Alenco had not knowingly committed any deceptive acts. The district court denied the homeowners' posttrial motions challenging this verdict. But then, considering the same evidence, the court found that Alenco had engaged in an unconscionable practice by committing eight deceptive acts that the jury had rejected. The court imposed a $10,000 civil penalty against Alenco for violating the KCPA and ordered the company to pay $40,000 of the homeowners' attorney fees. And though Alenco had not yet sought attorney fees under the KCPA, the district court preemptively ruled that Alenco was not entitled to attorney fees under the Act.

The parties now appeal virtually every aspect of these various judgments under the KCPA:

- The homeowners assert that the jury's finding that Alenco had not engaged in any deceptive acts was contrary to the evidence presented at trial—they note that the district court found, based on the same evidence, that Alenco's conduct was unconscionable. They also assert that the district court erred when it found Alenco's actions together constituted one unconscionable practice rather than eight separate deceptive practices, each subject to a penalty under the KCPA. And they argue that the district court abused its discretion when it awarded them $40,000 in attorney fees rather than the over $175,000 they had requested.
- Alenco asserts that there was evidence at trial showing it had not knowingly engaged in any deceptive acts. It asserts that the district court's unconscionability decision was really a rehashed assessment of whether Alenco had engaged in deceptive practices, and given the jury's finding, the district court erred when it reweighed the evidence to come to the opposite conclusion. Alenco thus asserts that the district court erred when it assessed a penalty and attorney fees against the company, and the court acted prematurely when it denied Alenco's request for attorney fees under the KCPA before that request was submitted.

Having reviewed the trial and posttrial record, we agree with Alenco that the jury's finding under the KCPA was supported by the evidence. And while it is true that unconscionability typically rests on a legal conclusion drawn by the court, we agree that the district court's analysis in this case was merely a reweighing of the facts already assessed by the jury. This was error. We thus affirm the jury's verdict but reverse the district court's posttrial finding that Alenco had violated the KCPA.

2.1. *The Kansas Consumer Protection Act distinguishes between deceptive acts, which are found by a jury, and unconscionable acts, which are determined by a court.*

The KCPA was enacted to discourage suppliers from engaging in deceptive or unconscionable acts or practices when doing business with consumers. K.S.A. 50-623(b). To achieve this goal, the Act empowers the Kansas Attorney General to prosecute prohibited practices and establishes a private claim for consumers who have been subjected to a supplier's deceptive or unconscionable actions. See K.S.A. 50-633 (actions by the Attorney General); K.S.A. 50-634 (private remedies). Aggrieved consumers may recover either actual damages associated with a supplier's knowingly deceptive or unconscionable practices or a civil penalty of up to $10,000 for each violating act or practice, whichever is greater. K.S.A. 50-634(b); K.S.A. 50-636(a). Suppliers who willfully violate the Act—meaning suppliers who intend to cause harm to the consumers—are subject to penalties of up to $20,000 per violation. K.S.A. 50-636(b); *Unruh v. Purina Mills, LLC*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009).

On the most basic level, a supplier uses deceptive acts or practices when it makes false or misleading statements or insinuations to consumers that it knew or should have known were untrue. The KCPA penalizes deceptive acts or practices in consumer transactions, regardless of whether the targeted consumer was ever actually misled. The Act lists several examples of deceptive representations, including knowingly stating that "[p]roperty or services have . . . characteristics [or] benefits" that they do not. K.S.A. 2023 Supp. 50-626(b)(1)(A). Whether a supplier misrepresented information to a consumer and whether the supplier knew or

should have known that the statement was inaccurate are factual questions entrusted to the jury. *Manley v. Wichita Business College*, 237 Kan. 427, Syl. ¶ 2, 701 P.2d 893 (1985).

Unconscionable practices, which the KCPA treats differently than deceptive practices, "'typically involve[] conduct by which a supplier seeks to induce or to require a consumer to assume risks which materially exceed the benefits . . . of a related consumer transaction.'" *State ex rel. Stovall v. ConfiMed.com*, 272 Kan. 1313, 1318, 38 P.3d 707 (2002) (quoting Kansas Comment 1 to K.S.A. 50-627). Unconscionable conduct is "'not necessarily deception'"; it can also involve "overreaching.'" 272 Kan. at 1318 (quoting Kansas Comment 1 to K.S.A. 50-627). Even so, Kansas courts have recognized that most unconscionable conduct penalized by the KCPA involves "'some element of deceptive bargaining conduct present as well as unequal bargaining power.'" 272 Kan. at 1321; see also K.S.A. 50-627(b) (listing seven examples of unconscionable actions that would violate the KCPA).

While the deceptiveness of a practice is a factual question for the jury, whether an action is unconscionable is a determination left to the court. K.S.A. 50-627(b). Unconscionable acts committed knowingly (or willfully) are subject to a civil penalty for up to $10,000 (or $20,000) per violation. K.S.A. 50-636(a), (b). Courts have discretion to decide, within the appropriate confines of the facts and the law, whether a supplier's actions rise to the level of unconscionability and the extent of the damages to be awarded or the penalty to be assessed. See *State ex rel. Stovall v. DVM Enterprises, Inc.*, 275 Kan. 243, 249, 62 P.3d 653 (2003).

The homeowners identified 11 aspects of their transaction with Alenco that they claimed were either deceptive or unconscionable. See K.S.A. 2023 Supp. 50-626 (defining deceptive acts or practices); K.S.A. 50-627 (discussing unconscionable acts or practices). They did not allege that Alenco acted willfully when it installed a siding with a different R-value than they had previously agreed. But they asserted that Alenco acted "knowingly"—that the company "knew or should have known" that it was agreeing to install a product that did not exist or was not available. See *Via Christi Regional Medical Center, Inc. v. Reed*, 298 Kan. 503, 521, 314 P.3d 852 (2013).

The central question in this case is one of first impression: K.S.A. 50-627(b) states that the court—not the jury—decides whether an act is unconscionable, and yet the truth or falsity of a representation and the party's intent in making that representation are traditionally questions of fact to be resolved by the jury. Is a judge tasked with assessing unconscionability bound by the jury's findings about the supplier's intent and whether the underlying conduct was deceptive? We answer this question, "yes."

2.2. *The jury's finding that Alenco did not knowingly deceive the homeowners is supported by evidence in the record.*

Before digging deeper into the relationship between the respective roles of the judge and jury under the KCPA, we must first resolve a factual disagreement as to whether the jury's finding that Alenco had not knowingly deceived the homeowners was supported by the evidence.

At trial, the homeowners argued that Alenco had made 11 deceptive statements in violation of the KCPA, including that the "Cedar Ridge siding had a 4.0 R value" and other matters relating to the construction project. The jury found that the homeowners had not shown that Alenco had made any of these misrepresentations knowingly.

On appeal, as in their posttrial motions for judgment as a matter of law and for a new trial, the homeowners limit their argument to Alenco's statements regarding the R-value of the siding. They observe that it was undisputed at trial that Alenco installed siding that was different from that listed in the contract, and they note that the R-value of this siding, which was stated on the box, was different from the R-value listed in the contract. Thus, the homeowners assert the evidence was undisputed that Alenco represented to them that the siding would have "characteristics" or "benefits" that it did not. See K.S.A. 2023 Supp. 50-626(b)(1)(A).

Alenco responds that multiple witnesses testified that this difference was an honest mistake caused by erroneous marketing materials from the manufacturer and that Alenco attempted to ameliorate the situation when it realized its mistake. In other words, Alenco emphasizes that there was evidence that it did not knowingly deceive the homeowners.

As the district court pointed out at the posttrial hearing, the KCPA is not a strict-liability statute. See K.S.A. 2023 Supp. 50-626(b)(1)(A). The jury was asked whether Alenco stated that Cedar Ridge siding had an R-value of 4.0, or made the 10 other statements the homeowners claimed were untrue, while "knowing or with reason to know that those representations were not true." Ample evidence presented at trial supported that Alenco's promise to deliver R-value 4.0 siding was a mistake, rather than a knowing misrepresentation:

- Alenco's vice president testified that Alenco did not know that "the R-value had been changed while the product had remained the exact same." He explained that no one at Alenco had seen a box listing the siding as a 2.2 R-value; the first time it was brought to his attention was when the homeowners contacted Alenco. He characterized what happened as a "very unfortunate misunderstanding" and stated that the manufacturer of the siding still claimed that the siding was "a 4.0."
- Alenco's sales manager testified that he was "shocked" when the homeowners pointed out the difference in R-value because he was "not aware that [the product's box] said 2.2." The sales manager explained that Alenco had been selling the same product since 2001 and "had never been provided any information from the manufacturer that anything had ever changed."

It was the homeowners' burden at trial to convince the jury that Alenco violated the KCPA. *Hernandez v. Pistotnik*, 58 Kan. App. 2d 501, 506, 472 P.3d 110 (plaintiff must prove deceptive acts), *rev. denied* 312 Kan. 891 (2020). But the jury apparently rejected the homeowners' theory and credited Alenco's explanation that it had mistakenly relied on information about the R-value that it received from the siding manufacturer. This finding was supported by the evidence. Thus, the district court correctly denied the homeowners' motions to set aside the jury verdict.

2.3. *The district court erred by reweighing the evidence despite the jury's verdict, finding that Alenco violated the KCPA, and awarding attorney fees to the homeowners.*

The homeowners also argue that the jury's verdict should not be allowed to stand because it is directly at odds with the district court's finding that Alenco engaged in an unconscionable practice in violation of the KCPA. Alenco takes the opposite view, asserting that the district court's ruling on unconscionability cannot be reconciled with the jury verdict and must be overturned. These two arguments spawn several other related challenges:

- The homeowners challenge the magnitude of the penalty the district court imposed, asserting that the district court found that Alenco had engaged in eight unconscionable acts or practices but only imposed one $10,000 penalty for the transaction rather than eight separate penalties.
- The homeowners claim the district court erred when it awarded them $40,000 in attorney fees, rather than the $175,000 they requested.
- Alenco asserts the district court should not have granted any attorney fees to the homeowners under the KCPA because the jury's finding showed that it did not violate the Act.
- Alenco argues that the district court's unprompted ruling that Alenco was not entitled to any attorney fees was premature since Alenco had not yet requested attorney fees under the KCPA.

Ultimately, we agree with Alenco that the district court erred when it reweighed the facts that the jury had already decided. It is true that the unconscionability of a supplier's actions is determined by the district court. But once a jury has weighed the evidence presented and made factual findings supported by that evidence, a district court does not have discretion to make factual findings that conflict with the jury's verdict.

As we have noted, the conclusion that a supplier has acted unconscionably involves several analytical steps. The court must first determine whether a supplier knowingly misrepresented

some aspect of the transaction or otherwise overreached—a factual assessment. The court must then determine whether this conduct was undertaken in the presence of some recognized vulnerability or imbalance of power—a mixed question of law and fact. If the supplier's behavior meets both criteria, the court has discretion to assess whether this behavior rises to the level of unconscionability that requires a penalty under the KCPA, and if so, what the appropriate penalty should be. See *DVM Enterprises, Inc.*, 275 Kan. at 249 (citing *ConfiMed.com*, 272 Kan. at 1322).

The district court's ruling on unconscionability in this case did not follow this pattern. The court recognized that the jury had found that Alenco had not knowingly deceived the homeowners and denied the homeowners' requests to set aside that verdict. The court then found there was no imbalance of power between the parties and that there was no reason for Alenco to believe either homeowner had a protected legal status—a determination the parties do not dispute on appeal.

Nevertheless, the court proceeded to make extensive factual findings "independent of those [made by] the jury," finding that Alenco "misled" the homeowners in 8 of the 11 respects that had been previously submitted to and rejected by the jury. And the court found that this "method used for closing the sale"—making a "misleading false statement, which it would later disavow, or refute, or attempt to refute, or claim to be impossible to perform"—was unconscionable, as it showed Alenco "was willing to say and promise anything to get the sale, when it did not intend to deliver as promised."

As both parties point out, the district court's findings that Alenco knowingly deceived the homeowners in eight ways directly contradicted the jury's verdict. This ruling strayed outside the governing legal framework in at least two notable ways.

First, the KCPA distinguishes between deceptive and unconscionable practices. Compare K.S.A. 2023 Supp. 50-626 (deceptive acts) with K.S.A. 50-627 (unconscionable acts). As we have previously indicated, unconscionable practices tend to involve knowing misrepresentations or overreach rendered unscrupulous because of some legal vulnerability or lack of bargaining power between the parties. See *ConfiMed.com*, 272 Kan. at 1321. The

district court did not make any of these necessary findings and thus based its unconscionability conclusion on an error of law.

Although the district court described its ruling as an unconscionability finding, our review of the content of that ruling shows it is better described as a second assessment of whether Alenco engaged in deceptive conduct. The district court specifically found that the parties' transaction did not involve any power imbalance inherent in most unconscionability findings. See 272 Kan. at 1321. The district court's findings do not resemble any of the examples of unconscionable conduct listed in K.S.A. 50-627(b). Nor did the court analyze whether Alenco's conduct involved some overreach, other than deception. Instead, the court repeatedly emphasized its view that Alenco knowingly misled the homeowners in an effort to close the deal.

Second, Kansas law has long recognized that disputes surrounding a person's intent and whether someone has engaged in deceptive acts are "question[s] of fact for the jury to decide." *Manley*, 237 Kan. 427, Syl. ¶ 2. When those factual findings have been made and are based on evidence in the record, the jury's findings control; courts do not second guess the jury's parsing of the facts or its credibility assessments. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 407, 266 P.3d 516 (2011).

The fact that K.S.A. 50-627 reserves the question of unconscionability for the court does not give a judge free reign to invade the jury's realm or reweigh the evidence on claims that have already been decided. We appreciate that the district court would have reached a different conclusion on many of the matters presented to the jury in this case regarding Alenco's representations during the course of this transaction. Such is the nature of our court system, which allocates the responsibility to make factual findings and render legal rulings between the jury and the court. But the jury's finding that Alenco had not knowingly engaged in any deceptive practices was supported by evidence at trial.

This is not to say that all unconscionable practices involve deception, or that a jury's finding that a supplier did not engage in deceptive acts precludes as a matter of law a conclusion that the supplier acted unconscionably. There may be circumstances when a supplier engages in business practices that are not misleading

but are still unconscionable because they unfairly take advantage of a consumer's legal vulnerability. See, e.g., Kansas Comment 2 to K.S.A. 60-527 (1973) (providing examples of unconscionable practices involving overreach or where the consumer is unable to recognize a material benefit to the transaction, even in the absence of deception by the supplier). But the district court here found no such conduct.

In sum, the district court erred when it reweighed that evidence and came to an opposite conclusion on eight allegations—previously rejected by the jury—that Alenco had engaged in deceptive conduct. Beyond these reassessments of the jury's actions, the district court again erred when it provided no explanation for its conclusion that Alenco engaged in an *unconscionable*—not a deceptive—practice. We thus reverse the district court's unconscionability ruling and the resulting civil penalty assessed against Alenco, and we remand with directions that judgment be entered in Alenco's favor on that claim.

Because we have reversed the court's unconscionability ruling, several of the parties' remaining questions fade away.

- Because the district court erred when it assessed a $10,000 penalty against Alenco, we need not consider the homeowners' assertions that the district court should have assessed eight separate $10,000 penalties for each of the misrepresentations the court identified in its ruling.
- We also need not consider the homeowners' challenge to the size of the district court's attorney-fee award. Because the homeowners have not prevailed on either of the KCPA claims, there is no basis for attorney fees under that Act. See K.S.A. 50-634(e)(1). We must therefore vacate the district court's attorney-fee award.

As the fallout from the district court's KCPA ruling settles, we are left with one trailing, related argument. Alenco argues that the district court erred when it preemptively noted in its ruling that the company was not entitled to attorney fees under the KCPA, even though it had prevailed on the claim before the jury. Alenco asserts that the district court's ruling was premature, as Alenco had

never filed a motion for attorney fees under the KCPA. Our review of the parties' discussion is more nuanced.

It is true, as Alenco points out, that the company never sought attorney fees based on the KCPA. The district court acknowledged as much at the hearing on the parties' posttrial motions:

"That supplier attorney fee provision [under the KCPA], I think, has to do with claims that were—that had no basis. It's almost a, like a 60-211-type of sanction, if this—if the supplier prevails. I don't think in this case that the KCPA claims were brought without a reasonable basis.

"Again, you can file your motion. I'll listen to you. But if it'll save you some money, I can tell you what my understanding of the law is and my understanding of the facts as they're fresher now than they're going to be in a couple months when we hear your motion, because I've just gone over them again.

"I don't think there was a lack of a reasonable basis. I think they got a jury that weighed the facts differently."

Alenco is correct that the district court's comments were technically premature. Courts generally do not answer questions before the parties ask them. Rather, we "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243, 128 S. Ct. 2559, 171 L. Ed. 2d 399 (2008). The district court therefore should have waited to see if Alenco requested attorney fees beyond the amount listed in the parties' contract before it preemptively explained that any such request would be denied.

We note, however, that the district court was correct in its statement of the legal principles that would guide a supplier's request for attorney fees under the KCPA. Under K.S.A. 50-634(e)(1), a supplier who prevails on a KCPA claim can only recover attorney fees if the consumer knew their allegations to be "groundless." And though the homeowners were ultimately unsuccessful on their claims under the Act, reasonable minds could—and, as the history of this case demonstrates, *did*—differ on what conclusions can be drawn regarding the parties' transaction. Alenco does not dispute this finding. The district court acted within its discretion when it found that the circumstances here do not warrant an additional attorney-fee award for Alenco under the KCPA, and we do not disturb the district court's decision here.

3. *The parties have not shown other errors in the district court's rulings.*

The parties raise two additional claims that we must address before we close. First, the homeowners assert that the district court should have granted their motion for a new trial based on a posttrial allegation concerning the presiding juror during deliberations. Second, Alenco asserts that the district court erred when it imposed a monetary sanction after the trial based on a pretrial discovery dispute. These allegations require some further factual development. But the parties have not shown that either of the district court's conclusions requires reversal.

