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. 3

Opinions filed in January - February 2025

Cite as 65 Kan. App. 2d

PUBLISHED 2025

by

Sara R. Stratton, Official Reporter

For the use and benefit of the State of Kansas

JUDGES AND OFFICERS OF THE KANSAS
COURT OF APPEALS

CHIEF JUDGE:

HON. KAREN ARNOLD-BURGER ..... Overland Park

JUDGES:

HON. HENRY W. GREEN JR. ..... Leavenworth
HON. THOMAS E. MALONE ..... Wichita
HON. STEPHEN D. HILL ..... Paola
HON. G. GORDON ATCHESON ..... Westwood
HON. DAVID E. BRUNS ..... Topeka
HON. KIM R. SCHROEDER ..... Hugoton
HON. KATHRYN A. GARDNER ..... Topeka
HON. SARAH E. WARNER[1] ..... Lenexa
HON. AMY FELLOWS CLINE ..... Valley Center
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[1]Sworn in as C.J. on January 13, 2025.

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PAGE

In re Marriage of L.F. and M.F. 175
Rumbaugh v. DirecTV 266
State of Kansas, ex rel. KHP v. $28,350 in U.S. Currency 203
State v. Calvert 301
State v. Hall 369
State v. Kemp 425
State v. Lund 416
State v. Newson 310
State v. Payne 283
State v. Reynolds 337
State v. Sanders 236

UNPUBLISHED OPINIONS
OF THE COURT OF APPEALS

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
Adams v. State	127,220	Wyandotte	01/31/2025	Affirmed
B.K. v. A.P.	127,764	Johnson	01/31/2025	Affirmed
Blanck v. Smith	127,089	Sedgwick	02/07/2025	Affirmed
Brown v. Payne & Jones	126,532	Workers Comp. Bd	01/03/2025	Reversed and remanded with directions
Brungardt v. DS&O Electric Cooperative, Inc.	126,264	Saline	02/28/2025	Affirmed
Conard v. Neosho Drilling	126,667	Cherokee	02/14/2025	Affirmed in part, reversed in part, and remanded with directions
Copeland v. State	126,212	Chautauqua	02/14/2025	Affirmed
Donald Dean Schaake Revocable Trust v. City of Lawrence, Kansas	127,281	Douglas	01/10/2025	Appeal dismissed
Edwards v. State	127,233	Sedgwick	01/31/2025	Affirmed
Elliott v. Centurion of Kansas	127,044	Butler	02/14/2025	Affirmed
Hamilton v. Housing Authority of the City of Manhattan, Kansas	127,821	Riley	02/28/2025	Reversed and remanded with directions
Hickles v. Kansas Dept. of Revenue	126,958	Labette	01/03/2025	Reversed and remanded with directions
In re Care and Treatment of Davis	126,785	Sedgwick	02/21/2025	Affirmed
In re Care and Treatment of Preiss	127,560	Sedgwick	02/21/2025	Affirmed
In re Estate of Lyons	127,104	Sedgwick	01/17/2025	Affirmed
In re Estate of Zavala-Ruiz	126,582	Wyandotte	02/21/2025	Affirmed
In re I.W.	127,198	Neosho	02/21/2025	Affirmed
In re K.S.	126,755			
	126,756	Butler	01/31/2025	Affirmed
In re Marriage of Boorigie	127,951	Sedgwick	02/21/2025	Appeal dismissed
In re Marriage of S.L.W. and S.M.W.	128,075	Decatur	02/21/2025	Affirmed
In re N.M.	127,621			
	127,622			
	128,393	Bourbon	01/17/2025	Affirmed
In re T.M.	127,574			
	127,575	Butler	01/24/2025	Affirmed
King v. Bernhardt	127,977	Johnson	01/31/2025	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
Little v. Kansas Dept. of Revenue	127,347	Meade	02/14/2025	Reversed and remanded with directions
McNelly v. State	126,688	Saline	01/10/2025	Affirmed
Morales-Yanes v. State Farm Mut. Automobile Ins. Co.	127,415	Sedgwick	02/07/2025	Affirmed
N&B Enterprises, Inc. v. English	126,339	Allen	01/24/2025	Affirmed in part, reversed in part, and remanded with directions
Rodina v. Castaneda	126,411	Wyandotte	02/14/2025	Affirmed in part, reversed in part, and remanded with directions
Saint Luke's Health System, Inc. v. Kansas Dept. of Labor	127,066	Johnson	01/17/2025	Affirmed in part and reversed in part
Savage v. Timsah	127,122	Sedgwick	02/07/2025	Affirmed
State v. Akin	127,489	Harvey	01/17/2025	Affirmed
State v. Alashqar	126,543	Sedgwick	01/10/2025	Affirmed
State v. Alexander	127,462	Reno	02/28/2025	Affirmed in part and dismissed in part
State v. Anderson	126,770	Ellsworth	01/24/2025	Appeal dismissed
State v. Bell	127,519			
	127,520	Sedgwick	01/24/2025	Affirmed
State v. Bennett	127,190	Lyon	01/24/2025	Affirmed
State v. Boese	125,691	Marion	02/21/2025	Conviction reversed and sentence vacated
State v. Brown	125,655	Sedgwick	02/07/2025	Affirmed
State v. Churchill	126,888	Reno	02/21/2025	Affirmed
State v. Coleman	127,295			
	127,296	Sedgwick	02/21/2025	Affirmed
State v. Combs	127,558	Wyandotte	01/10/2025	Affirmed
State v. Cooper	127,805	Wyandotte	02/14/2025	Affirmed and remanded with directions
State v. Cozart	125,907			
	125,908	Cloud	01/03/2025	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Daily	126,804	Sedgwick	01/10/2025	Affirmed in part, vacated in part, and remanded with directions
State v. Dreher	127,098	Crawford	02/07/2025	Affirmed
State v. Evans	127,467	Allen	01/31/2025	Affirmed
State v. Everett	127,034	Harvey	01/31/2025	Appeal dismissed
State v. George	126,414	Riley	02/28/2025	Affirmed
State v. Gonzalez	127,071	Ford	01/10/2025	Affirmed
State v. Graham	127,399	Finney	01/24/2025	Affirmed
State v. Hightower	126,388	Sedgwick	01/31/2025	Affirmed
State v. Hogue	127,006	Shawnee	02/14/2025	Affirmed
State v. Howard	127,234	Douglas	02/28/2025	Affirmed
State v. Ibrahim	127,186	Montgomery	01/31/2025	Affirmed
State v. Ingram	127,397	Sedgwick	02/14/2025	Affirmed
State v. Jaramillo-Salcedo	127,150	Sedgwick	01/24/2025	Affirmed
State v. Johnson	127,614	Johnson	01/24/2025	Affirmed
State v. Johnson	127,069	Douglas	02/14/2025	Affirmed
State v. Kennemer	126,892	Sheridan	02/14/2025	Affirmed
State v. King	127,966	Harper	02/28/2025	Affirmed
State v. King	127,239	Sedgwick	02/28/2025	Affirmed
State v. Lanham-Ollek	127,199	Sedgwick	01/24/2025	Affirmed
State v. Lara-Lopez	126,412	Wyandotte	01/17/2025	Conviction affirmed and case remanded with directions
State v. Lemaster	126,971	Saline	01/10/2025	Affirmed
State v. Lundberg	127,161	Bourbon	02/14/2025	Affirmed
State v. Mack	125,867	Shawnee	01/24/2025	Affirmed
State v. McIntosh	126,136	Greenwood	01/17/2025	Affirmed in part, reversed in part, and vacated in part
State v. Meeks	126,436	Riley	01/10/2025	Affirmed
State v. Mitchell	127,062	Johnson	02/07/2025	Affirmed
State v. Moran-Espinosa	126,306	Greenwood	02/21/2025	Affirmed in part and reversed in part
State v. Munsell	127,698	Shawnee	01/31/2025	Affirmed
State v. Mwaura	127,516	Johnson	02/14/2025	Affirmed
State v. Nesbitt	126,684	Sedgwick	01/10/2025	Affirmed
State v. Odor	124,831	Wyandotte	01/31/2025	Affirmed
State v. Ortega	127,525	Sedgwick	02/14/2025	Affirmed
State v. Penabaz	126,796	Riley	01/31/2025	Affirmed
State v. Phommaly	126,557	Seward	02/14/2025	Affirmed
State v. Poulson	125,933	Wyandotte	01/17/2025	Affirmed
State v. Rayton	127,535 127,536	Douglas	01/31/2025	Affirmed

TITLE	DOCKET NUMBER	DISTRICT COURT	DATE OF DECISION	DECISION
State v. Reynolds	126,608	Wyandotte	02/21/2025	Affirmed
State v. Ridder	127,040	Smith	01/31/2025	Affirmed
State v. Rider	127,267	Sedgwick	02/21/2025	Affirmed
State v. Rojo	126,616	Douglas	01/10/2025	Affirmed
State v. Ruddick	127,212	Reno	02/14/2025	Affirmed and remanded with directions
State v. Rundles	127,272	Sedgwick	02/28/2025	Affirmed in part and dismissed in part
State v. Rutherford	127,545	Dickinson	02/14/2025	Affirmed
State v. Sandfort	127,781	Butler	02/14/2025	Affirmed and remanded with directions
State v. Schmidt	127,381	Shawnee	02/14/2025	Affirmed
State v. Schuckman	127,485	Finney	02/14/2025	Affirmed
State v. Schwartz	126,872	Kingman	02/14/2025	Affirmed
State v. Smith	126,038	Bourbon	01/31/2025	Vacated in part and case remanded with directions
State v. Swai	127,457 127,458	Sedgwick	01/31/2025	Affirmed
State v. Vasquez	127,000	Rice	02/28/2025	Affirmed and cross-appeal dismissed
State v. Vickers	127,244	Shawnee	01/31/2025	Affirmed
State v. West	127,720	Sedgwick	02/14/2025	Affirmed
State v. Wheeler	127,241 127,242	Sedgwick	01/03/2025	Affirmed
State v. Williams-Winbush	127,060	Sedgwick	01/24/2025	Affirmed
State v. Withrow	126,169	Sedgwick	02/07/2025	Affirmed
State v. Yardley	126,713	Finney	02/14/2025	Affirmed
State v. Zachry	127,142	Riley	01/31/2025	Affirmed
State vs. Evans	126,049	Sedgwick	01/10/2025	Affirmed
Suitter v. Johnsonville Sausage	127,306	Workers Comp. Bd	02/14/2025	Reversed and remanded
Thomas v. State	127,562	Montgomery	02/14/2025	Affirmed
Todd v. Sedgwick County Emergency Medical Svcs.	127,348	Sedgwick	01/24/2025	Affirmed
Verstraete v. State	127,020	Pratt	01/24/2025	Affirmed
Vigil v. State	126,390	Reno	02/07/2025	Affirmed
Warren v. State	127,110	Sedgwick	01/10/2025	Affirmed
Wilkerson v. City of Atchison	126,502	Atchison	02/21/2025	Affirmed
Williams v. State	127,555	Wyandotte	02/21/2025	Affirmed

SUBJECT INDEX
65 Kan. App. 2d No. 3
Cumulative for Advance Sheets 1, 2 and 3
Subjects in this Advance Sheet are marked with *

PAGE

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. *Alenco, Inc. v. Warrington*..... 79

Consideration of Prosecutorial Error on Appeal—Two-Step Review. When a defendant argues prosecutorial error on appeal, this court considers the defendant's argument in two steps. First, this court considers whether the prosecutor's conduct fell outside the wide latitude that prosecutors have when presenting the State's case. Second, if the defendant establishes that the prosecutor erred by engaging in conduct outside this wide latitude, then this court must consider whether the error was harmless under the constitutional harmlessness error test. Under the constitutional harmlessness error test, an error is harmless if the State can establish that the prosecutor's error did not affect the outcome of the defendant's trial in light of the entire record. *State v. Newson*.....310*

District Court's Ruling on Motion to Continue—Appellate Review. An appellate court reviews the district court's ruling on a motion to continue for an abuse of discretion.
State of Kansas, ex rel. KHP v. $28,350 U.S. Currency.....203*

Motion to Dismiss for Failure to State a Claim Granted by District Court—Appellate Review. When a district court has granted a motion to dismiss for failure to state a claim, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom. The appellate court then decides whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. If so, the dismissal by the district court must be reversed.
Harding v. Capitol Federal Savings Bank..... 30

— — When a district court has granted a motion to dismiss for failure to state a claim, an appellate court must accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom. The appellate court then decides whether those facts and inferences state a claim based on plaintiff's theory or any other possible theory. If so, the dismissal by the district court must be reversed.
Harding v. Capitol Federal Savings Bank..... 30

Reasonable Probability Test for Determination If *Brady* Violation—Materiality Standard. Once a reviewing court has applied the reasonable probability test to determine if there is a *Brady* violation, there is no need for further harmless error review. There is no need to consider whether the

PAGE

Brady violation was harmless because the test whether the disputed evidence was material encompasses the constitutional harmlessness error test. Thus, if the State has failed to disclose material evidence, the accused is entitled to a new trial. *State v. Newson* 310*

Review of Jury Instruction Issues—Three-Step Process by Appellate Courts. When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, in other words, whether the error can be deemed harmless. *State v. Payne* 283*

CIVIL PROCEDURE:

Kansas Standard Asset Seizure and Forfeiture Act—Plaintiff's Attorney Has Burden of Proof That Interest in Property Subject to Forfeiture by Preponderance of Evidence. Under the Kansas Standard Asset Seizure and Forfeiture Act, K.S.A. 60-4101 et seq., the plaintiff's attorney shall have the initial burden of proving the interest in the property is subject to forfeiture by a preponderance of the evidence. If the State proves the interest in the property is subject to forfeiture, the claimant has the burden of showing by a preponderance of the evidence that the claimant has an interest in the property which is not subject to forfeiture.
State of Kansas, ex rel. KHP v. $28,350 U.S. Currency.....203*

CONSTITUTIONAL LAW:

Aim of Due Process to Prevent Fundamental Unfairness in Use of All Confessions. Unlike the aim of the corpus delicti rule to prevent convictions upon false confessions, the aim of due process is to prevent fundamental unfairness in the use of confessions whether true or false.
State v. Reynolds.....337*

Due Process Clause Protects against Involuntary Confessions—Requirements. The Due Process Clause protects against involuntary confessions: (1) that are inherently coercive and a per se violation of the Due Process Clause and (2) where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive.
State v. Reynolds.....337*

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. *State v. Goforth* 108

PAGE

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.
State v. Goforth 108

Fifth Amendment Protection Applicable—State's Burden to Prove Individual Waived Rights to Make Voluntary Statement—Requirements. The State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment and voluntarily—that is based on the person's unfettered will—made a statement. In that vein, the State must establish that police or other state actors did not intimidate, coerce, deceive, or engage in other misconduct that, when considered in the totality of the circumstances, was the motivation for the individual to make a statement.
State v. Reynolds 337*

Fundamental Constitutional Rights Are Not Absolute—Subject to Limitations Advancing Compelling Governmental Interests. Fundamental constitutional rights, including Section 4 of the Kansas Constitution Bill of Rights, are not absolute. They are subject to narrowly tailored limitations advancing compelling governmental interests. *State v. Hall* 369*

Kansas Public Speech Protection Act—Motion to Strike Filed after Complaint Served. Under the Kansas Public Speech Protection Act, a motion to strike is filed after service of a complaint. A First Amendment privilege is premature when no complaint has been filed, no affirmative defense has been raised, and no discovery order has been issued.
Kansas Governmental Ethics Comm'n v. Shepard 1

CONSUMER PROTECTION ACT:

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. *Alenco, Inc. v. Warrington* 79

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. *Alenco, Inc. v. Warrington* 79

PAGE

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.
Alenco, Inc. v. Warrington..... 79

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. *Alenco, Inc. v. Warrington*..... 79

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. *Henretty v. Healthcenter Northwest*..... 67

Illegal Sentence—Erroneous Application of Special Sentencing Rule Can Result in Illegal Sentence. Erroneous application of a special sentencing rule can result in an illegal sentence that does not conform to the applicable statutory provision, either in character or punishment under K.S.A. 22-3504(c)(1). *State v. Lund*.....416*

Interpretation of Contract—Courts Construe Ambiguous Language against Drafter of Contract. For ambiguity to exist within a contract, the contract's provisions or language must have doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. A contract is ambiguous if after applying the rules of contractual construction, a court is genuinely uncertain which one of two or more meanings is the proper meaning. When a court determines that disputed contractual language is ambiguous, a court is required to strictly construe any ambiguous language against the drafter of the contract.
Harding v. Capitol Federal Savings Bank..... 30

— Intent of Parties Is Primary Rule. When interpreting a contract, the primary rule is to interpret the contract as the contracting parties intended.
Harding v. Capitol Federal Savings Bank..... 30

Interpretation of Contract by District Court—Appellate Review. Whether the district court erred in its interpretation of a contract is a question of law over which an appellate court exercises unlimited review.
Harding v. Capitol Federal Savings Bank..... 30

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 agree-

PAGE

ment 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. *Alenco, Inc. v. Warrington*..... 79

Special Sentencing Rule in K.S.A. 21-6805(f)(1) Implicated Only When Defendant Has Two Qualifying Convictions. The special sentencing rule in K.S.A. 21-6805(f)(1), which creates a presumptive term of imprisonment for a "third or subsequent felony conviction" for unlawful possession of a controlled substance, is implicated only when the defendant has two qualifying felony convictions before the conviction to which the special rule is being applied. *State v. Lund*.....416*

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.
Alenco, Inc. v. Warrington..... 79

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. *Alenco, Inc. v. Warrington*..... 79

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. *Alenco, Inc. v. Warrington*..... 79

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. *Henretty v. Healthcenter Northwest*..... 67

CRIMINAL LAW:

Aggravated Intimidation of Witness Is Not Separate Offense Controlled by K.S.A. 21-5301—Identical Offense Doctrine Does Not Apply to Such Conviction. Aggravated intimidation of a witness, K.S.A. 21-5909(b), is not a separate offense controlled by K.S.A. 21-5301 or subject to the reduced penalty provisions of that statute. Because the aggravated intimidation of a witness statute includes attempt language, the offense is

PAGE

complete even when a defendant attempts to prevent or dissuade a witness. So the identical offense doctrine does not apply to such a conviction. *State v. Sanders*.....236*

Application of Formal Corpus Delicti Rule—State's Burden. When applying the formal corpus delicti rule, the State's burden is met if there is some evidence which renders the corpus delicti more probable than it would be without the evidence. *State v. Reynolds* 337*

Confession Could Be Untrustworthy Yet Still Voluntary—State Required to Prove Confession Is Trustworthy. Likewise, a confession could be untrustworthy, yet still voluntary. This would come into play when there is no tangible injury and the State is required to prove that the confession, its sole evidence, is trustworthy. If it cannot establish trustworthiness, then it does not matter if it was voluntary. *State v. Reynolds*.....337*

Court of Appeals Adopts Reasoning of Nebraska Case That State Has Legitimate Reason to Ban Creation of Child Pornography. We adopt the reasoning in *State v. Senters*, 270 Neb. 19, 26-27, 699 N.W.2d 810 (2005), that the State has a legitimate reason to ban the creation of child pornography because it is often associated with child abuse and exploitation, resulting in physical and psychological harm to the child, and due to the potential for reputational harm. *State v. Sanders* 236*

Crime of Involuntary Manslaughter or Vehicular Homicide—Causation Element Required to Prove Defendant Proximately Caused Death of Victim. To find a defendant guilty of involuntary manslaughter or vehicular homicide, the jury must find the defendant proximately caused the death of the victim. The causation element is reflected in the PIK instructions for each offense, although the trial court may also consider giving a separate jury instruction on causation more tailored to the facts of a particular case. *State v. Payne*.....283*

Date of a Prior Conviction Falls under *Apprendi* Exception for the Fact of a Prior Conviction. A district court may find the date that a prior conviction occurred, for K.S.A. 2021 Supp. 21-5801(b)(6) purposes, falls under the same exception as the fact of a prior conviction established by *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *State v. Calvert*.....301*

Defendant's Claim in This Case Is Rejected That Child Pornography Is Constitutionally Protected Activity. Under the facts of this case, we reject the defendant's claim that making and distributing child pornography is a constitutionally protected activity simply because the minor could lawfully consent to sexual activity. *State v. Sanders* 236*

Determination of Trustworthiness and Voluntariness of Confession from Totality of Circumstances—Considerations. Both trustworthiness and voluntariness must be determined from the totality of the circumstances. This entails consideration of factors relating to the nature of the interrogation and the characteristics of the accused. *State v. Reynolds*.....337*

PAGE

Exculpatory Evidence—Determination if *Brady* Violation by State—Three Factors. To determine whether the State has committed a *Brady* violation, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a court must evaluate three factors: (1) whether the disputed evidence was favorable to the accused because it was exculpatory or impeaching; (2) whether the disputed evidence was suppressed by the State, either willfully or inadvertently; and (3) whether the evidence was material, which establishes prejudice. To be material, the accused must show that there is a reasonable probability that but for the State's failure to disclose the disputed evidence to the defense, the result of the proceeding would have been different. *State v. Newson*.....310*

Formal Corpus Delicti Rule—Requirement of State to Show Existence of Crime Independently of Extrajudicial Confession by Defendant. Under the formal corpus delicti ("body of the crime") rule, the State is required to show the existence of a crime independently of an extrajudicial confession by the defendant. Recognizing that false confessions do occur for a variety of reasons, courts use this rule when the only evidence of a crime is the defendant's confession. *State v. Reynolds*.....337*

Formal Corpus Delicti Rule Not Followed for Crimes That Produce No Tangible Injury. Kansas does not follow the formal corpus delicti rule for crimes that produce no tangible injury. The law only demands the best proof of the corpus delicti which is attainable given the nature of the crime. Under these circumstances, the State may show the corpus delicti through a trustworthy confession. *State v. Reynolds*.....337*

Illegal Sentence—Erroneous Application of Special Sentencing Rule Can Result in Illegal Sentence. Erroneous application of a special sentencing rule can result in an illegal sentence that does not conform to the applicable statutory provision, either in character or punishment under K.S.A. 22-3504(c)(1). *State v. Lund*.....416*

Involuntary Confession—If CVSA Used by Law Enforcement to Trick or Induce Defendant into False Confession. An officer's exaggeration of the reliability of the Computer Voice Stress Analysis (CVSA) to identify the "truth" is deceptive. Although deceptive practices by law enforcement do not always constitute misconduct, if law enforcement uses the CVSA as subterfuge to trick or otherwise induce a defendant into a false confession, it can result in the confession being deemed involuntary. *State v. Reynolds*.....337*

— Link between Coercive Police Activity and Resulting Confession. Coercive police activity is a necessary predicate to a finding that a confession is involuntary. And there must be a link between the coercive police activity and the resulting confession. *State v. Reynolds*.....337*

Kansas Corpus Delicti Rule Requires Higher Burden on State Than More Probable Than Not Standard. Under the Kansas corpus delicti rule (opposed to the formal corpus delicti rule), the State carries a higher burden

PAGE

than the more probable than not standard when establishing the corpus delicti solely through a trustworthy confession. *State v. Reynolds* 337*

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. *State v. Bell*..... 160

Key Difference Between Reliability and Voluntariness—Confession Can Be Trustworthy but Still Involuntary. There is a key distinction between reliability and voluntariness. The reliability of a confession has nothing to do with its voluntariness. Proof that the defendant committed the crime to which he or she has confessed is not to be considered in deciding whether a defendant's will has been overborne and therefore the confession involuntary. A confession can be trustworthy, but still involuntary.
State v. Reynolds.....337*

Persons 16 Years of Age or Older Can Consent to Intercourse under Statute in Kansas. In Kansas, under K.S.A. 21-5507(a)(1)(A), persons 16 years of age or older can lawfully consent to sexual intercourse.
State v. Sanders.....236*

Proof of Two Prior Theft Convictions Not an Element of Felony Theft under Statute—Classifies Crime at Sentencing and Enhances Penalty. Proof of two prior theft convictions is not an element of felony theft defined by K.S.A. 2021 Supp. 21-5801(a)(1) but is contained in the penalty section of the statute in K.S.A. 2021 Supp. 21-5801(b)(6) and serves only to classify the crime at sentencing and thus enhances the penalty.
State v. Calvert.....301*

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).
State v. Goforth..... 108

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,

PAGE

the designation of which conviction becomes the second or third is left to the district court's discretion. *State v. Bell* 160

Sentencing—Reversal of Conviction of Primary Crime in Multiple Conviction Case—Mandatory Resentencing—Expectation of Finality under Double Jeopardy Analysis. When a defendant's original, multiple conviction sentence must be modified under K.S.A. 21-6819(b)(5) due to reversal of a conviction, that defendant lacks a reasonable expectation of finality in his or her sentence under a double jeopardy analysis until the mandated resentencing is completed by the district court.
State v. Smith 19

— — Resentencing Is Mandatory. When an appellate court reverses a conviction designated as the primary crime in a multiple conviction case, resentencing in the district court is mandatory under K.S.A. 21-6819(b)(5), despite whether the reversed charge is retried or dismissed on remand.
State v. Smith 19

Special Sentencing Rule in K.S.A. 21-6805(f)(1) Implicated Only When Defendant Has Two Qualifying Convictions. The special sentencing rule in K.S.A. 21-6805(f)(1), which creates a presumptive term of imprisonment for a "third or subsequent felony conviction" for unlawful possession of a controlled substance, is implicated only when the defendant has two qualifying felony convictions before the conviction to which the special rule is being applied. *State v. Lund* 416*

Statute Requires Defendant to Pay $400 Assessment Fee for Each Crime Committed against a Minor. Under K.S.A. 20-370(a), a defendant convicted of a crime against a minor victim must pay a $400 assessment fee for each crime committed against a minor, not each complaint or information. *State v. Sanders* 236*

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. *State v. Bell* 160

ELECTIONS:

Kansas Campaign Finance Act—Commission's Subpoena Power Not Limited. The Kansas Campaign Finance Act does not limit the Commission's subpoena power to known or suspected violators. It can subpoena witnesses or records when it reasonably suspects that someone violated the Act and can require the production of any other documents or records which it deems relevant or material to the investigation.
Kansas Governmental Ethics Comm'n v. Shepard 1

Kansas Governmental Ethics Commission Investigates Matters under Kansas Campaign Finance Act—Complaint Not Required to Have

PAGE

Been Filed. The Kansas Governmental Ethics Commission is statutorily authorized to investigate any matter to which the Kansas Campaign Finance Act applies, regardless of whether a complaint has been filed.
Kansas Governmental Ethics Comm'n v. Shepard..... 1

EMPLOYER AND EMPLOYEE:

Employer of Teachers Owes Duty to Exercise Reasonable Care to Protect Students. An employer of teachers working in an elementary-aged public education setting owes a duty to exercise reasonable care to protect students from being inappropriately physically restrained and hit by its employees acting within the scope of their employment.
S.B. v. Sedgwick Co. Area Educ. Svcs...... 54

Employer Owes Third Party a Duty to Exercise Reasonable Care—Duty to Train and Supervise Employees Is Question of Fact. After determining an employer owes a third party a duty to exercise reasonable care under the circumstances, it is a question of fact whether that duty of reasonable care includes a duty to train and supervise its employees.
S.B. v. Sedgwick Co. Area Educ. Svcs...... 54

EVIDENCE:

***Brady* Violation—Delayed Disclosure of Exculpatory Information May or May Not Qualify as *Brady* Violation—Requirement of Prejudice to be Established by Defendant.** Delayed rather than absent disclosure of exculpatory information may or may not qualify as a *Brady* violation, depending on whether the defendant can establish prejudice due to his or her inability to use the *Brady* material effectively at trial. If the defendant has sufficient time to effectively use evidence disclosed immediately before trial or during trial, the belatedly disclosed evidence does not qualify as *Brady* material. When the State delays disclosure of favorable evidence, the defendant must establish that the delayed disclosure of the discovery prejudiced his or her ability to present his or her defense.
State v. Newson.....310*

— Law Enforcement's Knowledge of Evidence Imputed to State. Because law enforcement's knowledge of evidence is imputed to the State, a *Brady* violation can occur when the prosecutor withholds material evidence that is not known to the prosecutor but is known to law enforcement.
State v. Newson.....310*

Hearsay Exception for Business Records—Requirement of Self-Authenticating Certification. For a party to admit a domestic business record under K.S.A. 2023 Supp. 60-460(m) without live testimony from the record's custodian or through a business-records subpoena, the party must produce a self-authenticating certification that complies with K.S.A. 2023 Supp. 60-465(b)(7). K.S.A. 2023 Supp. 60-465(b)(7) requires in part that any "[c]ertified domestic records of a regularly conducted activity" be certified by a custodian or other qualified person "in an affidavit or a declaration pursuant to K.S.A. 53-601." *State v. Kemp*.....425*

PAGE

Hearsay Generally Inadmissible unless Statutory Exception Applies—Business-Records Exception to Hearsay Rule. Hearsay is generally inadmissible unless a statutory exception applies. K.S.A. 2023 Supp. 60-460(m) sets forth the requirements for a writing to meet the business-records exception to the rule against hearsay. *State v. Kemp*.....425*

Statute Allows Unsworn Written Declaration Subscribed by Person as True to Have Same Force and Effect as Sworn Written Declaration. K.S.A. 53-601 generally allows an unsworn written declaration subscribed by the person as true under the penalty of perjury to have the same force and effect as a sworn written declaration, verification, certificate, statement, oath, or affidavit. *State v. Kemp*.....425*

Statutory Requirement for Out-of-State Declaration Ensures Reliability of Statement by Meeting Objectives—Substantial Compliance with Statutory Form. The spirit and intent of K.S.A. 53-601(a)(1)'s requirement that an out-of-state declaration be under penalty of perjury under "'the laws of the state of Kansas'" is to ensure reliability of the statement by: (1) requiring the declarant to make their statement under penalty of perjury; and (2) allowing the possibility of criminal prosecution in Kansas for knowingly making a false representation. If an out-of-state declaration meets these objectives, it is likely to be in substantial compliance with the form in K.S.A. 53-601(a)(1). *State v. Kemp*.....425*

Written Declaration Executed Outside Kansas Must Substantially Comply with Statute. Any such written declaration executed outside the state of Kansas must substantially comply with the form of K.S.A. 53-601(a)(1). Substantial compliance may be found where the declaration complies with the spirit and intent of the law, but not with its absolute letter. *State v. Kemp*.....425*

KANSAS CONSTITUTION:

Section 4 Establishes Fundamental Right to Possess Firearms. Section 4 of the Kansas Constitution Bill of Rights establishes a fundamental right to possess firearms. *State v. Hall*.....369*

Section 4's Right to Possess Firearms—Independent of Second Amendment to United States Constitution. Section 4 of the Kansas Constitution Bill of Rights establishes a right to possess firearms to be applied independently of and not in lockstep with the Second Amendment to the United States Constitution. *State v. Hall*.....369*

MINORS:

K.S.A. 38-101 Identifies Age at Which Being a Minor Ends as 18 Years of Age. Whether a person is considered a child in Kansas is statutorily different than whether one is considered of sufficient age to consent to sexual intercourse. The Kansas Legislature has the power to determine the age at which being a minor ends, and K.S.A. 38-101 identifies it as 18 years of age. *State v. Sanders*.....236*

PAGE

NEGLIGENCE:

Claim of Negligence—Breach of Duty Must Be Identified by Court to Define Reasonable Standard of Care. The court must identify the alleged breach to appropriately define the reasonable standard of care under the circumstances. *S.B. v. Sedgwick Co. Area Educ. Svcs.*..... 54

Duty of Defendant to Exercise Reasonable Care—Question of Law. Whether the defendant owes a duty to a third party to exercise reasonable care under the circumstances is a question of law.
S.B. v. Sedgwick Co. Area Educ. Svcs...... 54

Expert Testimony Not Required to Establish Causation from Reasonable Standard of Care for Cases of Nonprofessional Services. It is well established in Kansas that expert testimony is not needed to establish causation or deviations from the reasonable standard of care in cases involving nonprofessional services or subject matter within common knowledge, skill, or experience of the lay juror. *S.B. v. Sedgwick Co. Area Educ. Svcs.*..... 54

Expert Witness Testimony Not Required for Every Breach of Job Function. Not every alleged breach of a job function requires expert testimony to establish a deviation from the reasonable standard of care in the performance of the job function. *S.B. v. Sedgwick Co. Area Educ. Svcs.*. 54

Plaintiff's Claim of Direct Negligence—Requirements. A claim of direct negligence requires the plaintiff to demonstrate that the defendant owed a duty to the injured party, the defendant breached that duty, the breach caused the plaintiff's damages, and that the plaintiff suffered damages.
S.B. v. Sedgwick Co. Area Educ. Svcs...... 54

Requirement of Expert Witness Usually to Establish Reasonable Standard of Care. An expert witness is typically required to establish the reasonable standard of care in a case alleging professional liability or when the subject matter is outside the common knowledge, skill, or experience of an average juror.
S.B. v. Sedgwick Co. Area Educ. Svcs...... 54

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. *In re S.C.*..... 128

Psychological Evaluations May Be Conducted to Determine Legal Custody, Residency, and Parenting Time. Investigations and reports ordered under K.S.A. 23-3210 may include psychological evaluations of parents

PAGE

conducted for the purpose of determining appropriate legal custody, residency, visitation rights, and parenting time.
In re Marriage of L.F. and M.F. 175*

Realized Capital Gains Can Be Included in Gross Income of Parent in Calculating Child Support. Realized capital gains which are periodically and regularly received by a parent can be included in that parent's gross income for the calculation of child support under the Kansas Child Support Guidelines. *In re Marriage of L.F. and M.F.* 175*

Reports Issued under K.S.A. 23-3210 Not Subject to K.S.A. 60-456 and *Daubert* Hearing Not Required. Investigations and reports ordered under K.S.A. 23-3210 are not subject to the requirements of K.S.A. 2023 Supp. 60-456 and a *Daubert* hearing is not required to determine their admissibility. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
In re Marriage of L.F. and M.F. 175*

Use of Income to Pay Attorney Fees for Purpose of Calculating Child Support. A parent's use of income to pay their attorney fees does not change the character of the funds from "income" to "non-income" for purposes of calculating child support under the Kansas Child Support Guidelines.
In re Marriage of L.F. and M.F. 175*

SEARCH AND SEIZURE:

Constitutional Exclusionary Rule Applicable to Forfeiture Proceedings. Although forfeiture actions are civil in nature, the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights are applicable. Thus, the constitutional exclusionary rule applies to forfeiture proceedings.
State of Kansas, ex rel. KHP v. $28,350 U.S. Currency.....203*

Determination Whether Seizure or Consensual Encounter—Totality of Circumstances Test. The United States Supreme Court has developed a "totality of the circumstances" test to determine whether there is a seizure or a consensual encounter. Under the test, law enforcement interaction with a person is consensual, not a seizure if, under the totality of the circumstances, the law enforcement officer's conduct conveys to a reasonable person that they are free to refuse the requests or otherwise end the encounter.
State of Kansas, ex rel. KHP v. $28,350 U.S. Currency.....203*

Dog Sniff of Exterior of Automobile During Traffic Stop Is Not a Search. The United States Supreme Court has held that a dog sniff of the exterior of an automobile during an otherwise lawful traffic stop does not implicate legitimate privacy interests and is not a search subject to the Fourth Amendment.
State of Kansas, ex rel. KHP v. $28,350 U.S. Currency.....203*

PAGE

When Purpose of Traffic Stop Ends—Driver Must Be Allowed to Leave without Further Delay or Questioning—Exceptions. Once the officer determines that the driver has a valid license and the purpose of the traffic stop has ended, the driver must be allowed to leave without further delay or questioning unless (1) the encounter ceases to be a detention and the driver voluntarily consents to additional questioning or (2) during the traffic stop the officer gains a reasonable suspicion that the driver is engaged in illegal activity.
State of Kansas, ex rel. KHP v. $28,350 U.S. Currency.....203*

STATUTES:

Party's Challenge to Statute as Facially Unconstitutional—Requirement. A party challenging a statute as facially unconstitutional must show that every reasonable reading of the statute would be constitutionally impermissible.
State v. Hall 369*

Statute Not Presumed to Be Constitutional if Impinging on Fundamental Right. A statute impinging on a fundamental right is not presumed to be constitutional. The State must establish the statute is narrowly tailored and advances a compelling governmental interest. *State v. Hall* 369*

TRIAL:

Exculpatory Evidence—*Brady* Violation if Prosecutor Fails to Disclose Evidence. A prosecutor's failure to disclose exculpatory evidence constitutes a *Brady* violation whether the prosecutor intentionally or mistakenly failed to disclose the evidence. *State v. Newson* 310*

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.
Alenco, Inc. v. Warrington..... 79

Prosecutor Commits Error by Suggesting Jurors Vote on Meaning of "Beyond a Reasonable Doubt." A prosecutor does not impermissibly dilute the State's burden to prove the defendant guilty beyond a reasonable doubt by discussing in voir dire the fact that the judge is not going to define "beyond a reasonable doubt." But a prosecutor does commit error by suggesting that the jurors discuss and vote on the meaning of "beyond a reasonable doubt."
State v. Kemp 425*

Prosecutor Error—Certain Phrases Cannot Be Used to Give Prosecutor's Personal Opinion. The Kansas Supreme Court has held that a prosecutor must be careful when using phrases like "we know," "we submit," "I know," and "I submit" during closing arguments to the jury. Although a

PAGE

prosecutor may use phrases like "we know" and "I submit" when the prosecutor is speaking about uncontroverted evidence, a prosecutor cannot use these phrases to give the prosecutor's personal opinion. A prosecutor also errs whenever the prosecutor makes an argument that draws inferences for the jury about controverted evidence using such phrases.
State v. Newson.....310*

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. *In re S.C.*..... 128

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. *In re S.C.*..... 128

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. *In re S.C.*..... 128

If Jurisdictional Issue in CINC Case—UCCJEA Analysis Requirement. A UCCJEA analysis is required if there is a possible jurisdictional issue in a CINC case. *In re S.C.*..... 128

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.
In re S.C...... 128

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

PAGE

interests. But this choice of its law must be neither arbitrary nor fundamentally unfair.
Henretty v. Healthcenter Northwest..... 67

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.
Henretty v. Healthcenter Northwest..... 67

Employer Obtains Subrogation Lien by Statute on Employee's Third-Party Recovery if Recovery Duplicates Award. Pursuant to K.S.A. 44-504(b), an employer obtains a subrogation lien on an employee's third-party recovery only to the extent that the employee's recovery duplicates an award paid or owed by the employer under the Workers Compensation Act.
Rumbaugh v. DirecTV.....266*

(562 P.3d 1014)

No. 125,862

In the Matter of the Marriage of L.F., *Appellant*, and M.F., *Appellee*.

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Psychological Evaluations May Be Conducted to Determine Legal Custody, Residency, and Parenting Time*. Investigations and reports ordered under K.S.A. 23-3210 may include psychological evaluations of parents conducted for the purpose of determining appropriate legal custody, residency, visitation rights, and parenting time.

2. SAME—*Reports Issued under K.S.A. 23-3210 Not Subject to K.S.A. 60-456 and* Daubert *Hearing Not Required.* Investigations and reports ordered under K.S.A. 23-3210 are not subject to the requirements of K.S.A. 2023 Supp. 60-456 and a *Daubert* hearing is not required to determine their admissibility. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

3. SAME—*Realized Capital Gains Can Be Included in Gross Income of Parent in Calculating Child Support.* Realized capital gains which are periodically and regularly received by a parent can be included in that parent's gross income for the calculation of child support under the Kansas Child Support Guidelines.

4. SAME—*Use of Income to Pay Attorney Fees for Purpose of Calculating Child Support.* A parent's use of income to pay their attorney fees does not change the character of the funds from "income" to "non-income" for purposes of calculating child support under the Kansas Child Support Guidelines.

Appeal from Johnson District Court; ERICA K. SCHOENIG, judge. Oral argument held October 15, 2024. Opinion filed January 3, 2025. Affirmed.

Thomas R. Buchanan, *Susan B. Galamba*, and *Deborah A. Moeller*, of McDowell, Rice, Smith & Buchanan, of Kansas City, Missouri, for appellant.

Catherine A. Zigtema, Zigtema Law Office LC, of Shawnee, for appellee.

Before CLINE, P.J., MALONE and SCHROEDER, JJ.

CLINE, J.: This appeal involves a fact-intensive and emotionally charged divorce case. The parties are familiar with the long history of this case, so we recite only the facts necessary to explain our ruling. Highly summarized, L.F. (Mother) and M.F. (Father),

parents of three children, divorced in 2018 and agreed to a parenting plan. They each moved to modify the parenting plan in 2019, accusing each other of multiple types of abuse and poor parenting. At one point, the district court ordered an investigator to conduct psychological evaluations and parenting assessments of the parents under K.S.A. 23-3210. After an evidentiary hearing, the district court issued orders on parenting time and child support, among other issues.

On appeal, Mother challenges the district court's admission of her psychological evaluation at the hearing, as well as its modification of the parenting plan, calculation of child support, and various rulings involving the guardian ad litem (GAL) who was appointed to represent the children's interests in the divorce proceedings. After careful review of the record, we find no error in the court's rulings. As for Father's motion for attorney fees on appeal under Supreme Court Rule 7.07(a)(4) and (c) (2024 Kan. S. Ct. R. at 52), we do not find Mother's appeal was frivolous and therefore deny the motion.

REVIEW OF MOTHER'S APPELLATE CHALLENGES

I. *Did the district court err in ordering and admitting Dr. Prado's psychological evaluations and testimony under K.S.A. 23-3210?*

Before the hearing on the parties' competing motions to modify parenting time, the GAL requested psychological evaluations of the parents to assist his custody investigation. The district court ordered both parents to undergo psychological evaluations and parenting assessments by Dr. Nicole Prado under K.S.A. 23-3210(c) and Johnson County Local Rule 23. The evaluations were completed and submitted to the district court with copies to the parties' attorneys. Mother moved to exclude the evaluations and the supervised parenting reports alleging they were inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), claiming Dr. Prado's methodologies and opinions were flawed and unreliable.

While the district court initially scheduled a *Daubert* hearing, it reconsidered and ruled Dr. Prado's opinions, evaluations, and reports were admissible under K.S.A. 23-3210. The court found K.S.A. 23-3210, as the more specific statute in the family law

code, applied over the general rule of evidence found in K.S.A. 60-456. It also noted there was no need for a *Daubert* hearing because K.S.A. 23-3210 allows a party to challenge opinions and reports from court-appointed investigators like Dr. Prado through cross-examination and/or impeachment through other experts.

Mother renews her challenge to the admission of these documents on appeal, along with Dr. Prado's hearing testimony, claiming the district court abrogated its gatekeeping function by failing to hold a *Daubert* hearing. She maintains that K.S.A. 60-456 still applies and the admission of this evidence prejudiced her by influencing the district court's findings on appropriate parenting time.

A. *Standard of review*

Our standard of review of this issue is multifaceted. While a district court's admission of expert testimony is generally reviewed for an abuse of discretion, to the extent interpretation of statutes is required, our review is de novo. *In re Care & Treatment of Cone*, 309 Kan. 321, 325, 435 P.3d 45 (2019). A judicial action constitutes an abuse of discretion if the action is arbitrary, fanciful, or unreasonable; is based on an error of law; or is based on an error of fact. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 935, 296 P.3d 1106 (2013). And if we find an error in the court's admission of expert testimony, that error "does not warrant reversal unless 'there is a "reasonable probability that the error will or did affect the outcome of the trial in light of the entire record."'" *Castleberry v. DeBrot*, 308 Kan. 791, 812, 424 P.3d 495 (2018).

B. *K.S.A. 23-3210 or K.S.A. 60-456*

The first question we must decide is whether the admission of Dr. Prado's testimony, evaluations, and letters was governed by K.S.A. 23-3210 or K.S.A. 60-456.

K.S.A. 23-3210, the statute concerning investigations in child custody cases, reads:

"(a) *Investigation and report*. In any proceeding in which legal custody, residency, visitation rights or parenting time are contested, the court may order an

investigation and report concerning the appropriate legal custody, residency, visitation rights and parenting time to be granted to the parties. The investigation and report may be made by court services officers or any consenting person or agency employed by the court for that purpose. The court may use the Kansas department for children and families to make the investigation and report if no other source is available for that purpose. The costs for making the investigation and report may be assessed as court costs in the case as provided in article 20 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

"(b) *Consultation*. In preparing the report concerning a child, the investigator may consult any person who may have information about the child and the potential legal custodial arrangements. Upon order of the court, the investigator may refer the child to other professionals for diagnosis. The investigator may consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past. If the requirements of subsection (c) are fulfilled, the investigator's report may be received in evidence at the hearing.

"(c) *Use of report and investigator's testimony*. The court shall make the investigator's report available prior to the hearing to counsel or to any party not represented by counsel. Upon motion of either party, the report may be made available to a party represented by counsel, unless the court finds that such distribution would be harmful to either party, the child or other witnesses. Any party to the proceeding may call the investigator and any person whom the investigator has consulted for cross-examination. In consideration of the mental health or best interests of the child, the court may approve a stipulation that the interview records not be divulged to the parties."

In re Marriage of Talkington, 13 Kan. App. 2d 89, 762 P.2d 843 (1988), was one of this court's earlier cases interpreting K.S.A. 60-1615, now K.S.A. 23-3210. The court noted the purpose of this section was to permit "'reports by a neutral investigator'" which "'remove[s] the child custody question from an adversarial fact-finding process.'" 13 Kan. App. 2d at 91 (quoting Maxwell, *In the Best Interests of the Divided Family: An Analysis of the 1982 Amendments to the Divorce Code*, 22 Washburn L.J. 177, 238 [1983]). This section is important, because in adversarial child custody proceedings requiring tremendous amounts of fact-finding, the investigator's "'report can reduce court time because the information is not obtained through in-court testimony.'" 13 Kan. App. 2d at 91 (quoting Maxwell, 22 Washburn L.J. at 238).

In *In re Marriage of Talkington*, a parent objected to the admission of a home study report ordered under K.S.A. 60-1615 on the grounds of hearsay because the investigator did not testify at the custody hearing. While we agreed the report would otherwise

be hearsay under the circumstances, we found it was admissible because it met the requirements for admissibility under K.S.A. 60-1615—that is, the report was made available to the opposing party before the hearing. 13 Kan. App. 2d at 92. Relying on the statutory interpretation principle that a more specific statute controls over a general one unless it appears the Legislature intended otherwise, we found that in child custody hearings the provisions of K.S.A. 60-1615 governing admissibility of reports supplanted the evidentiary rules in the hearsay statute, K.S.A. 60-460. 13 Kan. App. 2d at 91-92. We noted the objecting parent had the right under K.S.A. 60-1615 to call the investigator who prepared the home study to testify. And we found if that parent wanted to cross-examine the preparer, he should have subpoenaed the preparer as a witness or taken his testimony by deposition. 13 Kan. App. 2d at 92.

On the other hand, K.S.A. 2023 Supp. 60-456, the statute concerning witness testimony in civil proceedings, reads:

> "(a) If the witness is not testifying as an expert, the testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds: (1) Are rationally based on the perception of the witness; (2) are helpful to a clearer understanding of the testimony of the witness; and (3) are not based on scientific, technical or other specialized knowledge within the scope of subsection (b).
>
> "(b) If scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if: (1) The testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case."

K.S.A. 60-456(b) effectively adopted the test found in *Daubert*. Under *Daubert*, the Court determines the reliability of proposed scientific testimony by looking to factors such as (1) whether the theory has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error associated with the theory; and (4) whether the theory has attained widespread or general acceptance. 509 U.S. at 592-94. But these four factors are not a "'definitive checklist or test'" and a court's gatekeeping inquiry into reliability must be "'tied to the facts' of a particular 'case.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, 119 S. Ct. 1167, 143 L. Ed. 2d 238

(1999). K.S.A. 60-456(b) is substantively identical to Federal Rule of Evidence 702.

The "rejection of expert testimony is the exception rather than the rule." Fed. R. Evid. 702 advisory committee's note to 2000 amendments. As Mother contends, *Daubert* requires the court to act as a gatekeeper for the admission of expert testimony. 509 U.S. at 596. But "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" remain "the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596. In short, "[t]he *Daubert* factors are simply a way of distinguishing 'between science and pseudo-science.'" *Hyman & Armstrong, P.S.C. v. Gunderson*, 279 S.W.3d 93, 104 (Ky. 2008). A district court most commonly fulfils its gatekeeping role regarding challenged expert testimony by conducting a *Daubert* hearing. *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

Mother contends the district court abrogated its gatekeeping role by failing to assess Dr. Prado as an expert under *Daubert* and K.S.A. 2023 Supp. 60-456. But Father argues K.S.A. 2023 Supp. 60-456 does not apply because K.S.A. 23-3210 controls.

> 1. *K.S.A. 23-3210 can be used to order psychological evaluations of parents.*

Mother argues K.S.A. 23-3210 only provides authority for mental health evaluations of a child, not their parents. But district courts have used K.S.A. 23-3210 (or its predecessor K.S.A. 60-1615), to order psychological evaluations of parents, companions of parents, and children in contested child custody proceedings. See *In re Marriage of Talkington*, 13 Kan. App. 2d at 90 (noting the district court ordered a mental health evaluation of the mother under K.S.A. 60-1615). And in *Watchous v. Jensen*, No. 70,382, 1994 WL 17120393 (Kan. App. 1994) (unpublished opinion), this court considered whether the district court committed reversible error by accepting and relying upon certain psychological evaluations without giving the parties notice of the reports. The district court ordered full psychological evaluations of the parents, children, and companion of one of the parents. We found the evaluations admissible under K.S.A. 60-1615 because they were made

available to the parties' counsel before the hearing, which is all the statute requires. 1994 WL 17120393, at *3.

Similarly, in *In re Marriage of Block*, No. 70,143, 1994 WL 17120582 (Kan. App. 1994) (unpublished opinion), the district court ordered an expert to conduct a psychological evaluation under K.S.A. 60-1617, now K.S.A. 23-3510. This statute permits the district court to appoint a "professional trained in family counseling to determine if it is in the best interests of the parties' children that the parties and any of the children have counseling regarding custody and visitation matters." 1994 WL 17120582, at *5. The mother argued "the trial court improperly used Dr. Johnson in dual roles as the clinical psychologist who evaluated the parents and child under K.S.A. 1993 Supp. 60-1617 and as the child custody investigator under K.S.A. 60-1615." 1994 WL 17120582, at *6. This court disagreed with the mother. It found there was "no conflict between the role of a psychological expert under K.S.A. 1993 Supp. 60-1617 and the role of a child custody investigator under K.S.A. 60-1615." 1994 WL 17120582, at *6. It then held: "Neither statute prohibits an *expert* from serving in both capacities and, as demonstrated in this case, the roles overlap." (Emphasis added.) 1994 WL 17120582, at *6. Here, the district court did not order a counseling determination under K.S.A. 23-3210. But like *In re Marriage of Block*, it did order Dr. Prado to act as a child custody investigator under that statute.

Mother relies on one sentence in K.S.A. 23-3210(b)—which she reads out of context—to conclude that this statute only allows for evaluation of a child. She contends that since the statute only permits the child custody investigator to "refer the *child* to other professionals for diagnosis," this means the investigator cannot evaluate the parents. (Emphasis added.) K.S.A. 23-3210(b). But this reading ignores the statute's purpose and the context for that sentence.

To begin, the purpose of K.S.A. 23-3210 is to authorize an "investigation and report concerning the appropriate legal custody, residency, visitation rights and parenting time to be granted to the parties." K.S.A. 23-3210(a). Dr. Prado testified she conducted her psychological evaluation to diagnose any mental health symptoms which impacted the parties' parenting and coparenting

abilities. As in *Watchous*, the psychological evaluations of the parents here were ordered for the purpose of determining the most beneficial custodial arrangement for their three children. 1994 WL 17120393, at *2.

Next, Mother's reading of the sentence allowing an investigator to refer a child for diagnosis also takes it out of context. The scope of the investigation under the statute—both who can conduct it and what type of information can be gathered—is quite expansive. First, the statute specifies: "The investigation and report may be made by court services officers or *any consenting person or agency employed by the court for that purpose*." (Emphasis added.) K.S.A. 23-3210(a). And it allows an investigator to "consult *any* person who may have information about the child and the potential legal custodial arrangements." (Emphasis added.) K.S.A. 23-3210(b). This includes the power to "consult with and obtain information from medical, psychiatric or other expert persons who have served the child in the past." K.S.A. 23-3210(b). By allowing the investigator to also obtain a professional diagnosis of the child, the Legislature empowered the investigator to fill any gaps in information that may exist, not restrict the investigator's authority.

The statutory designation of this authority also protects the investigator from what may otherwise be seen as an invasion of the child's privacy or medical privileges. In *Werner v. Kliewer*, 238 Kan. 289, 296, 710 P.2d 1250 (1985), which was an invasion of privacy case, the Kansas Supreme Court held a mother's medical privilege under K.S.A. 60-427 was waived and overridden by K.S.A. 60-1610(a)(3)—a statute requiring courts to consider the best interests of the child in custody proceedings—when the court needed to determine mother's fitness to have custody of the children in a divorce proceeding. See also *In re Marriage of Kiister*, 245 Kan. 199, Syl. ¶ 2, 777 P.2d 272 (1989) ("In determining visitation rights, the court's paramount concern is the best interests of the child. This concern outweighs the parent's right of confidentiality in medical and psychological counseling records."). By authorizing the investigator to refer the child for a medical diagnosis, the statute appears to override the *child's* statutory medical privileges and privacy. See Comment g to the Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.13 (Am.

Law Inst. 2002) (statutes like K.S.A. 23-3210[b]) "explicitly provide[s] for waiver of otherwise applicable statutory privileges, in cases involving custody of children"). Again, we read this language to expand the investigator's authority rather than contract it.

Finally, Mother argues for the first time on appeal that the district court can only order parental evaluations under K.S.A. 2023 Supp. 60-235. This statute provides the court where the action is pending "may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner." K.S.A. 2023 Supp. 60-235(a)(1). And there is a section in the Kansas Family Law Code which discusses K.S.A. 2023 Supp. 60-235: Under K.S.A. 23-3218(a), "the court may change or modify any prior order of custody, residency, visitation and parenting time, when a material change of circumstances is shown." More pertinently, it also provides: "The court may order physical or mental examinations of the parties if requested pursuant to K.S.A. 60-235, and amendments thereto." K.S.A. 23-3218(b).

Since Mother failed to make this argument to the district court, it is unpreserved for our review. See Kansas Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36). We also note that she provides no analysis to support her claim that K.S.A. 2023 Supp. 60-235 is the only way a court can order a mental health evaluation of a parent in a child custody proceeding. The court ordered the psychological evaluation and parenting assessments here under K.S.A. 23-3210, not K.S.A. 60-235, so we limit our discussion to whether district courts are required to apply K.S.A. 2023 Supp. 60-456 before admitting opinions and reports of investigations conducted under K.S.A. 23-3210. And we note the scope of Dr. Prado's charge from the district court was broader than simply providing a mental health evaluation like the kind authorized by K.S.A. 2023 Supp. 60-235. That is, in addition to conducting psychological evaluations of both parents, Dr. Prado was asked to complete a parenting assessment. During that assessment, Dr. Prado consulted several third parties, as contemplated by K.S.A. 23-3210(b). Such consultations do not appear to be involved—or are at least not mentioned—in an independent mental health examination conducted pursuant to K.S.A. 2023 Supp. 60-235.

2. *K.S.A. 23-3210 applies to the type of evaluation the parents were ordered to undergo by Dr. Prado.*

Mother next argues the district court incorrectly relied on K.S.A. 23-3210 to admit Dr. Prado's opinions and report because Mother says the statute only allows for a "custody evaluation," and Dr. Prado admitted she did not conduct a custody evaluation. But Mother reads both the statute and the scope of Dr. Prado's work too narrowly.

First, K.S.A. 23-3210 does not limit an investigator's report to a custody evaluation. It more generally permits the report to "concern[] the appropriate legal custody, residency, visitation rights and parenting time to be granted to the parties." K.S.A. 23-3210(a). Indeed, the title of the statute is: "Information relating to custody or residency of children; visitation or parenting time with children."

Next, even though Dr. Prado testified she did not conduct a custody evaluation, she did testify that she was asked to do a "parenting assessment." And she testified the psychological evaluation she conducted was meant to "determine and understand the mental health components impacting the parties functioning, globally, the impacts they may have on their parenting ability, and the impacts any mental health conditions they have on their ability to effectively coparent." She explained how she consulted third parties working with the children "to determine how [the parents] were interacting with the children." She also discussed how her psychological evaluations are meant to diagnose mental health symptoms "that are negatively impacting the person[']s functioning and potentially their coparenting relationship," which would be directly related to decisions about the appropriate legal custody, residency visitation, and parenting time to be granted.

The purpose of Dr. Prado's report was to examine Mother and Father's parenting ability and capacity to coparent, both of which would help the district court determine the appropriate parenting time. Therefore Dr. Prado's evaluations qualify as a report under K.S.A. 23-3210.

3. *Requiring a* Daubert *hearing and application of K.S.A. 2023 Supp. 60-456 to reports issued under K.S.A. 23-3210 is unnecessary and impractical.*

Mother also contends that even if K.S.A. 23-3210 authorizes reports such as Dr. Prado's, it does not mandate their admission. That is, she maintains the district court is still required to determine the admissibility of investigatory reports in child custody proceedings under K.S.A. 2023 Supp. 60-456 for the court to fulfill its gatekeeping role to ensure the evidence is reliable. She cites no legal authority for this proposition—she simply notes K.S.A. 23-3210(b) states an ordered report "*may* be received in evidence at the hearing." (Emphasis added.) That is, it does not "automatically" allow for admission of the report but simply permits the court to do so. She believes because the statute makes the admission of the report permissive, this means the Kansas Legislature intended the *Daubert* standard to still be applied.

But Mother does not offer any statutory language or legislative history showing the Legislature considered *Daubert* in passing this law or when it passed amendments to the law. A more reasonable interpretation would be that the Legislature used the word "may" so as not to eliminate objections based on relevance to the issues to be tried at the hearing. And Mother lodged no such objection to Dr. Prado's report.

Moreover, as the district court pointed out, a *Daubert* hearing would be redundant since the procedure for testing reliability of the evidence is already in the statute. It explained that K.S.A. 23-3210 allows a party the full ability to challenge the report and present testimony about why the investigator's findings are invalid or problematic. Indeed, the court noted in the pretrial order that Dr. Prado's evaluations and reports were "admitted pursuant to K.S.A. 23-3210, subject to further evidence disputing any findings or recommendations, and subject to cross-examination and/or impeachment of the preparer or consultant of the preparer."