3.1. *The district court did not commit reversible error when it denied the homeowners' request for a new trial based on juror misconduct.*

As we have noted, the homeowners filed several posttrial motions challenging the evidence supporting the jury's verdict and seeking a new trial or judgment as a matter of law. The homeowners later filed a "supplemental" motion for a new trial alleging that the presiding juror had engaged in juror misconduct.

The supplemental motion attached an affidavit from another juror declaring that the presiding juror had referred to his own experience in having siding replaced on his house. According to the attesting juror, the presiding juror had shown other jurors pictures of his siding on his cell phone, stating the R-value of the siding was "not a big deal" because his siding did not have that rating and "still looks good." The homeowners argued that this had called the integrity of the jury's verdict into question and thus required a new trial. The district court denied the motion, stating that an inquiry should have been made and addressed while the jury was still present.

K.S.A. 60-441 states that "no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him or her to assent or dissent from the verdict . . . or concerning the mental processes by which it was determined." The prohibition against inquiring into a juror's

mental process allows for confidentiality in the jury's deliberations, protection against corruption of jurors following discharge, and finality of jury verdicts.

But there are limited situations—beyond assessing the jurors' deliberations—when it may be relevant or necessary to examine jurors' actions. These generally relate to the integrity of the judicial process itself. For example, a district court may allow a juror to testify if that person believes the jury "intentionally disregarded the court's instructions." *State v. Wainwright*, 18 Kan. App. 2d 449, 453, 856 P.2d 163 (1993). And courts have discretion to consider evidence of the "physical facts, conditions, or occurrences of juror misconduct which come to the attention of other members of the jury panel which may be verified or denied." *Vallejo v. BNSF Railway Co*., No. 119,100, 2021 WL 402066, at *7 (Kan. App.) (unpublished opinion) (citing *Williams v. Lawton*, 288 Kan. 768, 799, 207 P.3d 1027 [2009]), *rev. denied* 313 Kan. 1046 (2021).

The practical effect of these limitations is that whenever a party alleges juror misconduct, the district court must first answer "a threshold question whether juror testimony may be received"—that is, if "the evidence will not probe into the mental processes of the jury"—"to establish the misconduct." *Johnson v. Haupt*, 5 Kan. App. 2d 682, 685, 623 P.2d 537 (1981). A party seeking to impeach a verdict based on juror misconduct must demonstrate both that misconduct occurred, as we have defined it here, and that the misconduct substantially prejudiced that party's right to a fair trial. *Stover v. Superior Industries Int'l, Inc*., 29 Kan. App. 2d 235, 243, 29 P.3d 967, *rev. denied* 270 Kan. 903 (2000).

If the presiding juror here had merely been discussing his own recently completed siding project, this conversation may have fallen into the realm of jurors' experiences and mental thought processes. But that is not what occurred. The affidavit attached to the homeowners' supplemental motion states that the presiding juror took out his cell phone and showed other jurors pictures of the siding on his house. This conduct is akin to considering an exhibit that was never offered by the parties or admitted by the court. We note that the district court instructed the jurors that they "must consider and weigh only evidence which was admitted during the

trial, including exhibits, admissions, stipulations, and witness testimony." The presiding juror's actions, as described by the affidavit, did not comply with this instruction and was misconduct.

But not all juror misconduct requires reversal, and the homeowners have not met their burden of demonstrating that the presiding juror's action here affected the jury deliberations or verdict. See *Stover*, 29 Kan. App. 2d at 243. The affidavit merely describes the presiding juror's actions on his cell phone. It does not state that this conduct swayed the affiant's own actions or otherwise affected the decision-making process of the other jurors. In short, the homeowners' assertions in their supplemental motion are based on speculation; they have not shown that the presiding juror's behavior affected the jurors' decision or the outcome of the trial.

Indeed, the allegations here are distinct from instances where our Supreme Court has found prejudicial jury misconduct based on the introduction of external evidence into deliberations. In *Kaminski v. Kansas City Public Service Co*. 175 Kan. 137, 139-40, 259 P.2d 207 (1953), several jurors visited the scene of a collision and started measuring distances between certain points in the street. And in *Barajas v. Sonders*, 193 Kan. 273, 273-74, 277, 392 P.2d 849 (1964), a juror made several measurements and calculations about the point of impact in an auto accident using a slide ruler. In those instances, the external evidence was tailored to the specific facts of the case. The photo of the presiding juror's siding was anecdotal at best and is easily distinguishable.

The homeowners' argument that the district court erred by not recalling the jury to determine whether misconduct occurred is similarly misplaced. The homeowners never filed a motion to recall the jury. Accord *State v. Smith-Parker*, 301 Kan. 132, 166, 340 P.3d 485 (2014) ("'Jurors may be recalled for post-trial hearings only by order of the court after a hearing on a request to recall the jury.'"). Rather, the homeowners' argument about juror misconduct was raised in their motion for a new trial, months after the trial.

To some extent, the complicated beauty of the jury system stems from its reliance on jurors' combined experiences and common sense to make factual assessments of the evidence presented

at trial and apply the law to that evidence as instructed by the court. But the jurors' deliberations must be limited to the evidence at trial, and the presiding juror's actions here violated this principle. Even so, the homeowners have not shown how the presiding juror's actions improperly affected his or the other jurors' assessment of the facts in this case. Nor have they shown that the jurors refused to follow the law as instructed by the judge or refused to consider evidence presented. Thus, the district court did not err when it denied the homeowners' motion for a new trial based on juror misconduct.

3.2. *Alenco has not shown that the district court abused its discretion in imposing a $2,500 discovery sanction.*

Alenco argues that the district court erred when it ordered the company to pay a $2,500 discovery sanction after trial. Alenco asserts that although the discovery issue had been addressed before trial, the pretrial order did not indicate that there was a pending issue relating to discovery sanctions that needed to be resolved. The homeowners counter that the district court had granted their motion for discovery sanctions in a pretrial hearing but took the amount of the sanction under advisement until after trial.

We pause to provide some context. Before trial, the homeowners filed a motion arguing that Alenco committed a discovery violation by directing one of its corporate representatives not to answer questions during a deposition and asking the district court to impose sanctions. That motion is not included in the record on appeal. The district court then held a pretrial hearing on that motion in April 2022. That transcript is also not included in the record on appeal. After trial concluded, the parties submitted briefing on the discovery-sanction issue and discussed the matter at the posttrial hearing. The district court then ordered Alenco to pay a $2,500 discovery sanction in its written order.

Alenco has not provided us with the transcript of the pretrial hearing where the discovery motion was heard. We acknowledge the homeowners' argument that the bench notes may provide some limited insight into what happened at the pretrial hearing. But this does not resolve our concerns about the adequacy of the record

before us. The error that Alenco claims—that the discovery motion was fully resolved and could not be revisited because it was not listed as a pending motion in the pretrial order—cannot be reviewed without a record of what occurred during that hearing.

"An appellant has the burden to designate a record that affirmatively establishes the claimed error. Without such a record, an appellate court presumes the action of the trial court was proper." *State v. Auch*, 39 Kan. App. 2d 512, 524, 185 P.3d 935 (2008). Alenco has not provided this court with a sufficient record to review the alleged error about the district court's authority to order a posttrial discovery sanction against it. We thus presume the district court's actions were appropriate. See *Deutsche Bank Nat'l Trust Co. v. Sumner*, 44 Kan. App. 2d 851, 861-62, 245 P.3d 1057 (2010) (district court has broad discretion to impose discovery sanctions), *rev. denied* 292 Kan. 964 (2011).

CONCLUSIONS

The jury's verdict denying the homeowners' breach-of-contract counterclaim was not against the weight of the evidence. Neither was the jury's verdict concluding that Alenco did not violate the KCPA.

The district court erred by finding that Alenco committed an unconscionable act in violation of the KCPA, as that ruling was in essence a retrial of the jury's finding that Alenco had not engaged in deceptive practices. We reverse that finding and direct the district court to enter an appropriate order in Alenco's favor in line with this opinion. And we vacate the related monetary rulings: the $10,000 civil penalty against Alenco and the $40,000 in attorney fees awarded to the homeowners.

The district court correctly found that the homeowners' juror misconduct allegation did not warrant a new trial.

We presume that the district court had authority to sanction Alenco for a discovery violation posttrial because Alenco failed to furnish this court with a sufficient record to review the alleged error.

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

(561 P.3d 523)

No. 125,580

STATE OF KANSAS, *Appellee*, v. THOMAS GOFORTH, *Appellant.*

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Fifth Amendment Forbids State from Compelling Self-Incriminating Statements as Probation Condition or Release Then Prosecuting New Crime.* The Fifth Amendment to the United States Constitution forbids a State from compelling self-incriminating statements as a condition of probation or supervised release, and then using the statements to prosecute a new crime.

2. SAME—*Fifth Amendment Privilege Claimed When Self-incrimination Threatened.* A Fifth Amendment privilege must generally be claimed when self-incrimination is threatened. But an exception applies when an individual's assertion is penalized so as to foreclose a free choice to remain silent, such as when the State asserts that invocation of the privilege would lead to revocation of probation.

3. CRIMINAL LAW—*Search Permitted of Person on Supervised Release by Parole Officer with or without Cause under Statute.* When police involvement is nothing more than technical assistance in response to a parole officer's request to search a phone, K.S.A. 22-3717(k)(2) applies (permitting search of person on supervised release by parole officer with or without cause) and K.S.A. 22-3717(k)(3) does not apply (permitting search of person on supervised release by law enforcement officer with reasonable suspicion).

Appeal from Sedgwick District Court; TYLER ROUSH, judge. Oral argument held September 17, 2024. Opinion filed November 22, 2024. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, for appellant.

Boyd K. Isherwood, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GARDNER and CLINE, JJ.

GARDNER, J.: Following his release from prison for exploitation of a child convictions, Thomas Goforth participated in a polygraph examination as a condition of his postrelease supervision. Goforth's responses to two of its questions resulted in a warrantless search of Goforth's phone. After officers discovered porno-

graphic images of children on the phone, the State charged Goforth with new crimes—five counts of exploitation of a child by possessing a visual depiction. Goforth moved to suppress the evidence, arguing it stemmed from compelled, self-incriminating statements in violation of the Fifth Amendment to the United States Constitution. The district court denied that motion, and a jury convicted Goforth on all counts. Goforth appeals, arguing the admission of the evidence at trial violated the Fourth and Fifth Amendments and that his convictions are multiplicitous. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After being released from prison for exploitation convictions, Thomas Goforth started serving his postrelease supervision. Given the nature of his offense, Goforth was required—as a part of his postrelease supervision—to participate in a sex offender treatment program (SOTP). He was assigned a supervising officer, Alexis Olave, and attended an intake, where he learned the rules associated with the program.

The SOTP required Goforth to submit to polygraph examinations and to follow several restrictions related to his internet use. For example, Goforth could not possess any type of pornography or access social media without prior approval. Goforth signed an agreement which explained that if he violated these or other terms of his postrelease supervision, he risked arrest and additional imprisonment, pending a hearing before the Kansas Prisoner Review Board to determine whether his postrelease supervision should be revoked.

For a time, Goforth complied with his postrelease supervision after his release—participating in treatment, attending required meetings, and maintaining employment. Yet during his first polygraph examination about seven months into his postrelease supervision, Goforth's answers to two questions caused Olave concern. He gave "significant reactions" to questions about him "accessing the Internet for any reason that would be in violation of his supervision" and achieving sexual gratification while thinking about anyone underage. Olave decided to have Goforth's home and phone searched, so she asked Brandon Bansemer (a special agent for the

Kansas Department of Corrections' Enforcement, Apprehensions, and Investigations Unit) to do so.

Bansemer drove to Goforth's job and seized his phone. Bansemer had a signed consent form from Goforth to search his residence, and he got a list of Goforth's electronic devices and his password and username for his Google account. With the help of two other agents, Bansemer searched Goforth's home. He recovered the listed electronics and transported them to two police officers who worked for the Internet Crimes Against Children (ICAC) task force. Bansemer asked them to search Goforth's phone, warning them that it might contain child pornography.

One of the officers, Jennifer Wright, regularly performed digital forensic examinations and other searches for parole officers as a part of her duties on the ICAC task force. She first did a cursory search of Goforth's phone to determine whether a search warrant was needed. Upon finding a pornographic picture of a toddler, she stopped her search and notified John Ferreira (the assigned Homeland Security case agent) and Shay Carpenter (an ICAC detective) that she needed a search warrant. When she got a warrant, she resumed her search and found additional child pornography pictures.

After Wright's discovery, Goforth agreed to a police interview. Bansemer took him to the police station where Ferreira interviewed him. Goforth then admitted that he had downloaded the images on his phone and had used them to masturbate. Ferreira arrested him. The State charged Goforth with five counts of sexual exploitation of a child by "possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person," in violation of K.S.A. 2017 Supp. 21-5510(a)(2).

Goforth moved pretrial to suppress the evidence found on his phone, arguing that compelled statements he had made during a required polygraph examination gave rise to the search, in violation of his privilege against self-incrimination. At the hearing on the motion, Goforth relied primarily on *United States v. Von Behren*, 822 F.3d 1139 (10th Cir. 2016), to support his claim of a Fifth Amendment violation. The State countered that K.S.A. 22-

3717(k)(2) controlled the issue. This statute provides that any person on parole or postrelease supervision is subject to search by parole or other Kansas Department of Corrections (KDOC) officers without cause. The State also claimed that the polygraph questions were not incriminatory, so they did not implicate Goforth's Fifth Amendment rights.

The district court agreed that the polygraph questions were not incriminating and that the officers could search and seize Goforth's property without cause under K.S.A. 22-3717(k)(2) and as stated in Goforth's postrelease supervision. The district court also found that the officers had a warrant for all but the first photo found on Goforth's phone. The district court thus found it unnecessary to conduct a *Von Behren* analysis, and denied Goforth's motion.

A jury later convicted Goforth of five counts of sexual exploitation by possessing a visual depiction. Goforth moved for a departure sentence but the district court denied it, sentencing him to a presumptive term of 256 months in prison for his first count and 68 months for the remaining counts, to run concurrent. Goforth timely appeals, challenging the district court's denial of his motion to suppress his statements and other evidence obtained as the result of his polygraph examination.

I. PROCEDURAL MATTERS SHAPE OUR REVIEW

The State argues that Goforth's arguments must be dismissed for several procedural reasons, as well as on the merits. We first address these procedural hurdles.

A. *The District Court's Ruling Establishes Jurisdiction*

The State first alleges that this court lacks jurisdiction to hear this appeal. 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). When the record shows a lack of jurisdiction, we must dismiss the appeal. *In re I.A.*, 313 Kan. 803, 805-06, 491 P.3d 1241 (2021).

The State argues that Goforth failed to adequately raise his Fifth Amendment argument and receive a ruling on it. In response to Goforth's constitutional claims in the district court, the State

argued that K.S.A. 22-3717(k) controlled the issue, and the district court agreed. That statute allows searches of persons or the property of persons on parole or postrelease supervision without cause. The State argues that the district court thus found it unnecessary to address *Von Behren* when deciding Goforth's suppression request, so Goforth failed to obtain a ruling on his constitutional claim, which divests this court of jurisdiction. But to support its lack of jurisdiction argument, the State cites solely *State v. Huff*, 278 Kan. 214, 217, 92 P.3d 604 (2004), which states that an appellate court obtains jurisdiction only over the rulings identified in the notice of appeal. And it concedes that the notice of appeal covered the suppression issue generally. The State's argument more accurately claims lack of preservation, not lack of jurisdiction. See *State v. Gray*, 311 Kan. 164, 170, 459 P.3d 165 (2020) (decision to review unpreserved claim under exception is a prudential one).

At any rate, we find that Goforth properly raised his Fifth Amendment argument and received a ruling on it. Goforth moved to suppress his statements and other evidence "based on the polygraph examination." He broadly claimed that the evidence requiring suppression included "the search of [his] cell phone and all oral, written or other communications, confessions, statements, whether inculpatory or exculpatory, alleged to have been made by [him] prior to, at the time of, or subsequent to, his arrest in [this] case." He argued that police obtained this evidence in violation of his Fourth and Fifth Amendment rights and corresponding State constitutional protections, but he focused his argument almost entirely on the Fifth Amendment. As support for that claim, Goforth relied on *Maness v. Meyers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975), and *Von Behren*. He raises the same argument on appeal.

The district court considered these arguments, held a hearing, then gave this rationale for denying Goforth's motion: (1) Under K.S.A. 22-3717(k), the postrelease officer could seize his property and look at it any time, day or night, with or without cause; (2) the questions asked during the polygraph, which triggered the underlying searches, were not incriminating; and (3) after the polygraph examination, police obtained a search warrant for Goforth's

phone. In making these findings, the district court ruled on Goforth's constitutional claims.

True, the district court first found that the officers properly obtained the challenged evidence based on K.S.A. 22-3717(k)(2). Relatedly, the district court also found the purpose of the exclusionary rule—to thwart improper police actions—would not be served by granting Goforth's suppression request because the statute grants express authority to search without cause. This analysis touched on Fourth Amendment principles but did not necessarily answer Goforth's Fifth Amendment argument.

Yet after agreeing with the State that K.S.A. 22-3717(k) allowed the search of Goforth and his phone, the district court "secondarily adopt[ed]" the State's argument that the questions that Goforth submitted to were not "in and of themselves incriminatory because they did not ask him [whether he had] any illegal materials on [his] phone."

Its analysis then addresses in eight paragraphs the Fifth Amendment claim that the State contends is not addressed. The district court found *Von Behren* distinguishable, found Goforth's supervisory agreement comparable to the one in *United States v. Richards*, 958 F.3d 961, 967-68 (10th Cir. 2020), found the government had not taken the extra and impermissible step of compelling the defendant to incriminate himself, and then concluded: "But I don't need to reach that step because I agree with the arguments from [the prosecutor]."

That the court's ruling was stated in the alternative, or secondarily, matters not. It sufficiently addressed and disposed of Goforth's Fifth Amendment claim to allow our review.

B. *Goforth's Appellate Briefing of K.S.A. 22-3717(k)(2) Is Adequate*

The State next contends that Goforth fails to challenge the district court's decision based on K.S.A. 22-3717(k)(2) and thus abandons any challenge to its suppression decision.