Father also points out the Family Law Code specifies that general rules of evidence apply in domestic proceedings unless superseded by specific provisions. K.S.A. 23-2104; K.S.A. 60-402. And we relied on a similar rule of statutory interpretation in *In re*

Marriage of Talkington to find the general evidentiary rules governing hearsay do not apply to reports ordered under K.S.A. 23-3210. 13 Kan. App. 2d at 92-93. This rule equally supports our conclusion that, like hearsay and K.S.A. 2023 Supp. 60-460, *Daubert* and K.S.A. 2023 Supp. 60-456 also do not apply to such reports.

The plain text confirms the Legislature intended K.S.A. 23-3210 reports to be admitted if the procedural safeguards in subsection (c) are met. Neither Mother nor Father dispute subsection (c) was met in this case. Since subsection (c) was met, like it was in *In re Marriage of Talkington*, the district court had the authority to accept the report into evidence.

Finally, both Father and the district court also point out: "The provisions of the Kansas family law code shall be construed to secure the just, speedy, inexpensive and equitable determination of issues in all domestic relations matters." K.S.A. 23-2102. As already mentioned, and acknowledged by Mother, the goal of K.S.A. 23-2310 is to receive "reports by a neutral investigator [which] remove the child custody question from an adversarial fact-finding process. . . . The report can reduce court time because the information is not obtained through in-court testimony." *In re Marriage of Talkington*, 13 Kan. App. 2d at 91. Mother even notes K.S.A. 23-3210's "sole rationale is to speed trial and to save expense by obviating the need for additional testimony to counter hearsay." Dr. Prado filled the role of an investigator who helped speed the trial along because she was charged with providing insight into Mother and Father's parenting abilities after her evaluation. This saved the district court many hours of listening to more witnesses from both sides, including some whom Dr. Prado consulted. Although the court eventually held Dr. Prado's testimony was "successfully" challenged by Mother through Mother's experts, that does not diminish the statute's purpose.

4. *Mother's attempt to distinguish caselaw relied on by the district court is unpersuasive.*

Mother next argues the district court improperly relied on *In re Marriage of Talkington*, 13 Kan. App. 2d. 89 and *Smart v. BNSF Railway Co.*, 52 Kan. App. 2d 486, 496-97, 369 P.3d 966

(2016), in admitting Dr. Prado's reports. Mother argues *In re Marriage of Talkington* "evaluated only whether hearsay would preclude the admission of reports and . . . made no analysis of whether the . . . expert opinion is admissible." This is a fair conclusion. We made no ruling on the interplay of expert testimony and K.S.A. 60-1615 in *In re Marriage of Talkington*. But as explained earlier, our reasoning there is still analogous because we addressed application of a general rule of evidence in the specific context of a child custody case.

Mother also posits *In re Marriage of Talkington*'s reasoning does not apply because its hearsay rule comes with procedural safeguards. She states that even when a court-appointed reporter under K.S.A. 23-3210 does not testify, *In re Marriage of Talkington* permits the report to be entered into evidence, even with hearsay statements, because it still allows cross-examination of the hearsay declarant "whom the investigator has consulted." K.S.A. 23-3210(c). Mother thus believes even when an investigator does not testify, there is still an "avenue to ensure the admitted hearsay testimony is reliable."

But the same is true for cross-examining the investigator's credentials, investigatory methodology, and conclusions. Mother can and did challenge Dr. Prado's report through cross-examination. See K.S.A. 23-3210(c). She also was permitted to and did present expert testimony to discredit Dr. Prado's report. See *In re Marriage of Block*, 1994 WL 17120582, at *6 (stating parties "present[] expert testimony to substantiate" their problems with the investigator's opinions). The cross-examination of Dr. Prado and testimony of her own expert ensured Mother had an opportunity to challenge the reliability of Dr. Prado's report.

Mother further contends the district court improperly relied on *Smart*, 52 Kan. App. 2d at 496-97. But the record citation Mother provides (the first page of the parties' pretrial order) does not support her contention since it does not discuss *Smart*, nor could we find any mention of *Smart* elsewhere in the pretrial order. The only case the court cited in the pretrial order when it held Dr. Prado's reports were admissible under K.S.A. 23-3210 was *In re Marriage of Talkington*, 13 Kan. App. 2d at 93.

For these reasons, we do not find the district court erred in admitting Dr. Prado's testimony, evaluations and assessment, and parenting time reports under K.S.A. 23-3210.

> 5. *Mother was not prejudiced by the district court's decision to admit Dr. Prado's report under K.S.A. 23-3210 because the district court stated that Mother "successfully" challenged that evidence.*

Even if we found the district court erroneously admitted Dr. Prado's reports and testimony, we are not persuaded the admission prejudiced Mother. While Mother contends Dr. Prado's unreliable opinions and report influenced the district court's decision, the court specifically said it gave "little weight to Dr. Prado's reports, and found [Mother's] evidence, including her expert witnesses, to be compelling." The court also noted "[s]cant evidence" was presented relating to Dr. Prado's parenting time reports, and it specifically noted it "did not find those reports to be helpful in reaching its decision."

We are not persuaded by Mother's request that we disbelieve the district court. As the court noted when it denied Mother's motion to amend the judgment: "This is not a jury-tried case, and the Court appropriately weighed the evidence related to Dr. Prado's reports and [Mother]'s two experts. [Mother] was not denied the opportunity to challenge Dr. Prado's findings, and in the Court's mind, successfully did so." Generally, "[w]hen a trial court acts as the finder of fact, it is presumed to have considered only legal, competent, and admissible evidence." 75b Am. Jur. 2d, Trial § 1585. That "presumption is overcome only when there is an indication that the court did give some consideration to inadmissible evidence or evidence that should have been excluded." 75b Am. Jur. 2d, Trial § 1585. When there is a bench trial, "the harm caused by evidentiary error is lessened, and an appellate court will reverse only when the trial court's judgment has apparently or obviously been infected by erroneously admitted evidence." 5 Am. Jur. 2d, Appellate Review § 660.

This court has found it persuasive when a district court judge, acting as a fact-finder, conveys on the record that alleged erroneously admitted evidence was unimportant to the final judgment.

In *State v. Clingerman*, 63 Kan. App. 2d 682, 688, 536 P.3d 892 (2023), Clingerman argued "that the inclusion of [an officer's] unsworn testimony tainted the trial court's view of the evidence during the bench trial." In denying Clingerman's new trial motion the magistrate judge stated: "But even if the Court were to find that his oath was not sufficient, and that his testimony cannot be relied upon, there is still ample evidence from the other witnesses that this crime was committed, beyond a reasonable doubt." 63 Kan. App. 2d at 689. This court found:

> "In most cases, appellate courts reviewing for harmless error do not have the benefit of the fact-finder explicitly outlining which evidence was more persuasive and which evidence was less useful in arriving at a verdict.
>
> . . . .
>
> "Most harmless error review does not have the benefit of such explicit statements from the finder of facts. Here, the record provides the unusual benefit of having the fact-finder, the magistrate judge, explicitly state on the record the rationale behind the conviction and which evidence was most relevant to her factual conclusion. We know directly from the record that [the officer's] testimony—whether erroneously admitted or not—did not affect the verdict. Because there is no reasonable possibility that the error, if any, affected the verdict, we conclude that this is an independent alternative ground for affirming this decision. [Citations omitted.]" 63 Kan. App. 2d at 689-90.

The same is true here. The district court specified that it gave little weight to Dr. Prado's testimony and reports and found that Mother's expert testimony successfully challenged Dr. Prado's findings. Like *Clingerman*, this record provides the unusual benefit of having the fact-finder, the district court judge, explicitly state on the record that the alleged erroneously admitted evidence had little weight in her factual conclusion. So even if Dr. Prado's testimony and report were erroneously admitted, we find there is no reasonable possibility that the alleged error affected the district court's judgment.

We decline to reverse the district court's order or to remand the matter for a new trial based on its admission of Dr. Prado's testimony and reports.

II. *Did the district court err in its division of parenting time?*

Mother next argues the district court erred in its division of parenting time between the parties. She claims the evidence does

not support the factual findings on which the court based its division. Specifically, she contends the district court: (1) made no finding that Father was untruthful, (2) gave insufficient weight to Father's history of domestic violence; and (3) gave too much weight to evidence of Mother's alcohol abuse.

Review of child custody arrangements is subject to an abuse of discretion standard. See *State, ex. rel. Secretary, DCF v. M.R.B.*, 313 Kan. 855, 862, 491 P.3d 652 (2021). And to the extent we must review the district court's factual findings, we examine whether they are supported by substantial competent evidence. See *Gannon v. State*, 305 Kan. 850, 881, 390 P.3d 461 (2017); *Harrison v. Tauheed*, 292 Kan. 663, 674, 256 P.3d 851 (2011).

A district court abuses its discretion: "(1) when no reasonable person would take the view adopted by the district court; (2) when a ruling is based on an error of law; or (3) when substantial competent evidence does not support a district court's finding of fact on which the exercise of discretion is based." *Cheney v. Poore*, 301 Kan. 120, 128, 339 P.3d 1220 (2014). Mother bears the burden of demonstrating the district court abused its discretion. *Harsch v. Miller*, 288 Kan. 280, 293, 200 P.3d 467 (2009).

Mother largely asks us to reweigh evidence and make credibility determinations, which we cannot do. *M.R.B.*, 313 Kan. at 863-64. We must defer to the district court's credibility assessments because, unlike this court, the district court personally observed all the witnesses. *Cresto v. Cresto*, 302 Kan. 820, 839, 844, 358 P.3d 831 (2015). And district courts are in the best position to evaluate testimony of witnesses, unlike this court, which is presented with only a paper record. *State v. Schaefer*, 305 Kan. 581, Syl. ¶ 7, 385 P.3d 918 (2016); *M.R.B.*, 313 Kan. at 863-64.

Mother offers no proof the district court failed to assess Father's credibility other than that the court did not write about Father's credibility in its journal entry. But there is no legal requirement that it do so. As Father correctly notes, we presume the district court made all factual findings required to support its judgment, which necessarily includes credibility determinations on contested matters. *State v. Goff*, 44 Kan. App. 2d 536, 540-41, 239 P.3d 467 (2010). Mother has failed to persuade us that the district

court did not assess the credibility of all witnesses when making its factual findings on the division of parenting time.

Mother also asks us to believe her version of several events over Father's, but while the court made no explicit finding about Father's credibility, it did find that "Mother's credibility . . . is questionable," particularly when the children's negative reports of Mother were corroborated by the other siblings and their individual therapists.

We also find the district court properly considered Father's history of domestic abuse in determining parenting time, as it is required to do under K.S.A. 23-3203(a)(9). The court found Mother was a victim of Father's domestic abuse, including physical and emotional abuse. Indeed, the court made findings addressing past and present abuse by the parties against each other and abuse affecting the children. But the court found that Father's abusive actions towards Mother stopped in 2015, and Father had not been abusive to the children since the divorce, while it found Mother, on the other hand, has engaged in alcohol abuse and physical violence towards the children after the divorce. With both parents having a history of abusing each other, the district court took the reasonable action of putting more weight towards the parents' present behavior, instead of disproportionately weighing abuse that occurred before the divorce. In context of evaluating the parties' domestic abuse, the district court did not abuse its discretion in noting both parties have a history of domestic abuse and choosing to evaluate their individual *present* behaviors.

The district court found Father's abuse was directly related to his alcohol abuse, and he testified he stopped drinking after his arrest in 2015 for domestic violence against Mother. While Mother argues the district court erred in "relyi[ng] heavily on [Father's] version of events," she offers no evidence to dispute the events other than her assertion that Father is dishonest. Mother offered no evidence of Father's current alcohol abuse, testifying she "ha[d] no idea" if Father was drinking again. On the other hand, Father successfully completed his probation early for the misdemeanor with no indication of alcohol concerns on probation. Father's undisputed testimony is both relevant to domestic abuse

and furnishes a substantial basis of fact. And Mother points to no conflicting evidence the court should have relied on.

As for the district court's findings about Mother's drinking, Mother is right that her Soberlink tests largely show she tested negative for alcohol consumption. Yet other evidence supports the district court's conclusion that Mother engaged in alcohol abuse. In a social worker's supervised parenting time log, it stated that in Mother's house on July 25, 2020, a "social worker noticed alcohol bottles in the cabinet, including a Smirnoff bottle and another bottle." The district court also listened to the children's reports of Mother's drinking and her behaviors, as presented by the GAL. For example, one child reported in December 2019 that Mother drinks "most days." Mother, according to the child, would smell like alcohol and act "weird." Mother would hide her drinking by placing wine in Gatorade bottles, hiding alcohol in tumblers, drinking late at night, and hiding vodka bottles in the laundry room. And the children reported that while Mother was drinking, she was "mean," "annoying," would "bump into walls," and would be "angry."

Even if Mother is correct that she stopped abusing alcohol sometime in 2020, as demonstrated by Soberlink tests, that does not mean the district court abused its discretion in dividing the parties' parenting time. The GAL reported other domestic abuse behaviors Mother engaged in. Mother would become angry with the children for disclosing things to the GAL, telling them they "would have to go to an orphanage if they didn't stop talking to [the GAL]" about her and "ratt[ing]" her out. Mother was consistently engaging in erratic and confrontational behavior according to the children.

Mother also engaged in a physical altercation with one of the children. In February 2020, Mother overpowered the child physically, chased and held the child down, and was "overly physical" with the child. Mother, a tae kwon do instructor, was on top of the child and asked another present child to video the altercation. Police were called. Mother was known as a bully, mean, and picked on the children repeatedly. This evidence is another indication of abusive behavior towards the children, that occurred after the divorce, and supports the court's parenting time findings.

The district court analyzed relevant factors under K.S.A. 23-3203 and expressed concerns about: Mother's behavior towards the children; two of the children's frustrations with the current 50/50 parenting plan, including one child specifically sharing she would prefer more time with Father; Mother's struggles with meeting the children's emotional and physical needs including a failure to ensure the children are fed and attend school on time; Mother's physical abuse towards the children; the negative effect of Mother's roughly 50% parenting time on a child's school behavior; Mother dictating how the therapists should do their jobs; Mother's continued disparaging of Father when the children are with Mother; the chaos of Mother's house; Mother and Father's domestic abuse of each other and the children; Mother's alcohol abuse; and Mother's inability to maintain the children's schedules for school and activities.

The district court's detailed findings are supported by evidence presented at the hearing, so we therefore find it did not abuse its discretion in its parenting time decisions.

III. *Did the district court properly assess GAL fees between the parties and deny Mother's posthearing motion for additional discovery?*

Mother next challenges posthearing rulings by the district court "denying additional discovery and dividing GAL fees between the parties." She cites the district court's order granting the GAL's posthearing request for fees over Mother's objection in support of both points. But this order only addresses the GAL fees, it does not address any additional discovery. Mother claims she sought to reopen discovery of all communications between Father and/or his counsel and the GAL, and Dr. Prado to investigate the GAL's alleged collaboration between the GAL and Father. She also claims she sought to subpoena documents and a deposition from Dr. Prado. She provides no citation for her request for this discovery or an accurate citation to the record for the district court's ruling on that request, in violation of Rule 6.02(a)(5). Our independent review of the record located a transcript of a hearing denying Mother's request, which Father cited as well. In denying the request, the district court stated it had ruled on the substantive

issues involved in the case and had denied Mother's motion to alter or amend. The court found it did not need more information from Dr. Prado on and after those rulings.

As for the GAL's request for fees, Mother contends the GAL failed to properly perform his duties and, according to the GAL's time records submitted after the hearing, improperly collaborated with Father. She contends the GAL failed to present evidence favorable to Mother at the hearing and acted as Father's "joint defense counsel." And Mother contends the court erred in denying her request for additional discovery because she contends this discovery will support the alleged collusion between Father and the GAL. Mother asks us to remand the case to the district court with instructions to "permit the requested post-trial discovery to ascertain the extent of collaboration, its potential impact on the presentation of facts and make new findings based upon a complete record." She also asks us to order Father to pay all the GAL fees and expenses.

A. *Standard of review*

To the extent Mother challenges the district court's findings of fact and conclusions of law related to the GAL's representation of the children's best interests, those decisions are reviewed for substantial competent evidence and de novo, respectively. *Gannon*, 305 Kan. at 881; see also *In re Marriage of Bergmann & Sokol*, 49 Kan. App. 2d 45, 47, 305 P.3d 664 (2013) ("The issue of GAL fees involves findings of fact and issue of law creating a mixed standard of review."). And we review a district court's ruling on a posttrial or posthearing discovery request under an abuse of discretion standard of review. *State v. Gutierrez*, No. 119,849, 2019 WL 4553478, at *1 (Kan. App. 2019) (unpublished opinion); see *City of Mission Hills v. Sexton*, 284 Kan. 414, 421, 160 P.3d 812 (2007).

B. *We see no error in the district court's assessment of GAL fees.*

Mother's arguments are largely based on inflammatory accusations against the GAL which are largely void of any record citations to support the claims. We find there is substantial evidence

in the record to support the district court's findings in support of its assessment of fees.

Under Kansas Supreme Court Rule 110A(c)(1) (2024 Kan. S. Ct. R. at 192), a GAL must:

"(1) *Conducting an Independent Investigation.* A guardian *ad litem* must conduct an independent investigation and review all relevant documents and records, including those of social service agencies, police, courts, physicians, mental health practitioners, and schools. Interviews—either in person or by telephone—of the child, parents, social workers, relatives, school personnel, court-appointed special advocates (CASAs), caregivers, and others having knowledge of the facts are recommended. Continuing investigation and ongoing contact with the child are mandatory."

Mother believes the GAL ignored his duties and responsibilities under this statute because he did not act in the best interests of the children when he worked with Father's counsel. According to Mother, the GAL and Father's counsel worked together to prepare for the hearing and prepare witnesses like Dr. Prado and colluded together to make biased recommendations towards Father.

The district court recognized the GAL and Father met three times before the hearing. It stated: "The Court has reduced [Mother]'s one-half portion of the GAL fees due and owing by $3,630. The Court is requiring [Father] to pay this amount because the time entries for dates 4/21/2022, 4/29/2022, and 5/02/2022, indicate that the GAL conferenced with [Father]'s attorneys on those dates for trial preparation." The court did not mention any "collusion" between the GAL and Father and did not conclude the GAL "picked sides" with Father because the GAL was "biased." It did, however, acknowledge that Mother wanted Father to pay all fees incurred by the GAL and found "the GAL's advocacy in this case complies with his 'duties and responsibilities' enumerated in Kansas Supreme Court Rule 110A."

Father points out that a GAL, under Rule 110A must conduct an "independent investigation." The rule does not say the GAL must be "impartial." And Father correctly asserts that Mother is not entitled to have the GAL present favorable evidence of Mother. See Rule 110A.

GALs must review a variety of documents and conduct interviews with various sources. Rule 110A(c)(1). A GAL's purpose is

to determine the best interests of the child and represent those interests in court through "vigorous[] advoca[cy]." Rule 110A(c)(3)(E) (2024 Kan. S. Ct. R. at 192). Here, before the hearing, the GAL submitted a proposed parenting plan he believed best served the best interests of the children. Father sent Mother written notice that he intended on asking the court to follow the GAL's proposed plan.

GALs must vigorously advocate for the best interests of the child. This means they must represent those interests in a partisan way. If the GAL determines it is in the best interests of the child to reduce parenting time with Mother, then the GAL has a duty to advocate for that position through: "(i) calling, examining, and cross-examining witnesses; (ii) submitting and responding to other evidence; and (iii) making oral and written arguments based on the evidence that has been or is expected to be presented." Rule 110A(c)(3)(E) (2024 Kan. S. Ct. R. at 192). If the GAL determines the best interests of the children are for Father to receive more parenting time, it is the responsibility of the GAL to vigorously advocate for that position at the hearing. Consequently, that position will inherently line up with Father's position if Father also seeks to receive more parenting time.

In sum, the GAL did not err by making a set of independent recommendations, in the best interests of the children, that Father chose to join. Nor was it improper for the GAL to meet with Father after the GAL had made his assessments to prepare to present the best case to support those assessments at the hearing.

The district court ordered GAL's fees to be split among Mother and Father. And it ordered Father to pay GAL's fees for the 13.2 hours the GAL spent with Father over three days discussing preparation for the hearing. It stated:

"As the Court has already found, the conduct of both parties has contributed to the litigation and court orders entered in this case. No persuasive evidence has been presented to support a finding that Father should have to pay a larger portion of the GAL fees than Mother. The Court continues to find, based upon all information available and previously presented, that Mother is capable of paying, and has sufficient resources to be able to pay, one-half of the GAL fees incurred, including witness fees, subject to the exceptions stated herein."

Mother now argues: "Because [the] GAL crossed the line and became more akin to an advocate for [Father], [Mother] should not be forced to pay any of the GAL's trial preparation fees and expenses."

Since Mother fails to present evidence supporting her claim that the GAL improperly colluded with Father, there is no basis for concluding the district court erred in requiring her to pay a fair share of the GAL fees. Indeed, the reasonability of the district court is further demonstrated by its careful consideration of the 13.2 hours the GAL spent with Father's counsel in preparation for the hearing. The district court stated, "after considering the equities involved," Mother's portion should be reduced so she did not have to pay for the GAL's time meeting with Father's counsel. It was reasonable for the district court to require Father to pay the fees that were linked to the GAL meeting his counsel. It was not unreasonable to require Mother to pay half of those remaining fees.

C. *We see no error in the district court's decision not to reopen discovery.*

Mother contends the GAL's bias has two implications: First, that discovery needs to be reopened so the collusion between the GAL and Father can be explored, and second, Father should have paid GAL's fees entirely. Given that Mother's accusations about the GAL colluding with Father are unsubstantiated, and we see no error in splitting the GAL's fees between the parties, we also see no error in the district court's decision not to allow Mother to pursue discovery after the hearing on this issue.

We therefore affirm the district court' decision to deny Mother's motion for additional discovery.

IV. *Did the district court err in calculating the gross incomes of Mother and Father to determine child support?*

Mother argues the district court erred in calculating both parties' gross incomes. She contends her realized capital gains should not be included in her gross income. And she argues the district court should not have deducted depreciation from Father's income or have awarded him health insurance credit.

A. *Standard of review*

We review de novo a district court's interpretation and application of the Kansas Child Support Guidelines (2024 Kan. S. Ct. R. at 101). Because Mother's appeal of the district court's interpretation of her

gross income turns on the meaning of "gross income" under the Guidelines, we review that challenge de novo. *In re Marriage of Dean*, 56 Kan. App. 2d 770, 773, 437 P.3d 46 (2018).

B. *Mother's gross income should include her realized capital gains.*

The district court included realized capital gains in both parties' gross incomes for child support purposes, using a two-year average based on their tax returns and other supporting documents admitted as exhibits. Mother argued the district court should exclude her capital gains as income because the withdrawals from her investment accounts were used to pay her litigation expenses. But the court found it legally could not consider how Mother used her income in calculating her gross income, citing *In re Marriage of Matthews*, 40 Kan. App. 2d 422, 429, 193 P.3d 466 (2008). And factually it found Mother's part-time wages and yearly dividends did not cover her claimed monthly expenses, and the evidence presented at the hearing supported the finding that Mother regularly received income from sources other than her part-time job and yearly dividends.

On appeal, Mother argues the district court erred by including her realized capital gains in her gross income. She argues these gains were generated from the sale of assets set aside to her in the divorce action, and thus, according to *In re Marriage of Case*, 19 Kan. App. 2d 883, 891, 879 P.2d 632 (1994), and *In re Marriage of Dimond*, No. 98,855, 2008 WL 3369094 (Kan. App. 2008) (unpublished opinion), cannot be included in her gross income. She contends these cases hold income earned from the liquidation of assets obtained as property division are not regular earnings and should not be considered income for calculating child support. But these cases are not analogous nor does Mother properly describe them.

As we noted in *In re Marriage of Ormiston*, 39 Kan. App. 2d 1076, 1080, 188 P.3d 32 (2008), *In re Marriage of Case* does not stand for the "broad proposition" that lump-sum payments are not included income. Rather, we recognized in *In re Marriage of Case* that "'[d]omestic gross income includes "every conceivable form of income, whether it be in the form of earnings, royalties, bonuses, dividends, interest, maintenance, rent, or whatever."'" *In re*

Marriage of Ormiston, 39 Kan. App. 2d at 1080 (quoting *In re Marriage of Case*, 19 Kan. App. 2d at 892). We also noted the Kansas Child Support Guidelines "explicitly *include* income that *is* regularly and periodically received." *In re Marriage of Ormiston*, 39 Kan. App. 2d at 1081. And in *In re Marriage of Dimond*, we upheld the exclusion of funds generated from the liquidation of an asset set aside to her in the divorce because the funds were not "regular and periodic income." 2008 WL 3369094, at *4.

Mother does not address the district court's factual finding that she regularly and periodically uses income beyond what she receives from her part-time job and yearly dividends to pay her monthly expenses. The Guidelines "define domestic gross income as income from all sources, including that which is regularly or periodically received, excluding public assistance and child support received for other children in the residency of either parent." *In re Marriage of Matthews*, 40 Kan. App. 2d 422, Syl ¶ 4. Income, under the Guidelines, "mean[s] every conceivable form of income, whether it be in the form of earnings, royalties, bonuses, dividends, interest, maintenance, or rent." 40 Kan. App. 2d 422, Syl ¶ 5. Thus, it was proper for the district court to include this additional income since it falls within the Guidelines' definition of domestic gross income.

While Mother argues the district court should not have included this income because she liquidated assets to pay for the divorce proceedings, she fails to address the caselaw the court cited which holds the court cannot consider how the income is used when determining whether it qualifies as gross income. In *In re Marriage of Dean*, we held the Guidelines "do not grant a district court the discretion to exclude non-liquid capital gains from rental income received by self-employed persons." 56 Kan. App. 2d 770, Syl. ¶ 5. We relied on *In re Marriage of Matthews*, in part, because that case noted: "'[T]he fact that [Father] chose to use his income to pay for an asset he purchased does not change the character of the money from "income" to "non-income" for purposes of calculating child support under the Guidelines.'" *In re Marriage of Dean*, 56 Kan. App. 2d at 777 (quoting *In re Marriage of Matthews*, 40 Kan. App. 2d at 429). The same is true here. The fact

that Mother chose to use her income to pay for attorney fees does not change the character of the money from "income" to "non-income" for purposes of calculating child support under the Guidelines. The district court noted, in quoting *In re Marriage of Matthews*, 40 Kan. App. 2d at 429, "how a party chooses to use their income 'does not change the character of the money from "income" to "non-income."'" Nor does Mother address the district court's finding that Mother regularly liquidated assets to pay her monthly expenses. Realized capital gains which are periodically and regularly received by a parent can be included in that parent's gross income for the calculation of child support under the Kansas Child Support Guidelines.

We therefore find no error in the district court's inclusion of Mother's realized capital gains in her domestic gross income for child support purposes.

C. *Mother failed to preserve her remaining objections to the child support calculation.*

On appeal, Mother also raises two more objections to the district court's calculation of Father's income in its child support calculations. First, she alleges Father depreciated a vehicle he purchased which reduced his gross income for child support purposes. Next, she alleges the court should not have deducted the cost of the children's health insurance from Father's income because his company pays this expense. Father alleged Mother failed to raise these objections before the district court so they are unpreserved for appeal. We agree. *State v. Green*, 315 Kan. 178, 182, 505 P.3d 377 (2022) (Generally, issues not raised before the district court cannot be raised on appeal.).

Mother failed to cite in her brief where she made these arguments below. An independent review of the record reveals Mother raised these issues in her motion to alter or amend, filed after the hearing. And in denying that motion, the district court found Mother should have raised these arguments at the hearing.

In his brief on appeal, Father alleged Mother failed to preserve these arguments. While Mother filed a reply brief, she did not address this issue in it. After oral argument, she filed a purported Rule 6.09 letter in which she recited snippets of Father's hearing

testimony which briefly mentioned these two items along with generic citations to various child support worksheets. See Supreme Court Rule 6.09(a)(2) (2024 Kan. S. Ct. R. at 40). But the purpose of a Rule 6.09 letter is to notify the court of "persuasive or controlling authority" that was published either after a party's appellate brief was filed or after oral argument, not to correct a party's failure to comply with Rule 6.02(a)(5). Rule 6.09(a)(2) (2024 Kan. S. Ct. R. at 40). Further, none of the record citations provided in Mother's letter show that Mother brought these issues to the district court's attention. A mention of these items in Father's testimony or child support worksheets with no objection from Mother before or during the hearing is not sufficient to notify the district court that Mother is challenging the inclusion of these items. And as Father points out, these items are intertwined with other factual considerations made by the district court, which would have required Mother to raise her objections below.

Kansas Supreme Court Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36) requires an appellant to cite "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on" in the district court. Or "[i]f the issue was not raised below," the brief must include "an explanation why the issue is properly before the court." Rule 6.02(a)(5) (2024 Kan. S. Ct. R. at 36). Because Mother fails to point to where in the record on where the district court ruled on her argument, she failed to preserve her argument for review.

FATHER'S MOTION FOR ATTORNEY FEES ON APPEAL

After oral argument, Father moved for attorney fees on appeal under Rule 7.07(a)(4) and (c) (2024 Kan. S. Ct. R. at 52). Father alleges justice and equity require that we grant him an award of fees in this case because Mother's appeal stayed the district court's judgment of child support, meaning Father has had to pay out fees on appeal while being denied payment of child support assessed by the district court. He also alleges the appeal is frivolous because Mother raised no justiciable issue.

While we empathize with Father's difficult financial situation, we do not find Mother's appeal was frivolous nor do we find the equities of this situation in particular support an award of fees. To

award fees simply because the underlying judgment is stayed while the matter is on appeal would chill parties' exercise of their legal right to appeal. The staying of an underlying judgment is a normal occurrence in appellate practice, which can have difficult but not unusual consequences. We do not find the circumstances here to be unusual enough to justify an award of fees. And while Mother was unsuccessful on appeal, this was a fact intensive and complicated case in which emotions ran high. We find the issues she raised to be justiciable even though they were not persuasive. Therefore, we deny Father's motion for attorney fees on appeal.