We are unpersuaded. Goforth challenges the district court's reliance on this statute as his second issue on appeal. Goforth argues that the State failed to show that the search complied with K.S.A. 22-3717(k)(3) because Wright, a law enforcement officer,

searched his phone. This subsection requires proof of reasonable suspicion to justify a search conducted by a law enforcement officer. And by arguing that (k)(3) applies, Goforth necessarily contends that subsection (k)(2), which permits a search by a probation officer without cause, does not apply. The two sections are mutually exclusive.

C. *The Contemporaneous Objection Rule Is Inapplicable*

The State's last procedural hurdle alleges that Goforth failed to contemporaneously object to the polygraph examination and related evidence at trial, so he failed to preserve the issue for appeal. Goforth admits that he did not object to admission of his phone or to Bansemer's and Wright's testimony about the pictures seized from his phone. Still, he argues that he objected at trial to the admission of the pictures themselves and to his confession, invoking the fruit of the poisonous tree doctrine.

But Goforth does not contend on appeal that the district court erred by admitting any evidence, so any lack of preservation seems immaterial. See K.S.A. 60-404. And the State does not show how a lack of a timely and contemporaneous objection to the admission of evidence, as is required for evidentiary challenges, see *State v. Scheetz*, 318 Kan. 48, 61-62, 541 P.3d 79 (2024), impacts any issue on appeal. Although Goforth contends that the admission of the photos from his phone violated his Fourth and Fifth Amendment rights, the contemporaneous objection rule has no bearing on our analysis of those constitutional issues. We thus decline to address the merits of this procedural challenge.

II. WERE GOFORTH'S FIFTH AMENDMENT RIGHTS VIOLATED?

We next address the merits of Goforth's claim that police obtained the incriminating photos on his phone, which led to his confession, in violation of his Fifth Amendment rights.

"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). In reviewing the factual findings, an appellate court does not reweigh the evidence or assess the

credibility of witnesses. *State v. Sesmas*, 311 Kan. 267, 275, 459 P.3d 1265 (2020); *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018).

A. *The Fifth Amendment's Protections Go Beyond One's Refusal to Testify at Trial*

"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."' [Citations omitted.]" *State v. G.O.*, 318 Kan. 386, 396, 543 P.3d 1096 (2024).

"The Fifth Amendment protection against self-incrimination and the Fourteenth Amendment Due Process Clause require that statements made to government officials are given voluntarily. Overreach by police or other state actors—that is, intimidation, coercion, deception, or other misconduct—is a necessary predicate to finding a confession is not voluntary, and there must be a link between the overreach and a defendant's resulting confession to establish the constitutional violation. *G.O.*, 318 Kan. at 404." *State v. Huggins*, 319 Kan. 358, 367, 554 P.3d 661 (2024).

The Fifth Amendment privilege applies not only to persons who refuse to testify against themselves at their own criminal trial, '"but also "privileges [them] not to answer official questions put to [them] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [them] in future criminal proceedings."' [Citations omitted.]" *Von Behren*, 822 F.3d at 1144; *Bankes v. Simmons*, 265 Kan. 341, 349-50, 963 P.2d 412 (1998).

"This includes witnesses called to testify—'in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory'—when the answer could subject them to criminal liability. *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). Along with protecting answers which would support a criminal conviction, the privilege also protects information which 'would furnish a link in the chain of evidence' that could lead to a criminal prosecution. *Hoffman*, 341 U.S. at 486." *State v. Showalter*, 319 Kan. 147, 155, 553 P.3d 276 (2024).

In *Bankes*, Kansas' Sexual Abuse Treatment Program (SATP) required an admission of guilt for the crime for which the inmate was convicted. Bankes objected to that requirement and refused to

participate in the SATP because of it. As a result, the State withheld his earned good time credits, which lengthened his sentence for each plan review period he continued to refuse to participate in SATP. Bankes claimed that KDOC's requirements that he admit guilt for his crime of conviction and participate in SATP violated his privilege not to incriminate himself, as stated in the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. Our Supreme Court explained that when the State gains information in violation of this right, it may not use that information or its fruits in later criminal proceedings. 265 Kan. at 351.

But "commitment as a sexually violent predator is a civil proceeding, not a criminal proceeding. Since the Fifth Amendment does not apply in civil settings, the petitioner's compelled information required by SATP *can* be used against him in a civil commitment proceeding as a sexually violent predator." *Bankes*, 265 Kan. at 350-51; see also *State v. Faidley*, 202 Kan. 517, 520, 450 P.2d 20 (1969) (finding section 10 of Kansas Constitution Bill of Rights grants same protection against compelled self-incrimination as the Fifth Amendment). "Thus, respondents, in administering their Sexual Abuse Treatment Program, can insist that the petitioner admit responsibility, so long as his or her admission is not used against the petitioner in later *criminal* proceedings." *Bankes*, 265 Kan. at 352-53.

The district court found that Goforth's answers to the polygraph examination were not incriminating "in and of themselves . . . because they did not ask him [whether he had] any illegal materials on [his] phone." But incrimination is broader than that. Goforth's answers to mandatory questions during a required polygraph examination likely posed a danger of self-incrimination, as the information he gave created a link in the chain of evidence that led to his criminal prosecution.

"'There is no doubt that answering questions during a polygraph examination involves a communicative act which is testimonial.' *Id.* And, as the Government recognizes, the polygraph examination to which Defendant must submit might elicit potentially incriminating statements that could 'provide a "lead" or "a link in the chain of evidence needed to prosecute the" speaker.' *Id.* at 1145 (quoting *United States v. Powe*, 591 F.2d 833, 845 n.36 [D.C. Cir. 1978]). After all, the

purpose of a polygraph test is not to elicit honest responses to innocuous questions such as, for example, whether Defendant enjoyed his morning coffee." *Richards*, 958 F.3d at 967.

We thus assume, without finding, that Goforth's answers were incriminatory.

B. *An Individual Must Affirmatively Assert the Fifth Amendment Right Rather Than Answer, Absent a Penalty*

Still, to qualify for the Fifth Amendment privilege, "a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 189, 124 S. Ct. 2451, 159 L. Ed. 2d 292 (2004). To properly state a Fifth Amendment claim, Goforth must show not only that Olave's questions carried a risk of incriminating him, but also that the penalty he suffered amounted to compulsion. See 542 U.S. at 189; *Doe v. Heil*, 533 Fed. Appx. 831, 836 n.4 (10th Cir. 2013) (unpublished opinion).

To show the compulsion element of this claim, Goforth relies on *Von Behren* and related federal cases. Stated simply, these cases hold that the Fifth Amendment forbids a State from compelling self-incriminating statements as a condition of probation or supervised release and then using the statements to prosecute a new crime. In *Von Behren*, the 10th Circuit held that Colorado officials violated the Fifth Amendment by requiring a probationer to submit to a polygraph test as a condition of his supervised release and by threatening to revoke it for invoking his privilege against self-incrimination. 822 F.3d at 1141. *Von Behren* found that the probationer's answers to mandatory questions during a required polygraph examination posed a danger of self-incrimination. And those answers were compelled because the government had expressly asserted that it would seek his remand to prison if he refused to answer the incriminating questions. 822 F.3d at 1145-48.

The district court found *Von Behren* distinguishable, found Goforth's supervisory agreement more like that in *Richards*, 958 F.3d at 967-68, and found the government had not taken the extra and impermissible step of compelling the defendant to incriminate himself. As detailed below, we agree.

The general rule is that a Fifth Amendment privilege must be claimed when self-incrimination is threatened. *Minnesota v. Murphy*, 465 U.S. 420, 429, 104 S. Ct. 1136, 79 L. Ed. 2d 409 (1984). So an individual must affirmatively assert his Fifth Amendment right rather than answer. Unlike the petitioner in *Bankes*, Goforth did not assert his Fifth Amendment rights but answered the polygraph questions without objecting.

Still, some "self-executing exceptions" have been recognized where "'some identifiable factor "was held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.'"' 465 U.S. at 429." *McGill v. State*, No. 121,037, 2020 WL 4726038, at *10 (Kan. App. 2020) (unpublished opinion). Goforth relies on the "penalty" exception addressed in *Murphy*. In that line of cases the State sought to induce a witness to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions capable of forcing the self-incrimination which the Amendment forbids. *Von Behren*, 822 F.3d at 1149. Murphy, like Goforth, had not asserted the privilege. The *Murphy* Court explained that the penalty exception applies when an individual's assertion "is penalized so as to 'foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony.'" 465 U.S. at 434 (quoting *Garner v. United States*, 424 U.S. 648, 661, 96 S. Ct. 1178, 47 L. Ed. 2d 370 [1976]). *Murphy* held that when the State "either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation," that assertion would lead to the "classic penalty situation [in which] the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." 465 U.S. at 435. But because Murphy's probation officer never threatened that a refusal to answer would lead to probation revocation, the Court found that Murphy's incriminating statements were voluntary. 465 U.S. at 437-39.

More recently, in *Richards*, 958 F.3d at 967-68, the Tenth Circuit analyzed the *Murphy* and *Von Behren* holdings. Richards asserted that the periodic polygraph testing required as a special condition of his supervised release violated his Fifth Amendment right against self-incrimination, raising a facial challenge to the

condition's constitutionality. 958 F.3d at 968. The court recognized that polygraph answers were testimonial and could provide a link to one's future criminal prosecution. Still, the court concluded that requiring Richards to submit to periodic polygraph testing did not violate his Fifth Amendment rights because no government actor had threatened to revoke his supervised release for refusing to answer a question. 958 F.3d at 967-68. The polygraph condition thus failed to satisfy the compulsion element of the defendant's Fifth Amendment claim. 958 F.3d at 967.

C. *Goforth's Failure to Assert His Fifth Amendment Rights Is Not Excused*

Unlike *Von Behren*, Goforth was not compelled to answer polygraph questions after first refusing. And the record has no evidence that Goforth answered the polygraph questions because he feared that his probation would be revoked if he remained silent. Goforth does not contend that anyone told him that an assertion of the privilege would result in a penalty.

Nor does Goforth's supervised release agreement threaten to revoke his release for refusing to answer a question. It requires his participation in polygraph testing as a condition of his release, but it does not state that his probation officer would seek revocation if he did not respond to questions. Instead, it provides that in the event of a violation, Goforth may be arrested on a warrant, and imprisoned pending a hearing before the Kansas Prisoner Review Board to determine whether his release should be revoked. Goforth agreed that he understood that he would be afforded a preliminary hearing whenever necessary, to determine whether he had violated any conditions, unless he chose to waive that hearing or the court determined a violation by due process of law.

Thus, the terms of Goforth's supervised release agreement do not limit his freedom to decline to answer particular questions and contain no suggestion that his probation is conditioned on his waiving his Fifth Amendment privilege with respect to further criminal prosecution. His probation condition simply says that he will "[s]ubmit to polygraph examinations as directed by [his] parole officer and/or treatment provider." In short, Goforth's condi-

tions of release did not require him to refrain from raising legitimate objections to furnishing information that might lead to his conviction for another crime. His conditions do not actually require a choice between asserting the Fifth Amendment and revocation of his supervised release. The record contains no reasonable basis for concluding that the State tried to attach an impermissible penalty to the exercise of Goforth's privilege against self-incrimination.

Nor do the facts show a reasonable basis for Goforth to believe that he had to choose between asserting the Fifth Amendment and having his supervised release revoked. Under our revocation statute, the State must prove a probation violation by a preponderance of the evidence; then the district court has discretion to revoke probation and impose the underlying sentence unless otherwise limited by statute. *State v. Tafolla*, 315 Kan. 324, 328, 508 P.3d 351 (2022); see K.S.A. 22-3716. And we know of no case in which the State has tried to revoke probation because a probationer refused to make nonimmunized disclosures about his own criminal conduct. "[United States Supreme Court] decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege." *Murphy*, 465 U.S. at 438.

True, Goforth was compelled to submit to a polygraph test by a probation officer, but that is indistinguishable from the compulsion felt by any witness who is required to appear and give testimony, so it does not excuse his failure to timely exercise the privilege. See *Murphy*, 465 U.S. at 437. And "[a] state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege." 465 U.S. at 435. Goforth fails to show an implied or express threat of revocation as is necessary to meet the penalty exception in this context. He revealed incriminating information instead of timely asserting his Fifth Amendment privilege, yet his disclosures were not compelled. Because he was not compelled to incriminate himself, Goforth cannot successfully invoke the privilege to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution. His Fifth Amendment claim thus fails.

III. DID THE SEARCH OF GOFORTH'S PHONE VIOLATE GOFORTH'S FOURTH AMENDMENT RIGHTS?

Goforth next asserts that Wright's search of his phone violated his Fourth Amendment right to be free from unreasonable searches and seizures. Goforth argues that the district court erred by upholding the search without cause under K.S.A. 22-3717(k)(2) because Wright, who searched his phone, was a law enforcement officer and thus needed reasonable suspicion to conduct the search, as required by K.S.A. 22-3717(k)(3).

The record shows that Goforth consented to the search of his home before it was searched. Goforth signed a written consent to search as a condition of his postrelease supervision. And consent is an exception to the general rule that a warrantless search is unreasonable. See *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014).

Although Goforth correctly notes that the district court did not rely on consent, Goforth now contends that the search exceeded the limitations of his consent. When the basis for a search is consent, the search must conform to the limitations placed upon the right granted by the consent. Goforth agrees that he consented to a search by parole officers, their staff, and KDOC enforcement, apprehensions, and investigations officers "with or without a search warrant and with or without cause." And he concedes that the search of his house was done by those officers. Similarly, Goforth concedes that the seizure of his phone was ordered by his postrelease supervision officer and was completed by a member of KDOC's enforcement, apprehensions, and investigations unit. So he does not challenge the seizure of his phone.

But Goforth objects that the search of his phone was by police officer Wright, triggering his consent to search by "any law enforcement officer" upon reasonable suspicion that he had violated his conditions of release or engaged in criminal activity. See K.S.A. 22-3717(k)(3). He contends that the State failed to show that officer Wright had reasonable suspicion.

Goforth's release agreement confirms the distinction between a search by a parole officer and a police officer. As to a search, Goforth agreed to:

- "Be subjected to a search of my person and my effects, vehicle, residence, and any other property under my control by parole officers, any authorized parole staff, and department of corrections enforcement, apprehension and investigation officers with or without a search warrant and with or without cause[; and]
- "Be subjected to a search of my person and my effects, vehicle, residence, and any other property under my control by any law enforcement officer based on reasonable suspicion of violation of conditions of post-incarceration supervision, or reasonable suspicion of criminal activity."

This language reflects the same parameters for searches of parolees and persons on postrelease supervision established in K.S.A. 22-3717(k)(2) and (k)(3), respectively.

But the search of Goforth's phone was not warrantless. It is undisputed that after Wright found one suspicious photograph on Goforth's phone, she got a warrant before searching further. The statute and Goforth's conditions of release permit warrantless searches under the stated conditions, but they do not prohibit a search pursuant to a warrant, which requires probable cause—a standard higher than reasonable suspicion. Although a warrant is generally not necessary for a search of a person on postrelease supervision, see *State v. Toliver*, 307 Kan. 945, 958, 417 P.3d 253 (2018) (noting diminished expectation of privacy dictated by terms of one's parole agreement), a warrant is certainly sufficient. Nothing in K.S.A. 22-3717 or Goforth's agreement negates the general rule that a search pursuant to a warrant is reasonable and legal. See *State v. Estrada-Vital*, 302 Kan. 549, 556, 356 P.3d 1058 (2015) ("'[A] "reasonable," and, thus, a constitutionally valid search, is one conducted pursuant to a warrant.'"). Thus, as the district court held, the photos Wright found under the warrant were during a legal search that did not violate Goforth's Fourth Amendment rights.

Goforth's claim of an illegal search thus narrows to the initial photograph Wright found without a warrant. Goforth contends that when a parole or probation officer enlists the aid of police officers in searching a person, this triggers K.S.A. 22-3717(k)(3)'s requirement of reasonable suspicion for a search by a law enforcement officer. Yet he cites no authority for that assertion. Kansas cases reflect that police officers sometimes aid parole officers in arresting a person. See, e.g., *State v. Edwards*, 39 Kan. App. 2d

300, 304, 179 P.3d 472 (2008); *State v. Austin*, No. 89,124, 2003 WL 21947736, at *2 (Kan. App. 2003) (unpublished opinion). But we have found no Kansas case addressing the extent to which police may aid parole officers in a search before that search is transformed into a routine law enforcement search.

Still, persuasive authority rejects Goforth's contention. See *State v. Peters*, 130 Idaho 960, 962, 950 P.2d 1299 (Ct. App. 1997); *State v. Pinson*, 104 Idaho 227, 233, 657 P.2d 1095 (Ct. App. 1983). "Nothing precludes law enforcement officials' cooperation with a parole officer's request to assist in a parole search." *State v. Cruz*, 144 Idaho 906, 910, 174 P.3d 876 (Ct. App. 2007); *State v. Vega*, 110 Idaho 685, 688, 718 P.2d 598 (Ct. App. 1986).

Although police may not use a parole officer as a "stalking horse" to evade search warrant requirements, officers may work together, and a search resulting from such cooperation is not illegal for that reason. *United States v. Harper*, 928 F.2d 894, 897 (9th Cir. 1991), *overruled on other grounds by United States v. King*, 687 F.3d 1189 (9th Cir. 2012). So for example, in *People v. Vann*, 92 A.D.3d 702, 938 N.Y.S.2d 182 (2012), the police officers' assistance in executing a parole violation warrant did not render their search of a parolee's residence a police operation, so as to violate the parolee's right to be secure against unreasonable searches and seizures. There, the parole officer had not acted as an agent or conduit for the police in conducting the search, the parole officer had initiated and conducted the search, and the search was done to further parole purposes related to the parole officer's official duties.

Of course, a probation or parole search may not be a subterfuge for a police search as part of a criminal investigation. See, e.g., *State v. Cowans*, 87 Ohio St. 3d 68, 75-76, 717 N.E.2d 298 (1999) (finding police may cooperate in proper search by probation officer); see also *United States v. Chandler*, 56 F.4th 27, 43 (2d Cir. 2022) (probation department did not impermissibly act as "stalking horse" for city police department, despite assertion that police department was true law enforcement animator of search and probation officers were assisted by police officers).

No facts suggest that the search of Goforth's phone was initiated by police officers or that the search was for normal law enforcement purposes rather than for purposes connected to the enforcement of Goforth's conditions of probation. Nor do the facts suggest that the search was a subterfuge for a police search. Rather, the police involvement here was nothing more than technical assistance with the parole officer's request to perform a search of Goforth's phone. Parole officers asked Wright to conduct a forensic extraction/examination of Goforth's phone because they lacked the technical ability or forensic expertise to do so themselves. Under these circumstances, Goforth's agreement to be subject to a search by parole officers without a search warrant and without cause, as reflected in K.S.A. 22-3717(k)(2), controls, as the district court found. Because K.S.A. 22-3717(k)(2) controls, K.S.A. 22-3717(k)(3) and its requirement of reasonable suspicion is inapplicable. Goforth thus fails to show a violation of his Fourth Amendment right to be free from unreasonable search and seizure.

IV. ARE GOFORTH'S FIVE CONVICTIONS MULTIPLICITOUS?

Lastly, Goforth contends that his five convictions are multiplicitous and should have been only one. The State charged and a jury convicted Goforth of five counts of sexual exploitation of a child by possessing a visual depiction based on images found on Goforth's phone. He alleges these convictions are multiplicitous, as they arose out of the same conduct and constituted a single crime under the statute.

We exercise unlimited review over issues of multiplicity and issues of statutory interpretation. *State v. Hirsh*, 310 Kan. 321, 338, 446 P.3d 472 (2019). The basic principles applicable to questions about statutory interpretation are well established. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be established. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). An appellate court must first try to determine legislative intent through the statutory language enacted, giving common words their ordinary meanings. 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. *Keys*, 315 Kan. at 698.

Multiplicity splits one offense into several counts and leads to multiple punishments for one offense.

""Multiplicity is the charging of a single offense in several counts of a complaint or information. The reason multiplicity must be considered is that it creates the potential for multiple punishments for a single offense in violation of the Double Jeopardy Clause of the Fifth Amendment [to] the United States Constitution and section 10 of the Kansas Constitution Bill of Rights."" *State v. Schoonover*, 281 Kan. 453, 475, 133 P.3d 48 (2006).

This court conducts a two-part inquiry to determine whether a conviction is multiplicitous, asking: "(1) Do the convictions arise from the same conduct and, if so, (2) by statutory definition, are there two offenses or only one?" *State v. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 (2009). The parties do not dispute that Goforth's convictions arise from the same conduct. Given this concession, we move directly to the second step of the inquiry.

For the second inquiry, the test we apply depends on whether the convictions arise from a single statute or from multiple statutes. When, as here, convictions arise from a single statute, we apply the unit of prosecution test: Did the Legislature intend to allow more than one unit of prosecution under the statute? *Thompson*, 287 Kan. at 245. Goforth acknowledges that this court has found in several unpublished opinions that the Legislature intends to allow more than one unit of prosecution under K.S.A. 21-5510(a)(2). See, e.g., *State v. Hulsey*, No. 109,095, 2014 WL 4627486, at *11-12 (Kan. App. 2014) (unpublished opinion). But he asserts that these cases were decided incorrectly, and asks us to rule differently, vacating four of his five convictions and remanding for resentencing.

The statute that Goforth was convicted under criminalizes "possessing any visual depiction of a child under 18 years of age shown or heard engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person." K.S.A. 2017 Supp. 21-5510(a)(2). Goforth asserts that the plain language of this statute creates a unit of prosecution for each act of possession, not for

each item possessed. But *Hulsey* and our line of cases that we find persuasive and well-reasoned reject that approach.

In *Hulsey*, the defendant received 89 convictions of sexual exploitation of a child under K.S.A. 2010 Supp. 21-3516(a)(2), an earlier version of K.S.A. 2017 Supp. 21-5510(a)(2), which he appealed as multiplicitous. 2014 WL 4627486, at *6, 9. As here, officers seized the pictures which supported Hulsey's convictions from a single device. Based on its review of the statute in effect at the time, the panel found that Hulsey's convictions were not multiplicitous because "each individual picture supports a conviction pursuant to K.S.A. 2010 Supp. 21-3516(a)(2)." 2014 WL 4627486, at *21. The panel's rationale focused on a 2005 amendment to the statute and its use of the term "any."

> "[T]he legislature removed language criminalizing computer equipment containing child pornography [in 2005], leaving only the criminalization of 'any visual depiction' of child pornography. With this revision, the clear statutory language criminalizes each sexually explicit visual image containing a child under 18 years old. How the images are collected or contained makes no difference under K.S.A. 2010 Supp. 21-3516(a)(2). . . . Thus, by statutory definition, Hulsey is guilty of possessing each image of a child less than 18 years old. It does not matter when he obtained or accessed the images." 2014 WL 4627486, at *12.

The *Hulsey* panel found the use of the word "any" in the statute showed an intent to allow multiple units of prosecution in cases when the defendant possessed multiple prohibited items. 2014 WL 4627486, at *11-12. Other cases by this court have adopted that same analysis. See, e.g., *Gillespie v. State*, No. 126,273, 2024 WL 1231250, at *5-6 (Kan. App. 2024) (unpublished opinion); *State v. Odegbaro*, No. 108,493, 2014 WL 2589707, at *9 (Kan. App. 2014) (unpublished opinion); *State v. Odell*, No. 105,311, 2013 WL 310335, at *8 (Kan. App. 2013) (unpublished opinion). We agree with this analysis.

Goforth counters that our Supreme Court's recent comments in *State v. Eckert*, 317 Kan. 21, 27-31, 522 P.3d 796 (2023), disparage this court's analysis of the term "any." We disagree. The defendant in *Eckert* was convicted of several felony and misdemeanor counts of possession of drug paraphernalia under K.S.A. 2016 Supp. 21-5709(b). That statute prohibits possession of "any" drug paraphernalia. In determining the multiplicity issue, our Supreme Court noted that this court generally "concluded the term

'any' allowed for multiple prosecutions when there were multiple paraphernalia items." 317 Kan. at 27-28. The *Eckert* court then found that the term "paraphernalia" could be defined as singular or plural, creating an ambiguity as to whether the statute prohibited drug paraphernalia as a unit or individual items of paraphernalia. Given that ambiguity, the court concluded that the statute did not allow multiple units of prosecution and reversed all but one of each of Eckert's felony and misdemeanor counts as multiplicitous. 317 Kan. at 30-31, 33.

Nothing in *Eckert*'s analysis supports Goforth's assertion that the *Eckert* court criticized this court's application of the term "any" in this context. Although "paraphernalia" may be ambiguous within K.S.A. 2016 Supp. 21-5709(b), "any" is not ambiguous within K.S.A. 2017 Supp. 21-5510(a)(2). And other than *Eckert*, Goforth cites no Kansas authority to support his claim that this court wrongly decided *Hulsey* or similar cases. This court has long agreed that "any" allows multiple units of prosecution. We find no error in that analysis and apply it here.

The word "any" in K.S.A. 2017 Supp. 21-5510(a)(2) shows legislative intent to allow multiple units of prosecution when the defendant possesses multiple prohibited items. Goforth's convictions are thus not multiplicitous. Each conviction was based on a separate image as this statute allows.

Affirmed.

(561 P.3d 538)

No. 126,807

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

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Original Jurisdiction Conferred to Kansas Courts for CINC Proceedings—Jurisdiction Subject to UCCJEA*. The revised Kansas Code for Care of Children, K.S.A. 38-2201 et seq., generally confers original jurisdiction to Kansas courts to hold proceedings concerning any child who may be a child in need of care (CINC). The Legislature, however, has purposely placed limits on this jurisdiction by making it subject to the Uniform Child-Custody Jurisdiction and Enforcement Act, known as the UCCJEA. Accordingly, the UCCJEA applies to Kansas CINC cases.

2. UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT—*Act's Purpose Is to Avoid Jurisdictional Disputes with Other State Courts—Jurisdiction Limited to One State at a Time*. The primary purpose of the UCCJEA is to avoid jurisdictional competition and conflict with courts of other states. The UCCJEA achieves this goal of preventing jurisdictional disputes with rules that generally limit jurisdiction related to a child's custody and care to one state at a time.

3. SAME—*Jurisdiction Acquired by District Court through Four Bases.* The UCCJEA prioritizes the four bases or grounds under which a district court can acquire jurisdiction: (1) home state, (2) significant connections, (3) more appropriate forum, and (4) default or vacuum jurisdiction.

4. SAME—*Highest Priority Given to Child's Home State on Date Proceeding Commences—Definition of "Home State" under UCCJEA.* Provided that no other provisions conflict, the highest and first priority is given to the child's home state on the date the proceeding commences. The UCCJEA defines "home state" as the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding.

5. SAME—*Home State has Exclusive Continuing Jurisdiction unless Special Circumstances or Changes Occur.* Once a court in the child's home state exercises jurisdiction, the home state has exclusive, continuing jurisdiction unless special circumstances exist or changes occur that allow the custody determination to be modified by another state. If the child does not have a home state, the district court should consider the remaining three bases by which a court attains initial child custody jurisdiction.

6. SAME— *Jurisdictional Issue in CINC Case—UCCJEA Analysis Requirement.* A UCCJEA analysis is required if there is a possible jurisdictional issue in a CINC case.

Appeal from Finney District Court; CHRISTOPHER SANDERS, judge. Submitted without oral argument. Opinion filed December 6, 2024. Affirmed.

Coleman J. Younger, of Younger Law Office, of Garden City, for appellant natural father.

Isaac LeBlanc, assistant county attorney, and *Susan Lynn Hillier Richmeier*, county attorney, for appellee.

Blair W. Loving, guardian ad litem, of Hope, Mills, Bolin, Collins & Ramsey LLP, of Garden City.

Before ATCHESON, P.J., HURST and PICKERING, JJ.

PICKERING, J.: We are asked to determine whether the district court had jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), K.S.A. 23-37,101 et seq., in a child in need of care (CINC) case. On appeal, K.C. (Father) challenges the district court's termination of his right to parent S.C. He contends the district court lacked subject matter jurisdiction under the UCCJEA. He also argues that his due process rights were violated due to an 11-month gap between the motion to terminate his rights and the hearing on that motion, and that the State produced insufficient evidence that he was an unfit parent. Upon review, we find the district court had initial child custody jurisdiction and could therefore enter an initial child custody order, Father's due process rights were not violated, and the State produced sufficient evidence that Father was unfit. We affirm the termination of Father's parental rights.

A CINC CASE BEGINS IN KANSAS

S.C. (born in 2014) moved from Columbia, Missouri, to Garden City, Kansas, with Father, Mother, and her brothers on September 30, 2019. On December 6, 2019, S.C. disclosed to the school counselor that her brother "had tried to marry her and hurt her in the butt." On December 9, 2019, the Assistant Finney County Attorney filed a petition alleging that S.C. was a CINC. The petition stated that the court had "jurisdiction to make a child custody determination pursuant to K.S.A. 23-37,204(a)," which is

the emergency jurisdiction section of the UCCJEA. Under the "Facts Alleged" section of the CINC petition, it stated that the police officer responding to the school where S.C. disclosed the sexual abuse to a school counselor was aware that "[Brother] had previously victimized [S.C.] when they lived in Columbia, Missouri." It added that S.C. told the school counselor that the family had been living in their new house for approximately one to two weeks.

The petition and subsequent hearings involved both Father and Mother, but Mother is not a party to this appeal.

The petition further alleged that S.C. provided the following information during a forensic interview by the Child Advocacy Center:

> "[S.C.] identified the parts of the body where [Brother] would hump her as her vagina and buttocks, which she referred to as pee-pee and butt. She stated [Brother] had pulled down her pants and humped her in a room with a white couch after he pulled down her pants. She described hers and [Brother's] clothing as being on and off. When asked what part of his body [Brother] humped her with she pointed to the penis on an anatomical drawing, which she referred to as pee-pee. She also stated [Brother's] pee-pee went inside her pee-pee. She told him no and he didn't listen. She advised he eventually let her go and she went to [Father] and told him what happened. [S.C.] advised [Father] then 'hurt' [Brother] for what happened. She stated [Father] told her not to tell anyone what happened. When asked how old she was when this occurred, she said it happened on Friday."

Following the forensic interview, S.C. was put into police protective custody and taken to an emergency placement. On December 11, 2019, the district court ordered S.C. to be placed in the custody of the Department for Children and Families (DCF) in out-of-home placement. The district court entered an order of temporary custody with DCF after finding that an emergency existed in which it was in the child's best interests not to return home. The Order of Temporary Custody stated: "The Court finds that jurisdiction and venue are proper." The district court did not specifically address the UCCJEA in its orders.

The district court continued the adjudication hearing several times for reasons not apparent by the record. On January 25, 2021, more than a year after S.C. was placed in DCF custody, the district court adjudicated S.C. as a CINC and ordered S.C. to remain in

DCF custody. The adjudication hearing transcript is not in the record on appeal. The journal entry memorializing the hearing was issued on April 6, 2021, with no indication of why it took over two months to file. The court's order stated that it found jurisdiction was proper, but there is nothing in the record on appeal to suggest that the court specifically considered whether Kansas had proper jurisdiction under the UCCJEA.

The district court held a permanency hearing the same date—January 25, 2021. At that time, the court found that reintegration remained a viable goal but that it was still in S.C.'s best interests to remain in DCF custody. Again, the journal entry was not issued until April 6, 2021, for reasons unknown.

Another permanency hearing was held March 28, 2022. A written decision was filed April 18, 2022. The district court found that Father's progress towards reintegration was not adequate despite S.C. being in DCF custody for over 800 days. The district court changed the permanency plan to adoption, finding reintegration was no longer a viable goal. The district court set the matter for a pretrial hearing on June 27, 2022, and for hearing on the "upcoming" motion to terminate parental rights on July 27, 2022.

The State moved to terminate Mother's and Father's parental rights on July 19, 2022. The State alleged that Father "failed to carry out a substantial portion of the Reintegration Plan" and put forth "insufficient effort" "to provide for the basic needs of [S.C.]." The State asserted that Father "demonstrated inappropriate physical contact with the child throughout the case." The State claimed that

> "[S.C.] disclosed that when she would watch scary movies, she would sleep with her dad and cuddle. She would then wake up without clothes on. The child did not know how her clothes came off and her father slept with her in the bed. [S.C.] commented her dad could touch her private areas because he's her dad."

The State further alleged that visitation between Father and S.C. remained supervised "because [Father] has not demonstrated age appropriate boundaries in regards to physical contact with the child." The State relied on information from Father's psychological evaluation that concluded reintegration was "not likely to be successful because there is knowledge of children acting out sexually with one another in the home and father . . . has coached

[S.C.] to keep it a secret which leads the evaluator to wonder if father believes this type of behavior is normal." Finally, the State alleged that "Father continues to take no accountability in the abuse that occurred in his household. Saint Francis continues to be concerned about the abuse that occurred in [Father's] care and his ability to protect his children from future abuse."

Also filed on July 19, 2022, was a motion to reassign the matter to a district court judge instead of a district magistrate judge. The motion itself is not in the record on appeal. On August 30, 2022, the Chief Judge assigned the case to a district court judge for all further proceedings. The matter came before the court for a status review on October 11, 2022. The district court set the termination hearing for January 25, 2023, but the matter was continued to June 14, 2023, with no apparent objections.

The district court held an evidentiary hearing on termination of Mother's and Father's parental rights on June 14 and June 15, 2023. Mother did not appear. The district court accepted the State's proffer of her unfitness and found factual bases existed to determine her unfitness. The district court found Mother to be unfit and terminated her parental rights.

The State called the following witnesses concerning Father: Melissa Fulton (the forensic interviewer at the Child Advocacy Center), Katrina Jones (S.C.'s individual therapist), Sasha Mai (a family support worker with St. Francis Ministries [SFM]), Angelique Quint (a case manager for the reintegration department at SFM), and Deanna Barnett (a mental health counselor who performed a psychological evaluation with parenting emphasis on Father). Barnett submitted a report based on her review of the Missouri's Department of Social Services (DSS) reports, which indicated that after Father moved from Kansas to Missouri in 2015, DSS issued reports on the family from 2016 through 2019.

Father's attorney did not argue at the termination hearing that Missouri was the home state or that the district court lacked subject matter jurisdiction, but he alluded to a jurisdictional problem through his cross-examination of witnesses. When Father's counsel cross-examined Fulton, counsel asked, "Were you aware if that—if the family had recently moved from a different state?" He followed up with, "Through your . . . meetings with [S.C.], the

humping and the kissing on the mouth, and was that—do you know if that was in Kansas or a different state?" When Father's counsel cross-examined Barnett, counsel asked, "[F]rom your research, you were aware of there was another case in Missouri; is that correct, for this family?" Then he asked, "[T]his alleged abuse, did that happen in Missouri or in Kansas?"

Details of the remaining testimony at the termination hearing will be addressed in the analysis of the district court's findings below.

From the bench, the district court ruled that there was clear and convincing evidence for finding that Father was unfit, his conduct or condition was unlikely to change in the foreseeable future, and it was in S.C.'s best interests for Father's parental rights to be terminated. At the time of the hearing, S.C. had been in DCF custody for 42 months.

ANALYSIS

I. THE DISTRICT COURT HAD INITIAL CHILD CUSTODY JURISDICTION

Subject matter jurisdiction under the UCCJEA

Father appeals the district court's order terminating his parental rights to S.C. on the ground that the district court lacked subject matter jurisdiction under the UCCJEA. Recently, in *Nicholson v. Mercer*, 319 Kan. ___, 2024 WL 4897814, at *2, 3 (2024), the Kansas Supreme Court "clarified the true nature of subject-matter jurisdiction in Kansas" by explaining that "subject-matter jurisdiction is simply the constitutional power of courts in this state to decide disputes." Stated differently, "[s]ubject matter jurisdiction concerns the court's authority to hear and decide cases." *In re K.L.B.*, 56 Kan. App. 2d 429, 437, 431 P.3d 883 (2018). If the district court lacks jurisdiction to make a ruling, its judgment is void. *In re Adoption of A.A.T.*, 287 Kan. 590, Syl. ¶ 2, 196 P.3d 1180 (2008).