CONCLUSION

We see no error in the district court's admission of Dr. Prado's testimony and related documents, nor do we see error in its assessment of parenting time and child support. We therefore affirm its decisions.

Affirmed.

(562 P.3d 1034)

No. 126,321

STATE OF KANSAS, ex rel. KANSAS HIGHWAY PATROL, *Appellee*, v. $28,350 in U.S. CURRENCY (Boris Rodriguez), *Appellant.*

Petition for review filed Feb. 9, 2025

SYLLABUS BY THE COURT

1. SEARCH AND SEIZURE—*Constitutional Exclusionary Rule Applicable to Forfeiture Proceedings.* Although forfeiture actions are civil in nature, the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights are applicable. Thus, the constitutional exclusionary rule applies to forfeiture proceedings.

2. SAME—*When Purpose of Traffic Stop Ends—Driver Must Be Allowed to Leave without Further Delay or Questioning—Exceptions.* Once the officer determines that the driver has a valid license and the purpose of the traffic stop has ended, the driver must be allowed to leave without further delay or questioning unless (1) the encounter ceases to be a detention and the driver voluntarily consents to additional questioning or (2) during the traffic stop the officer gains a reasonable suspicion that the driver is engaged in illegal activity.

3. SAME—*Determination Whether Seizure or Consensual Encounter—Totality of Circumstances Test.* The United States Supreme Court has developed a "totality of the circumstances" test to determine whether there is a seizure or a consensual encounter. Under the test, law enforcement interaction with a person is consensual, not a seizure if, under the totality of the circumstances, the law enforcement officer's conduct conveys to a reasonable person that they are free to refuse the requests or otherwise end the encounter.

4. SAME—*Dog Sniff of Exterior of Automobile During Traffic Stop Is Not a Search*. The United States Supreme Court has held that a dog sniff of the exterior of an automobile during an otherwise lawful traffic stop does not implicate legitimate privacy interests and is not a search subject to the Fourth Amendment.

5. CIVIL PROCEDURE—*Kansas Standard Asset Seizure and Forfeiture Act—Plaintiff's Attorney Has Burden of Proof That Interest in Property Subject to Forfeiture by Preponderance of Evidence.* Under the Kansas Standard Asset Seizure and Forfeiture Act, K.S.A. 60-4101 et seq., the plaintiff's attorney shall have the initial burden of proving the interest in the property is subject to forfeiture by a preponderance of the evidence. If the State proves the interest in the property is subject to forfeiture, the claimant has the burden of showing by a preponderance of the evidence that the claimant has an interest in the property which is not subject to forfeiture.

6. APPEAL AND ERROR—*District Court's Ruling on Motion to Continue—Appellate Review*. An appellate court reviews the district court's ruling on a motion to continue for an abuse of discretion.

Appeal from Wabaunsee District Court; JEFFREY R. ELDER, judge. Oral argument held November 12, 2024. Opinion filed January 10, 2025. Affirmed.

Pantaleon Florez Jr., of Topeka, for appellant.

Stacy R. Bond, of Kansas Highway Patrol, *Anthony J. Powell*, solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

BEFORE SCHROEDER, P.J., MALONE and BRUNS, JJ.

MALONE, J.: This is a civil asset seizure and forfeiture case under the Kansas Standard Asset Seizure and Forfeiture Act (KSASFA), K.S.A. 60-4101 et seq. A Kansas Highway Patrol (KHP) trooper stopped Boris Rodriguez on Interstate 70 for committing two traffic violations. The traffic stop led to a vehicle search and the trooper found $28,350. The State alleged the money was related to drug trafficking. The case proceeded to trial after Rodriguez' request for a continuance was denied. After hearing the evidence, the district court found that the KHP established the seized property was proceeds from the sale of marijuana and was subject to forfeiture under the KSASFA.

On appeal, Rodriguez claims (1) the trooper lacked reasonable suspicion to initiate the traffic stop; (2) the seizure was unreasonably extended in violation of Rodriguez' constitutional rights; (3) the district court improperly granted the forfeiture because of the constitutional violations; (4) the district court abused its discretion in denying the trial continuance; and (5) Rodriguez must be awarded prejudgment interest because of the unconstitutional taking of his currency. After thoroughly reviewing the record, we find no reversible error and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 12, 2020, KHP Trooper Chandler Rule was on routine patrol on I-70 in Wabaunsee County. Rule was also a certified K-9 handler and his service dog, Cain, was in the patrol vehicle. While traveling west on I-70, Rule observed a black Chevrolet Volt commit what he believed were two traffic violations.

Rule later testified that he observed the Chevrolet Volt pass a semi-truck and trailer and then merge back into the right lane in an unsafe manner. Rule also testified that he observed the Volt "tailgate" a passenger vehicle while changing lanes. As a result of these observations, Rule decided to stop the Volt for unsafe passing and following too closely.

After observing the traffic violations but before initiating the stop, Rule contacted dispatch and ran the California license plate number on the Volt. From the license plate reader database, Rule learned that the vehicle had been to or passed through the state of Georgia six times in the last six months. Rule activated the dashcam in his patrol vehicle after he observed the traffic violations so he could record the stop, but the dashcam failed to clearly record the encounter and was not admitted into evidence.

Rule activated his emergency lights and the Volt promptly pulled over to the side of the highway. After the vehicle had safely stopped, Rule believed that he deactivated his emergency lights because that was his usual practice. Rule approached the vehicle from the passenger side and contacted the driver, later identified as Rodriguez, who was the vehicle's only occupant. Rule explained why he had stopped Rodriguez and asked to see his driver's license and vehicle registration. While Rodriguez was retrieving these documents, Rule asked what brought him to Kansas. He replied that he had traveled to Florida to visit his aunt who had recovered from COVID and that he was returning home to San Jose, California. Rule asked Rodriguez how often he goes to Florida and Rodriguez stated he had not been out there in a long time.

Rule testified that he spoke to Rodriguez in a "conversational" tone throughout the encounter. There were no other law enforcement officers at the scene at the beginning of the stop. Rule did not believe that he placed his "hand on [Rodriguez'] vehicle in any way, shape, or form." Rule was wearing a service weapon as part of his uniform, but he did not draw the weapon at any time during the encounter.

During their conversation, Rule observed that Rodriguez seemed unusually nervous. Beads of sweat were visible on his forehead and Rodriguez was visibly shaking when handing over his driver's license. Rule observed that the vehicle had a lived-in

look about it because of two coolers in the backseat as well as many water bottles and a guitar. Rule later testified that this fact meant little in itself but is something "we see commonly in people involved with criminal activity that are traveling across the country." Rule told Rodriguez that he would issue a warning for the traffic violations. Rule observed that Rodriguez remained nervous even after being told he was only receiving a warning.

Rule took Rodriguez' driver's license and registration back to the patrol vehicle to confirm the information through dispatch and to check for any outstanding warrants for Rodriguez. Rule also asked dispatch to run a criminal history check, which was completed while Rule was checking the driver's license and registration. Rodriguez' criminal history check revealed that he had been arrested for cultivating and selling marijuana in California. After receiving the information from dispatch, Rule entered the warning for the traffic violations into the KHP database.

Rule returned to Rodriguez' vehicle on the passenger side and handed the driver's license and registration to him. Rodriguez asked Rule some questions about following too closely and cutting off vehicles. Once Rodriguez was done asking questions, Rule considered the conversation to be over and he told Rodriguez to have a safe trip. Rule was not standing in the way of Rodriguez leaving. Rule took a step away from the vehicle and then returned and asked if he could ask some more questions. Rodriguez agreed.

Rule asked Rodriguez how long he had owned the car and Rodriguez said for about a year and a half. Rule then asked Rodriguez if he had ever been arrested. Rodriguez admitted that he had been arrested in a money scheming incident at Walmart, but he failed to mention he had been arrested for cultivating and selling marijuana. Rule found the nondisclosure of the drug trafficking arrest to be "extremely suspicious."

Rule then asked whether Rodriguez had any drugs, guns, or large sums of money in the vehicle. Rodriguez said he did not have drugs or guns. When asked about money, Rodriguez said he did not have large sums of money in the vehicle and looked over his shoulder toward the trunk. Rule testified this behavior was con-

sistent with someone trafficking large amounts of drugs or proceeds from drug transactions as individuals involved in criminal activity inadvertently look at the contraband when mentioned.

At this point, Rule believed Rodriguez was somehow involved in trafficking money or narcotics and asked to search the vehicle. Rodriguez said no. Rule then asked Rodriguez if his K-9 could sniff around the vehicle. Rodriguez told Rule he could perform the K-9 sniff "if [he] had to." Rule asked Rodriguez to exit the vehicle and performed a safety check for weapons. He then went back to his patrol vehicle to leash Cain and commanded him to sniff around the vehicle. Cain did two rotations around the vehicle and, on the second rotation, started showing erratic behavior, alerting Rule to the odor of narcotics at the passenger side front window.

Rule told Rodriguez that Cain had alerted and asked if Rodriguez had been around narcotics. Rodriguez said he had a license to smoke marijuana in California. Rule believed the K-9 alert gave him probable cause to search the vehicle. Before the search, Rodriguez told Rule he had $3,000 in the backseat. Rule found the $3,000 and located two speaker systems with tool marks and screws holding them together. Based on Rule's training and experience, the tool marks and screws suggested the speakers were being used to hide contraband. Rule found a power tool inside the vehicle and opened the speakers where he found 10 bundles of mixed denominations of currency rubber banded together. Rule had seen money bundled this way before when it was involved in criminal activity. Rule also found money in a food container in a cooler packed similarly to the money found in the speakers. When counted later, the money found in Rodriguez' vehicle totaled $28,350. Rule did not find any controlled substances in the vehicle.

When the vehicle search was completed, Rule placed the money in his patrol vehicle and asked Rodriguez to follow him to the KHP office in Topeka. By that time another trooper had arrived at the scene. At the KHP office, Rule and another trooper performed a "currency screen" as a way to confirm the prior K-9 alert. The troopers took Cain into various clean rooms and the K-9 did not alert to the odor of narcotics. The troopers then placed

the currency seized from Rodriguez' vehicle into one of the same rooms. Cain again found the currency and alerted to the odor of narcotics.

Logan Littell, a KHP intelligence analyst, later examined and downloaded contents from Rodriguez' cellphone under a search warrant. Littel testified that based on his training and experience, he was familiar with typical language used in drug cases and Rodriguez' cellphone contained conversations that appeared to be drug related. Littell also testified that the cellphone had notes with monetary numbers that appeared to be drug prices for various quantities and types of marijuana. The notes referred to "carts," and Littell testified this is "a short term for cartridges, which then translates to THC cartridges, which is smokable THC oil." The State introduced two notes as exhibits and Littell testified they resembled a drug ledger. The State also introduced an exhibit with 40 photographs of marijuana leaves taken off Rodriguez' cellphone.

Luke Rieger, a task force officer with the Drug Enforcement Administration and the KHP, interviewed Rodriguez. Rieger provided Rodriguez with his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). During the interview, Rodriguez mentioned he had obtained a small business association loan between $20,000 and $22,000. Rodriguez explained he had withdrawn the money over the course of several months and was carrying the money in his car. Rieger testified the discrepancy between the amount of money Rodriguez reported to him and the amount of money found in his car was common in these investigations. He explained that someone legally carrying large sums of money usually knows exactly how much they have, but not persons involved in the drug trade. Rieger testified, based on his training and experience, that the notes recovered from Rodriguez' cellphone looked like a drug dealer ledger and the currency recovered from Rodriguez' vehicle was likely for facilitating the purchase or sale of marijuana. Rieger noted he had conducted a substantial number of interviews and thought Rodriguez was behaving in a deceptive manner and withholding information.

On December 11, 2020, the State, on behalf of the KHP, filed a notice of pending forfeiture of the $28,350 it had seized from

Rodriguez in Wabaunsee District Court. The State asserted the property was proceeds of a felony drug offense and should be forfeited to the State. Legal counsel entered an appearance for Rodriguez. In May 2022, Rodriguez moved to deny the forfeiture and for the money to be returned to him, asserting the traffic stop was illegal and the contents of the vehicle search should be suppressed.

A bench trial, including a hearing on the suppression motion, was scheduled for July 15, 2022. The State requested a continuance a few days before the scheduled trial because of a witness problem. Rodriguez objected to the continuance motion because he had already traveled to Kansas for the hearing. The district court ultimately continued the matter a day before the trial because of an ongoing trial in another case, without addressing the State's continuance motion. On September 16, 2022, the district court provided written notice that the bench trial was rescheduled for November 8, 2022.

On November 7, 2022—a day before the rescheduled trial—Rodriguez moved for a continuance alleging he had exhausted his limited resources traveling to Kansas for the first trial setting and he "has been unable to save sufficient funds with which to appear before the court for this hearing." The State objected, claiming it had arranged for its witnesses to be at the hearing, including one from out of state, and asserting Rodriguez should not have waited until the day before the hearing to request a continuance.

The district court convened the bench trial/suppression hearing the next day. Rodriguez appeared by counsel. The district court first took up Rodriguez' continuance request filed the day before and denied it "[d]ue to the close proximity of the trial date."

Rule, Littell, and Rieger testified for the State. Rodriguez' counsel recalled Rule as his only witness. Rule testified that Cain had completed a 13-week training course with the KHP and was certified to alert to the odor of narcotics. Rule acknowledged that Cain sometimes had false positive alerts for narcotics, but this had occurred "[f]ive or less [times] out of the thousands of sniffs." Rule explained that Cain was trained to alert for the odor of narcotics and would not have alerted to currency unless there was a "residual odor" of narcotics on the currency, which had happened

before. Rule acknowledged that the currency recovered from Rodgriguez' vehicle was not tested for drug residue.

After hearing the evidence and arguments of counsel, the district court ruled from the bench. As for the suppression motion, the district court found that Rule had "probable cause" to stop Rodriguez for the traffic violations. The district judge stated, "I'm not going to go through all of the totality of the circumstances, but the trooper felt that more was going on." The district court then found that Rule had probable cause to search the vehicle based on the K-9 alert to the odor of narcotics. Based on the money found in the car and the other evidence presented by the State including the evidence discovered on Rodriguez' cellphone, the district court found that the KHP established the seized property was proceeds from the sale of marijuana and was subject to forfeiture under the KSASFA. Rodriguez timely appealed the district court's judgment.

DID RULE HAVE REASONABLE SUSPICION TO INITIATE THE TRAFFIC STOP?

Rodriguez first claims that he did not commit any traffic violations and Rule's testimony did not support an objective basis for the traffic stop. Rodriguez contends that Rule lacked reasonable articulable suspicion that he committed, was committing, or was about to commit a crime. The State counters that the initial stop was supported by reasonable suspicion based on Rule's testimony about the traffic violations.

"Whether reasonable suspicion exists is a question of law." *State v. Moore*, 283 Kan. 344, 350, 154 P.3d 1 (2007). Appellate courts apply a mixed standard of review requiring substantial competent evidence to support the district court's findings while the legal conclusions are reviewed de novo. 283 Kan. at 350.

The Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Kan. Const. Bill of Rights, § 15. These rights are fundamental and must be safeguarded by the courts. The Kansas Supreme Court has long held that the search and seizure provisions

of the Kansas and United States Constitutions are similar and provide the same rights and protections. See, e.g., *State v. Neighbors*, 299 Kan. 234, 239, 328 P.3d 1081 (2014). "Although forfeiture actions are civil in nature, the protections against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights are applicable. Therefore, the constitutional exclusionary rule applies to forfeiture proceedings." *State v. One 2008 Toyota Tundra*, 55 Kan. App. 2d 356, Syl. ¶ 1, 415 P.3d 449 (2018).

A traffic stop in which a law enforcement officer pulls over a vehicle and "restrains an individual's liberty" constitutes a seizure. *State v. Jones*, 300 Kan. 630, 637, 333 P.3d 886 (2014). For such seizure to be constitutionally reasonable, a law enforcement officer must have "specific and articulable facts that create a reasonable suspicion the seized individual is committing, has committed, or is about to commit a crime or traffic infraction." 300 Kan. at 637. A traffic infraction provides an objectively valid reason for a traffic stop. 300 Kan. at 637. The United States Supreme Court has held that a valid traffic stop is not rendered invalid by the fact that it is a pretext for a narcotics search. *Whren v. United States*, 517 U.S. 806, 812, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). The Kansas Supreme Court also adopts this view. *Jones*, 300 Kan. at 638.

K.S.A. 8-1516(a) states: "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." K.S.A. 8-1523(a) states: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Rule testified he observed Rodriguez pass a semi-truck and did not leave a reasonable distance between his vehicle and the truck when he merged back into the right lane. Rule also testified Rodriguez followed another passenger vehicle too closely. Rule's testimony was unrebutted, and the district court found that it supported the traffic stop.

On appeal, Rodriguez boldly claims that he "was not violating any rule of the road and the officer's testimony did not support an objective basis for the stop." Rodriguez asserts that he would have challenged Rule's testimony about the alleged traffic violations had he testified in court, and he had his own dashcam recordings not admitted into evidence that would have refuted some of Rule's testimony. We will address Rodriguez' claim that the district court abused its discretion in denying a trial continuance later in this opinion. But based on Rule's testimony, substantial competent evidence supports the district court's finding that Rodriguez committed two traffic violations. The district court did not err in finding that Rule had reasonable suspicion to initiate the traffic stop.

WAS THE SEIZURE UNREASONABLY EXTENDED IN VIOLATION OF RODRIGUEZ' CONSTITUTIONAL RIGHTS?

Next, Rodriguez claims that even if the initial traffic stop was a lawful seizure, it was unreasonably extended in violation of his constitutional rights. More specifically, Rodriguez argues that Rule predetermined he would search the vehicle and/or arrest Rodriguez without probable cause or reasonable suspicion and pressured Rodriguez into submitting to an extended detention. Rodriguez also claims his consent to the K-9 sniff around his vehicle was an involuntary submission to authority. Finally, Rodriguez asserts that the vehicle search was unlawful and the evidence seized should be suppressed.

The State contends that the entire encounter was lawful. The State argues that after the purpose of the traffic stop had ended, Rule lawfully extended the scope and duration of the seizure based on Rodriguez' voluntary consent and also because Rule had gained reasonable suspicion that Rodriguez was engaged in criminal activity. The State argues that the open-air K-9 sniff was not a search requiring consent. According to the State, the K-9's alert to the odor of narcotics provided probable cause to search the vehicle.

As stated before, the constitutional exclusionary rule applies to forfeiture proceedings. *One 2008 Toyota Tundra*, 55 Kan. App. 2d 356, Syl. ¶ 1. "On a motion to suppress, an appellate court generally reviews the district court's findings of fact to determine whether they are supported by substantial competent evidence and

reviews the ultimate legal conclusion de novo." *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021). When the material facts supporting a district court's decision on a motion to suppress evidence are not in dispute, the ultimate question of whether to suppress is a question of law over which an appellate court has unlimited review. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018).

> "Appellate review of a trial court's determination of whether a reasonable person would feel free to refuse the law enforcement officer's requests or otherwise terminate the encounter consists of two parts: (1) the factual underpinnings are reviewed under a substantial competent evidence standard and (2) the ultimate legal conclusion drawn from those facts, i.e., whether a reasonable person would feel free to refuse the requests or to terminate the encounter, is reviewed under a de novo standard." *State v. Thompson*, 284 Kan. 763, Syl. ¶ 10, 166 P.3d 1015 (2007).

The scope and duration of a traffic stop must be no longer than necessary to serve the legitimate purpose of the stop. *State v. DeMarco*, 263 Kan. 727, 733, 952 P.2d 1276 (1998) (citing *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 [1968]). "[T]he legitimacy of the duration of a traffic stop is measured by the time it takes for an officer to ask for, obtain, and record the driver's license, proof of insurance, and vehicle registration; run a computer check; and issue a citation." *Jones*, 300 Kan. at 640. Once the officer determines that the driver has a valid license and the purpose of the traffic stop has ended, the driver must be allowed to leave without further delay or questioning unless (1) the encounter ceases to be a detention and the driver voluntarily consents to additional questioning or (2) during the traffic stop the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity. *Thompson*, 284 Kan. at 774-75.

The State asserts that Rule lawfully extended the scope and duration of the traffic stop based on Rodriguez' voluntary consent to answer more questions. The heart of this case is whether Rule lawfully extended the duration of the traffic stop when he employed a maneuver known as the "Kansas Two Step" to obtain Rodriguez' consent for additional questioning. See *State v. Gonzalez*, 57 Kan. App. 2d 510, 513, 455 P.3d 419 (2019) (referring to maneuver used by KHP troopers to ask for driver's consent for additional questioning as the Kansas Two Step). The landmark

Kansas Supreme Court case addressing this issue is *Thompson*, so we will examine that case in detail.

City of McPherson Police Officer Weinbrenner stopped Dennis W. Thompson for having a faulty headlight. Weinbrenner's emergency lights remained activated even after the stop. Weinbrenner asked for Thompson's driver's license and insurance documents and ran the license through police dispatch. Another officer arrived at the scene and parked behind Weinbrenner's patrol car but did not approach Thompson's vehicle or have any direct contact with him. Just before Weinbrenner returned to Thompson's vehicle, he told the back-up officer that he would ask Thompson for consent to search his vehicle because Weinbrenner had information that Thompson had previously been involved in illegal drugs. Weinbrenner returned Thompson's driver's license, issued a verbal warning about the headlight, and told Thompson to have a nice day. Weinbrenner started to walk away after issuing the warning but then returned within a second or two and asked, "'By the way, can I ask you a few questions?'" 284 Kan. at 769.

The subsequent questioning resulted in Thompson saying that Weinbrenner could search his vehicle. The search yielded a baggie containing a powder residue and assorted drug paraphernalia. Thompson subsequently granted authorities written permission to search his garage where many items of manufacturing paraphernalia were found. Thompson moved to suppress the evidence, and the key issue was whether Weinbrenner lawfully extended the scope and duration of the initial traffic stop based on Thompson's consent to submit to additional questioning after the traffic stop had ended. Although the district court found there was "'no disengagement'" before Weinbrenner asked for Thompson's consent to additional questioning, it denied the motion to suppress the evidence and a jury found Thompson guilty of manufacturing methamphetamine and other crimes. 284 Kan. at 769-70. The Court of Appeals reversed Thompson's convictions, focusing on the district court's finding that there was no disengagement, and ruled that the district court should have suppressed the evidence.

On a petition for review, the Kansas Supreme Court emphasized that to determine whether there is a seizure or a consensual

encounter, the United States Supreme Court has developed a "totality of the circumstances" test. 284 Kan. at 775. These United States Supreme Court cases, from *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), to *Ohio v. Robinette*, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996), are analyzed in the *Thompson* opinion. 284 Kan. at 781-95. "[U]nder the test, law enforcement interaction with a person is consensual, not a seizure if, under the totality of the circumstances, the law enforcement officer's conduct conveys to a reasonable person that he or she [is] free to refuse the requests or otherwise end the encounter." 284 Kan. at 775. An objective standard is applied; the actual state of mind of either the officer or the driver is not a relevant circumstance. 284 Kan. at 809-10. The State has the burden of establishing the voluntariness of a consent. 284 Kan. at 776.

Because the determination of whether a reasonable person would feel free to terminate an encounter or refuse to answer questions is fact-driven, no list of factors is exhaustive or exclusive. Some factors often occur, including the following ones that tend to show that an encounter was consensual: knowledge of the right to refuse, a clear communication that the driver is free to terminate the encounter or refuse to answer questions, return of the driver's license and other documents, and a physical disengagement before further questioning. 284 Kan. at 811. Other factors that often occur suggest a coercive environment, including the presence of several officers, an officer's display of a weapon, some physical touching of the person, the use of aggressive language or tone of voice indicating that compliance with an officer's request is compulsory, the prolonged retention of personal effects such as identification, a request to accompany the officer somewhere, interaction in a nonpublic place, absence of other members of the public, or the display of emergency lights. 284 Kan. at 811.

After conducting an extensive analysis of the relevant circumstances, our Supreme Court determined that Weinbrenner's return of Thompson's driver's license and his statement to have a nice day was not a clear statement that the traffic stop had ended and was not "a clear physical disengagement." 284 Kan. at 811. Still, the court went on to find that under the totality of the circumstances presented in the case, a reasonable person in Thompson's

position would feel free to decline the officer's request for questioning or otherwise terminate the encounter. 284 Kan. at 812. Thus, our Supreme Court concluded that the district court correctly found the detention was consensual. 284 Kan. at 812.

Returning to our case, the State argued in district court that Rodriguez voluntarily consented to additional questioning from Rule after the purpose of the traffic stop had ended. Alternatively, the State argued that Rule had gained reasonable suspicion that Rodriguez was engaged in criminal activity to extend the scope and duration of the stop. Rodriguez argued the opposite on both issues. The district court found that Rodriguez' traffic violations justified the initial stop. The district judge also stated, "I'm not going to go through all of the totality of the circumstances, but [Rule] felt that more was going on." The district court then found that Rule had probable cause to search the vehicle based on the K-9 alert. The district court concluded that the evidence seized in the vehicle search was admissible and denied the motion to suppress.

Supreme Court Rule 165(a) (2024 Kan. S. Ct. R. at 232) imposes on the district court the duty to provide adequate findings of fact and conclusions of law on the record to explain the court's decision on contested matters. See K.S.A. 2023 Supp. 60-252. Here, the district court's factual findings and legal conclusions were inadequate to fully address the arguments the parties presented. But generally, a party bears the responsibility to object to inadequate findings of fact and conclusions of law to give the district court an opportunity to correct any alleged inadequacies. See *In re Guardianship and Conservatorship of B.H.*, 309 Kan. 1097, 1107-08, 442 P.3d 457 (2019). When, as here, no objection is made to a district court's findings of fact or conclusions of law on the basis of inadequacy, an appellate court can presume the district court found all facts necessary to support its judgment. *Bicknell v. Kansas Dept. of Revenue*, 315 Kan. 451, 510, 509 P.3d 1211 (2022).

Moreover, we observe that the evidence offered by the parties in district court on the suppression issue was essentially undisputed. The parties merely disagreed on the application of the law to the undisputed facts. When the material facts supporting a district court's decision on a motion to suppress evidence are not in

dispute, the ultimate question of whether to suppress is a question of law over which an appellate court has unlimited review. *Hanke*, 307 Kan. at 827. Thus, despite the district court's inadequate findings of fact and conclusions of law, we are in a position to review the record on appeal and decide whether the district court erred in denying the motion to suppress.

Rodriguez' case is factually similar to *Thompson*. The State argues that after the purpose of the traffic stop had ended, Rule lawfully extended the scope and duration of the seizure based on Rodriguez' voluntary consent to answer more questions. As our Supreme Court explained in *Thompson*, we must employ a "totality of the circumstances" test based on an objective standard to decide whether a reasonable person in Rodriguez' position would have felt free to refuse Rule's request for additional questioning or otherwise end the encounter. 284 Kan. at 775. We will examine the same relevant circumstances the court examined in *Thompson* and apply them to our facts.

Knowledge of the right to refuse

Under this factor, this court must determine whether Rodriguez knew he had the right to refuse to answer Rule's questions and leave without further incident, if the evidence allows the court to make that finding. Here Rodriguez did not testify and the evidence does not show whether he knew he had the right to refuse to answer Rule's questions and end the encounter. But as our Supreme Court held in *Thompson*, "[w]hile the defendant's knowledge of a right to refuse to consent is a factor to be taken into account, the State is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent." 284 Kan. 763, Syl. ¶ 16.

There is a fact about this case that bears mentioning here. Even after Rodriguez agreed to answer more questions at the end of the traffic stop, just moments later he *refused* to give Rule consent to search his vehicle. Rodriguez appeared to know his rights on consenting to a search and knew how to say no. If Rodriguez was not too intimidated to deny Rule's request to search his vehicle, it appears he may have known that he did not need to submit to Rule's other questioning and could have ended the encounter. But from the evidence presented at

the hearing, we cannot conclude one way or another whether Rodriguez knew he had the right to refuse additional questioning and leave.

Clear communication of the right to refuse

After reinitiating contact with Rodriguez, Rule did not clearly communicate to Rodriguez that he could terminate the encounter or refuse to answer questions. The United States Supreme Court has held that the Fourth Amendment does not require that a lawfully seized person be advised that they are "free to go" before their consent will be recognized as voluntary. *Robinette*, 519 U.S. at 39-40. Kansas courts apply this same rule. "A law enforcement officer is not required to inform a person that he or she is free to leave or that the person is not required to answer any questions. But the absence of this advice is a factor that may be considered under the totality of the circumstances." *Gonzalez*, 57 Kan. App. 2d at 518. Rule returned Rodriguez' driver's license and registration and told him to have a safe trip. This communication is similar to the officer's statement to the driver in *Thompson* "to have a nice day." 284 Kan. at 769. While Rule's statement—telling Rodriguez to have a safe trip—may generally signal the end of a conversation, a reasonable person may consider the conversation ongoing when an officer, within seconds, reapproaches and asks if he or she could continue questioning the individual. The State cannot rely on this factor to show the encounter was consensual.

Return of driver's license and other documents

"During a routine traffic stop, a law enforcement officer's retention of a driver's documents is significant because it indicates that a reasonable person, as a general rule, would not feel free to terminate the encounter." *Thompson*, 284 Kan. 763, Syl. ¶ 18. The record reflects Rule returned Rodriguez' driver's license and registration. The return of the driver's documents will often, but not always, signal to a reasonable person that the traffic stop is over and further questioning is consensual.