We are first tasked with whether this issue may be raised for the first time on appeal. Father did not raise this issue in the district court or explain why we may consider this issue for the first time on appeal. See *In re A.S.*, 319 Kan. 396, 399, 555 P.3d 732 (2024);

Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36). Without either of these actions, Father has not preserved this issue for review. Subject matter jurisdiction, however, "cannot be waived and may be raised at any time, whether it be for the first time on appeal or even upon the appellate court's own motion." *Vorhees v. Baltazar*, 283 Kan. 389, 397, 153 P.3d 1227 (2007). Even if the parties do not question our subject matter jurisdiction, we also have "an independent duty" to do so. *In re A.A.*, 51 Kan. App. 2d 794, 805, 354 P.3d 1205 (2015). We have recognized that a UCCJEA jurisdiction question raises a subject matter jurisdiction question. 51 Kan. App. 2d 794, Syl. ¶ 1 ("The Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA] is one such limitation on the subject-matter jurisdiction of the Kansas district courts."). Thus, we will consider this issue.

Standard of Review

"Subject-matter jurisdiction raises a question of law subject to unlimited review." *In re A.A.-F.*, 310 Kan. 125, Syl. ¶ 1, 444 P.3d 938 (2019). "Because subject matter jurisdiction is ordinarily conferred by statute, it should be noted that the interpretation of a statute is also a question of law subject to unlimited review." *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009).

The UCCJEA applies to Kansas CINC cases.

The revised Kansas Code for Care of Children (Code), K.S.A. 38-2201 et seq., "generally confers original jurisdiction on Kansas courts to hold proceedings concerning any child who may be a child in need of care." *In re A.A.-F.*, 310 Kan. 125, Syl. ¶ 3. As the Kansas Supreme Court noted in *In re A.A.-F.*, the Legislature has purposely placed limits on this jurisdiction, making it subject to the UCCJEA. 310 Kan. 125, Syl. ¶ 3. Accordingly, the UCCJEA applies to Kansas CINC cases. K.S.A. 38-2203.

The primary purpose of the UCCJEA is to avoid jurisdictional competition and conflict with courts of other states. *In re A.A.-F.*, 310 Kan. 125, Syl. ¶ 4. The UCCJEA achieves this goal of preventing jurisdictional disputes with rules that generally limit jurisdiction related to a child's custody and care to "*one state at a time*."

(Emphasis added.) *In re A.W.*, 60 Kan. App. 2d 296, 302, 493 P.3d 298 (2021). Outside of Massachusetts, which adopted an earlier, similar uniform act, every state, including Kansas and Missouri, has adopted the current UCCJEA. *In re A.A.*, 51 Kan. App. 2d 794, 804, 354 P.3d 1205 (2015).

There are four ways by which a district court attains initial child custody jurisdiction.

With this primary purpose in mind, the UCCJEA prioritizes the four bases or grounds under which a district court can acquire jurisdiction: (1) home state, (2) significant connection, (3) more appropriate forum, and (4) default or vacuum jurisdiction. K.S.A. 23-37,201(a).

The highest and first priority is given to the child's home state on the date the proceeding commences. K.S.A. 23-37,201(a)(1); *In re A.A.-F.*, 310 Kan. 125, Syl. ¶ 4. The UCCJEA defines "'[h]ome state'" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." K.S.A. 23-37,102(8). Once a court in the child's home state exercises jurisdiction, the home state has "exclusive, continuing jurisdiction" unless special circumstances exist or changes occur that allow the custody determination to be modified by another state. *In re A.A.-F.*, 310 Kan. 125, Syl. ¶ 5; *In re Z.E.H.*, No. 109,799, 2013 WL 5975324, at *8 (Kan. App. 2013) (unpublished opinion).

If the child does not have a home state, the district court should consider the remaining three bases by which a court attains initial child custody jurisdiction. This begins with the second basis, significant connection jurisdiction, which is "conjunctive in critical ways." *In re S.L.*, 61 Kan. App. 2d 276, 307, 503 P.3d 244 (2021). That is, "[i]f no court has home state jurisdiction," a Kansas court has jurisdiction when "(A) the child *and* the parents, or the child *and* at least one parent or person acting as a parent have a significant connection with the state other than mere physical presence, *and* (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships." 61 Kan. App. 2d at 307-08; see K.S.A. 23-37,201(a)(2).

The third basis is the "'more appropriate forum'" jurisdiction. 61 Kan. App. 2d at 308. This occurs if all courts having home state or significant connection jurisdiction decline to exercise their jurisdiction on the ground that another state is the "more appropriate forum." K.S.A. 23-37,201(a)(3). The UCCJEA lists several factors that the court should consider when making this determination. K.S.A. 23-37,207(b).

The fourth basis is the default or vacuum jurisdiction. 61 Kan. App. 2d at 308. A state has initial child custody jurisdiction when "no court of any other state would have jurisdiction under the criteria specified" for home state jurisdiction, significant connection jurisdiction, or a more appropriate forum jurisdiction. K.S.A. 23-37,201(a)(4).

A UCCJEA analysis is required if there is a possible jurisdictional issue.

In view of the four UCCJEA bases by which a state attains jurisdiction in a CINC case with interstate connections, a district court "errs by assuming subject-matter jurisdiction . . . without making sure that the provisions of the UCCJEA have been satisfied." *In re A.A.*, 51 Kan. App. 2d at 806. Here, the district court would have been on notice that this was a case with interstate connections. The State's CINC petition stated that S.C. had previously resided in Missouri. The State asserted that the district court had jurisdiction "to make a child custody determination" under K.S.A. 23-37,204(a). Under this statutory subsection, a court has "temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." K.S.A. 23-37,204(a). The State's petition also stated that the police officer responding to the school where S.C. disclosed the sexual abuse to a school counselor was aware that her brother had previously victimized S.C. "when they lived in Columbia, Missouri."

But here, the district court appears to have assumed initial child custody jurisdiction over a case that had interstate connections without undertaking a UCCJEA analysis. The record does not indicate that the district court considered whether the

UCCJEA applied and, if so, whether the Kansas court had initial child custody jurisdiction. Despite this, as discussed below, the district court was not deprived of jurisdiction.

In a UCCJEA analysis, the first step is determining whether there is a home state.

With the highest and first priority given to the child's home state, a district court should first consider if the child has a home state. See K.S.A. 23-37,201(a)(1); K.S.A. 23-37,102(8). Father alleges that S.C. was a resident of Missouri when the State filed a CINC petition on December 9, 2019. The record reflects that S.C. lived in Missouri from 2015 through September 30, 2019, and began living in Kansas with her parents on October 1, 2019. While the Missouri DSS, a state administrative agency, did intervene with the family and established a plan to assist the family, no court case was ever filed in Missouri. As such, no Missouri court entered a custody order, which would have triggered the UCCJEA. See Mo. Ann. Stat. § 452.740.1(1) (a Missouri court has jurisdiction to make an initial child custody determination only if "[t]his state is the home state of the child on the date of the commencement of the proceeding").

Under different circumstances, Missouri may have continued as the home state had one of the parents continued to reside there. See Mo. Ann. Stat. § 452.740.1(1). The undisputed evidence establishes that S.C. and both her parents moved from Missouri and had begun residing in Kansas less than six months before this action was filed. Neither Kansas nor Missouri qualified as a home state.

We next consider whether the district court had significant connection jurisdiction under K.S.A. 23-37,201(a)(2).

Having concluded that S.C. did not have a home state, we next consider whether Kansas or Missouri had significant connection jurisdiction. See K.S.A. 23-37,201(a)(2). On appeal, both the State and the guardian ad litem (GAL) argue that S.C. has a significant connection with Kansas. As a reminder, the bases for finding significant connection jurisdiction are: "(A) the child *and* the parents, or the child *and* at least one parent or person acting as a

parent have a significant connection with the state other than mere physical presence, *and* (B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships." *In re S.L.*, 61 Kan. App. 2d at 307-08.

Kansas has not defined the term "significant connection" as applied to the UCCJEA. But as the UCCJEA is a uniform act adopted by 49 states, we may look to other states' interpretations of the Act. See *In re E.T.*, No. 111,971, 2015 WL 1125364, at *7 (Kan. App. 2015) (unpublished opinion) (comparing UCCJEA cases from California, Iowa, and Vermont); *Arizona Dept. of Economic Sec. v. Grant ex rel. County of Maricopa*, 232 Ariz. 576, 580, 307 P.3d 1003 (Ct. App. 2013) (considering other jurisdictions which had defined the term "significant connection").

We consider several cases to be significant.

In *Rennie v. Rosenthol,* 995 A.2d 1217 (Pa. Super. Ct. 2010), a Pennsylvania court looked at the dictionary meaning of the words and determined "'significant connection'" meant the connection to the state must be meaningful. 995 A.2d at 1221; see also Webster's New World College Dictionary 1351 (5th ed. 2014) (defining "significant" as "1. Having or expressing a meaning 2. important"). A significant connection is therefore not trivial or slight.

Accordingly, to determine whether a child has a significant connection to justify the exercise of "exclusive, continuing jurisdiction," a court "must look at the nature and quality of the child's contacts with the parent[s] living in the [state]." 995 A.2d at 1221-22. Under this framework, "a majority of jurisdictions have found a significant connection . . . where one parent resides in the state and exercises at least some parenting time in the state." *White v. Harrison-White*, 280 Mich. App. 383, 392, 760 N.W.2d 691 (2008). Determining whether there is a "significant connection" to a state does require a factual analysis of the record. *Arizona Dept. of Economic Sec.*, 232 Ariz. at 580.

In *In the Matter of the Marriage of Schwartz and Battini*, 289 Or. App. 332, 344, 410 P.3d 319 (2017), the Court of Appeals of Oregon first determined that Oregon was not the child's home state. The *Schwartz* court proceeded under Or. Rev. Stat. § 109.741(1)(b), Oregon's statute codifying the UCCJEA §

201(a)(2), which is identical to K.S.A. 23-37,201(a)(2). The court looked to the record for evidence of a significant connection to Oregon and found evidence that the mother was from Oregon, the child was born in Oregon, and the child's doctor was in Oregon. Additionally, the child's maternal grandparents—who lived half the year in Oregon—spent considerable time with the child in Oregon. From this record, the appellate court found that the child had a significant connection with Oregon, and thus Oregon had significant connection jurisdiction. 289 Or. App. at 344.

In Kansas, panels of this court have held that courts have jurisdiction due to a child's significant connection to Kansas. See *In re Marriage of Ruth*, 32 Kan. App. 2d 416, 421-22, 83 P.3d 1248 (2004) (affirming lower court's decision that Kansas has "exclusive, continuing jurisdiction" over child custody issues because the children had a significant connection to Kansas due to regular visits with their father); see also *In re Adoption of Baby Girl B.*, 19 Kan. App. 2d 283, 291, 867 P.2d 1074 (1994).

In contrast, other panels of this court have found that a child had no significant connection to Kansas. See *In re S.L.*, 61 Kan. App. 2d at 308 (finding no significant connection with Kansas where child "had not lived in Kansas for two years, had not been enrolled in school [in Kansas], and had no more extended family [in Kansas] than she had in the Netherlands"); *In re E.T.*, 36 Kan. App. 2d 56, 67-68, 137 P.3d 1035 (2006) (finding child had significant connection with Missouri because he was born in Missouri, was in foster care in Missouri, and child's "medical records and information gained from foster care concerning his care, protection, training and personal relationships" were in Missouri); *In re Marriage of Harris*, 20 Kan. App. 2d 50, 60, 883 P.2d 785 (1994) (finding children had no significant connection to Kansas when father filed for divorce in Kansas one day after removing children from Georgia).

> *We look for evidence in the record of S.C.'s significant connection with Kansas.*

Under this subsection, we first consider whether "[t]he child and the child's parents, or the child and at least one parent or person acting as a parent, have a significant connection with this state

other than mere physical presence." K.S.A. 23-37,201(a)(2)(A). In this case, both of S.C.'s parents reside in Kansas and both exercise parenting time in Kansas. The record reflects that S.C. was born in Kansas in 2014 and later moved to Missouri. On October 1, 2019, she and her family returned to live in Kansas. Neither parent returned to Missouri but chose to remain in Kansas. Once settled in Garden City, Mother was able to find work at Goodwill, while Father stayed home to care for the children. Consequently, at the time the petition was filed, S.C. was living with both parents, her older brother, and her paternal grandmother with no apparent or expressed intent to leave Kansas.

Another factor showing a meaningful presence in Kansas was S.C.'s enrollment in a Kansas grade school. The parents' decision to enroll S.C. into school in Garden City shortly after arriving provides strong circumstantial evidence of an intent to remain for an extended period—going well beyond a mere transient presence of limited, though indefinite, duration. See *DeLima v. Tsevi*, 301 Neb. 933, 943-44, 921 N.W.2d 89 (2018) (child's attendance at school indicative of significant connection under UCCJEA); *In re T.B.*, 497 S.W.3d 640, 645-46 (Tex. App. 2016) (child's attendance at school "factor" showing more than mere presence in state); *Amidon v. Clark*, No. 353888, 2021 WL 935687, at *3 (Mich. App. 2021) (unpublished opinion) (enrollment in school indicative of significant connection); *Hansen v. Hansen*, No. A19-1779, 2020 WL 3494334, at *4 (Minn. App. 2020) (unpublished opinion) (child's attendance at preschool indicates significant connection). And that intent remained intact when the petition was filed about two months later.

There is additional evidence that S.C. and her family had a significant connection with Kansas that went beyond mere presence. At the termination hearing, Father testified that a key component under Missouri DSS's safety plan was that S.C. and her brother must live separately. But while the family stayed in Missouri, the safety plan was not feasible because Father's grandmother was no longer able to separately care for S.C.'s brother. As such, moving the family back to Kansas ensured that S.C. would live apart from her brother. Father testified why living in Kansas was important for the family: "I had to move somewhere that was

going to be beneficial to both kids to remain separated." He chose to move to Garden City where their family lived, including S.C.'s biological mother. This allowed S.C.'s brother to live with his mother and S.C. to live with Father. Still, at the time of the reported offense, S.C.'s brother was apparently living with Father's family, including S.C. Even so, according to Father, living in Kansas provided an important means to properly follow the safety plan for S.C., thereby safeguarding S.C. As such, the nature and quality of S.C.'s contacts with her family living in Kansas shows the first factor is met. We move to the next factor.

Second, we consider whether substantial evidence is available in Kansas concerning the child's care, protection, training, and personal relationships. K.S.A. 23-37,201(a)(2)(B). Here, the Kansas district court had access to ample information concerning S.C.'s care, safety, education, and personal relationships. At the termination hearing, Father testified how he had met with Missouri DSS before leaving Missouri and that a DSS worker "was going to transfer everything to the State of Kansas to the local DCF office here[.]" This included the family's DSS reports and the Missouri DSS-prepared safety plan for S.C. and her family. The safety plan also referenced S.C.'s mental health, requiring therapy services for both S.C. and her brother. Father recalled: "[The Missouri DSS worker] told me that she was going to forward the safety plan and the case over to Kansas to where it could be made sure I was following the recommendations, and to give me the support that I needed to get the services if I needed any help." Upon receipt of the referral from the Missouri DSS, DCF was to contact Father. In fact, the State's CINC petition stated that because the family resided in Finney County, the Finney County Sheriff's Office had also received the Missouri DSS reports regarding S.C.

The district court also would be able to review the DCF information regarding Father and the family *before and after* S.C. was born in Kansas. During the years from 2011 through 2014, DCF had been involved with the family when they lived in Garden City. And before the petition was filed, DCF had filed a referral for S.C. to be removed from her parents' custody.

Further, because S.C. was attending school in Kansas at the time the petition was filed, the court would have access to S.C.'s school records. This includes records regarding her education and care through her teachers and counselors, including the counselor who reported the incident between S.C. and her brother. In addition to S.C.'s teachers and counselors, several other Kansas parties familiar with S.C. would have been available to the court—most notably her family members, DCF workers, the Finney County Sheriff's Office, and the investigating law enforcement officer from the Garden City Police Department.

Thus, at the time the CINC petition was filed, the district court had access to the following documents: (1) the Missouri DSS reports regarding S.C. and her family from 2015-2019; (2) Missouri DSS's safety plan for S.C. and the family; (3) DCF reports dating from 2011-2014, which includes the first year of S.C.'s birth; (4) DCF's 2019 referral report regarding removing S.C. from the custody of her parents; (5) Garden City grade school reports from teachers and/or counselors regarding S.C.; and (6) local Kansas law enforcement reports. Given the amount of information available to the court when the petition was filed, substantial evidence existed showing S.C.'s significant connection to Kansas. The second factor is also met.

To conclude, we find that S.C. had a significant connection with Kansas at the time the petition was filed due to (A) S.C. and her parents having a significant connection with Kansas other than mere physical presence; and (B) substantial evidence available to the Kansas district court concerning S.C.'s care, protection, and training, i.e., S.C.'s education and personal relationships.

Our decision that Kansas has significant connection jurisdiction essentially agrees with the State's and the GAL's arguments. However, their arguments differ in that they contend that the court first exercised the UCCJEA's temporary emergency jurisdiction per K.S.A. 23-37,204(a) before "ripening" to significant connection jurisdiction under K.S.A. 23-37,201(a)(2). In support, the State cites to *In re K.L.B.*, 56 Kan. App. 2d at 444.

In considering emergency circumstances, a district court may obtain temporary emergency jurisdiction when "it is necessary in an emergency to protect the child because the child . . . is subjected

to or threatened with mistreatment or abuse," and the child is present in Kansas. K.S.A. 23-37,204(a). "An emergency is '[a] serious situation or occurrence that happens unexpectedly and demands immediate action.'" *In re A.A.*, 51 Kan. App. 2d at 807. And the "UCCJEA omits the 'child in need of care' basis for emergency jurisdiction and clearly provides only limited emergency jurisdiction." 51 Kan. App. 2d at 807 (citing K.S.A. 2014 Supp. 23-37,204[a]).

A crucial aspect of emergency jurisdiction granted by the UCCJEA is that it is limited and temporary in nature. 51 Kan. App. 2d at 806-07. While a district court may have temporary emergency jurisdiction, this is "meant to be 'very limited [in] scope and to be reserved for extraordinary circumstances.'" 51 Kan. App. 2d at 807 (noting that a "child-in-need-of-care finding by itself does not invoke emergency jurisdiction under the UCCJEA").

In this case, the State's petition stated that the court had "jurisdiction to make a child custody determination pursuant to K.S.A. 23-37,204(a)." Yet the court's Journal Entry and Order of Temporary Custody did not specifically indicate that it was exercising temporary emergency jurisdiction under K.S.A. 23-37,204. For instance, in its written Journal Entry and Order of Temporary Custody, the district court only stated: "An emergency exists whereby it is contrary to the best interest of the child to return home at this time." Even in the court's own handwritten orders, the court made no indication it was exercising temporary emergency jurisdiction under the UCCJEA. And the court did not suggest that it was contacting Missouri to confirm jurisdiction as outlined under the UCCJEA. See K.S.A. 23-37,204(b)-(d). The two court documents indicate that the court only entered standard orders. See *In re K.L.B.*, 56 Kan. App. 2d at 442 (Kansas court was aware of a potential jurisdictional issue and ordered the district attorney's office to contact the appropriate Kentucky court following the temporary custody hearing).

In sum, we find S.C. had a significant connection with Kansas under K.S.A. 23-37,201(a)(2). Having satisfied that Kansas has jurisdiction, we need not consider whether the court has jurisdiction under the remaining two bases, namely,

more appropriate forum and default or vacuum jurisdiction. See K.S.A. 23-37,201(a)(3) and (a)(4).

Conclusion

When the UCCJEA statutory requirements are fulfilled, the Code allows Kansas courts to make an initial child custody determination. Here, Kansas does have significant connection jurisdiction under K.S.A. 23-37,201(a)(2). The district court thus had initial child custody jurisdiction enabling it to issue permanent orders of child custody for S.C., including terminating Father's parental rights.

II. THE DISTRICT COURT DID NOT DENY FATHER'S RIGHT TO DUE PROCESS

Father alleges the 11-month gap between the filing of the motion to terminate his parental rights and the hearing on that motion violated his procedural due process rights. Father notably did not make this argument to the district court.

"[C]onstitutional grounds for reversal cannot be raised for the first time on appeal." *Bussman v. Safeco Ins. Co. of America*, 298 Kan. 700, 729, 317 P.3d 70 (2014).

There are several exceptions to this general rule, including: "'"(1) the newly asserted theory involves only a question of law arising on proved or admitted facts . . . ; (2) consideration of the theory is necessary to serve the ends of justice or to prevent [a] denial of fundamental rights"; or (3) the district court's judgment is correct for the wrong reason.' [Citation omitted.]" *In re A.S.*, 319 Kan. at 399.

"If the issue was not raised below," an appellant must provide "an explanation why the issue is properly before the court." Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36). While Father fails to provide such an explanation, he does assert that his fundamental liberty rights as a parent are at issue, which falls under the second exception. Even so, our review of the issue finds that Father's due process rights were not violated.

Standard of Review

"'Whether a right to due process has been violated is a question of law, over which an appellate court exercises unlimited review.'" *In re K.E.*, 294 Kan. 17, 22, 272 P.3d 28 (2012).

Analysis

When a court receives a "petition or motion requesting termination of parental rights . . . , the court shall set the time and place for the hearing, which shall be held within 90 days. A continuance shall be granted only if the court finds it is in the best interests of the child." K.S.A. 38-2267(a). The State filed the motion for termination of parental rights on July 19, 2022. On August 8, 2022, the matter was continued for a district judge to be assigned. On October 11, 2022, the district court set a pretrial hearing for December 22, 2022, and the termination hearing for January 25, 2023. There were no objections noted. On January 25, 2023, the district court continued the termination hearing to June 14 and 15, 2023. A review of the record shows that Father did not object to any continuances.

A due process analysis under Mathews v. Eldridge

When the State seeks to terminate the relationship between a parent and child, it must do so by "fundamentally fair procedures" that meet the requisites of due process. *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). To establish that his due process rights were violated, Father must show that he was "both entitled to and denied a specific procedural protection." *In re A.A.-F.*, 310 Kan. at 145. When considering the procedural protection requirements, a court weighs

"(1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that any additional or substitute procedures would entail." *In re J.D.C.*, 284 Kan. 155, 166-67, 159 P.3d 974 (2007).

The historic United States Supreme Court case, *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), established these three factors.

Beginning with the first factor, Father, as the parent to S.C., has a fundamental liberty interest in the right to make decisions about S.C.'s care, custody, and control. See *In re J.D.C.*, 284 Kan. at 166. Father does have rights at stake because the 11-month period from when the State filed the motion to terminate his parental rights and the parental termination hearing involves his ability to parent his child.

The second factor—the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards—is not present. Father does not claim that he was unable to present evidence and argument at the termination hearing, or that he was otherwise "unheard." He argues that the delay "remove[d] his ability to parent his child" because the visitation schedule with S.C. was reduced after the finding that reintegration was no longer viable.

The State counters that the added time between the motion and the hearing was to Father's benefit "because he could have used the time to address the issues with reintegration and his parenting, which he did not do." The State also points out that Father never motioned the court to modify the visitation schedule for additional visits.

Father's argument is against the visitation schedule, which is not subject to appeal. See K.S.A. 38-2273(a) (limiting appeals to orders of temporary custody, adjudication, disposition, finding of unfitness, or termination of parental rights). He argues that delay "keep[s] a child from attaining permanency." This is not an argument that his rights were violated but an attempt to argue the merits of the termination. Father, moreover, cites no authority for his contention that a delay between the filing of the motion to terminate and the termination hearing is a due process violation. A failure to support a point with pertinent authority or failure to show why a point is sound despite a lack of supporting authority or in the face of contrary authority is like failing to brief the issue. *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018). A point raised incidentally in a brief and not argued therein is deemed waived or abandoned. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017).

The third factor—the State's interest in the procedures used, including the fiscal and administrative burdens, support a finding that Father's due process rights were not violated. The State has an interest in seeing that a CINC case proceeds in a timely and proper manner. This includes—when necessary—the appointment of a district court judge to hear a parental termination hearing. In this case, a new judge was appointed to preside over the termination hearing. Given that appointment, and the later continuance, the timeframe here was reasonable under the circumstances.

A similar argument was made in *In re B.H.*, 32 Kan. App. 2d 12, 80 P.3d 396 (2003). There, a father alleged he was denied his right to parent his children between removal of the children and termination of his parental rights. The panel held that the father's due process rights were not violated. It stated: "The language regarding time limitations for dispositions of a child in need of care case stated in K.S.A. 38-1561 and K.S.A. 38-1561(c) is directory, not mandatory." 32 Kan. App. 2d at 16. While K.S.A. 38-1561 was repealed, it required a hearing on a motion for termination of parental rights within 90 days of the date the motion was filed, just as K.S.A. 38-2267 does today. See also *In re K.D.B.*, No. 116,278, 2017 WL 3001033, at *3 (Kan. App. 2017) (unpublished opinion) (finding a "generic allegation of prejudice doesn't legally establish actual prejudice" where "[n]either parent has shown that the delay [in conducting an adjudication hearing] deprived him or her of access to specific relevant evidence").

Our Kansas Supreme Court has stated that "failure to follow a statutorily required process does not inevitably result in a due process violation." *In re A.A.-F.*, 310 Kan. at 146-47. There, our highest state court found no constitutional due process violation when the district court did not hold a statutorily mandated permanency hearing within 30 days of finding reintegration was no longer viable. 310 Kan. at 149.

Father had notice of the hearing to terminate his parental rights; he was present and fully represented at the termination hearing. He also had a chance to be heard. Moreover, Father never objected to the continuances of the termination hearing in the district court on due process grounds or for any other reason. The delay did not create a risk that he would be erroneously deprived

of his parental interests. See *In re A.A.-F.*, 310 Kan. at 147. Father's due process rights were not violated.

Finally, in *In re A.A.-F.*, after the Kansas Supreme Court ruled that the parent had failed to show a constitutional due process violation due to the untimely permanency hearing, our highest court clarified that such delays are not preferable and are discouraged: "Other facts may lead to a different holding, and, knowing that, we are confident Kansas district courts will not read our conclusion that the failure to comply with a statutory requirement in this case did not violate constitutional due process as a license to ignore K.S.A. 2015 Supp. 38-2264(e)." 310 Kan. at 149. Likewise, this holding is limited to this case—that is, under the facts of this case, Father did not establish a constitutional violation. We therefore echo the Supreme Court's clarification that courts should not read our holding that courts are permitted to ignore CINC statutory requirements.

III. THE DISTRICT COURT DID NOT ERR IN TERMINATING FATHER'S PARENTAL RIGHTS

Standard of Review

When a child has been adjudicated a CINC, the court may terminate parental rights "when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future." K.S.A. 38-2269(a). Accordingly, termination of parental rights "will be upheld on appeal if, after reviewing all the evidence in the light most favorable to the prevailing party, the district judge's fact-findings are deemed highly probable, i.e., supported by clear and convincing evidence." *In re Adoption of Baby Girl G.*, 311 Kan. 798, 806, 466 P.3d 1207 (2020). In making this determination, "the appellate court does not weigh conflicting evidence, pass on credibility of witnesses, or redetermine questions of fact." *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008).

Additional Facts

The State's first witness at the termination hearing was Fulton, who conducted the initial forensic interview of S.C. on December 6, 2019. During the interview, S.C. told Fulton that she lived in a house with Mother, Father, a grandma and grandpa, and four older brothers. S.C. disclosed details of one of her older brother's sexual abuse. S.C. stated on an anatomical diagram that when she used the term "pee-pee," she meant a boy's penis and a girl's vagina. S.C. also told Fulton that her father told her not to tell anyone about what her brother did to her.

The State's next witness was Barnett, who performed a psychological evaluation with parenting emphasis on Father on March 11, 2021. Barnett's recommendations were that reintegration with S.C. was "not likely to be successful." Barnett testified that Father believed S.C.'s mother "had coached her into saying that [Brother] had perpetrated on her" and that Father "didn't believe that it happened." Barnett testified that Father admitted there were "a couple of incidents of domestic violence" between himself and his ex-wives that the children had witnessed. Barnett testified that Father "does some therapy on a surface level, but he's not really dealing with the real issues that brought the children into custody to begin with." She also testified that Father was "kicked out of a parenting class because they said he was acting out sexually."

Among Barnett's concerns were Father's blaming of others and inability to take responsibility for his children's wellbeing and safety. Father was diagnosed with generalized anxiety and major depressive disorder. Barnett reported that "his judgment was poor and his insight was lacking. He does not have a lot of insight into his own functioning, as well as what his children need, and he has a history of making poor decisions." Barnett testified that Father had a history of blaming others, avoiding talking about trauma, and running from his problems. She stated, "[H]e wasn't really accountable for his own behavior and his own culpability as the father of these children and what had been going on."

Barnett testified that she knew that Missouri had opened a case on this family before their relocation to Kansas. She read a portion of the report that she received from Missouri's DSS, dated March 17, 2020

"'DSS determined [Brother] had sexually abused [S.C.] and the two brothers not involved in this evaluation. There was a great concern about a continuing cycle of sexual abuse with this family on May 18, 2020. Because the family had relocated to Kansas, Missouri DSS determined not to open a family-centered services case.'"

Barnett testified that the family moved to Kansas in September 2019; at that time they were supposed to be using a safety plan implemented in Missouri, but they failed to comply with it. "The safety plan was put in place to keep [Brother] and [S.C.] apart from each other so that there was no more . . . sexual abuse." Barnett had information from Missouri DSS that Father drove to Kansas with Brother and S.C. together, and they all stayed overnight together in a motel, which violated the safety plan.

Barnett's testimony also included reading from a Missouri DSS report about an incident on September 12, 2019:

"'DSS met with [Father], [Brother], and the Columbia police with regard to exposing his genitals to [S.C.]. It was agreed [Brother] would enter residential treatment. [Father] admitted he could not provide for the safety of his children. The previous night 911 was called because [Brother] was chasing his grandmother with a stick.'"

Brother was never admitted to residential treatment. Rather than completing services in Missouri, Father decided to move out of state to Kansas. Barnett expressed concern that Father told her he was intending to relocate out of Kansas as soon as S.C. came home, as she believed he was planning to do so in order to avoid consequences.

Barnett testified to her conclusion that "reintegration was not a feasible option, mostly because [Father] had not shown any progress in addressing his personal issues that were actually reinforcing what the children were doing." Barnett's ultimate finding was that Father did not have the parenting skills necessary to provide for the safety and wellbeing of S.C.

Next the State called Jones, a licensed clinical marriage and family therapist and a registered play therapist with High Plains Mental Health Center. Jones provided therapy for S.C. for over two years. S.C. was diagnosed with "other reactions to severe stress," which "is a diagnosis that [is used] when someone does not meet complete or full criteria for PTSD, but has many traits or symptoms of that trauma diagnosis." S.C. has also been diagnosed

with attention deficit hyperactivity disorder (ADHD). During therapy, S.C. disclosed other incidents where her brother had touched her inappropriately. Jones testified, "Research has shown that actually a parent knowing and failing to protect, or a parent denying that it occurred, can actually be more harmful to the child than the actual act of abuse itself." Jones testified that S.C. would regress if placed back into Father's home. Jones stated that returning S.C. to Father's home could be potentially harmful for S.C

The State next called Mai, who visited S.C. monthly and supervised the visits between S.C. and Father. Those supervised visits were two hours each, twice a month in the SFM office. Mai testified that Father's behavior had been consistent over the last two years of visits—"He comes in, they greet each other, he brings fast food, they watch a movie on his phone. The conversation is very limited; usually it's just watching a movie in silence for at least an hour." The fact that Father largely remained silent during visits was concerning to Mai. She testified, "There's a lack of bond between them." Mai also testified as to why Father's supervised visits had not progressed to unsupervised visits. She said the concern was a risk that Father was not able to keep S.C. safe considering he does not acknowledge that sexual abuse occurred. In fact, his visits decreased from weekly to twice a month. Mai also testified to inappropriate acts during the visits. At one point, S.C. asked Father "to tickle her in her private part." S.C. was overly affectionate, sitting on his lap for extended periods, laying on him, and once tried to lick him.

Father did complete some case plan tasks. Mai testified that he completed a mental health assessment and the fatherhood initiative class. Father participated in one IEP meeting at the school. Although Father was successfully discharged from individual therapy, he continued not to hold himself accountable for the sexual abuse that occurred in his household. Mai testified to SFM's conclusion:

"'St. Francis has had time to access the allegations and address the concerns with the family. [S.C.] has been out of home since December 11, 2019. Due to the circumstances of the case and the overall wellbeing of the child, reintegration has not occurred. The likelihood of it changing in the near future for either parent is unlikely. [Father] continues to take no accountability in the abuse that occurred in his household.

"'St. Francis Ministries continues to be concerned about the abuse that occurred in [Father's] care and his ability to protect his children from . . . future abuse. The children removed from [Father's] care have been sexually or had some form of abuse at one point in their lives while in his care.'"

Mai's recommendation was to terminate Father's parental rights.

The State next called Quint, who served as a SFM case manager over this case for its entire duration, since 2019. She testified that it has been SFM's recommendation to terminate Father's parental rights since January 24, 2022. Quint reiterated Father's lack of accountability and refusal to acknowledge the sexual abuse that took place. Quint testified that Father was admitted into Larned State Hospital from April 17 to April 21, 2020. Father told Quint on the phone that "he emotionally lost it and needed a break from the kids."

Quint testified that Father completed several parenting classes but had to retake the fatherhood initiative class because the instructor believed Father was actively using drugs, displaying behaviors that were disruptive. Quint clarified that completing a parenting class consisted only of attending the sessions, not being tested for knowledge or skills. She agreed that she did not believe Father "actually learned and assimilated the skills that have been presented to him."

When asked what interactions Father has had with S.C. that give her concern about allowing unsupervised visits, Quint testified: "We have been involved with numerous . . . CINC matters. We've noticed that there's a difference in treatment between one child and the other. There is multiple DCF investigations during the duration of the case . . . and as recent as . . . December 2022, [S.C.] asked for us to be in the room." Quint listed specific safety concerns that SFM had that justified keeping visitation supervised, including lack of boundaries and S.C.'s behavior after visits, as well as S.C.'s request that SFM be in the room during visits. Quint testified that SFM talked to Father about limiting electronic use during his visits with S.C., but that he continued to have S.C. watch a movie on his phone at every visit within the last year. Father had fallen asleep on more than 10 visits.

Quint testified that early in the case Father had two positive drug tests, one in January 2020 and one in March 2020. After that,

his tests were negative for controlled substances. Quint testified that based on the case plan, Father has not demonstrated the ability to ensure S.C. goes to therapy and to take care of S.C.'s other needs. Quint recommended termination because S.C. has been out of the home since 2019 and deserves permanency. The State then rested its case.

Father, Father's mother, Father's current wife, and S.C. all testified on behalf of Father. Father testified that there were two prior sexual occurrences between Brother and S.C. while they lived in Missouri, before relocating to Kansas in September 2019.

Father denied violating the safety plan that was instituted in Missouri. He continued to deny that any incidents of a sexual nature between the children occurred in Kansas, even though S.C. told a school counselor and the forensic interviewer while she lived in Kansas that she lived in a house with her brother and that he touched her inappropriately there the previous week. Father further denied telling S.C. not to tell anyone about the incident. He also stated that he had been in Larned State Hospital for three to four days but denied having any symptoms of suicidal ideation or anxiety at that time. He testified that the only reason he was admitted to the hospital was because his ex-wife told the doctors he was suicidal.

Father denied that S.C. ever asked him to tickle her private part. He claimed that S.C. only asked him why he did not tickle her anymore and he told her that SFM would not "deem it to be appropriate." Father admitted that S.C. once tried to lick his arm but said he pulled away and told her it was inappropriate and not to do it again. Father also denied ever sleeping in the same bed as S.C., much less removing her clothing.

Father claimed that during visits with S.C. he would provide activities like card games, board games, coloring books, and activity books with reading, math, or spelling to work on. He acknowledged there were times that they would watch movies or shows on his phone. He admitted that he may have dozed off a couple of times during visits but denied ever being in a deep sleep. Additionally, he denied being unsuccessfully discharged from a parenting class for exhibiting "erotic behaviors during class." He

testified that he was told that he was being kicked out for having a positive drug test.