Physical disengagement before further questioning

Rodriguez argues Rule executed the "'Kansas Two Step"' by taking a step away from his vehicle and then reapproaching to ask investigatory questions. He contends this was not a clear physical disengagement to convey to Rodriguez the traffic stop had ended. Rule's actions

were similar to the officer's actions in *Thompson* where the officer started to walk away after issuing a warning but returned within a second or two and asked Thompson if he could ask a few more questions. Our Supreme Court determined these facts failed to establish "a clear physical disengagement." 284 Kan. at 811.

Presence of more than one officer

Rule was the only law enforcement officer involved for most of the encounter with Rodriguez. A second trooper arrived after the car search was completed and helped Rule escort Rodriguez to the KHP office in Topeka. The record does not reflect the second trooper was involved in the search or interacted with Rodriguez. Thus, the presence of two officers at the end of the encounter was not coercive.

Display of a weapon

Rule was presumably in uniform when the stop occurred but did not draw his gun at any time during the encounter with Rodriguez. There was no display of a weapon to coerce Rodriguez.

Physical contact by the officer

In *Gonzalez*, the officer "was leaning into the Escalade with his hands physically placed on the open passenger window of the Escalade at the same time he was asking if Gonzalez would be willing to answer more questions." 57 Kan. App. 2d at 519-20. Although this court applied the totality of circumstances test to the facts of the case, it appears this court relied substantially on the officer's physical contact with the vehicle in concluding that the driver did not voluntarily consent to additional questioning. 57 Kan. App. 2d at 517-21. No evidence suggests Rule engaged in any type of physical contact with Rodriguez' person aside from checking Rodriguez for weapons after Rodriguez exited the vehicle before Cain performed an open-air sniff. This physical contact was not coercive and was simply for Rule's safety while conducting the search. The contact was also after Rodriguez had agreed to answer more questions. As for physical contact with the vehicle, Rule did not believe that he placed his "hand on [Rodriguez'] vehicle in any way, shape, or form." This factor suggests a lack of coercion.

Use of commanding tone of voice

Rule testified he spoke to Rodriguez in a conversational tone like the tone he used while testifying at trial. There is no evidence Rule's questions were "badgering, repetitive, or accusatory." See *Gonzalez*, 57 Kan. App. 2d at 520. The record reflects Rule was not using a commanding tone of voice in a coercive manner.

Interaction in a nonpublic place

Rule's encounter with Rodriguez was on a public highway and not in any isolated or remote area. This factor favors a lack of coercion.

The display of emergency lights

The display of emergency lights is often an important factor in determining whether there is a show of authority amounting to a seizure. See *State v. Greever*, 286 Kan. 124, 136, 183 P.3d 788 (2008) (officer's seizure of motorist occurred when motorist saw the emergency lights and submitted to officer's show of authority by not fleeing); *State v. Morris*, 276 Kan. 11, 20, 72 P.3d 570 (2003) (court found encounter was not consensual when officers parked behind the motorist's truck that was stopped in a secluded location off a roadway, activated the emergency lights, and illuminated the back of the truck with spotlights). Rule activated his emergency lights to initiate the traffic stop but testified his normal practice was to turn off his front emergency lights when the apprehended vehicle had pulled to the shoulder of the road. Rule testified he had no reason to believe he acted differently during this stop. The fact Rule's emergency lights were not activated suggests a lack of coercive behavior by the trooper.

Attempt to control the ability to flee

Rule parked his patrol vehicle on the shoulder of the highway behind Rodriguez' vehicle without blocking Rodriguez' ability to drive away. When he reapproached Rodriguez' vehicle to return the driver's license and registration, Rule was standing on the passenger side of Rodriguez' vehicle and was not standing in the way of him leaving. This factor overall tends to suggest a lack of coercion.

Rule's intent to detain Rodriguez

Rodriguez makes much of the fact that Rule testified he intended to detain Rodriguez based on reasonable suspicion even if Rodriguez did not consent to answer more questions. But as our Supreme Court explained in *Thompson*, "the officer's subjective intent [is] irrelevant unless the driver is somehow made aware of the intent." 284 Kan. at 807. Rule believed he had reasonable suspicion that Rodriguez was involved in criminal activity by the time he returned his driver's license and registration, and we will address that issue later in this opinion. But Rule did not convey this subjective belief to Rodriguez. There is nothing wrong for a law enforcement officer to ask a person for consent to detain them or to search them even though the officer believes there are other legal grounds to support the action. That does not mean the consent is tainted or otherwise involuntary, as long as the person is not made aware of the officer's subjective intent. The fact that Rule intended to detain Rodriguez for further questioning even if he did not consent is irrelevant to whether Rodriguez' consent was voluntary.

Totality of the circumstances

No one factor is dispositive. *Thompson*, 284 Kan. at 803. We cannot help observing that Rodriguez' case is much like *Thompson* except in that case the officer's emergency lights remained activated during the entire encounter while it appears that Rule deactivated his emergency lights once he safely stopped Rodriguez. In *Thompson*, our Supreme Court determined that the officer's return of Thompson's driver's license and his statement to have a nice day was not a clear statement that the traffic stop had ended. 284 Kan. at 811. Likewise, the court determined that the officer's conduct of stepping away from the vehicle and immediately returning to ask more questions failed to establish "a clear physical disengagement." 284 Kan. at 811. Still, the court went on to find that under the totality of the circumstances in that case, a reasonable person in Thompson's position would feel free to decline the officer's request for questioning or otherwise terminate the encounter. 284 Kan. at 812.

Rule was the only officer involved in most of the encounter and it occurred on a public highway. He spoke with Rodriguez in a nonthreatening, conversational tone. Although he was wearing a uniform, he never drew his weapon. There is no evidence that Rule placed his hands on Rodriguez' vehicle. Rule returned Rodriguez' driver's license and registration and then answered some questions Rodriguez asked about following too closely and cutting off vehicles. Once Rodriguez was done asking questions, Rule considered the conversation to be over and he told Rodriguez to have a safe trip. Rule was not standing in the way of Rodriguez leaving. Rule took a step away from the vehicle and then returned and asked if he could ask some more questions. Rodriguez agreed.

The ultimate legal conclusion drawn from the facts—whether a reasonable person would feel free to refuse the officer's request for more questioning or to terminate the encounter—is reviewed under a de novo standard. *Thompson*, 284 Kan. 763, Syl. ¶ 10. If the Kansas Supreme Court found from the totality of the evidence presented in *Thompson* that a reasonable person in Thompson's position would feel free to decline the officer's requests or otherwise terminate the encounter, then we are hard-pressed to reach a different conclusion here. Under this analysis, we agree with the State that Rodriguez voluntarily consented to answer additional questions from Rule at the end of the traffic stop and the extension of the stop did not violate Rodriguez' constitutional rights.

Shaw v. Jones

Rodriguez cites *Shaw v. Jones*, 683 F. Supp. 3d 1205 (D. Kan. 2023), to support his claim that Rule's actions were unlawful and violated his constitutional rights. *Shaw* is a 42 U.S.C. § 1983 action brought by several plaintiffs against Colonel Herman Jones in his capacity as Superintendent of the KHP. The plaintiffs alleged that Jones "maintains a policy and practice of detaining drivers in violation of the Fourth Amendment" and sought injunctive and declaratory relief to remedy practices allegedly but not exclusively undertaken in the course of drug interdiction. 683 F. Supp. 3d at 1219-20.

Presented with evidence of several traffic stops made by KHP troopers between 2014 and 2022, the federal district court found

that the KHP has been engaged in a practice of using the so-called "Kansas Two-Step" in a manner that violates the Fourth Amendment and issued an injunction preventing the KHP from using the tactic. 683 F. Supp. 3d at 1260-61. The *Shaw* court found:

"KHP troopers conduct the Kansas Two-Step under circumstances where reasonable drivers do not feel free to leave and do not knowingly, voluntarily and intelligently consent to re-engage with the trooper. In the traffic stops examined at trial, a reasonable driver would not believe that the coercive aspect of the original traffic stop had ceased.

"Troopers occupy a position of power and authority during a traffic stop, and when a trooper quickly reapproaches a driver after a traffic stop and continues to ask questions, the authority that a trooper wields—combined with the fact that most motorists do not know that they are free to leave and KHP troopers deliberately decline to tell them that they are free to leave—communicates a strong message that the driver is not free to leave. A reasonable driver could not knowingly and intelligently believe otherwise. In such circumstances, the theory that a driver who remains on the scene gives knowing and voluntary consent to further questioning is nothing but a convenient fiction; in the circumstances present in this case, troopers unlawfully detained drivers, without reasonable suspicion, for further questioning." 683 F. Supp. 3d at 1247.

In short, the *Shaw* court concluded that the KHP's use of the "Kansas Two-Step" is inherently—and categorically—designed and deployed in a manner to unlawfully extend a traffic stop in violation of the driver's constitutional rights. The court determined as a matter of law that a reasonable person will never feel free to decline an officer's request for additional questioning when a car stop has ended. But in reaching this conclusion, the court completely abandoned the "totality of the circumstances" test mandated by the Kansas Supreme Court in *Thompson*, which in turn is based on decades of United States Supreme Court consent search jurisprudence. See 284 Kan. at 781-95. In fact, federal courts have explicitly held that police-citizen encounters in which an officer uses the so-called Two-Step may be classified as consensual under the totality of the circumstances. See *United States v. Hunter*, 663 F.3d 1136, 1145 (10th Cir. 2011); *United States v. Guerrero*, 472 F.3d 784, 786, 789 (10th Cir. 2007); *United States v. Velazquez*, 349 Fed. Appx. 339, 341-42 (10th Cir. 2009) (unpublished opinion).

Shaw has no precedential value, even as persuasive authority, because it is on appeal and is not a final decision. A notice of appeal was filed on December 18, 2023, and the Tenth Circuit has not issued an opinion as of the date this opinion is filed. In *Thompson*, the Kansas Supreme Court recognized that the factual nature of the "totality of the circumstances" test can make the test difficult to apply, and has led commentators to criticize the United States Supreme Court's consent search jurisprudence. See 284 Kan. at 777-79 (listing several law journal articles criticizing United States Supreme Court consent search jurisprudence). But the *Thompson* court recognized it must follow the United States Supreme Court's interpretation and application of the Fourth Amendment. 284 Kan. at 779. And as we said before, the Kansas Supreme Court has long held that the search and seizure provisions of the Kansas and United States Constitutions are similar and provide the same rights and protections. See, e.g., *Neighbors*, 299 Kan. at 239.

Just as the Kansas Supreme Court must follow the United States Supreme Court's interpretation and application of the Fourth Amendment, this court is duty bound to follow Kansas Supreme Court precedent unless there is some indication that the Supreme Court is departing from its previous position. *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022). *Thompson* is controlling law in Kansas on this issue, and this court must be guided by that decision in determining whether Rodriguez voluntarily consented to answer questions from Rule and whether the extension of the traffic stop violated Rodriguez' constitutional rights.

The State's alternative argument on reasonable suspicion

The State also argued in district court that after the purpose of the traffic stop had ended, Rule lawfully extended the scope and duration of the seizure because by that time he had gained reasonable suspicion that Rodriguez was engaged in criminal activity. Rodriguez argued the opposite. In its ruling denying the motion to suppress, the district judge stated, "I'm not going to go through all of the totality of the circumstances, but [Rule] felt that more was

going on." On appeal, the State reprises its argument that the duration of the traffic stop was lawfully extended based on reasonable suspicion.

By the time Rule returned the driver's license and vehicle registration to Rodriguez, Rule knew that (1) Rodriguez' vehicle registered in California had been to or passed through Georgia six times in the last six months, (2) Rodriguez was unusually nervous during the encounter even after he learned he was only receiving a warning, with beads of sweat visible on his forehead and visibly shaking when handing over his driver's license, (3) Rodriguez' vehicle had a lived-in look, which Rule testified was common in people involved in criminal activity and traveling across the country, and (4) Rodriguez' criminal history disclosed a previous arrest for cultivating and selling marijuana.

Rodriguez argues that Rule admitted in his testimony that he did not have reasonable suspicion of criminal activity to extend the duration of the traffic stop. This is incorrect. Rule admitted in his testimony that his suspicions about Rodriguez did not amount to probable cause to search Rodriguez' vehicle. But as Rule correctly stated at the hearing, reasonable suspicion to detain Rodriguez demands less than probable cause to search his vehicle. Rule believed all along that he had reasonable suspicion to detain Rodriguez for further questioning even if Rodriguez would have denied consent.

Whether Rule gained enough reasonable suspicion that Rodriguez was engaged in criminal activity to extend the duration of the traffic stop is a close question. The district court did not make a clear ruling on the issue, and we need not resolve the issue in this appeal. We simply conclude that Rule lawfully extended the scope and duration of the traffic stop based on Rodriguez' voluntary consent to answer more questions.

Probable cause to search Rodriguez' vehicle

If Rule did not have reasonable suspicion of criminal activity by the time he returned Rodriguez' driver's license and registration, he gained it just a few moments later. Rule asked Rodriguez how long he had owned the car and Rodriguez said for about a year and a half. Rule then asked Rodriguez if he had ever been

arrested. Rodriguez admitted that he had been arrested in a money scheming incident at Walmart, but failed to mention he had been arrested for cultivating and selling marijuana. This was contrary to the information Rule had just received in the criminal history check. Rule found the nondisclosure of the drug trafficking arrest to be "extremely suspicious." Rule also asked Rodriguez if he had any drugs, guns, or large sums of money in the vehicle. When asked about money, Rodriguez said he did not have large sums of money in the vehicle but looked over his shoulder toward the trunk, which Rule testified was consistent with someone who had contraband in the vehicle.

Rule asked Rodriguez if he could search his vehicle, and Rodriguez said no. Rule then asked Rodriguez if his K-9 could sniff around the vehicle. Rodriguez told Rule he could perform the K-9 sniff "if [he] had to." Rodriguez argues that his consent to the open-air dog sniff was equivocal and involuntary. But a dog sniff of the exterior of an automobile during an otherwise lawful traffic stop does not implicate legitimate privacy interests and is not a search subject to the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005); *State v. Lutz*, 312 Kan. 358, 366, 474 P.3d 1258 (2020). Thus, Rule did not need Rodriguez' consent for the open-air dog sniff. Moreover, the dog sniff did not measurably extend the duration of the stop because Rule's K-9 was already in his patrol vehicle. This was not a situation where the driver was detained for several minutes waiting for a K-9 to arrive from another location. See *State v. Arceo-Rojas*, 57 Kan. App. 2d 741, 746-47, 458 P.3d 272 (2020) (driver was detained for an additional four or five minutes for K-9 to arrive from another location).

Rule's K-9, Cain, alerted to the odor of narcotics from Rodriguez' vehicle. At the hearing, the State established that Cain had completed a 13-week training course with the KHP and was certified to alert to the odor of narcotics. Although Cain sometimes had false positive alerts for narcotics, this had occurred "[f]ive or less [times] out of the thousands of sniffs." Cain's alert to the odor of narcotics at the exterior of Rodriguez' vehicle, along with all the other information Rule had gathered, provided Rule with probable cause to search Rodriguez' vehicle. See *State v. Barker*, 252

Kan. 949, 959-60, 850 P.2d 885 (1993) (K-9's alert may supply probable cause to search a vehicle provided there is some evidence that the K-9's behavior reliably indicates the likely presence of a controlled substance); *State v. Brewer*, 49 Kan. App. 2d 102, 110, 305 P.3d 676 (2013) (evidence of K-9's certification and regular training provided the necessary foundation to establish the dog's alert provided probable cause to search the vehicle).

Rodriguez later gave a statement to Rieger after receiving his *Miranda* rights. Littell searched Rodriguez' cellphone under a warrant. Rodriguez does not challenge the admissibility of this evidence on appeal except to argue it was fruit of the poisonous tree.

Conclusion

Applying the "totality of the circumstances" test mandated in *Thompson*, we conclude that a reasonable person in Rodriguez' position would have felt free to refuse Rule's request to ask more questions at the end of the traffic stop. Rule did not unlawfully extend the scope and duration of the stop in violation of Rodriguez' constitutional rights. The open-air dog sniff of the exterior of Rodriguez' vehicle while he was lawfully detained did not constitute a search. Rule gained probable cause to search Rodriguez' vehicle when the certified K-9 with regular training alerted to the odor of narcotics, and Rule recovered $28,350 in currency inside the vehicle. The district court did not err in denying Rodriguez' motion to suppress the evidence.

DID THE DISTRICT COURT ERR IN GRANTING THE FORFEITURE?

Rodriguez argues that the district court erred in "granting [the] forfeiture based upon a 4th Amendment violation." But we have determined that Rule did not violate Rodriguez' Fourth Amendment rights during their encounter. Rodriguez also asserts that the State failed to meet its burden that the currency was subject to forfeiture.

The standard of review for a civil forfeiture action where the district court has conducted an evidentiary hearing is to determine whether the district court's findings of fact are supported by substantial competent evidence and whether they support the district

court's conclusions of law. *Kansas Highway Patrol v. 1985 Chevrolet Astro Van*, 24 Kan. App. 2d 841, 844, 954 P.2d 718 (1998). The appellate court does not reweigh the evidence or pass upon the credibility of the witnesses. If the evidence and all reasonable inferences drawn from it, when viewed in the light most favorable to the prevailing party, support the district court's decision, that decision will be affirmed. *City of Hoisington v. $2,044 in U.S. Currency*, 27 Kan. App. 2d 825, 828, 8 P.3d 58 (2000).

K.S.A. 2023 Supp. 60-4105 states in part:

> "The following property is subject to forfeiture:
>
> . . . .
>
> "(d) all property of every kind, including, but not limited to, cash and negotiable instruments derived from or realized through any proceeds which were obtained directly or indirectly from the commission of an offense listed in K.S.A. 60-4104, and amendments thereto."

K.S.A. 2023 Supp. 60-4104(b) states that conduct and offenses giving rise to forfeiture include "violations involving controlled substances, as described in K.S.A. 21-5701 through 21-5717, and amendments thereto." This includes the unlawful cultivation and or distribution of controlled substances. K.S.A. 21-5705.

K.S.A. 2023 Supp. 60-4113(h) states:

> "The issue shall be determined by the court alone. The plaintiff's attorney shall have the initial burden of proving the interest in the property is subject to forfeiture by a preponderance of the evidence. If the state proves the interest in the property is subject to forfeiture, the claimant has the burden of showing by a preponderance of the evidence that the claimant has an interest in the property which is not subject to forfeiture."

After hearing the evidence, the district court found that "the plaintiff has sustained its burden" that the currency seized from Rodriguez was subject to forfeiture as "money that was obtained from the sale of marijuana." We have already observed there was no objection based on the inadequacy of the district court's findings which were based on evidence at the hearing that was essentially undisputed. The record on appeal is sufficient for our court to exercise de novo review over the district court's legal conclusion that the currency seized from Rodriguez' vehicle was subject to forfeiture under the KSASFA.

We will not recite again all the evidence presented by the State at Rodriguez' bench trial. But we will emphasize the highly incriminating evidence recovered from Rodriguez' cellphone under a search warrant. Littell testified that based on his training and experience, he was familiar with typical language used in drug cases and Rodriguez' cellphone contained conversations that appeared to be drug related. Littell also testified that the cellphone had notes with monetary numbers that appeared to be drug prices for various quantities and types of marijuana. The notes referred to "carts," and Littell testified this is "a short term for cartridges, which then translates to THC cartridges, which is smokable THC oil." The State introduced two notes as exhibits and Littell testified they resembled a drug ledger. The State also introduced an exhibit with 40 photographs of marijuana leaves taken off Rodriguez' cellphone. Rieger also testified, based on his training and experience, that the notes recovered from Rodriguez' cellphone looked like a drug ledger and the currency was likely for facilitating the purchase or sale of marijuana. We have no difficulty concluding that the State presented substantial competent evidence supporting the district court's legal conclusion that the currency seized from Rodriguez' vehicle was subject to forfeiture under the KSASFA.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING RODRIGUEZ' MOTION TO CONTINUE THE BENCH TRIAL?

Rodriguez argues the district court abused its discretion by denying his motion to continue the bench trial because it failed to give him a reasonable opportunity to appear and support his case. Rodriguez' argument on this issue is essentially one paragraph in his brief. The State asserts that the district court did not abuse its discretion in denying Rodriguez' motion for continuance which was filed one day before the hearing.

An appellate court reviews the district court's ruling on a motion to continue for an abuse of discretion. Judicial discretion is abused only when no reasonable person would take the view adopted by the district court. See *Miller v. Glacier Development Co.*, 284 Kan. 476, 493, 161 P.3d 730 (2007). Rodriguez bears the

burden of showing an abuse of discretion. See *State v. Keys*, 315 Kan. 690, 708, 510 P.3d 706 (2022).

A bench trial, including a hearing on the suppression motion, was scheduled for July 15, 2022. The State requested a continuance a few days before the scheduled trial because of a witness problem. Rodriguez objected to the continuance motion because he had already traveled to Kansas for the hearing. The district court ultimately continued the matter a day before the trial because of an ongoing trial in another case, without addressing the State's continuance motion. On September 16, 2022, the district court provided written notice that the bench trial was rescheduled for November 8, 2022.

On November 7, 2022—a day before the rescheduled trial—Rodriguez moved for a continuance alleging he had exhausted his limited resources traveling to Kansas for the first trial setting and he "has been unable to save sufficient funds with which to appear before the court for this hearing." The State objected, claiming it had arranged for its witnesses to be at the hearing, including a witness who came from New Mexico, and asserting Rodriguez should not have waited until the day before the hearing to request a continuance. The district court took up the motion the next day and Rodriguez appeared by counsel. After allowing the parties to make a record, the court denied the continuance.

Rodriguez implies that the district court treated the parties differently and unfairly when it granted the first trial continuance when the State had a witness problem but denied the second continuance when Rodriguez claimed he could not attend. But the district court granted the first trial continuance because of its own schedule, without addressing the State's continuance motion. On September 16, 2022, the district court provided written notice that the bench trial was rescheduled for November 8, 2022. Rodriguez then waited until the day before the trial to move for a continuance. As the State pointed out, it would seem Rodriguez should have known sooner that he could not afford to make the second trip. His counsel stated that Rodriguez' plan to attend the hearing "fell through" but gave no details as to why he did not realize it sooner.

Rodriguez complains that he could not challenge Rule's testimony and that he could not introduce certain evidence at trial because he was not there to lay a foundation. If Rodriguez' testimony was necessary, his counsel could have asked to bifurcate the hearing and present Rodriguez' testimony later or present his testimony by Zoom. But counsel made no such request. Just because the district court denied the continuance motion does not mean it would not have considered such a reasonable request.

Perhaps another judge would have granted Rodriguez' continuance motion on the eve of trial. But we cannot say that no reasonable person would agree with the district court's decision to deny the motion—and that is the standard of review we must apply. Based on that standard of review, we conclude Rodriguez fails to show the district court abused its discretion in denying the motion to continue the bench trial.

IS RODRIGUEZ ENTITLED TO PREJUDGMENT INTEREST?

Finally, Rodriguez argues that he must be awarded prejudgment interest "for the unconstitutional taking of his lawful currency." This claim fails because we have found there was no unconstitutional taking. Moreover, Rodriguez cites K.S.A. 16-201 and K.S.A. 16-204(d) as the only authority supporting his claim for prejudgment interest. These statutes are not related to forfeiture proceedings. We observe that K.S.A. 60-4116(f)(2) was amended effective July 1, 2024, allowing a prevailing claimant in a proceeding under the KSASFA to recover postjudgment interest and, in cases involving currency, any interest actually paid from the date of seizure. L. 2024, ch. 79, § 8. Rodriguez does not argue that the amended statute would apply to his case.

Affirmed.

* * *

SCHROEDER, J., concurring in part and dissenting in part: For the reasons explained below, I respectfully concur in part and dissent in part from the majority opinion.

I concur with the majority that this case is controlled by *State v. Thompson*, 284 Kan. 763, 166 P.3d 1015 (2007), where the extended traffic stop became a consensual encounter, and we are

hard-pressed to reach a different conclusion. As the majority points out, *Thompson* would suggest a reasonable person in Rodriguez' shoes would have felt free, under the totality of the circumstances, to leave after the officer said, "[H]ave a safe trip." 65 Kan. App. 2d at 218.

However, I agree with Justice Beier's dissent in *Thompson* that "the majority expects far too much chutzpah from a person in defendant's position." 284 Kan. at 814 (Beier, J., dissenting). I agree some traffic stops certainly may be converted into a voluntary encounter. Here, however—in circumstances remarkably similar to those in *Thompson*—more should be required than the totality of the circumstances demonstrated. It seems to me the nature of the encounter did not change and Rodriguez' extended detention violated his rights under the Fourth Amendment to the United States Constitution. See 284 Kan. at 814 (Beier, J., dissenting). As such, I believe our Supreme Court should revisit *Thompson*.

I find it difficult to believe Rodriguez voluntarily consented to additional questioning from Rule as the purpose of the stop had not clearly ended. Rule, therefore, needed "at least a minimal level of objective justification" in which he could "articulate more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity." See *Illinois v. Wardlow*, 528 U.S. 119, 123-24, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). Even if Rule gained such an objective justification, it was not until after the equivocal and involuntary consent to answer more questions.

The majority emphasizes that Rodriguez agreed to answer additional questions but refused to consent to a vehicle search, indicating Rodriguez knew his rights and how to say no. 65 Kan. App. 2d at 217. I do not agree. While Rule's statement—telling Rodriguez to have a safe trip—may generally signal the end of a conversation, a reasonable person would consider the conversation ongoing when an officer immediately reapproaches and asks if he or she can continue questioning the individual. I observe no clear detachment between the traffic stop and Rule's desire to extend the stop. The totality of the circumstances ought to account for the fact a law enforcement officer is in a position of authority and a reasonable person would submit to such an authoritative figure,

especially on a busy highway, such as I-70. An individual is more likely to recognize his or her right to refuse a search of his or her person or belongings—an action much more invasive and accusatory than mere questioning—just as Rodriguez did.

Again, no one factor is dispositive. *Thompson*, 284 Kan. at 803. While more of the factors relied on in *Thompson* under current law suggests a consensual encounter, based on the totality of the circumstances, I cannot find a reasonable person—aside from maybe a lawyer versed in Fourth Amendment law—would have felt free to refuse the request by a uniformed law enforcement officer to answer more questions or otherwise end the encounter. When Rule took a single step away from Rodriguez' vehicle then returned, Rodriguez reasonably could have concluded Rule either forgot to ask additional questions earlier in the encounter or decided he needed more information stemming from the traffic stop. A reasonable person conversing with another would not consider a conversation over if that person said goodbye and immediately turned around to add a last-minute thought on the topic they were just discussing. The social customs surrounding everyday conversations should be considered in determining how a reasonable person would perceive the situation. See *Georgia v. Randolph*, 547 U.S. 103, 111, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006) (finding "great significance given to widely shared social expectations" when evaluating reasonableness of search based on third-party consent). Further, Rule may or may not have placed his hand on the window but was standing near the vehicle. A reasonable person would wait to pull away until someone standing nearby was a safe distance away.

While I recognize *Shaw v. Jones*, 683 F. Supp. 3d 1205, 1236 (D. Kan. 2023), is on appeal and is not a final decision, I tend to agree Rule's behavior in that case was like his behavior in this case and his "thought process was based on an absurd and tenuous combination of innocent factors that were not objectively suspicious." The *Shaw* court similarly found the factors Rule relied on there were "so ordinary and benign that singly and in combination, they contributed only minimally, if at all, to the reasonable suspicion calculus." 683 F. Supp. 3d at 1237. I cannot see how Rodriguez' continued detention after the traffic stop was a consensual

encounter. But, I recognize we are duty-bound to follow our Supreme Court's precedent as laid out in *Thompson*, and I do so reluctantly. See *State v. Patton*, 315 Kan. 1, 16, 503 P.3d 1022 (2022).

I dissent with respect to the majority's finding the district court did not abuse its discretion in denying Rodriguez' request for a trial continuance. 65 Kan. App. 2d at 231. Regardless of whether the district court initially continued the trial at the State's request or because of its own schedule, it provided only one day's notice to the parties. Rodriguez had already incurred the expense to travel to Kansas and was in Kansas and ready for trial. I acknowledge the district court's stated reason for the continuance, but it created quite the windfall for the State. In fact, Rodriguez objected to the initial continuance as he had spent over $1,000 to travel from California to Kansas for the trial. The district court also failed to consider the fact several thousand dollars of Rodriguez' money had been seized and, at that point, the State had not proved the seizure was proper. Yet the district court found it unreasonable to continue the trial at Rodriguez' request because his plans to attend collapsed on him at the last minute. I find this denial resulted in undue prejudice to him.

The State acknowledged Rodriguez had several exhibits—dashcam videos of his drive from Florida to Kansas leading up to the traffic stop—in his motion to deny forfeiture and return property that could not be admitted into evidence without Rodriguez present to lay proper foundation. Regardless of whether the first continuance was initially the result of the district court's schedule or at the State's request, I find it unreasonable to continue the initial trial date to the detriment of Rodriguez, creating a windfall for the State, then denying the subsequent request for a continuance by Rodriguez. Had the first continuance not occurred, the State would not have been able to present its case without Rule available to testify. Meanwhile, Rodriguez would have been better able to defend his position and admit relevant and necessary exhibits. Instead, Rodriguez—whose money was seized during the traffic stop and had spent over $1,000 to appear for the first trial date before it was continued the day before it was scheduled—was deprived of the ability to fully present his case. His presence for the

original trial setting reflects he wanted to be present for his day in court.