When asked why he indicated to SFM that he would leave Kansas if reintegrated with S.C., Father testified, "To where we can move on with our life. To move past it, to be better, to be happy." Moving the family from Missouri to Kansas and Kansas to Missouri to avoid consequences was a concern to SFM and Barnett. When asked why he moved out of Missouri right after the initial incidents between S.C. and Brother, Father testified that it was because "Missouri wasn't willing to help me find a cheaper place [to live] like they was saying that they would." But he added that the reason for moving to Kansas was to "separate my children to where I could get the services that they both needed to where they could reintegrate back in the same home."

Additionally, when asked why he did not send Brother to live with his biological mother and keep S.C. and the rest of the family in Missouri, Father responded that he did not know how to get in touch with Brother's biological mother. But he added that the reason he moved the family to Kansas was so Brother could live with his biological mother. According to the Missouri DSS reports that Barnett referenced in her psychological evaluation, Father stated to DSS his reason for moving to Kansas was that he feared losing the children. Ultimately, his testimony explaining his decision to move the family from Missouri to Kansas was inconsistent and confusing.

S.C. testified that she likes visits with Father very much and that "they're pretty fun." When asked what kind of activities she does with Father on their visits, S.C. testified, "We play games, we eat, we watch a movie together. That's really all." She testified that Father has brought games and books to their visits. S.C. also testified that she likes her foster parents very much. She stated that she wants to live with her father and brothers but also with the foster family.

After hearing all the evidence, the district court stated on the record, "This case, [notwithstanding] the history, was brought because of sexual abuse . . . that happened to [S.C.] by [Brother.] It happened. That's been established. . . . My biggest problem throughout these proceedings is that [Father] didn't believe it then

and he doesn't believe it now." The court also stated: "[Father] has made progress on the tasks that have been assigned to him, but yet, after 3 and a half years, there are still concerns from all the professionals involved in this case." Finally, the district court concluded:

"Dad hasn't done enough to progress anymore than where we're at after 3 and a half years of [S.C.]'s life being spent in the system. . . . [T]he State has met its burden, that beyond the clear and convincing evidence that it is in the best interest of [S.C.] to have her parental rights to . . . her father . . . terminated."

Analysis

A parent has a fundamental liberty interest protected by the Fourteenth Amendment to the United States Constitution to decide on the care, custody, and control of the parent's child. Before a parent can be deprived of the right to the custody, care, and control of the child, the parent is entitled to due process of law. *In re P.R.*, 312 Kan. 767, 778, 480 P.3d 778 (2021); see *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

Under K.S.A. 38-2269(a), the State, as the moving party, must prove by clear and convincing evidence Father is "unfit by reason of conduct or condition" making him "unable to care properly for [his] child" and that the circumstances are "unlikely to change in the foreseeable future." The statute contains a nonexclusive list of nine conditions that singularly or in combination would amount to unfitness. K.S.A. 38-2269(b). And the statute lists four other factors to be considered if a parent no longer has physical custody of a child. K.S.A. 38-2269(c). The State may also rely on 1 or more of the 13 statutory presumptions of unfitness outlined in K.S.A. 38-2271(a).

The district court relied on six of the factors under K.S.A. 38-2269(b) in its decision to terminate the parental rights of Mother and Father. It is not clear which, if any, factors pertain solely to Father and which to Mother. But evidence of a clear and convincing nature as to any factor is enough to affirm termination. K.S.A. 38-2269(f). Of the factors the district court relied on, we review the following factors:

- K.S.A. 38-2269(b)(2): "conduct toward a child of a physically, emotionally or sexually cruel or abusive nature;"

- K.S.A. 38-2269(b)(4): "physical, mental or emotional abuse or neglect or sexual abuse of a child;" and
- K.S.A. 38-2269(b)(8): "lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child[.]"

K.S.A. 38-2269(b)(2)—conduct toward a child of a physically, emotionally, or sexually cruel or abusive nature

The failure of a parent to "protect his or her child from abuse constitutes 'conduct toward a child of a physically, emotionally or sexually cruel or abusive nature' under K.S.A. 2008 Supp. 38-2269(b)(2)." *In re S.D.*, 41 Kan. App. 2d 780, Syl. ¶ 7, 788-90, 204 P.3d 1182 (2009) (upholding termination of parental rights under K.S.A. 38-2269[b][2]). Father's insistence that the abuse never happened—only admitting to two incidents that happened in Missouri and which did not specifically involve vaginal or anal penetration, despite S.C.'s disclosure to the contrary—is indicative of his failure to keep her safe.

Father argues on appeal that "he personally took care to follow the safety plans in Missouri, took steps to keep the children separate, and made corrective action for him as a parent." His testimony that he followed Missouri's safety plan was directly refuted at the termination hearing by Barnett, who had information from Missouri DSS that Father drove to Kansas with Brother and S.C. together, and they all stayed overnight together in a motel, which violated the safety plan. Additionally, S.C. had disclosed to a forensic interviewer that Brother sexually assaulted her at her current home, which was then Kansas. Father's continual denial of the sexual assault that happened under his care was of primary concern to the district court.

S.C.'s therapist testified that a parent's denial of events may cause more harm than the sexual assaults themselves. Barnett concluded that "reintegration was not a feasible option, mostly because [Father] had not shown any progress in addressing his personal issues that were actually reinforcing what the children were doing."

In *In re S.D.*, "mother's boyfriend allegedly battered S.D. and mother allegedly knew about the ongoing abuse and failed to protect the child." 41 Kan. App. 2d at 786. Mother continued to allow the boyfriend in her home despite a no-contact order. 41 Kan. App. 2d at 783-

84. Similarly, here, Father continued to allow Brother to have contact with S.C. and ignored the safety plan. He claims otherwise, but the district court believed S.C. and the professionals' versions over Father's, and this panel does not reweigh evidence or pass on the credibility of witnesses. *In re B.D.-Y.*, 286 Kan. at 705.

K.S.A. 38-2269(b)(4)—physical, mental, or emotional abuse or neglect or sexual abuse of a child

A parent's refusal to admit that one child is sexually abusing another in his household also has been found to support termination on this statutory factor. In *In re N.W.*, No. 125,235, 2023 WL 1879330, at *7 (Kan. App. 2023) (unpublished opinion), the panel recognized that the father "did not personally perpetrate the sexual abuse but [found] that does not insulate him from accountability."

"'Neglect' is defined as 'acts or omissions by a parent . . . resulting in harm to a child, or presenting a likelihood of harm.' 'Harm' is defined as 'physical or psychological injury or damage.'

"Based on a plain reading of these definitions, a showing of emotional neglect requires either psychological injury to a child or actions or omissions by the parent which present a likelihood of psychological injury to the child. [Citations omitted.]" *In re J.W.*, No. 112,668, 2015 WL 8590309, at *8 (Kan. App. 2015) (unpublished opinion).

A review of the record shows there is clear and convincing evidence of S.C.'s psychological injury. S.C. was diagnosed with "other reactions to severe stress," which "is a diagnosis that [is used] when someone does not meet complete or full criteria for PTSD, but has many traits or symptoms of that trauma diagnosis." S.C.'s therapist testified that a parent knowing and failing to protect, or a parent denying that abuse occurred, can be "more harmful to the child than the actual act of abuse itself." When S.C. confronted Father about the abuse she received from Brother, Father told her not to tell anyone. Viewing the evidence in a light most favorable to the State, a rational fact-finder could conclude it was highly probable that Father neglected S.C. emotionally.

K.S.A. 38-2269(b)(8)—lack of effort on the part of the parent to adjust the parent's circumstances, conduct, or conditions to meet the needs of the child

As the State points out, Father did not follow the safety plan initiated by Missouri. Importantly, although the record reflects Father completed parenting classes, participated in a mental health assessment, and provided a three-bedroom home to keep S.C. separate from her brothers, Father never modified his behavior so that the visitations could move from supervised to unsupervised. And due to Father's lack of progress, the visitations decreased in frequency. The district court did not weigh the evidence of Father's completion of the parenting classes, participation in a mental health assessment, and housing in his favor. We do not reweigh conflicting evidence. *In re B.D.-Y.*, 286 Kan. at 705. Thus, the evidence in the record was sufficient to establish that Father demonstrated a lack of effort to adjust his circumstances, conduct, or condition to meet S.C.'s needs.

Based on the analysis of these three factors, there is enough evidence, viewed in the light most favorable to the State, to deem the district court's fact-findings highly probable and affirm the termination of Father's parental rights. See *In re Adoption of Baby Girl G.*, 311 Kan. at 806.

Foreseeable Future

Father does not contest that his unfitness was unlikely to change in the foreseeable future. We must "measure the 'foreseeable future' from the child's perspective, considering the child's perception of time. *In re R.S.*, 50 Kan. App. 2d 1105, 1117, 336 P.3d 903 (2014)." *In re Ch.W.*, No. 114,034, 2016 WL 556385, at *8 (Kan. App. 2016) (unpublished opinion); see K.S.A. 38-2201(b)(4).

Our review of the record supports the district court's finding. There was credible evidence that S.C. would be harmed if returned to Father's care. Father made no attempts to shield S.C. from further harm when she was in his care. Additionally, there was no evidence suggesting Father would change in the foreseeable future. Notably, the district court stated that in the three-and-a-half years since the CINC case began, Father made little to no progress. The court found that Father's behavior was not likely to change in the foreseeable future. We conclude that clear and convincing evidence supports the district court's

determination that Father's unfitness is not likely to change in the foreseeable future.

Best Interests of the Child

If the district court finds the parent unfit, the court must then determine whether termination of parental rights is in the child's best interests. K.S.A. 38-2269(g)(1). A district court is in the best position to determine the best interests of a child, and the district court's judgment will not be disturbed on this point unless it has abused its discretion. *In re K.P.*, 44 Kan. App. 2d 316, 322, 235 P.3d 1255 (2010). "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." *Unruh v. Purina Mills*, 289 Kan. 1185, 1202, 221 P.3d 1130 (2009).

Father does not contest that termination of his parental rights was not in S.C.'s best interests. At the conclusion of the termination hearing, the district court stated, "All the professionals in this matter have testified, and their reports indicate that none of them believe . . . that reintegration is in the best interest of [S.C.]." At the time of the termination hearing, S.C. had been out of Father's home for almost four years. We conclude that it was not an abuse of discretion for the district court to find that it was in S.C.'s best interests to remain in out-of-home placement with Father's rights terminated.

Affirmed.

(561 P.3d 562)

No. 125,770

STATE OF KANSAS, *Appellee*, v. BRANDON STEVEN RUSSELL BELL, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Kansas Sentencing Guidelines for Drug Crimes—Plain Language of "Third or Subsequent" Convictions Requires Preexisting First and Second Conviction under K.S.A. 21-6805(f)(1).* In the revised Kansas Sentencing Guidelines for drug crimes, under K.S.A. 21-6805(f)(1), the plain language of "third or subsequent" convictions requires a preexisting first and second conviction of the unlawful possession of a controlled substance. In K.S.A. 21-6805(f)(1), the plain language of "third or subsequent" convictions requires a preexisting first and second conviction of the unlawful possession of a controlled substance.

2. SAME—*Under K.S.A. 21-6805(f)(1) a Second and Third Conviction May Arise in Same Hearing.* A second and third conviction under K.S.A. 21-6805(f)(1) may arise in the same hearing. In this way, the reading of K.S.A. 21-6805(f)(1) does not conflict with the inclusive rule found in K.S.A. 21-6810. Each statute simply considers the concurrent but separate convictions for their individual purposes.

3. SAME—*Second and Third Convictions under K.S.A. 21-6805(f)(1)—District Court's Discretion to Designate Which Conviction Is Second or Third.* In the event the second and third convictions under K.S.A. 21-6805(f)(1) arise in the same hearing, or are sentenced together but are not consolidated, the designation of which conviction becomes the second or third is left to the district court's discretion.

Appeal from Bourbon District Court; MARK ALAN WARD, judge. Submitted without oral argument. Opinion filed December 20, 2024. Sentence vacated and case remanded with directions.

Sean P. Randall, of Kansas Appellate Defender Office, for appellant.

Brandon D. Cameron, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before WARNER, P.J., HILL and COBLE, JJ.

COBLE, J.: In two separate, nonconsolidated cases, Brandon Steven Russell Bell pleaded no contest to felony drug charges. As

part of the parties' global plea agreement, the State was to recommend probation if Bell's criminal history score resulted in his sentencing range falling in a border box on the sentencing grid. But while awaiting sentencing, Bell twice tested positive for use of illegal drugs. At the sentencing hearing addressing both cases, the State instead suggested a median sentence of 30 months' imprisonment for each conviction. Additionally, the district court considered each of his present convictions to be a third felony conviction under K.S.A. 21-6805(f)(1) and, as a result, imposed a presumptive prison sentence on each, even though Bell had only one prior felony drug conviction.

Bell now appeals, claiming: (1) The district court erred by imposing a presumptive prison sentence under K.S.A. 21-6805(f)(1) for both current convictions, and (2) the State breached the plea agreement. On his first claim, we agree that because Bell had one prior drug conviction, his two current convictions must logically be counted as a second and a third—not both designated as third convictions requiring presumptive prison. As for his second claim, we find that the State erred by breaching the plea agreement. We vacate Bell's sentence accordingly and remand this case for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On June 14, 2022, Bell entered into a no contest, global plea agreement with the State on two counts of felony drug possession—one in each of two pending cases. The district court accepted his pleas and found Bell guilty of one count of possession of methamphetamine in case No. 19-CR-459 (Case 1) and one count of possession of methamphetamine in case No. 21-CR-448 (Case 2).

Among other provisions, the plea agreement outlined the parties' belief in how Bell's criminal history would be scored and where his sentencing range might fall on the drug offense table found in K.S.A. 21-6805(a):

> "In [Case 1], I believe that my criminal history score is C and that I will fall in a 'border box' gridbox at sentencing. If I fall in a 'border box' gridbox, the parties have agreed to recommend the median sentence in the gridbox and the State has agreed that the 'border box' criteria have been met as I have completed

inpatient drug treatment. In addition, I understand that if I am placed on probation, the term of my probation will be 12-18 months.

"In [Case 2], I believe that my criminal history score is C and that I will fall in a 'border box' gridbox at sentencing; however, a 'special rule' would apply as I was on felony bond at the time of the offense and the Court could order that I serve my sentence without giving me a chance on probation. If l fall in a 'border box' gridbox, the parties have agreed to recommend the median sentence in the gridbox and the State has agreed that the 'border box' criteria have been met as I have completed inpatient drug treatment and that the 'special rule' not be applied. In addition, I understand that if l am placed on probation, the term of my probation will be 12-18 months."

As part of the agreement, the State dismissed all remaining counts in each case, as well as three other pending criminal cases against Bell.

The presentencing investigation (PSI) report in each of the present cases revealed that in 2018, Bell was convicted of felony possession of methamphetamine. Each PSI also listed the other current crime, and each recommended that "special rule 26"—presumed prison under K.S.A. 21-6805(f)(1)—should apply because the subject crime committed was the third or subsequent conviction for drug possession.

Bell filed a written objection to the PSI report in each case, arguing that because the convictions in Cases 1 and 2 were scheduled for sentencing at the same time, both could not be third or subsequent convictions. He maintained one of the cases must be designated as his second conviction.

After his plea, but before sentencing, the State filed a motion to revoke Bell's bond. The attached court service officer's affidavit revealed that Bell tested positive for methamphetamine in a urinalysis (UA) collected two weeks prior. A bench warrant was issued for Bell's arrest and the district court held a hearing the same day. During the hearing, the State suggested it had planned to oppose Bell's request for a departure sentence but offered it would not oppose departure and would not ask for him to be remanded to custody if Bell could provide a clean drug test that day. Bell agreed to provide another drug test during the court's recess, but again tested positive for methamphetamine. The district court revoked Bell's bond.

The district court held the sentencing hearing about one month later and first addressed Bell's objection to the PSI report in Case

1. Bell's counsel argued against the application of "special rule 26," and reasoned that *State v. Shipley* should not apply in this circumstance, because that case involved "just general[ly] where [a defendant falls] on the sentencing guidelines." See *State v. Shipley*, 62 Kan. App. 2d 272, 278-79, 510 P.3d 1194 (2022) (finding the defendant's cases were not constructively consolidated, and thus convictions from each case counted as "prior convictions" for criminal history purposes). Bell's counsel maintained:

> "It just does not make logical sense that you have two convictions, and we go from one conviction to three convictions in both cases and run afoul of the Special Rule. So I would ask the Court to find in this [Case 1] that this is a second conviction for possession of methamphetamines. There would be no Special Rule in regards to a third or subsequent possession, being presumed prison.
>
> "In the other case that we are also scheduled for sentencing [Case 2], I would agree that would be a third time offense, and a Special Rule would be applicable."

The State responded that "in sentencing, when we get PSI's, the convictions always count against each other. They count against each other to an increased criminal history score which increases the penalty." The State maintained that *Shipley* "completely clears up this issue" and nonconsolidated cases always count against each other as prior convictions at sentencing.

The district court denied Bell's objection, finding the law dictates that the court use the "inclusive rule," meaning felony convictions in two separate cases on the same date are scored against each other in the PSI reports. The district court held that in Case 1, Bell's criminal history score was C which found him facing a presumptive prison sentence. Bell argued for a dispositional and durational departure. After hearing arguments from the parties and statements from Bell's witnesses, the district court asked the parties for sentencing recommendations. The State recommended against the plea agreement and asked the court to sentence Bell to a standard sentence of 30 months' imprisonment, applying the special rule, instead of probation. The district court sentenced Bell to the standard 30 months' imprisonment.

The district court next heard arguments on Case 2. The district court announced its same determination from Case 1 regarding the special rule applied. Defense counsel did not challenge Bell's criminal history. The State again recommended that the court impose the standard 30-month prison sentence, applying the special

rule. The district court sentenced Bell to the standard 30 months in prison, to run consecutive to Bell's sentence in Case 1. The district court again reiterated that this was a third or subsequent conviction for felony drug possession.

The journal entry on each case noted that special rule 26 applied. Bell timely appeals his sentences in both cases, and the district court ordered the cases consolidated for appeal.

THE DISTRICT COURT ERRED BY IMPOSING A PRESUMPTIVE PRISON SENTENCE ON BOTH OF BELL'S PRESENT CONVICTIONS

Bell argues the district court erroneously applied K.S.A. 21-6805(f), also known as "special rule 26," to find both of his two pending cases constituted a third felony drug possession. He asserts that the district court mistakenly applied the prior conviction definition found in K.S.A. 21-6810(a), which only applies to the calculation of criminal history scores. Before we address the merits of his argument, we must dispense with two threshold issues.

1. *Bell's Claim is Preserved for Review*

First, we must address whether Bell's claim is preserved. Before sentencing, Bell filed a written objection to the PSI reports, and at the sentencing hearing his counsel argued his specific objections to the application of special rule 26 to both of his convictions. Because he did so, the issue is properly preserved for our review.

2. *Bell's Claim is Not Jurisdictionally Barred*

Although neither party raises this issue on appeal, we first note that Bell must overcome a jurisdictional bar. K.S.A. 2021 Supp. 21-6820(c) provides that an appellate court shall not review on appeal a sentence for a felony committed after July 1, 1993, that is (1) within the presumptive revised Kansas Sentencing Guidelines Act (KSGA) sentence for the crime, or (2) the result of a plea agreement between the State and the defendant which the district court approved on the record. See *State v. Albano*, 313 Kan. 638, 640, 487 P.3d 750 (2021) (appellate court ordinarily lacks jurisdiction to review presumptive sentences); *State v. Quested*, 302 Kan. 262, 264, 352 P.3d 553 (2015) (no jurisdiction

to review sentences agreed to and approved by the sentencing court). Bell's sentences here fall within the presumptive sentence under the KSGA and are the results of approved plea agreements, so at first glance, it would seem we lack jurisdiction to consider his appeal.

Yet our Supreme Court has found limited instances permitting appellate review of presumptive sentences, including when the district court misinterprets its own statutory authority. See *State v. Warren*, 297 Kan. 881, Syl. ¶ 1, 304 P.3d 1288 (2013) (appellate court may review a presumptive sentence where the district court refused to consider the defendant's request for a downward departure sentence it had authority to impose); *State v. Cisneros*, 42 Kan. App. 2d 376, 379, 212 P.3d 246 (2009) (appellate court may review presumptive sentence where the district court incorrectly expressed at a probation violation hearing that it had no power to reduce the term of the defendant's sentence).

Because Bell alleges the district court misinterpreted the KSGA, this is the precise situation in which this exception would apply, and we continue to review the merits of Bell's appeal.

3. *The District Court's Statutory Interpretation was Erroneous*

Bell argues the district court misinterpreted the third or subsequent conviction provision of the drug crime sentencing grid, K.S.A. 21-6805(f)(1), and imposed a presumptive prison sentence by considering both of his present convictions as third convictions. Specifically, Bell claims the district court erroneously applied the "prior conviction" definition found in the criminal history category statute, K.S.A. 21-6810(a), which should only apply when calculating the criminal history of a defendant.

3.1. *Applicable Legal Standards*

Interpretation of sentencing statutes is a question of law, and our review is unlimited. *State v. Moore*, 309 Kan. 825, 828, 441 P.3d 22 (2019). "'An appellate court is not bound by the trial court's interpretation.'" *State v. Schow*, 287 Kan. 529, 536, 197 P.3d 825 (2008).

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained.

State v. Keys, 315 Kan. 690, 698, 510 P.3d 706 (2022). So, an appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. "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." *Keys*, 315 Kan. at 698. And where there is no ambiguity, the court need not resort to statutory construction. Only if the statute's language or text is unclear or ambiguous does the court use canons of construction or legislative history to construe the Legislature's intent. *State v. Betts*, 316 Kan. 191, 198, 514 P.3d 706 (2022).

3.2. *A Third Offense Requires There to Have Been a Second*

The statute at the heart of Bell's appeal, K.S.A. 21-6805(f)(1), is part of the sentencing grid for drug crimes. It states in pertinent part: "The sentence for a *third or subsequent felony conviction* of . . . K.S.A. 21-5706 [unlawful possession of controlled substances], and amendments thereto, shall be a presumptive term of imprisonment and the defendant shall be sentenced to prison as provided by this section." (Emphasis added.)

K.S.A. 21-6810(a), although also part of the KSGA, involves the determination of an offender's criminal history. It states, in relevant part:

"A *prior conviction* is any conviction, other than another count in the current case, which was brought in the same information or complaint or which was joined for trial with other counts in the current case pursuant to K.S.A. 22-3203, and amendments thereto, which occurred prior to sentencing in the current case, regardless of whether the offense that led to the prior conviction occurred before or after the current offense or the conviction in the current case." (Emphasis added.)

Bell claims this "prior convictions" provision in K.S.A. 21-6810(a) is for criminal history score purposes only and should not have been applied to view his two present convictions under K.S.A. 21-6805(f)(1). Under K.S.A. 21-6805(f)(1), the plain meaning of the conditional word "third"—as in "third or subsequent felony conviction"—requires the designation of a second

conviction. He claims the different language used in the two statutes—"prior convictions" versus "third or subsequent conviction"—does not carry the same meaning, because the "prior convictions" provision does not require a condition precedent that a second conviction be designated.

The State agrees with the district court's invocation of the "'inclusive rule,'" allowing multiple same-day convictions to be included as prior convictions, to also apply when determining third or subsequent convictions under K.S.A. 21-6805(f)(1). The State argues to accept Bell's theory would create different meanings for the term "conviction" in the two statutes and would conflict with legislative intent. Generally, the State claims the Legislature intended both statutes, viewed under the broad umbrella of the KSGA, to share a common operative pool of terms and the defined terms within the statutes should be read in harmony.

Bell supports his theory with our court's rationale in *State v. Unruh*, 39 Kan. App. 2d 125, 177 P.3d 411 (2008). There, Unruh was convicted of manufacturing methamphetamine in Case 1, and while sentencing was pending in that case, he was convicted in Case 2, in a different county, of unlawful manufacturing of methamphetamine. During sentencing of Case 1, the trial court doubled his sentence under K.S.A. 21-4705(e) (now K.S.A. 21-6805[e]), using Case 2 to elevate the conviction in Case 1 as a second conviction. There, the State argued the "inclusive rule" under K.S.A. 21-4710(a) (now K.S.A. 21-6810[a]) should apply to Unruh's sentencing allowing his first case to be considered a second or subsequent conviction. 39 Kan. App. 2d at 136. The *Unruh* court rejected the State's argument, finding that "because K.S.A. 21-4710(a) relates only to the use of prior convictions to establish a defendant's criminal history category in the [KSGA] grid, this statute does not support the State's argument." 39 Kan. App. 2d at 136. The *Unruh* court also held that "the plain language of [K.S.A. 21-6805(e)] [formerly K.S.A. 21-4705(e)] commands a definition of prior conviction different from that contained in [K.S.A. 21-6180(a)] [formerly K.S.A. 21-4710(a)]." 39 Kan. App. 2d at 137. The court explained that to allow a conviction in a subsequent case (Case 2) to be treated as the first conviction in order to double the sentence in a conviction of a prior case (Case 1) is inconsistent

with the Legislature's intent under K.S.A. 21-6805(e) (formerly K.S.A. 21-4705[e]), because under such circumstances, a defendant would never have a first conviction. 39 Kan. App. 2d at 137. Thus, the court ruled that a defendant's first conviction is not subject to the doubling provisions of K.S.A. 21-6805(e) (formerly K.S.A. 21-4705[e]). 39 Kan. App. 2d at 137.

The State cites *Shipley* to argue that the "inclusive rule" of K.S.A. 21-6810(a) should apply to the sentencing provision under K.S.A. 21-6805(f)(1). Yet, *Shipley* only addressed the "prior convictions" in context of criminal history purposes. 62 Kan. App. 2d at 273-74. Following this court's holding in *Unruh*, such analysis is unnecessary for the resolution of this appeal.

The circumstances here are not entirely analogous to *Unruh*, but the court's rationale is instructive. Bell is not facing the conundrum of having his first conviction used against him to double his sentence under K.S.A. 21-6805(e). The question for Bell, under the next section of the sentencing statute, K.S.A. 21-6805(f)(1), is whether his second and third convictions under K.S.A. 21-5706 can be interchangeably used as a "third or subsequent" conviction to constitute imposing a presumptive prison sentence.

The *Unruh* court's reasoning is persuasive, though. Under K.S.A. 21-6805(f)(1), to allow both convictions in these concurrent cases—where there is one existing prior felony drug conviction—to *both* be treated as a third conviction which requires a presumptive prison sentence is inconsistent with the Legislature's intent under K.S.A. 21-6805(f)(1). Under these circumstances, a defendant would never have a second conviction. This simply defies logical explanation.

Clearly, the Legislature understood the concept of an ordered series, as evidenced in K.S.A 21-6805. The ordered series addressed by our court in *Unruh* was K.S.A. 21-6805(e), directing a sentence for a "second or subsequent" conviction of unlawful manufacturing of a controlled substance. In *Unruh*, our court found that to have a second conviction, there must logically be a first conviction.

Likewise, in the ordered sequence set out in the next subsection, K.S.A. 21-6805(f)(1), the concept of a "third or subsequent"

conviction inherently implies the existence of intermediate convictions—that is, both a first and a second. The first conviction must be followed by a second, and the second must be followed by a third. But by the structure of ordered sequences, the existence of a second is required.

The plain language of the statute, "third or subsequent" convictions, requires a preexisting first and second conviction of the unlawful possession of a controlled substance. K.S.A. 21-6805(f)(1). Because there is no ambiguity, this court need not resort to statutory construction. *Betts*, 316 Kan. at 198.

Because Bell's first conviction was already designated, the only issue remaining, then, is which of his present convictions was his second conviction. On this topic, we have two primary thoughts. First, as illustrated by the facts of this case, a second and third conviction under this rule may occur simultaneously—in this way, the reading of K.S.A. 21-6805(f)(1) does not conflict with the inclusive rule found in K.S.A. 21-6810. Each statute is simply counting the concurrent but separate convictions for their individual purposes.

Second, the designation of which conviction becomes second or third is left to the district court's discretion. Here, Bell was convicted in Case 1 and Case 2 on the same date, June 14, 2022. Defense counsel asked the district court to label Case 1 as the second conviction and to designate Case 2 as Bell's third conviction for purposes of K.S.A. 21-6805(f)(1). This would have been appropriate. If either case were to be designated as the second conviction, then logically, the other becomes the third. This would properly render only one of Bell's convictions qualified for the presumptive prison sentence under K.S.A. 21-6805(f)(1) as the third felony conviction. The other would merely be the second conviction and would not be subject to the presumptive prison sentence under K.S.A. 21-6805(f)(1).

The district court was required to designate one of Bell's current convictions as the second conviction. By failing to do so, the district court erred by imposing the presumptive prison sentence under K.S.A. 21-6805(f)(1) on one of his convictions. For this reason, we vacate Bell's sentence and remand this case to the district

court with directions to designate a second and a third conviction and resentence Bell accordingly.

THE STATE BREACHED THE PLEA AGREEMENT

Bell next argues the State breached the plea agreement when it failed to join Bell's requests for probation. Specifically, he claims the plea agreement did not contain any provisions allowing the State to alter its sentencing recommendations under any circumstance. Bell also argues the State neither established a substantial change in circumstances that would relieve the State from its obligation to follow the plea agreement nor asked the district court to make such findings.

1. *Applicable Legal Standards*

Whether the State breached a plea agreement presents a question of law over which appellate courts have unlimited review. *State v. Jones*, 302 Kan. 111, 116, 351 P.3d 1228 (2015).

"'"[A]pplication of fundamental contract principles is generally the best means to fair enforcement of a plea agreement, as long as courts remain mindful that the constitutional implications of the plea-bargaining process may require a different analysis in some circumstances."'" 302 Kan. at 116 (quoting *State v. Peterson*, 296 Kan. 563, 567, 293 P.3d 730 [2013]).

2. *Preservation*

Bell concedes he did not object on this basis before the district court. The State argues this issue is moot, because if we uphold the district court's presumptive prison sentence under K.S.A. 21-6805(f)(1), then it is no longer a border-box matter considered by the plea agreement. We do not, so this argument is not persuasive. But even if any of the exceptions to preservation apply, the State contends there was a material change in circumstances that precluded the State from upholding the plea agreement.

Although Bell did not raise this issue before the district court, there are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal, including: (1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the

case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021). Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36) requires an appellant to explain why an issue that was not raised below should be considered for the first time on appeal. *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019).

Bell claims that his appeal meets the first and second exceptions, and we agree. First, the question of whether the State breached the agreement is a question of law, and all the necessary facts to decide the question are contained in the appellate record. Second, when the State violates a plea agreement, the defendant's due process rights are violated. *State v. Urista*, 296 Kan. 576, 583, 293 P.3d 738 (2013). As such, "appellate courts may address the issue for the first time on appeal in order to serve the ends of justice or prevent a denial of fundamental rights." *State v. Chetwood*, 38 Kan. App. 2d 620, Syl. ¶ 4, 170 P.3d 436 (2007). Accordingly, we consider Bell's appeal of this matter despite his failure to object below.

3. *The State Breached the Plea Agreement*

Bell argues the plea agreement did not include a provision which would allow the State to alter its sentencing recommendation, so it breached the agreement when it recommended Bell should serve 5 years in prison instead of the agreed 12 to 18 months of probation. He also asserts the State failed to establish a material change in circumstances to relieve itself of the obligations of the plea agreement. Bell claims the two positive UAs before sentencing did not constitute a significant or material change in circumstances. Bell also argues the State failed to advise the district court of its intent to depart from the sentencing recommendation in the plea agreement. He claims his due process rights were violated when the State breached the agreed-upon sentencing recommendations.

On June 14, 2022, Bell signed a global petition to enter plea agreement covering each of his current cases. As Bell claims, the plea agreement does not contain a provision permitting the State

to revoke the plea agreement if Bell violates conditions of bond. Yet in *State v. Marshall*, 21 Kan. App. 2d 332, 335-37, 899 P.2d 1068 (1995), this court held that an implied condition exists in a plea agreement that circumstances surrounding the agreement will remain substantially the same and that subsequent changes will be sufficient to relieve the State of its obligation. See *State v. Burkett*, 231 Kan. 686, 691-93, 648 P.2d 716 (1982).

Bell argues that the two positive UAs, which formed the basis of the State's nonperformance, did not so materially change the circumstances as to warrant the State abandoning the plea agreement. He claims that drug relapses are well-recognized and "'[t]here [were] going to be mess ups.'" But he also claims he was attending meetings and going to outpatient treatments and provided no fewer than 17 "'clean'" drug tests. Bell argues although the district court and the State only focused on his history of substance abuse, the positive testing did not constitute a significant or a material change in circumstances considering his months of sobriety during the pendency of these cases.

The State responds that Bell testing positive for methamphetamine was a material change in circumstances that relieved the State from the obligation to follow the sentencing recommendation in the plea agreement. The State claims the premise of the plea agreement was for Bell to receive effective drug treatment and continued sobriety, and at the time of the plea hearing, Bell was sober and engaged in treatment. His continued success through more effective non-prison treatment was the basis of the plea offer by the State. The State asserts that Bell's post-plea failure to stay sober calls into question the efficacy of his drug treatment plan, his long-term prognosis, and the State's interest in deterring potential recidivism. The State argues that Bell's failure negated the purpose for recommending non-prison sanctions, mainly because his continued drug use decreased the likelihood that continued non-prison sanctions could meet the needs of the community and Bell.

Perhaps, and probably in all likelihood, this was the impetus for the plea agreement. But the plea agreement is silent on its purpose, and silent as to any rationale which might support a party's deviation from its terms. Any ambiguity in a plea agreement

should be strictly construed against the State because the State controls the plea agreement process. *State v. Case*, 289 Kan. 457, 462, 213 P.3d 429 (2009); see *Marshall*, 21 Kan. App. 2d at 336. Construing the contract in favor of Bell, the four corners of the contractual agreement is silent about an exit clause for the State to relieve itself of the obligation to follow the plea agreement. On the face of the contract, the State breached the parties' plea agreement.

Having found that the State breached the plea agreement, we must next decide whether the State's breach constitutes harmless error. Such a breach denies the defendant due process even when the district court's sentencing decision is unaffected by the breach. *Urista*, 296 Kan. at 594. In *Urista*, our Supreme Court found that the breach of the plea agreement can constitute harmless error "if a court can say beyond a reasonable doubt that the State's promise had little, if any, influence on the defendant's decision to enter into the plea agreement." 296 Kan. at 594-95.

Were the question solely whether the breach affected Bell's sentence, this case may offer a different question, because the State's promise would not have affected the outcome of Bell's sentence. See *State v. Peterson*, 296 Kan. 563, 574, 293 P.3d 730 (2013) (suggesting a defendant would not be entitled to a remedy for the State's breach if the reviewing court could say there was no reasonable possibility the breach contributed to the sentence). According to the plea agreement, the State was to join the recommendation for a median sentence in the gridbox only *if* Bell was found to be in the border box. But the district court did not sentence Bell in the border box, so the State's failure to join the recommendation had no effect on Bell's sentence.

But the Kansas Supreme Court in *Urista* clearly articulated a test for harmlessness that concerns only the effect that the State's promise had on the defendant's decision to enter into the plea agreement at the outset. 296 Kan. at 594-95. Bell argues that at least one of his cases had been pending for almost three years, and only when the State agreed in writing to recommend probation in both cases did Bell agree to plead no contest. We cannot, then, find beyond a reasonable doubt that the reneged-upon promise of

probation was harmless. The State's breach of the plea agreement was erroneous.

The State tries to convince us that the two positive drug tests were a material change in circumstances which validate its deviation from the plea agreement. But it did not ask the district court to make such findings. Because we have no such findings to review, we will not make such findings for the first time on appeal.

We are vacating Bell's sentence and remanding this case to the district court for resentencing on the first issue in this case. As part of resentencing, the State should be cautious about its approach to its sentencing recommendations in line with the reasonings above. And resentencing before a different judge is the typical remedy for the State's breach of a plea agreement. *Peterson*, 296 Kan. at 574.

Sentence vacated and case remanded with directions.