I believe Rodriguez, in this fact-specific case, has met his burden to establish the district court abused its discretion and acted unreasonably. I would reverse the district court's denial of Rodriguez' request for a continuance and allow Rodriguez a reasonable "'opportunity to be heard, "at a meaningful time and in a meaningful manner."'" See, e.g., *U.S.D. No. 461 v. Dice*, 228 Kan. 40, 44-45, 612 P.2d 1203 (1980) (essential elements of due process are notice and opportunity to be heard at meaningful time in meaningful manner). I find it arbitrary and unreasonable for the district court to grant a continuance the day before the initial trial date—even as a result of its own schedule—enabling the State to fully present its case at a later date, while later denying Rodriguez a continuance so he could fully present his case. Accordingly, I would reverse and remand for a new trial.

(563 P.3d 234)

No. 126,406

STATE OF KANSAS, *Appellee*, v. JEFFERY A. SANDERS, *Appellant*.

Petition for review filed Feb. 7, 2025

SYLLABUS BY THE COURT

1. MINORS—*K.S.A. 38-101 Identifies Age at Which Being a Minor Ends as 18 Years of Age.* Whether a person is considered a child in Kansas is statutorily different than whether one is considered of sufficient age to consent to sexual intercourse. The Kansas Legislature has the power to determine the age at which being a minor ends, and K.S.A. 38-101 identifies it as 18 years of age.

2. CRIMINAL LAW—*Persons 16 Years of Age or Older Can Consent to Intercourse under Statute in Kansas.* In Kansas, under K.S.A. 21-5507(a)(1)(A), persons 16 years of age or older can lawfully consent to sexual intercourse.

3. SAME—*Defendant's Claim in This Case Is Rejected That Child Pornography Is Constitutionally Protected Activity.* Under the facts of this case, we reject the defendant's claim that making and distributing child pornography is a constitutionally protected activity simply because the minor could lawfully consent to sexual activity.

4. SAME—*Court of Appeals Adopts Reasoning of Nebraska Case That State Has Legitimate Reason to Ban Creation of Child Pornography.* We adopt the reasoning in *State v. Senters*, 270 Neb. 19, 26-27, 699 N.W.2d 810 (2005), that the State has a legitimate reason to ban the creation of child pornography because it is often associated with child abuse and exploitation, resulting in physical and psychological harm to the child, and due to the potential for reputational harm.

5. SAME—*Aggravated Intimidation of Witness Is Not Separate Offense Controlled by K.S.A. 21-5301—Identical Offense Doctrine Does Not Apply to Such Conviction.* Aggravated intimidation of a witness, K.S.A. 21-5909(b), is not a separate offense controlled by K.S.A. 21-5301 or subject to the reduced penalty provisions of that statute. Because the aggravated intimidation of a witness statute includes attempt language, the offense is complete even when a defendant attempts to prevent or dissuade a witness. So the identical offense doctrine does not apply to such a conviction.

6. SAME—*Statute Requires Defendant to Pay $400 Assessment Fee for Each Crime Committed against a Minor.* Under K.S.A. 20-370(a), a defendant convicted of a crime against a minor victim must pay a $400 assessment fee for each crime committed against a minor, not each complaint or information.

Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Submitted without oral argument. Opinion filed January 10, 2025. Affirmed in part, vacated in part, and remanded with directions.

Sam Schirer, of Kansas Appellate Defender Office, for appellant.

Matt J. Maloney, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

ARNOLD-BURGER, C.J.: A jury convicted Jeffery A. Sanders of multiple counts of sexual exploitation of a child for enticing 16-year-old Jane Doe (a pseudonym for the victim in the case) to send him nude pictures and for possessing a video of one of their sexual encounters. He was also convicted of one count of aggravated intimidation of a witness or victim for attempting to discourage Doe from revealing their relationship to law enforcement.

On appeal, Sanders raises several challenges to his convictions and resulting sentence, arguing: (1) the sexual exploitation of a child statute is unconstitutional as applied because it improperly criminalizes private, consensual sexual conduct; (2) the identical offense doctrine applies to his aggravated intimidation of a witness or victim charge, requiring resentencing; (3) the State failed to allege and prove his age to support imposing lifetime postrelease supervision; (4) lifetime postrelease supervision is cruel and unusual punishment; (5) the district court erred in requiring him to pay four Children's Advocacy Center fees instead of a single fee; and (6) the journal entry of sentencing must be corrected because the court ordered a lower witness mileage fee at sentencing than the amount shown on the journal entry. The State concedes the journal entry is incorrect and must be corrected. As to this last issue, we agree, and remand the case for correction of the journal entry. We affirm on all remaining issues.

FACTUAL AND PROCEDURAL HISTORY

The facts here are not in dispute. Given the issues presented in this appeal, we need not recount the evidence in detail. We will focus only on the facts related to the charges for which Sanders was convicted.

The volleyball coach grooms a 14-year-old player for sex.

Sometime in 2015, Doe began playing volleyball at a facility where Sanders, 41, was a coach. Sanders became friends with Doe's parents and eventually began communicating with 14-year-old Doe on Snapchat. Their messages were initially about volleyball but eventually became more personal, then sexual, in nature. Sanders began complimenting Doe on her body and revealed that he had dreams about having sexual intercourse with her.

The coach starts having sexual intercourse with the player after she turns 16, recording the encounters on his cell phone, and they exchange explicit photos via Snapchat.

About a month after she turned 16, Sanders kissed Doe during a private volleyball lesson. A month later, Sanders invited Doe to his house, where they had sexual intercourse for the first time. Sanders recorded this and many of their sexual encounters on his cell phone. Doe stated at trial that she did not want to view any of these videos but knew Sanders was recording them. The jury found Sanders guilty of sexual exploitation of a child in violation of K.S.A. 21-5510(a)(2) for possessing one of these videos. Although Doe had initially resisted several requests by Sanders to provide nude pictures of herself, she eventually relented, and they began regularly exchanging nude pictures on Snapchat as well. These requests formed the basis for one of Sanders' convictions for sexual exploitation of a child in violation of K.S.A. 21-5510(a)(1).

The player tells a friend about her sexual relationship with the coach and the friend contacts the police.

At some point between late 2017 and early 2018, Doe told a friend about her sexual relationship with Sanders and that disclosure led to the police filing a report. When a detective interviewed Doe, she first denied anything inappropriate had happened. Later in the interview, she acknowledged she had been having sexual intercourse with Sanders.

Before her interview with the police, the coach told the player not to say anything and mentioned he had a loaded firearm.

Before the interview, Sanders had messaged Doe "not to say anything" and reminded her that she knew what would happen if anyone found out about the relationship and mentioned he had a loaded firearm.

These messages supported Sanders' aggravated intimidation of a witness conviction.

The coach continues to ask for lewd pictures of the player, who complies.

After Doe's interview with police, her parents restricted her social media usage by taking away her phone. She later bypassed these restrictions by logging into her Instagram account on her friend's phone. Later at a sleepover, a friend intercepted messages between Sanders and Doe on Doe's phone. Sanders asked Doe to send nude pictures of herself. After she sent a photo of her vagina to Sanders, Doe's friend saw the picture and told her own mother what happened. The friend's mother then contacted law enforcement. This incident formed the basis for Sanders' final conviction for sexual exploitation of a child.

The coach is convicted after a jury trial.

A jury convicted Sanders of two counts of sexual exploitation of a child under K.S.A. 21-5510(a)(1) (inducing a child under 18 to engage in sexually explicit conduct with the intent to promote any performance), one count of sexual exploitation of a child under K.S.A. 21-5510 (a)(2) (possession of a visual depiction of a someone under the age of 18 in which the child is engaged in sexually explicit conduct with the intent to arouse the sexual desires or prurient interests of any person); and one count of aggravated intimidation of a witness under K.S.A. 21-5909(a)(2)(A) (attempting to prevent a victim from reporting the victimization to law enforcement when the victim is under 18). Although Doe could legally consent to sexual intercourse with Sanders because of her age, the sexual exploitation of a child charges stemmed from Sanders requesting nude pictures of Doe.

The coach is sentenced to 10 years in prison and assessed fines and costs.

At sentencing, the district court found Sanders' criminal history score was I and imposed a controlling sentence of 122 months in prison based on a combination of consecutive, aggravated prison terms on his four convictions capped under the "double rule." See K.S.A. 21-6819(b)(4). The court also imposed lifetime postrelease supervision and ordered Sanders to pay "ordinary

costs and fees," which included a $151.26 witness mileage fee. The court's journal entry of judgment, however, indicated a $315.01 witness mileage fee, as well as a $1,600 "Children's Advocacy Center fee." Before the hearing ended, the court granted defense counsel leave to brief a constitutional challenge to the lifetime postrelease supervision term based on *State v. Freeman*, 223 Kan. 362, Syl. ¶ 2, 574 P.2d 950 (1978). The court later held a hearing on the motion and ruled the lifetime postrelease supervision term was constitutional after evaluating the *Freeman* factors in a lengthy oral ruling and concluding all three prongs weighed against Sanders.

Sanders timely appealed.

ANALYSIS

Sanders does not challenge any of the facts established during trial. Instead, the basic premise of his constitutional and statutory arguments is that Kansas sets the age of consent for sexual intercourse at 16 years old. See K.S.A. 21-5507(a)(1)(A). Therefore, his requests to exchange nude images with Doe and his possession of videos depicting their sexual encounters amounted to private, consensual sexual conduct that is entitled to protection under the Due Process Clauses of both the United States and Kansas Constitutions.

Under this theory, he raises several constitutional and statutory claims we will address in turn, but our standard of review is the same on all—unlimited. *State v. Carr*, 314 Kan. 615, 646, 502 P.3d 546 (2022) (holding the constitutionality of a statute is a question of law subject to unlimited review), *cert. denied* 143 S. Ct. 581 (2023); *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022) (finding statutory interpretation presents a question of law over which appellate courts have unlimited review).

I. *K.S.A. 21-5510 is not unconstitutional as applied to Sanders.*

Sanders argues K.S.A. 21-5510 is unconstitutional as applied to him because sexual privacy between consenting participants is a form of liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution—as

well as its counterpart found in section 18 of the Kansas Constitution Bill of Rights. And for the first time on appeal, Sanders also contends section 1 of the Kansas Constitution Bill of Rights confers a "'right to privacy'" as a "'natural right'" which prevents the State from criminalizing his private, consensual sexual conduct. See *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, Syl. ¶ 8, 440 P.3d 461 (2019) (*Hodes I*) (recognizing right to personal autonomy); see also *Hodes & Nauser v. Kobach*, 318 Kan. 940, 950, 551 P.3d 37 (2024) (*Hodes II*) (reaffirming *Hodes I*); *Hodes & Nauser v. Stanek*, 318 Kan. 995, 1005, 551 P.3d 62 (2024) (*Hodes III*) (same).

A. *Sanders fails to properly preserve his claim under section 1 of the Kansas Constitution Bill of Rights.*

To begin, Sanders concedes that he is raising his constitutional claim based on section 1 of the Kansas Constitution Bill of Rights for the first time on appeal. Accordingly, to review this claim Sanders must justify application of a recognized exception to the prohibition against considering constitutional issues raised for the first time on appeal. And while the record shows Sanders indeed raised his arguments based on the Fourteenth Amendment and section 18 of the Kansas Constitution Bill of Rights in a pretrial motion to dismiss two of the charges, his motion to dismiss only challenged the constitutionality of K.S.A. 21-5510(a)(1). This is true because the State had not yet added any charge based on K.S.A. 21-5510(a)(2) when he filed his motion.

Sanders fails to explain why he neglected to incorporate his constitutional claim when he moved to dismiss the new charges based on (a)(2), simply offering that the issue was nonetheless preserved because his rationale "applies equally" to both subsections of the statute (sections 1 and 18). But preserving a constitutional challenge for appeal is not so simple.

Sanders does not establish that this court must invoke any of the recognized exceptions to consider an unpreserved issue for the first time on appeal. See *State v. Rhoiney*, 314 Kan. 497, 500, 501 P.3d 368 (2021) ("[A] 'decision to review an unpreserved claim under an exception is a prudential one.' Even if an exception may apply, we are under no obligation to review the claim. [Citation

omitted.]"). Sanders contends his as applied constitutional challenge to K.S.A. 21-5510 can be reviewed for the first time on appeal because it (1) presents a purely legal question arising on undisputed facts and its resolution would be finally determinative of the case, and (2) is necessary to review the claim to prevent the denial of a fundamental right. *State v. Allen*, 314 Kan. 280, 283, 497 P.3d 566 (2021) (recognizing these exceptions).

Contrary to Sanders' suggestion, the only relevant fact is not simply that he was "convicted of crimes based on his private, consensual sexual conduct with an individual above Kansas's age of consent." While Sanders discusses his sexual exploitation of a child convictions under the general umbrella term of "exchanging sexual imagery," it bears mentioning that subsections (a)(1) and (a)(2) prohibit entirely different conduct. K.S.A. 21-5510(a)(1) prohibits "[e]mploying, using, persuading, inducing, enticing or coercing a child under 18 years of age, or a person whom the offender believes to be a child under 18 years of age, to engage in sexually explicit conduct with the intent to promote any performance." But K.S.A. 21-5510(a)(2) prohibits "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 other words, subsection (a)(1) covers the creation of child pornography, while subsection (a)(2) covers mere possession.

This distinction matters because the entire premise of Sanders' constitutional arguments is built on an alleged infringement of his fundamental right to engage in private and *consensual* sexual activity. Yet only the charges based on subsection (a)(1) directly implicate whether Doe could lawfully consent to sending sexually explicit images of herself to Sanders. In contrast, the charge based on subsection (a)(2) was based on Sanders possessing a video depicting their consensual sexual activity. There was trial evidence suggesting Doe did not consent to Sanders recording and possessing those videos, based on her testimony that she did not want to view them, but knew he was recording them. Stated another way, were this court to agree with Sanders on his challenge to subsection (a)(1) based on the Fourteenth Amendment and section 18

of the Kansas Constitution Bill of Rights, that does not automatically mean his possession of the video under subsection (a)(2) falls within the same scope of constitutional protection for private, consensual sexual activity. Distinguishing these two situations may require further development of facts, which is properly the function of the trial court.

Sanders invokes the fundamental rights exception to consider his new challenge based on section 1 of the Kansas Constitution Bill of Rights, which by definition requires him to establish a fundamental right is being threatened. See *Hodes I*, 309 Kan. at 673 (The presumption of constitutionality does not apply when a statute implicates fundamental interests. In such cases, "'the burden of proof is shifted from plaintiff to defendant and the ordinary presumption of validity of the statute is reversed.'").

As the State points out, other panels of this court have declined to review similar claims for the first time on appeal based on the rationale in *Hodes I* because of the necessary factual inquiry that must be conducted when reviewing an as applied challenge. See *State v. Hanks*, No. 125,270, 2024 WL 136655, at *12-13 (Kan. App. 2024) (unpublished opinion) (declining to address as applied constitutional challenge to rape, sodomy, and aggravated indecent liberties statutes as violation of "right to choose one's own sexual partner"), *rev. denied* 318 Kan. 1088 (2024); *State v. Davis*, No. 124,980, 2023 WL 5811485, at *3 (Kan. App. 2023) (unpublished opinion) (indecent liberties), *rev. denied* 319 Kan. 835 (2024). Like these prior panels, we exercise our discretion to decline Sanders' invitation to address the merits of his unpreserved challenge based on section 1 of the Kansas Constitution Bill of Rights and *Hodes I*. And the same rationale applies to decline reviewing an unpreserved challenge to K.S.A. 21-5510(a)(2) based on the Fourteenth Amendment and section 18 of the Kansas Constitution Bill of Rights.

In any event, because the record shows Sanders preserved a challenge to K.S.A. 21-5510(a)(1) based on the Fourteenth Amendment and section 18 of the Kansas Constitution Bill of Rights, we will proceed to the merits of that claim.

B. *The Fourteenth Amendment does not protect a broadly defined fundamental right to engage in all forms of private, consensual sexual conduct.*

Sanders argues K.S.A. 21-5510 is unconstitutional as applied to him because it criminalizes "private consensual sexual conduct," in the form of "exchanging sexual imagery" with someone above the legal age of consent. The legal foundation for this argument stems from the 2003 decision in *Lawrence v. Texas*, 539 U.S. 558, 560, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), in which the United States Supreme Court held a Texas law criminalizing homosexual sodomy was unconstitutional. But to fully understand Sanders' right to privacy argument, we must look back even further at how the Supreme Court caselaw in this area has developed.

To begin, neither the United States Constitution nor the Kansas Constitution has specific language guaranteeing a "right to privacy." The Due Process Clause of the Fourteenth Amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The counterpart in section 18 of the Kansas Constitution Bill of Rights states: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Kansas courts have historically analyzed section 18 of the Kansas Constitution Bill of Rights as coextensive with its federal counterpart. See *State v. Boysaw*, 309 Kan. 526, 537-38, 439 P.3d 909 (2019).

But the United States Supreme Court has recognized the explicit rights guaranteed in the federal Bill of Rights "have penumbras, formed by emanations from those guarantees that help give them life and substance" and which "create zones of privacy." *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). In *Griswold*, the Court struck down Connecticut's ban on use of contraceptives by married persons, holding the laws unconstitutionally intruded upon the right of marital privacy, part of the penumbras of the Bill of Rights.

The Court later extended the right discussed in *Griswold* to include unmarried persons, striking down laws restricting the distribution of contraceptives to unmarried individuals on Equal Protection grounds. See *Eisenstadt v. Baird*, 405 U.S. 438, 448-54,

92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). The *Eisenstadt* Court explained: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (Emphasis added.) 405 U.S. at 453. A few years later, the Court considered a New York law prohibiting sale or distribution of contraceptives to persons under the 16 years old in *Carey v. Population Services International*, 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977). There, four justices agreed "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults." 431 U.S. at 693.

Griswold and *Eisenstadt* led to the Court's decision in *Roe v. Wade*, 410 U.S. 113, 152-53, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), *overruled by Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022), which held the right to privacy only included "'fundamental'" rights, including a woman's decision whether to terminate a pregnancy. Although *Dobbs* overruled *Roe*, the majority opinion did so by repeatedly distinguishing the right to abortion recognized in *Roe* as uniquely involving termination of a "'potential life'" and reiterating that overruling *Roe* "should [not] be understood to cast doubt on precedents that do not concern abortion." *Dobbs*, 597 U.S. at 290, 295.

Returning to *Lawrence*, it involved a constitutional challenge to a sodomy statute. The key difference is that the Texas statute at issue applied only to persons of the same sex. The *Lawrence* Court stated that the cases involved "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." 539 U.S. at 564. And ultimately, the *Lawrence* Court concluded the Texas law was unconstitutional because it furthered no legitimate state interest to justify intruding into an individual's intimate personal and private life. The Court explained its ruling as follows:

"The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any

relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." 539 U.S. at 578.

Sanders acknowledges that *Lawrence* explicitly held the case "does not involve minors," but nonetheless seeks to apply its holdings to the Kansas sexual exploitation of a child statute. But as the State points out, numerous federal courts have rejected similar attempts to apply *Lawrence* in cases like this. For instance, in *United States v. Bach*, 400 F.3d 622, 629 (8th Cir. 2005), the 41-year-old defendant was prosecuted for pressuring a 16-year-old boy to pose for nude photos and then transmitted those photos over the internet. Like Sanders, Bach sought to challenge his convictions based on the liberty interest recognized in *Lawrence*, but the Eighth Circuit disagreed that *Lawrence* applied since the conduct involved a minor who was coerced into engaging in the conduct at issue. *Bach*, 400 F.3d at 629.

The Eight Circuit adhered to this reasoning in *United States v. Rouse*, 936 F.3d 849, 852 (8th Cir. 2019), which is more factually analogous. Rouse engaged in a sexual relationship with a 16-year-old girl in Nebraska, which also sets the age of consent at 16 years of age. Rouse recorded some of their sexual activity with the victim's consent and later transmitted those videos to the victim. The victim also sent sexually explicit photos to Rouse. Rouse conditionally pleaded guilty to distribution of child pornography under 18 U.S.C. § 2252A(a)(2), reserving the right to appeal the constitutionality of the statute. But like in *Bach*, the appellate court rejected his argument that *Lawrence* created "a right to engage in lawful sexual conduct with a minor and record it on video for personal use." 936 F.3d at 852.

Lastly, the State references *State v. Senters*, 270 Neb. 19, 699 N.W.2d 810 (2005), which also rejected a substantive due process challenge based on *Lawrence* in a case involving a defendant convicted of making child pornography under a Nebraska law. Like the Eighth Circuit, the Nebraska Supreme Court believed *Lawrence* was not intended to apply to conduct involving children. 270

Neb. at 25. The *Senters* court added that "the State, in regulating child pornography, remains free to define children as persons under the age of 18, even if the age of consent is lower, as long as the law passes traditional rational basis review." 270 Neb. at 25. And under that standard of review, the *Senters* court concluded the State has a legitimate reason to ban the creation of child pornography because it "is often associated with child abuse and exploitation, resulting in physical and psychological harm to the child," and due to the potential for "reputational harm." 270 Neb. at 26-27 ("It is reasonable to conclude that persons 16 and 17 years old, although old enough to consent to sexual relations, may not fully appreciate that today's recording of a private, intimate moment may be the Internet's biggest hit next week."). We find the Nebraska court's analysis persuasive and we adopt it here.

Sanders recognizes this caselaw but asserts the *Lawrence* court possibly used "'minor'" to mean someone under the age of consent. He also contends the "disclaimer is simply intended to dispel the notion that nonconsensual or questionably-consensual private sexual conduct is constitutionally protected." As support, Sanders cites *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 398, 137 S. Ct. 1562, 198 L. Ed. 2d 22 (2017), in which the Supreme Court interpreted the federal sexual abuse of a minor statute as requiring the age of the victim to be less than 16. He also references *In re J.M.*, 276 Ga. 88, 90, 575 S.E.2d 441 (2003), which held the constitutional right of privacy in the Georgia constitution prohibited the State from criminalizing "the private, non-commercial, consensual sexual acts of two persons legally capable of consenting to those acts."

Sanders also points out that the Kansas Supreme Court applied *Lawrence* in *State v. Limon*, 280 Kan. 275, 287, 122 P.3d 22 (2005), which involved an equal protection challenge to the unlawful voluntary sexual relations statute because it punished members of different sexes less harshly than members of the same sex engaging in the same conduct. Limon, who was 18, was convicted of criminal sodomy against 15-year-old M.A.R. But as the State correctly notes, *Limon* did not involve a substantive due process

claim like the one Sanders is raising. But more to the point, Sanders' reference to these cases inadvertently reveals why his argument is not persuasive.

First, Sanders repeatedly equates the age of consent with the age of majority, which is incorrect. Whether a person is considered a child in Kansas is statutorily different than whether one is considered of sufficient age to consent to sexual intercourse. The Kansas Legislature has the power to determine the age of majority and has said it begins at age 18. See K.S.A. 38-101. Elsewhere in the statutes, a "[m]inor child" means any unemancipated child under the age of 18. K.S.A. 38-615(d). For a minor child to have the rights of one 18 or over, the child must petition the district to confer those rights. K.S.A. 38-108; K.S.A. 38-109.

So while persons over the age of 16 can lawfully consent to sexual intercourse, the sexual exploitation of a child statute itself still refers to such persons as a "child." See K.S.A. 21-5510. Thus, Sanders' attempt to equate the ability to consent to sexual intercourse with being an "adult" fails.

Next, *Esquivel-Quintana* is of little relevance since it did not involve any constitutional claims, let alone one based on the defendant's substantive due process rights. 581 U.S. 385. While *In re J.M.* and *Limon* directly involved constitutional challenges to laws that criminalized sexual conduct involving a minor, Sanders is *not* being prosecuted for having sex with a minor. His convictions for sexual exploitation of a child relate to enticing a 16-year-old to send him sexually explicit photos and possessing a video of a 16-year-old engaging in sexual activity. At no point in his brief does Sanders provide any authority recognizing this conduct as deserving of constitutional protection. In contrast, the State references several decisions which have rejected the notion that making and distributing child pornography is a constitutionally protected activity simply because the minor could lawfully consent to sexual activity. 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. *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020).

Finally, Sanders tries to seize upon language in *Obergefell v. Hodges*, 576 U.S. 644, 667, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), to argue that *Lawrence* "broadly protects private 'intimate association' of any kind." But as mentioned, *Lawrence* explicitly placed limits on its applicability by noting the case "does not involve minors[,] . . . persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused[, or] . . . public conduct or prostitution." *Lawrence*, 539 U.S. at 578. Thus, contrary to Sanders' assertion, *Lawrence* did not recognize a broadly defined fundamental right to engage in all forms of private sexual conduct, and we reject Sanders' claim that making and distributing child pornography is a constitutionally protected activity simply because the minor could lawfully consent to sexual activity. Accordingly, we find Sanders fails to carry his burden of proving his substantive due process claim based on *Lawrence* and the Fourteenth Amendment.

C. *Sanders fails to brief his claim that a "right to privacy" is a natural right protected under section 1 of the Kansas Constitution Bill of Rights.*

Moving to Sanders' challenge based on section 1 of the Kansas Constitution Bill of Rights, he first argues that the Kansas Supreme Court has identified a "'right to privacy'" as a "'natural right'" deserving of constitutional protection. See *Hodes I*, 309 Kan. at 650 (citing *Kunz v. Allen*, 102 Kan. 883, 884, 172 P. 532 [1918]). Sanders also argues the "right to self-autonomy" recognized in *Hodes I* should also include the right to engage in private, consensual sexual intimacy. These points are unpersuasive and lack adequate support.

While Sanders is correct that *Hodes I* mentioned privacy as a natural right, Sanders ignores that the *Hodes I* court explained that explicitly recognizing a constitutional right to privacy was "'not necessary'" to its decision to recognize that the Kansas Constitution protects the right to decide whether to continue a pregnancy. *Hodes I*, 309 Kan. at 650 (quoting *Preterm Cleveland v. Voinovich*, 89 Ohio App. 3d 684, 692, 627 N.E.2d 570 [1993]). Similarly, *Hodes I* said nothing about whether the right to self-autonomy includes a right to sexual privacy as Sanders asserts in his

brief. The only cases cited by Sanders other than *Hodes I* on this issue are not on point because they specifically dealt with interpreting the Georgia constitutional right to privacy that has been developed through years of Georgia caselaw. See *In re J.M.*, 276 Ga. 88; *Powell v. State*, 270 Ga. 327, 329, 510 S.E.2d 18 (1998). For these reasons, we likewise find he has failed to carry his burden of proving a claim based on section 1 of the Kansas Constitution Bill of Rights.

II. *The identical offense doctrine does not apply to Sanders' sentence.*

Sanders next argues that the district court should have sentenced him for attempted aggravated intimidation of a witness because he was found guilty of a completed aggravated intimidation of a witness based on a jury finding of attempted conduct. Stated another way, Sanders asserts the identical offense doctrine applies to his case because the elements of his crime of conviction are identical to an attempt to commit the same offense. We find his argument unpersuasive.

As Sanders notes, where two criminal offenses have the same elements but impose different penalties, a defendant convicted of either crime may be sentenced only under the lesser penalty provision. *State v. Euler*, 314 Kan. 391, 400, 499 P.3d 448 (2021). The identical offense doctrine applies either when: (1) the two offenses each have some provisions that overlap, the overlapping provisions apply to the charged crime, and the overlapping portions of the offenses are identical except the penalty; or (2) the two offenses have entirely identical provisions except the penalty provisions. 314 Kan. at 400. According to Sanders, the former scenario is present here because he was convicted of aggravated intimidation of a witness based on an attempt to prevent Doe from reporting his crimes, which has elements that overlap with the crime of attempted aggravated intimidation of a witness.

We disagree. The identical offense doctrine does not apply because Sanders is not comparing two separate criminal offenses, but two offenses arising under a single statute with different severity levels. See *State v. Robinson*, 293 Kan. 1002, 1037, 270 P.3d 1183 (2012) (holding identical offense doctrine "applies only

when two separate criminal offenses are compared"). Sanders points out the rule cited by the State was made "in the context of cases in which a lesser offense was asserted to be identical to a greater offense that criminalized the same conduct as the lesser offense *with an additional aggravating element*." He also asserts this case involves multiple statutes, particularly K.S.A. 21-5301 (defining "attempt" and prescribing lesser penalties for attempted crimes) and K.S.A. 21-5909 (defining simple and aggravated intimidation of a witness offenses and prescribing penalties).

Sanders, however, makes a critical error in presenting his identical offense doctrine claim. While he is correct that K.S.A. 21-5301(a) defines "attempt" crimes, he overlooks that the Legislature deliberately designed the intimidation of a witness statute to avoid its application by including "attempt" language in the offense's elements. See K.S.A. 21-5909(a); *State v. Mora*, 315 Kan. 537, 542, 509 P.3d 1201 (2022) (discussing different ways Legislature has addressed attempt crimes and when default definition applies); *State v. Horn*, 288 Kan. 690, Syl. ¶ 2, 206 P.3d 526 (2009) ("Where the statute defining a crime does not include an attempt as a means of violating that criminal statute, an attempt to commit the crime is a separate offense which is created and defined by the provisions of [predecessor to K.S.A. 21-5301(a)].").

Moreover, the Kansas Supreme Court has held "attempting to prevent or dissuade" a victim is "not [an] alternative means of committing the crime of aggravated intimidation of a victim." *State v. Aguirre*, 296 Kan. 99, 108, 290 P.3d 612 (2012). "[T]he crime of aggravated intimidation is complete when the defendant, with the requisite intent, commits an act to intimidate the victim." 296 Kan. at 106. In other words, the attempt subsection of the aggravated intimidation of a witness statute which Sanders was convicted of is but one example of the factual circumstances that could establish the actus reus of the offense.

We conclude that the identical offense doctrine does not apply here because attempted aggravated intimidation of a witness, K.S.A. 21- 5909(a)(2)(A), is not a separate offense controlled by K.S.A. 21-5301 or subject to the reduced penalty provisions of that statute. Because the aggravated intimidation of a witness statute includes attempt language, the offense is complete even when

a defendant attempts to prevent or dissuade a witness. Accordingly, we reject Sanders' invitation to apply the identical offense doctrine to his conviction for aggravated intimidation of a witness.

III. *Because there was evidence presented to the jury regarding Sanders' age, the district court did not err in imposing lifetime postrelease supervision.*

Sanders next challenges the district court's imposition of a lifetime postrelease supervision term under K.S.A. 22-3717(d)(1)(G)(i), which requires a lifetime term if an offender was 18 or older when they committed a sexually violent crime. According to Sanders, his crime of conviction did not include his age as an element of the offense, so he was convicted of a "lesser" offense that only required a 60-month postrelease supervision term.

To begin, Sanders concedes he is raising this claim for the first time on appeal, yet he asserts this court can consider it because an illegal sentence can be corrected "'at any time.'" K.S.A. 22-3504(a); *State v. Dickey*, 301 Kan. 1018, 1034, 350 P.3d 1054 (2015).

Our Supreme Court has repeatedly held that K.S.A. 22-3504(a) does not cover a claim that a sentence violates a constitutional provision. See *State v. Warrior*, 303 Kan. 1008, 1010, 368 P.3d 1111 (2016). Apparently to avoid this rule, Sanders insists he is challenging his lifetime postrelease supervision term as a statutory illegal sentence claim rather than raising a claim based on a constitutional violation under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Yet, he relies heavily on *Apprendi* to argue his claim.

For example, Sanders asserts "[c]rimes are defined by their 'elements,'" and "[c]onstitutionally speaking an 'element' is any fact that must be proven to either create, or enhance, a defendant's exposure to punishment." These assertions are merely recitations of the *Apprendi* court's recognition that a "'sentence enhancement' [factor] is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Indeed, it fits squarely within the usual definition of an 'element' of the offense." *Apprendi*, 530 U.S. at 494 n.19; *State v. Bello*, 289 Kan.

191, 199, 211 P.3d 139 (2009) ("[M]erely because a state legislature places a sentence enhancing factor within the sentencing provisions of the criminal code does not mean that the factor is not an essential element of the offense.") (citing *Apprendi*, 530 U.S. at 495).

By definition, Sanders' purported "illegal sentence" claim clearly implicates *Apprendi* because he is arguing the district court increased the penalty for his crime of conviction beyond the prescribed statutory maximum based solely on judicial fact-finding of his age. See *Blakely v. Washington*, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum [a judge] may impose *without* any additional findings. [Citations omitted.]"). Put simply, Sanders cannot disguise his argument as an illegal sentence claim to avoid adverse caselaw stemming from *Apprendi* while still relying on its holdings. His illegal sentence claim necessarily fails.

We note that the recent Supreme Court case of *State v. Nunez*, 319 Kan. 351, 354, 554 P. 3d 656 (2024)—decided while this appeal was pending— did address this issue, but not as an illegal sentence claim. There the court noted that an *Apprendi* error can be harmless if the reviewing court is convinced beyond a reasonable doubt the jury verdict would have been the same absent the error related to the omitted element, and that the omitted element was also uncontested and supported by overwhelming evidence. 319 Kan. at 356. Here, although the State never explicitly asked the jury to make a finding of Sanders' age, Detective Crystal Schell nonetheless testified at trial that Sanders provided his date of birth as March 21, 1974, upon his arrest. This meant Sanders was 43 years old when the investigation began in February 2018, and 44 years old at the time of arrest. He did not contest this evidence. Based on this evidence, the jury could reasonably have concluded beyond a reasonable doubt that Sanders was 18 or older at the time of his crimes.

IV. *Lifetime postrelease supervision is not cruel or unusual punishment as applied to Sanders.*

Sanders also challenges his lifetime postrelease supervision term by arguing it constitutes cruel or unusual punishment in violation of section 9 of the Kansas Constitution Bill of Rights under the specific facts of his case. As support, he asserts his conduct—sharing and possessing sexual imagery of Doe—is "decidedly less harmful than actual sexual intercourse that our legislature has not deemed fit to criminalize *at all*," and that no other states mandate an irrevocable term of lifetime supervision for similar conduct.

Appellate courts apply a bifurcated standard of review when assessing whether a sentence is cruel or unusual in violation of section 9 of the Kansas Constitution Bill of Rights. See *State v. Mossman*, 294 Kan. 901, 906, 281 P.3d 153 (2012) (citing *State v. Ortega-Cadelan*, 287 Kan. 157, 160, 194 P.3d 1195 [2008]). We review the district court's factual findings for substantial competent evidence without reweighing the evidence. The legal conclusions drawn from the factual findings are considered de novo. 294 Kan. at 906 (citing *State v. Gant*, 288 Kan. 76, 80, 201 P.3d 673 [2009]; *State v. Woolverton*, 284 Kan. 59, 70, 159 P.3d 985 [2007]).

In addition, a challenge to lifetime postrelease supervision imposed under K.S.A. 22-3717(d)(1)(G) is an indirect attack on the statute's constitutionality as applied. "[I]f there is any reasonable way to construe the statute as constitutional, courts have the duty to do so by resolving all doubts in favor of constitutionality." *Mossman*, 294 Kan. at 906-07 (citing *State v. Laturner*, 289 Kan. 727, 735, 218 P.3d 23 [2009]).

As Sanders notes, he is specifically raising an as-applied challenge based solely on section 9 of the Kansas Constitution Bill of Rights, which provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." Kansas courts assess such challenges relying on the analysis set out in *Freeman*, which identified the following relevant factors for determining whether a particular sentence violates the Kansas Constitution's prohibition against cruel and unusual punishments:

"(1) The nature of the offense and the character of the offender should be examined with particular regard to the degree of danger present to society; relevant to this inquiry are the facts of the crime, the violent or nonviolent nature of the offense, the extent of culpability for the injury resulting, and the penological purposes of the prescribed punishment;

"(2) A comparison of the punishment with punishments imposed in this jurisdiction for more serious offenses, and if among them are found more serious crimes punished less severely than the offense in question the challenged penalty is to that extent suspect; and

"(3) A comparison of the penalty with punishments in other jurisdictions for the same offense." 223 Kan. at 367.

No one factor is controlling, and the court should consider each factor—but one factor may weigh so heavily in a specific case that it determines the outcome. *State v. Funk*, 301 Kan. 925, 935, 349 P.3d 1230 (2015).

A. Freeman *Factor 1: Nature of the Offense and Character of the Offender*

The first *Freeman* factor is "inherently factual, requiring examination of the facts of the crime and the particular characteristics of the defendant." *Ortega-Cadelan*, 287 Kan. at 161. Sanders argues the district court improperly considered this factor by basing its decision primarily on findings related to his character, rather than the nature of his criminal conduct that led to his convictions. Sanders makes no attempt to challenge the district court's factual findings that he "sat in a fiduciary relationship" to "groom[]" Doe and was a "predator." As a result, he has waived and abandoned those points. *Meggerson*, 312 Kan. at 246 (points raised incidentally in a brief and not argued therein are deemed waived or abandoned).

Sanders primarily argues the district court improperly weighed this factor in the State's favor because his level of culpability is lower than a hypothetical defendant who possessed or requested sexually explicit images of someone under the age of 16 who could not lawfully consent to a sexual relationship. He also points out that his criminal history was low, thus suggesting he is not "prone to the sort of recidivism that postrelease sentences are intended to prevent." The only case Sanders cites in direct support of his view that this factor weighs in his favor is *State v. Proctor*,

No. 104,697, 2013 WL 6726286, at *4 (Kan. App. 2013) (unpublished opinion), for the proposition that the State's "legitimate interest in the indefinite monitoring of child sex offenders . . . is not without limit."

In *Proctor*, the 19-year-old defendant pleaded guilty to several child sex crimes after he, on multiple occasions, "cajoled [a 12-year-old family friend] into having manual and oral contact with [his] penis." 2013 WL 6726286, at *2. On appeal, this court found the first *Freeman* factor weighed in the defendant's favor based on several facts, mainly because the district court had determined the circumstances warranted imposing probation. 2013 WL 6726286, at *4. In the panel's view, subjecting Proctor to a potential lifetime prison sentence for a felony conviction was "constitutionally irreconcilable with the district court's entirely proper determination to place Proctor on probation." 2013 WL 6726286, at *4. The panel also noted Proctor's young age and lack of criminal history, combined with the evidence presented that Proctor himself was a victim of child sex abuse, suggested the penological purposes of lifetime postrelease supervision would not be served under the facts of the case. 2013 WL 6726286, at *5-6.

But Sanders cannot rely on Proctor because the only relevant factor present in both cases is a lack of significant criminal history. And *Proctor* says nothing about a victim's capability to consent factoring into the court's consideration of the first *Freeman* factor because the crimes involved a 12-year-old victim. So contrary to Sanders' points, he offers nothing but conclusory assertions to challenge the district court's legal conclusion that the nature of his offenses and his character weighed in his favor. See *Meggerson*, 312 Kan. at 246. As a result, the district court correctly weighed the first *Freeman* factor in the State's favor.

B. Freeman *Factor 2: Comparison of Punishments in Kansas*

When discussing the second *Freeman* factor, the district court found it "finds against the defendant" without much elaboration. After making findings for all three factors, the court explained the nature of the offense and Sanders' character—as well as "the goals of post-release supervision"—"outweigh[ed] the lack of strict pro-

portionality with other sentences in Kansas and other jurisdictions, especially those that the sentence is not grossly disproportional." The court also said it was "adopt[ing] the other findings set forth in [*State v. Cameron*, 294 Kan. 884, 889, 281 P.3d 143 (2012); *Mossman*, 294 Kan. at 903; and *State v. Collins*, No. 105,523, 2012 WL 5519088, *3 (Kan. App. 2012) (unpublished opinion)], and the arguments set forth by the State at this point in time."

Before discussing the cases referenced in the district court's ruling, we first note the State made the following statements at the hearing potentially in relation to the second *Freeman* factor:

- "[W]hile this is a sex offense and potentially lower severity level on the grid as far [as] sex offense convictions would go, I would submit that this is still a violent offense."
- "[I]n comparing this punishment with punishments imposed in this jurisdiction for more serious offenses or even comparable offenses, I would submit again that this does not rise to the level of being unconstitutional."

Both defendants in *Cameron* and *Mossman* compared the penalty for their crimes of conviction—aggravated indecent solicitation of 12-year-old child and aggravated indecent liberties with a 15-year-old child, respectively—to that imposed for an offender convicted of second-degree murder to discuss proportionality. The Kansas Supreme Court was unconvinced in both cases that a lifetime postrelease supervision term was so grossly disproportionate to weigh the second *Freeman* factor in either defendants' favor simply because the prison sentence for a second-degree murder conviction was longer. See *Cameron*, 294 Kan. at 893; *Mossman*, 294 Kan. at 917. This court relied on the same rationale in *Collins* to uphold the lifetime postrelease supervision term imposed for a conviction of aggravated indecent solicitation of an 11-year-old child. *Collins*, 2012 WL 5519088, at *3-4.

Here, Sanders argues only the district court's analysis of the second *Freeman* factor is "flawed" because his crimes might be less serious than "conduct that is lawful in Kansas, and, thus, carries no punishment at all." In short, Sanders asserts this factor

should have weighed in his favor because "Kansas counterintuitively punishes the exchange of sexual imagery more seriously than actual sexual intercourse," which in his view is "decidedly odd and unjust" because he is being punished for conduct that "entails a [lesser] level of intimacy."

The only authority Sanders cites to support his point is a concurring opinion in *Rouse*, 936 F.3d at 852-53, in which Eighth Circuit Judge Beam wrote separately to note that "the conviction and especially the sentence of 96 months–under the particular facts of this case is unseemly and quite possibly unfair." Like Sanders, Rouse engaged in a consensual sexual relationship with a 16-year-old girl. Rouse later plead guilty to a distribution of child pornography charge for transmitting a video of one of the sexual encounters to the victim. *Rouse* is inapplicable to the current issue because it did not involve a challenge to any portion of the defendant's sentence as being cruel and unusual punishment.

Moreover, as the State points out, accepting Sanders' invitation to substitute the second *Freeman* factor for a more favorable comparison would be contrary to Kansas Supreme Court precedent. *State v. Rodriguez*, 305 Kan. 1139, 1144, 390 P.3d 903 (2017) (this court is duty bound to follow Kansas Supreme Court precedent). As Sanders offers no compelling argument to counter the district court's rationale for weighing the second *Freeman* factor in his favor, this court has to adopt the rationale in *Cameron* and *Mossman*. Moreover, as these courts recognized, sexual exploitation of a child—regardless of the victim's age—is still statutorily defined as a sexually violent crime. K.S.A. 22-3717(d)(5)(H). Thus, we find that the district court's factual findings support its legal conclusion that the second *Freeman* factor does not weigh in Sanders' favor.

C. Freeman *Factor 3: Comparison with Punishments in Other States*

When discussing the third and final *Freeman* factor, the district court found "there are other jurisdictions that have this same sentencing scheme," so it "weighs against the defendant as well." And as mentioned above, the court explained the first *Freeman* factor "outweigh[ed] the lack of strict proportionality with other

sentences in Kansas and other jurisdictions, especially those that the sentence is not grossly disproportional" and adopted the rationale expressed in *Collins*, *Cameron*, and *Mossman*.

Like the previous factor, Sanders says the district court's analysis is flawed because Kansas mandates an irrevocable term of lifetime postrelease supervision for conduct that would not be punished similarly in other jurisdictions. Yet he mentions the Kansas Supreme Court has recognized that there is no national consensus against imposing lifetime postrelease supervision on offenders convicted of child pornography and similar offenses. See *State v. Williams*, 298 Kan. 1075, 1088-89, 319 P.3d 528 (2014) (citing *United States v. Williams*, 636 F.3d 1229 [9th Cir. 2011]) (considering categorical challenge to lifetime postrelease supervision arising under the Eighth Amendment). But according to Sanders, it is significant that Kansas requires judges to impose lifetime supervision, while that decision is discretionary at the federal level.

As an example, Sanders compares two hypothetical defendants: (1) "a pedophile [who] downloads thousands of sexually sadistic images depicting extremely young children"; and (2) a 19-year-old female "[who] requests a nude photo from her 17-year-old boyfriend." Because a sentencing judge would be compelled to impose lifetime postrelease supervision on both defendants under Kansas law—but could use "his or her common sense to distinguish the pedophile from the 19-year-old who had the misfortune of having a slightly younger boyfriend" under federal law—Sanders argues the third *Freeman* factor should weigh in his favor.

In response, the State points to this court's decision in *State v. Wieland*, No. 114,900, 2017 WL 657999, at *5-6 (Kan. App. 2017) (unpublished opinion), which rejected an as-applied challenge to a term of lifetime postrelease supervision based on section 9 of the Kansas Constitution Bill of Rights. There, we recognized that "Kansas appears to impose the most severe postrelease supervision for attempted possession of child pornography. . . . [But] that doesn't mean the state with the harshest punishment necessarily has committed a constitutional violation. Or here, since that appears to be Kansas, the punishment runs afoul of the third *Freeman* factor." 2017 WL 657999, at *5. This court added:

"The first and second factors are far more significant in determining whether the Kansas Constitution has been violated, since they deal with the circumstances of the case and the intent of the Kansas Legislature in fixing criminal penalties. How Kansas fares against other states and their legislative approaches to sentencing criminals presents a less compelling criterion for establishing a violation of § 9." 2017 WL 657999, at *5.

Although this court is not bound by decisions from other panels, the State correctly points out that *Cameron* and *Mossman* expressed similar rationales for concluding lifetime postrelease supervision sentences for offenders convicted of statutorily defined sexually violent crimes are not disproportionate to the punishments imposed in other jurisdictions for similar offenses. *Cameron*, 294 Kan. at 894-95 (citing *Mossman*, 294 Kan. 901, Syl. ¶ 5). Because Sanders offers no compelling reason to differentiate his case, this court finds that the district court correctly weighed the third *Freeman* factor in the State's favor.

In sum, contrary to Sanders' points, the district court did not err in weighing the three *Freeman* factors in this case and concluding that lifetime postrelease supervision was not cruel and unusual punishment in violation of the Kansas Constitution.

V. *The district court did not err in imposing Children's Advocacy Center assessment fees for each crime.*

Sanders next argues the district court erred in imposing four Children's Advocacy Center (CAC) fees under K.S.A. 20-370(a), rather than a single $400 fee.

Resolving this issue requires statutory interpretation, which presents a question of law subject to unlimited review. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019). 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). This court must first attempt to determine legislative intent though the statutory language enacted, giving common words their ordinary meanings 315 Kan. at 698. Unless the statute is ambiguous, courts need not resort to canons of statutory construction or legislative history to determine the legislative intent. *Betts*, 316 Kan. at 198.

The relevant statute is K.S.A. 20-370(a), which provides "[o]n and after July 1, 2013, any defendant convicted of a crime under

chapter 21 of the Kansas Statutes Annotated, and amendments thereto, in which a minor is a victim, shall pay an assessment fee in the amount of $400 to the clerk of the district court." Here, the district court imposed a $1,600 CAC fee, so presumably the amount reflects a $400 fee for each of Sanders' four convictions involving a minor victim.

The only Kansas appellate court that appears to have interpreted the statute thus far is *State v. McDuffie*, No. 113,987, 2017 WL 2617648 (Kan. App. 2017) (unpublished opinion). There, this court determined the language of the statute could be read two ways: (1) as creating a "one-to-one ratio, where defendants convicted of one crime against a minor are required to pay one fee, but defendants convicted of multiple crimes against minors are required to pay the number of fees equal to the crimes committed against minors"; or (2) "as requiring a defendant convicted of any unspecified number of crimes against minors to pay just one assessment fee." 2017 WL 2617648, at *19. Thus, the panel turned to legislative history to resolve the ambiguity and concluded the Legislature "intended to create a one-to-one crime-to-fee ratio requiring defendants to pay a CACF assessment fee for each crime they are convicted of committing against a minor." 2017 WL 2617648, at *19.

Both Sanders and the *McDuffie* panel rest their arguments on the words "a" crime and "an" assessment, focusing on the use of indefinite articles. Although we reach the same ultimate conclusion, we focus on the definition of the words used. After all, the first rule of statutory interpretation requires us to first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Betts*, 316 Kan. at 198.

The issue of whether fees are assessed per charge, per crime, per case or per traffic citation is an issue upon which the Legislature has been consistent and clear. So how are those words defined and how have they been used in similar statutes?

A crime is defined in Kansas statutes as "an act or omission defined by law and for which, upon conviction, a sentence of death, imprisonment or fine, or both imprisonment and fine, is au-

thorized or, in the case of a traffic infraction or a cigarette or tobacco infraction, a fine is authorized." K.S.A. 21-5102. Likewise, Black's Law Dictionary defines a "crime" as a singular act or "[a]n act that the law makes punishable." Black's Law Dictionary 466 (12th ed. 2024).

The term "charge" is not specifically defined by statute, but it is defined as it relates to the definition of a complaint, information, or indictment as "a plain and concise written statement of the essential facts constituting the crime charged." K.S.A. 22-3201. Black's Law Dictionary defines a charge as "[a] formal accusation of an offense as a preliminary step to prosecution." Black's Law Dictionary 291 (12th ed. 2024).

The term "count" is also not defined by statute, but in common legal usage it means "[t]he part of a charging instrument alleging that the suspect has committed a distinct offense." Black's Law Dictionary 441 (12th ed. 2024). And finally, an "offense" is defined as "[a] violation of the law, a crime." Black's Law Dictionary 1296 (12th ed. 2024).

"The terms 'crime,' 'offense,' and 'criminal offense' are all said to be synonymous, and ordinarily used interchangeably." 22 C.J.S., Criminal Law § 3. So the terms crime, charge, count, and offense refer to a singular event.

On the other hand, the term "case" refers to a civil or criminal action or proceeding. Black's Law Dictionary 266 (12th ed. 2024). When we refer to a case, we refer to a singular court action which may contain multiple charges or crimes.

So we turn to other statutes in which these terms are used as applied to the assessment of fees.

- The best example of similar language is contained in K.S.A. 8-2110(c).

"[W]hen the district or municipal court notifies the division of vehicles of a failure to comply with a traffic citation pursuant to subsection (b), the court shall assess a reinstatement fee of $100 *for each charge* on which the person failed to make satisfaction regardless of the disposition of *the charge* for which such citation was originally issued and regardless of any application for restricted driving privileges." (Emphasis added.)

At least since 1985, K.S.A. 8-2110(c) has provided that driver's license reinstatement fees were assessed per charge when a

driver failed to comply with a charge contained in a traffic citation (even though the amount steadily increased). See K.S.A. 1985 Supp. 8-2110(c).

But effective January 1, 2025, the statute has been amended to

"[W]hen the district or municipal court notifies the division of vehicles of a failure to comply with a traffic citation pursuant to subsection (b), the court shall assess a reinstatement fee of $100." L. 2024, ch. 101, § 2 (S.B. 500).

The Legislative Summary for S.B. 500 (2024) states:

"The bill limits reinstatement fees assessed under continuing law following failure to comply to a single fee of $100, replacing the requirement that imposes a separate $100 reinstatement fee for each charge associated with the citation with which the individual did not comply, regardless of the disposition of the charge."

The use of the term "traffic citation" in the newly adopted statute is significant. A traffic citation is a charging document that lists the offenses that are being charged. K.S.A. 8-2106(b). So failure to comply with a traffic citation would include all the charges contained in that citation. It is the failure to comply with the citation (not the individual charges) which results in the assessment of a fee in the amended provision. The language is clear and denotes a change in the language of the statute.

- Under K.S.A. 28-172a, regarding docket fees:

"(c) *If a conviction is on more than one count*, the docket fee shall be the highest one applicable to any one of the counts. The prosecuting witness or defendant, if assessed the costs, *shall pay only one fee*. Multiple defendants shall each pay one fee." (Emphasis added.)

- Under K.S.A. 2023 Supp. 32-1049a, regarding failure to comply with a wildlife and parks citation:

"(d) Except as provided in subsection (e), when the district court notifies the department of a failure to comply with a wildlife and parks citation *or failure to comply with a sentence of the district court imposed on violation of a wildlife and parks law or rule and regulation,* the court shall assess a reinstatement fee of $50 *for each charge or sentence* on which the person failed to make satisfaction, regardless of the disposition of the charge for which such citation was originally issued." (Emphasis added.)

- Under K.S.A 28-176(a):

"The court shall order any person convicted . . . of a misdemeanor or felony contained in chapters 21, 41 or 65 of the Kansas Statutes Annotated, and amendments thereto, . . . to pay a separate court cost of $400 *for every individual offense* if forensic science or laboratory services, forensic computer examination services or forensic audio and video examination services are provided, in connection with the investigation." (Emphasis added.)

See *State v. Goeller*, 276 Kan. 578, 584, 77 P.3d 1272, 1276 (2003), overruled on other grounds by *State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015) ("The phrase 'for each offense' is clear; 'each offense' means each count on which Goeller was convicted. It matters not that multiple offenses were charged in one case.").

Keeping this definitional framework in mind, the statute at issue here, K.S.A. 20-370, reads as follows:

"(a) On and after July 1, 2013, any defendant *convicted of a crime* under chapter 21 of the Kansas Statutes Annotated, and amendments thereto, in which a minor is a victim, shall pay an assessment fee in the amount of $400 to the clerk of the district court." (Emphasis added.)

The statute specifies "a crime," which is a singular event, as is "a charge." It does not use the term per case or per complaint or per traffic citation. As a result, we hold that K.S.A. 20-370(a) requires a defendant convicted of a crime against a minor victim to pay an assessment fee for each crime committed against a minor. Thus, the district court did not err in imposing an assessment fee for each of the four crimes Sanders committed against Doe.

VI. *The parties agree that the district court erred in imposing a higher witness mileage fee after sentencing.*

For his final issue, Sanders argues the district court erred when it entered a higher witness mileage fee on the journal entry of judgment than the amount assessed at sentencing. He seeks a nunc pro tunc order to correct the journal entry, which this court can address for the first time on appeal. See *State v. Edwards*, 309 Kan. 830, 835, 440 P.3d 557 (2019) ("[A]ny journal entry variance from a judge's oral pronouncement during sentencing is a clerical error that may be corrected at any time."). The State concedes that the journal entry is incorrect and that the appropriate remedy is to

remand with directions to correct the journal entry. We agree and so order.

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

(564 P.3d 17)

No. 127,031

JUSTIN RUMBAUGH, *Appellant*, v. DIRECTV and AMERICAN ZURICH INSURANCE COMPANY, *Appellees*.

SYLLABUS BY THE COURT

WORKERS COMPENSATION—*Employer Obtains Subrogation Lien by Statute on Employee's Third-Party Recovery if Recovery Duplicates Award.* Pursuant to K.S.A. 44-504(b), an employer obtains a subrogation lien on an employee's third-party recovery only to the extent that the employee's recovery duplicates an award paid or owed by the employer under the Workers Compensation Act.

Appeal from Workers Compensation Board. Submitted without oral argument. Opinion filed January 17, 2025. Affirmed in part, reversed in part, and remanded with directions.

Bruce Alan Brumley and *Chloe Elizabeth Davis*, of Brumley Law Offices, of Topeka, for appellant.

Andrew T. Jones, of Wiedner & McAuliffe, Ltd., of Overland Park, for appellees.

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

HURST, J.: After suffering a back injury at work in 2014, Justin Rumbaugh received treatment through his employer's workers compensation insurer in accordance with the Workers Compensation Act. In 2016, about eight months after Rumbaugh was released to return to work and two years after his original work injury, Rumbaugh presented to an emergency department with symptoms of cauda equina syndrome. Unfortunately, he was not immediately diagnosed and later brought a third-party medical malpractice action alleging he suffered permanent, continuing urological conditions from the delayed diagnosis.

In 2018, Rumbaugh reached a settlement with his employer, DirecTV, and its workers compensation insurer, American Zurich Insurance Company (collectively Respondents), related to outstanding claims for his 2014 work injury, but that settlement excluded claims for future medical benefits. Then, in 2020,

Rumbaugh also settled a third-party medical negligence claim related to damages for his delayed cauda equina syndrome diagnoses. After several communication attempts, to which Respondents did not reply, Rumbaugh sent Respondents a check and letter explaining that the check was intended to resolve any subrogation amount owed to Respondents.

Rumbaugh later filed a post-award application for workers compensation benefits related to his 2014 back injury, but the Workers Compensation Board (the Board) found that Respondents held a subrogation lien against Rumbaugh's entire third-party medical malpractice settlement award and that Rumbaugh must use it first to satisfy all future medical bills. The Board also found that Rumbaugh failed to establish his accord and satisfaction claim. Rumbaugh appeals, claiming that K.S.A. 44-504(b) of the Workers Compensation Act grants Respondents a subrogation lien only on duplicative damage awards—and his third-party medical negligence award was not duplicative—and the Board erred when it refused to address his accord and satisfaction claim.

The Board erred by granting Respondents a lien against Rumbaugh's entire third-party medical malpractice settlement award without determining whether the medical malpractice award constitutes duplicative recovery for Rumbaugh's workers compensation award. However, Rumbaugh failed to show that the Board erred when it found his accord and satisfaction claim untimely. Accordingly, the Board's decision that Respondents hold a subrogation lien against Rumbaugh's entire third-party medical malpractice award is reversed and remanded for further consideration consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

On April 30, 2014, Rumbaugh suffered a back injury while at work which was treated through his employer's workers compensation insurer. In October 2014, Rumbaugh underwent a left L3-L4 and left L4-L5 hemilaminectomy and microdiscectomy surgical procedure to repair his injured back. Dr. Daniel Zimmerman released Rumbaugh from treatment in February 2016 after finding Rumbaugh's condition was stable and had reached maximum medical improvement. Even so, Dr. Zimmerman believed that

Rumbaugh would likely need additional medical treatment and identified work restrictions for him to return to work.

In April 2016, Rumbaugh started working for the United States Postal Service but had to cease that work shortly thereafter due to his lower back pain. On October 2, 2016, Rumbaugh went to the emergency room of the Geary County Community Hospital with urinary retention complaints. The doctor who evaluated Rumbaugh attributed his complaints to prostate medication issues—not his back injury or spinal issues. Rumbaugh had a history of disc herniations and was exhibiting symptoms of cauda equina syndrome but was not diagnosed at that time. Cauda equina syndrome is swelling around the nerve roots in the spinal column and is an urgent or emergency condition requiring immediate treatment.

A few days later, on October 5, 2016, Rumbaugh went back to the emergency room with continuing urinary retention and bilateral leg weakness. Rumbaugh was diagnosed with cauda equina syndrome and referred to a neurosurgeon. Rumbaugh underwent a decompression surgery to address the cauda equina syndrome the next day, but the surgery did not restore his bladder or bowel control.

Dr. Theodore Koreckij examined Rumbaugh on November 18, 2016, and diagnosed him with cauda equina syndrome, secondary to disc reherniation at L3-L4 status post decompression with persistent neurologic sequela, neurogenic bowel, neurogenic bladder, and L3 pars fracture with instability. Dr. Koreckij believed that Rumbaugh's condition was related to his original workers compensation injury in April 2014. Dr. Koreckij recommended a L3-L5 fusion, repeat CT and MRI scans, and continued physical therapy. He opined that Rumbaugh was at maximum medical improvement for the cauda equina syndrome.

Workers Compensation and Third-Party Medical Malpractice Settlements

On April 17, 2018, Rumbaugh settled his back injury workers compensation claim with Respondents. According to the workers compensation settlement agreement, Rumbaugh received $72,500

as a "strict compromise" of all issues except future medical treatment. The workers compensation settlement resolved all issues related to indemnity, including future temporary total disability, work disability, vocational rehabilitation, and right to review and modification. Respondents reserved the right to obtain and fund a Medicare Set-Aside trust approved by the Centers for Medicare and Medicaid Services (CMS) for Rumbaugh's future medical care. See K.S.A. 44-510h; K.S.A. 44-510k. During the workers compensation settlement hearing, the administrative law judge (ALJ) explained to Rumbaugh that "your future medical is being left open, and you just must make sure you get prior approval."

Rumbaugh later filed a medical negligence claim where he alleged that he suffered damages from a negligent delay in diagnoses and treatment for his cauda equina syndrome on October 2, 2016. Rumbaugh did not contend the negligence caused his need for cauda equina surgery but claimed the negligence delayed the timing of his treatment, which caused him urological problems.

In March 2020, Rumbaugh's medical malpractice attorney reached out to Respondents' counsel to involve them and protect their subrogation lien interest under K.S.A. 44-504. According to Rumbaugh's attorney, Respondents' counsel failed to respond to multiple phone calls and emails about the medical malpractice mediation. Rumbaugh attended mediation and reached a tentative settlement of his medical malpractice claims without Respondents' involvement or input.

On April 6, 2020, Rumbaugh's medical malpractice counsel sent a letter to Respondents' counsel stating Rumbaugh's position about Respondents' subrogation amount after deducting attorney fees and expenses, which stated:

"We went through the itemization [of medical bills paid] you provided to determine which bills were related to Mr. Rumbaugh's urological problems. As you will see from the attached itemization, those bills total $59,796.53. In addition, I have attached a lost wage itemization that shows $9,216.90 in benefits paid. Together, these amounts total $69,013.43 in past benefits paid. As mentioned above, our attorney fees and expenses represent 46.20% of the total settlement. Reducing for attorney fees and expenses, we show **Gallagher Bassett's claimed lien should be $37,129.23** [$69,013.43 – ($69,013.43 * 46.20%)].

"If you are in agreement with the same, **please forward me a letter showing payment for $37,123.23 [sic] will satisfy your subrogation interests**. Should

you have any questions or concerns, please do not hesitate to contact me. Thank you in advance."

On April 14, 2020, Rumbaugh formally settled his third-party medical malpractice claims. According to Rumbaugh's counsel, the medical malpractice settlement related only to Rumbaugh's urological symptoms from the delay in proper diagnosis and treatment of his cauda equina syndrome. The attorney testified that he did not believe the "settlement encompassed treatment related to [Rumbaugh's] back pain." The confidential settlement was approved by the Sedgwick County District Court and required Rumbaugh to satisfy any valid subrogation interest through Rumbaugh's workers compensation carrier.

On April 27, 2020, after several attempts to contact Respondents about the subrogation lien under K.S.A. 44-504(b) without a response, Rumbaugh's counsel sent a certified letter with a check asking that Respondents accept the check for $37,129.23 in full accord and satisfaction of any subrogation lien. The letter included with the check stated:

"Pursuant to in my April 2, 2020, email, I have enclosed a check for $37,129.23 in relation to your client, American Zurich Insurance Company's, subrogation interests. This check is meant to serve as a full accord and satisfaction as to any subrogation interests, future setoffs/credits, and/or lien interests American Zurich Insurance Company and/or Gallagher Bassett have or claim to have in Mr. Rumbaugh's third-party liability settlement. Should you have any questions or concerns, please do not hesitate to contact me. If I have not heard from you otherwise, I will presume this matter is closed."

American Zurich Insurance Company cashed the check, but neither Respondents nor their counsel contacted Rumbaugh's medical malpractice counsel.

First Application for Post-Award Benefits

Rumbaugh filed a series of applications for post-award modifications of medical benefits and applications for a preliminary hearing to the Board. On November 24, 2021, in response to Rumbaugh's first post-award application, the ALJ denied payment of Rumbaugh's medical bills because he failed to introduce the bills into evidence, provide foundation for the bills, and establish that the bills arose from authorized medical treatment. In addition,

the ALJ ruled that Rumbaugh established an accord and satisfaction as to the past bills but that "[t]he same cannot be said as to DirecTV's right to future set-offs." The ALJ found that although Respondents were responsible for Rumbaugh's ongoing medical care related to his back injury, Rumbaugh had to first exhaust his third-party medical malpractice settlement award to treat his urological conditions.

Rumbaugh appealed the following issues to the Board:

"1. Is the respondent responsible for paying the claimant's medical bills based on the current record?
"2. Did the respondent waive the K.S.A. 44-504 subrogation credit due to accord and satisfaction?
"3. Should the respondent remain responsible for ongoing medical care related to claimant's back, without regard to a K.S.A.44-504 subrogation credit?"

In a January 28, 2022 order, the Board affirmed the ALJ's determination that Rumbaugh failed to meet his burden of proof for payment of the submitted medical bills. The Board further found it was premature for the ALJ to rule that medical bills associated with Rumbaugh's back should not be subject to subrogation, but medical bills associated with Rumbaugh's urological issues should be Rumbaugh's responsibility until the subrogation credit was exhausted. Finally, the Board also determined it was premature to rule on accord and satisfaction until the nature of the medical bills was established. Rumbaugh did not appeal this order.

Additional Medical Evaluations

At the request of Rumbaugh's attorney, Dr. Zimmerman examined Rumbaugh for a second time on March 30, 2022, and documented that Rumbaugh presented with complaints related to residual effects of cauda equina syndrome, including daily use of a Foley catheter and bowel incontinence. Dr. Zimmerman concluded that Rumbaugh had the immediate onset of a neurogenic bladder, neurogenic bowel, and severe lower extremity weakness and that even after treatment continued to have cauda equina syndrome symptoms. Dr. Zimmerman found the need for neurogenic bladder treatment resulted from cauda equina syndrome—and the reported delay in the operative treatment would have no impact on the need for the procedure performed. Dr. Zimmerman testified

that he believed Rumbaugh's urinary symptoms were caused by cauda equina syndrome from the original work-related injury and not the alleged delay in cauda equina syndrome treatment. According to Dr. Zimmerman, Rumbaugh continues to need treatment for the complications of cauda equina syndrome.

At the request of Rumbaugh's attorney, Dr. William Hopkins examined Rumbaugh on November 4, 2022, and found the direct and prevailing factor for the cauda equina lower back pain, loss of lower extremity strength and sensation, and impairment was the original work accident on April 30, 2014. Dr. Hopkins explained in his report that the alleged delay in treatment aggravated the cauda equina symptoms and may have contributed to making them worse:

"There is question as to whether or not the possible malpractice contributed to [Rumbaugh's] need for medical treatment specifically the urological complications. I do not believe it was the prevailing factor of his current conditions. However, it may have caused a worsening. The cauda equina syndrome pre-existed any malpractice and is directly related to the work accident of April 24 [sic], 2014. The prevailing factor for Mr. Rumbaugh's current condition and treatment related to cauda equina condition is the work accident and resulting injury and complications from that injury. The malpractice is not the prevailing factor of these conditions as they are directly caused by the work accident injury."

Second Application for Post-Award Medical Benefits

On December 29, 2022, Rumbaugh filed a second application for post-award benefits which is the subject of this appeal. In that application, Rumbaugh sought treatment for his back injury and to "get all medical outstanding paid." The issues mirrored the issues in Rumbaugh's previous application for post-award benefits. Rumbaugh introduced expert witness testimony as to his need for additional medical care and evidence about the cause of the cauda equina syndrome. That said, Rumbaugh failed to put medical bills into evidence or lay a foundation for his medical bills.

At Respondents' request, Dr. David Ebelke examined Rumbaugh on January 25, 2023. Dr. Ebelke found the 2014 work accident may have been the precipitating and prevailing factor for the development of the two disc herniations related to Rumbaugh's original back surgery. In contrast to the other doctors, Dr. Ebelke concluded the original work accident did not cause or contribute

to Rumbaugh developing cauda equina syndrome. He opined that Rumbaugh's superimposed soft tissue disc extrusion caused the cauda equina syndrome and that the original work accident did not cause the extrusion or need for the second surgery in October 2016. Dr. Ebelke suggested that Rumbaugh's obesity and genetic factors were more significant factors for his recurrent disk herniation and stenosis, which led to the cauda equina syndrome. Dr. Ebelke found that rapid decompression was the best treatment to minimize permanent dysfunction from cauda equina syndrome and thus Rumbaugh's ongoing urological problems are "far more likely related to the delay in diagnosis" and not his original work accident.

At the March 9, 2023 Board hearing, Rumbaugh sought payment of his outstanding medical bills and future medical treatment from Respondents. Although there were no witnesses, the administrative record included several deposition transcripts, stipulations, reports, and workers compensation records. Respondents did not dispute Rumbaugh's need for additional medical treatment but argued it should be paid from Rumbaugh's third-party medical negligence settlement.

The ALJ found Rumbaugh's cauda equina syndrome was the "natural and probable consequence of the underlying work injury," but he also found the emergency room physician's "failure to timely diagnose and treat the cauda equina syndrome likely made the symptoms worse and irreversible." The ALJ concluded that Respondents maintained a subrogation lien against Rumbaugh's entire third-party medical malpractice settlement award and were not required to pay any medical benefits until Rumbaugh exhausted that entire award.

The ALJ noted that Rumbaugh failed to present medical bills for the six-month period prescribed by K.S.A. 44-510k(b) or lay foundation for any. Similar to what the Board previously decided, the ALJ did not reach the issue of accord and satisfaction, finding it premature because Rumbaugh failed to meet his burden of proof by putting the bills into evidence or establishing the foundation for those bills.

Rumbaugh timely appealed to the Board for review. The only issue was framed as: "Is [Rumbaugh's] ongoing and future medical treatment to be paid from the proceeds of the settlement from the medical malpractice lawsuit in accordance with K.S.A. 44-504 or be authorized medical treatment paid for by Respondent in accordance with the settlement of the workers compensation claim?" On November 8, 2023, the Board affirmed the ALJ's decision and found that Rumbaugh must pay his ongoing medical bills from the proceeds from this third-party medical malpractice settlement. The Board explained:

> "According to the plain language of K.S.A. 44-504, Claimant's medical care shall be paid from the proceeds of the medical malpractice settlement until exhausted.
>
> "The ALJ's decision is affirmed in full. Respondent's subrogation lien against the entire amount the third-party settlement is intact and Respondent is excused from paying medical bills until the entirety of the third-party settlement proceeds, after deduction for attorney fees and expenses is exhausted. No medical bills are ordered paid by Respondent, as no bills have been placed in evidence, no foundation has been established for any claimed medical bills, and the Board's jurisdiction is limited to the six months preceding the filing of the application for post-award medical treatment. The Board does not reach the issue of accord and satisfaction, as the medical bills, and foundation for those bills have not been placed in evidence."

Rumbaugh timely petitioned for judicial review to this court.

DISCUSSION

Rumbaugh claims the Board erred in interpreting and applying the Workers Compensation Act (the Act) and by not addressing his accord and satisfaction claim. First, Rumbaugh argues the Board erred in finding that Respondents have a subrogation lien against Rumbaugh's entire third-party medical malpractice settlement award because it does not provide duplicative damages of his workers compensation award. Second, Rumbaugh claims that Respondents waived their subrogation claim under the Act because they accepted payment in full accord and satisfaction under K.S.A. 84-3-311. Generally, the Board's final order under the Act is appealable to this court in accordance with the Kansas Judicial Review Act (KJRA). K.S.A. 44-556(a); K.S.A. 77-601 et seq. Pursuant to the KJRA, this court may grant relief if it finds the

Board "has erroneously interpreted or applied the law." K.S.A. 77-621(c)(4).

I. THE BOARD ERRED IN FINDING THAT RESPONDENTS HAVE A SUBROGATION LIEN AGAINST ALL OF RUMBAUGH'S THIRD-PARTY MEDICAL MALPRACTICE SETTLEMENT AWARD.

The Board found that under K.S.A. 44-504(b), Respondents have a subrogation lien credit against Rumbaugh's third-party medical malpractice settlement award for all compensable workers compensation medical treatments. The Board concluded that Respondents are not required to pay Rumbaugh's outstanding or ongoing medical bills until he exhausts the entire medical malpractice settlement award on his medical care. Rumbaugh counters that his third-party medical malpractice award compensates him for damages unrelated to his workers compensation award and thus cannot be used to set off medical treatments from his workers compensation claim.

This court exercises unlimited review to interpret the Act to address Rumbaugh's claims. *Hawkins v. Southwest Kansas Co-op Service*, 313 Kan. 100, 107, 484 P.3d 236 (2021); see also *Higgins v. Abilene Machine, Inc.*, 288 Kan. 359, 361, 204 P.3d 1156 (2009) (explaining that courts interpreting the Act do not owe deference to the ALJ or Board's interpretation or decision). The most fundamental rule of statutory interpretation "is that the intent of the legislature governs if that intent can be ascertained." *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012). That review begins with the "plain language of the statute," and when that language is unambiguous this court "refrain[s] from reading something into the statute that is not readily found in its words." *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021). This court liberally construes the Act to bring "employers and employees within the provisions of the act." K.S.A. 44-501b(a).

An employer who is responsible for an employee's compensable injury has a duty to provide "the services of a healthcare provider and such medical, surgical and hospital treatment . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury." K.S.A. 44-510h(a). Depending on

the injury, an employer's obligation to make workers compensation payments may be ongoing. See K.S.A. 44-510h(e) (an employer's obligation to provide medical services ends when the employee reaches maximum medical improvement unless "it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement"); 44-510k(a)(1) (when future medical benefits are awarded an employee may apply for post-award medical benefits).

Here, Respondents and Rumbaugh specifically left future medical payments open, and Respondents reserved the right to fund a CMS-approved Medicare Set-Aside for future medical care. At the workers compensation settlement conference, Respondents' attorney explained to the court that

"[w]e are settling . . . as a strict compromise of all issues except medical treatment. Essentially, we are resolving all issues related to indemnity, including but not limited to, past or future TTD [Temporary Total Disability], work disability, vocational rehabilitation, and the right to review and modification. We are leaving open future medical with the employer reserving the right to obtain a CMS-approved Medicare Set-Aside and fund the Medicare Set-Aside and then close future medical."

Respondents anticipated Rumbaugh's need for future medical payments compensable under the Act.

An employee who receives workers compensation benefits may also pursue compensation from third parties who are liable for the employee's medical damages:

"(a) When the injury or death for which compensation is payable under the workers compensation act was caused under circumstances creating a legal liability against some person other than the employer or any person in the same employ to pay damages, the injured worker or the worker's dependents or personal representatives shall have the right to take compensation under the workers compensation act and pursue a remedy by proper action in a court of competent jurisdiction against such other person." K.S.A. 44-504(a).

When an employee is awarded through judgment, settlement, or otherwise a payment from a third party (not the employer) as contemplated in K.S.A. 44-504(a), the employer is entitled to a subrogation lien against that award:

"(b) In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees. Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker's dependents or personal representative prior to the completion of compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid." K.S.A. 44-504(b).

In 2018, Rumbaugh pursued a medical malpractice claim against the hospital and several providers for negligence in failing to timely diagnose and treat his cauda equina syndrome in 2016. Rumbaugh claimed that because they delayed his diagnoses, he suffered from ongoing, serious urological problems. Rumbaugh settled that third-party medical malpractice case. According to Rumbaugh's medical malpractice counsel, the settlement award covered only the urological symptoms due to a delay in proper diagnosis and treatment, but not medical treatment related to Rumbaugh's back pain. The Sedgwick County District Court approved the confidential medical malpractice settlement and required Rumbaugh to satisfy any valid subrogation interest with Rumbaugh's workers compensation carrier under K.S.A. 44-504(b). According to Rumbaugh's attorney, the medical malpractice settlement agreement does not itemize or describe the medical damages covered by the settlement.

In interpreting K.S.A. 44-504(b), the Board determined that Respondents had a subrogation lien against Rumbaugh's entire third-party medical malpractice settlement award without determining whether the settlement award duplicated his workers compensation award. In reaching that decision, the Board not only neglected to consider applicable Kansas Supreme Court precedent, but it also failed to consider the Act's statutory language regarding subrogation liens. K.S.A. 44-504(b); see also *Wishon v. Cossman*,

268 Kan. 99, 105-06, 991 P.2d 415 (1999) (explaining that subrogation under K.S.A. 44-504[b] applies to duplicative damages).

The Kansas Supreme Court has explained that the Act's subrogation and lien provision is intended to (1) preserve injured workers' claims against third-party tortfeasors; and (2) prevent double recoveries by injured workers. *Hawkins,* 313 Kan. at 108-09. The court has also explained that the statute "grants employers subrogation liens on tort recoveries by injured workers *only to the extent that a worker's recovery duplicates compensation and medical expenses paid by the employer under the Workers Compensation Act*." (Emphasis added). *Wishon*, 268 Kan. at 105-06. As a panel of this court explained when a claimant settled a third-party case, the employer had a lien for all the *duplicative benefits* the employer had paid. *Ballard v. Dondlinger & Sons Const. Co*., 51 Kan. App. 2d 855, 867-68, 355 P.3d 707 (2015); see also *Henson v. Davis*, 54 Kan. App. 2d 668, 402 P.3d 1161 (2015).

Contrary to Respondents' argument, the holding from *Wishon* that "the purpose of the subrogation right under [K.S.A. 44-504(b)] is to prevent double recovery by the employee" does not read something into the statute that is not present. 268 Kan. at 103. The applicable statutory language contemplates that the employer receives a subrogation lien only on payments to the employee for which "*compensation is payable under the workers compensation act*"—and not on future settlements the employee may receive for an unrelated injury. (Emphasis added.) K.S.A. 44-504(a). When interpreting a statute, this court must consider its provisions *in pari materia*, "to reconcile and bring those provisions into workable harmony, if possible." *Roe v. Phillips County Hospital*, 317 Kan. 1, Syl. ¶ 3, 522 P.3d 277 (2023). When possible, this court must give effect to the entire Act and read the provisions "so as to make them consistent, harmonious, and sensible." *State v. Bee*, 288 Kan. 733, Syl. ¶ 4, 207 P.3d 244 (2009). Moreover, this court "must construe a statute to avoid unreasonable or absurd results." *State v. Eckert*, 317 Kan. 21, Syl. ¶ 8, 522 P.3d 796 (2023).

Subsection (a) of K.S.A. 44-504 provides that when the employee's injury "for which compensation is payable *under the workers compensation act*" was caused in part by someone other

than the employer, the employee who received a workers compensation award has the right to also "pursue a remedy . . . against *such other person*" who may be liable for the injuries. (Emphases added.) K.S.A. 44-504(a). Subsection (b) provides that "[i]n the event of recovery from *such other person* by the injured worker" then "the employer shall be subrogated to the extent of compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of *such recovery* . . . ." (Emphases added.) K.S.A. 44-504(b). The clear and unambiguous statutory language provides that the subrogation lien in subsection (b) is limited to the extent of a recovery from a third party under subsection (a). Additionally, the third-party recovery in subsection (a) is for damages for medical claims for which the employee has also received a workers compensation award.

Not only is this result clear from the language, but it is also logical. When an employee receives an award for injuries unrelated to their workers compensation award, the employer has no subrogation rights as to that third-party award simply because the employee had a previous, unrelated workers compensation award. The Act grants the employer a subrogation lien—and the term subrogation has a specific, legal meaning that cannot simply be ignored. As the *Henson* panel explained, subrogation commonly means "'substitution of one person for another'" and central to subrogation is that "the party secondarily responsible—but relied upon to make the initial payment—gets reimbursed when the primarily responsible party pays." 54 Kan. App. 2d at 675. However, that reimbursement is "*only to the extent that it has contributed to the primary party's payment*." 54 Kan. App. 2d at 675; see Restatement (First) of Security § 141 (1941). An essential element of subrogation is avoiding two parties paying for the *same injury*. An employer's obligation for workers compensation benefits cannot be reduced by amounts the employee receives for other, unrelated injuries or conditions. Such a result would be absurd, contrary to the statutory language, ignore the purpose of subrogation, and may discourage an employee from seeking third-party recoveries.

Rumbaugh argues that his medical negligence settlement award was not intended to cover future medical treatment for his original back injury or, in fact, any future medical treatment. Although the journal entry memorializing the medical negligence settlement did not outline the damages, it does note that Respondents are responsible for some future medical payments. The court explained that

> "[g]iven that worker's compensation is responsible for future medical payments, the Court finds that a Medicare Set Aside (MSA) is not necessary under these circumstances to consider and protect Medicare's future interest, and the parties have reasonably considered Medicare's future interest as a secondary payer in the contest of this compromise liability settlement."

Rumbaugh argues this language "strongly suggests" the medical negligence settlement did not have an allowance for future medical expenses. Rumbaugh's medical negligence counsel also explained that he believed that the medical negligence settlement covered only Rumbaugh's urological symptoms related to the delay in proper diagnosis and treatment and not damages for his back injury.

The Board erred in interpreting K.S.A. 44-504(a) to find that Respondents were entitled to a subrogation lien against Rumbaugh's entire third-party medical malpractice settlement award without determining whether the medical malpractice award covered duplicative damages "for which compensation is payable under the workers compensation act." K.S.A. 44-504(a); K.S.A. 77-621(c)(4) (permitting judicial relief of an agency decision that erroneously interpreted or applied the law). The Board's decision is reversed and remanded. On remand, the Board must determine whether Rumbaugh's medical malpractice settlement includes damages for treatment of Rumbaugh's injury or condition for which he also received a workers compensation award. If it does, the Board must also determine whether, and to what extent, Rumbaugh's medical malpractice award includes damages for future medical expenses. In making these determinations, the Board should consider and apply the Kansas Supreme Court's decision in *Wishon* and the panel's discussion in *Henson*. See *Wishon*, 268 Kan. at 105-06; *Henson*, 54 Kan. App. 2d at 675.

II. THE BOARD DID NOT ERR IN FINDING RUMBAUGH'S ACCORD AND SATISFACTION CLAIM UNTIMELY.

Rumbaugh also asserts that he demonstrated full accord and satisfaction making Respondents' claim not recoverable. Rumbaugh specifically argues that the Board erred by refusing to consider his accord and satisfaction argument as provided in K.S.A. 84-3-311:

> "If a person against whom a claim is asserted proves that (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument, the following subsections apply." K.S.A. 84-3-311(a).

Contrary to Rumbaugh's argument, the Board did not ignore this issue. Rather, the Board found the issue either premature or lacking in factual support.

The Board affirmed the ALJ's decision and stated that it "does not reach the issue of accord and satisfaction, as the medical bills, and foundation for those bills have not been placed into evidence." The ALJ had found it premature to address the issue of accord and satisfaction until those medical bills were placed in evidence and found it was "precluded from reaching the issue of accord and satisfaction." The ALJ specifically found that "Rumbaugh remains entitled to authorized medical care, but that he has failed to establish his entitled to payment of post-award medical expenses."

The Board did not reject Rumbaugh's accord and satisfaction claim on the merits. Rather, it denied his claim on procedural grounds, finding that Rumbaugh failed to meet his burden of proof by providing the medical bills and a foundation for those bills. Rumbaugh makes no argument to refute this or to suggest that the bills were not necessary to determine the issue. Under the Act, Rumbaugh bears the burden to establish the right to compensation. K.S.A. 44-501b(c); *Woessner v. Labor Max Staffing*, 312 Kan. 36, 42, 471 P.3d 1 (2020). On appeal, Rumbaugh fails to establish or even argue that the Board wrongly determined that it lacked records to address the accord and satisfaction issue. Under these circumstances, Rumbaugh has failed to show the Board erred in ruling that it could not consider his accord and satisfaction argument.

CONCLUSION

The Board erred when it determined that Respondents have a subrogation lien on Rumbaugh's entire third-party medical malpractice settlement award. Pursuant to the Act, Respondents only hold a subrogation lien against Rumbaugh's medical malpractice award to the extent the award covers damages that are also payable under the Act. Accordingly, the Board's decision that Respondents are not responsible for Rumbaugh's current and future medical bills until he has exhausted the third-party medical malpractice award is reversed and remanded for reconsideration consistent with this opinion. On remand, the Board must determine whether and to what extent Rumbaugh's third-party medical malpractice settlement award duplicates his workers compensation award, including whether the proceeds were intended to cover future medical bills. The Board's determination that Rumbaugh's accord and satisfaction claim was untimely is affirmed.

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

(563 P.3d 253)

No. 125,459

STATE OF KANSAS, *Appellee*, v. JARED RAY PAYNE, *Appellant*.

Petition for review filed March 2, 2025

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*Review of Jury Instruction Issues—Three-Step Process by Appellate Courts.* When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, in other words, whether the error can be deemed harmless.

2. CRIMINAL LAW—*Crime of Involuntary Manslaughter or Vehicular Homicide—Causation Element Required to Prove Defendant Proximately Caused Death of Victim.* To find a defendant guilty of involuntary manslaughter or vehicular homicide, the jury must find the defendant proximately caused the death of the victim. The causation element is reflected in the PIK instructions for each offense, although the trial court may also consider giving a separate jury instruction on causation more tailored to the facts of a particular case.

Appeal from Wyandotte District Court; WESLEY K. GRIFFIN, judge. Submitted without oral argument. Opinion filed January 31, 2025. Affirmed.

Darby VanHoutan, of Kansas Appellate Defender Office, for appellant.

Garett C. Relph, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before GARDNER, P.J., MALONE and COBLE, JJ.

MALONE, J.: Jared Ray Payne appeals his convictions of involuntary manslaughter and aggravated battery arising from a fiery car crash that killed one of his sons and injured another. The State alleged that the crash was the result of a "road rage" incident on the part of Payne involving another driver. Payne claims: (1) The district court erred by not providing a legally and factually appropriate jury instruction on causation; (2) the district court erred in finding Payne gave a voluntary statement to the police and admitting it into evidence; (3) the prosecutor committed reversible error in closing argument by defining the terms "accident" and "road rage"; and (4) Payne was denied a fair trial based on

cumulative error. After thoroughly reviewing the record, we find no reversible error and affirm the district court's judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On June 5, 2020, Payne was driving on Interstate 435 with his two sons, Ethan and Caden, a minor child. This portion of the highway was three lanes travelling in both directions. Payne's vehicle collided with a United Postal Service (UPS) semi-truck driven by Kelly White causing Payne's vehicle to hit a bridge pillar and explode into flames, resulting in Caden's death. Payne and Ethan escaped the vehicle. Both were burned, among other injuries, and taken to the hospital. There were various accounts of the events leading to the collision which were ultimately presented to the jury at Payne's trial.

Ethan's account of the incident

Ethan was 19 years old at the time of the crash. Before the crash, Ethan noticed a UPS truck and started paying attention when his "dad hit the brakes pretty hard." Payne was swearing and was mad because of "whatever happened with the truck." While Payne was "cussing and yelling" the UPS truck was "just driving, like, slow, under the speed limit for sure." Payne directed his yelling at the UPS truck. As Payne drove closer to the truck, he used his cellphone to try to take a picture of the UPS truck's identifying number. Payne could have avoided the truck by simply driving away, and Ethan wanted to tell his father to "chill out." Eventually, while the UPS truck was still going slow, Payne moved into the left lane and sped up to pass it. Ethan assumed Payne was moving to cut off the UPS truck and Payne was still mad. Payne "jerked the wheel hard" to move over in front of the UPS truck and that is when the vehicles collided, and Payne's vehicle hit the pillar. Ethan did not recall the UPS truck changing lanes. He also did not recall the UPS truck swerving into Payne or doing anything that made him feel unsafe. After the crash, Ethan escaped the burning vehicle and yelled at Payne that he had killed Caden.

Stephan Hall's account of the incident

Stephan Hall, a FedEx Freight driver, witnessed the events leading to the crash. Hall saw Payne driving in the center lane of three lanes when the UPS semi-truck merged behind Payne and flashed its bright

lights. In response, he saw Payne tap his brakes. At that point, the UPS truck moved into the left lane and Payne also moved into the left lane, keeping close in front of the UPS truck. Payne again tapped his brakes in front of the UPS truck. The truck moved back to the center lane and Payne slowed to move beside the truck. Payne eventually sped up and moved into the right lane and onto an exit ramp before he "shot back onto the highway" behind the UPS truck and came around to its driver side. Hall lost sight of Payne's vehicle until he saw a ball of flames from the crash. Hall never saw the UPS truck swerve or move in a way that would have caused Payne to evade. According to Hall, the UPS truck looked like it tried to get away from Payne.

White's account of the incident

White, the driver of the UPS semi-truck, described the events leading to the crash. White was driving in the center lane when Payne moved in front of him and started slowing down. He thought Payne may have believed he had his bright lights on, so he flashed his brights momentarily, and Payne came to an almost complete stop in front of him. White had already begun to move into the left lane to avoid Payne when his automatic braking system brought him to a complete stop. White resumed driving and fully merged into the left lane when he noticed Payne holding a cellphone and pointing it at the side of his truck. Payne slowed down, and White, knowing that many states restrict big trucks from using the left lane, merged in front of Payne. Payne moved to the right lane and merged into an exit ramp before moving back around to White's left side in a manner that appeared to White as though Payne would try to cut him off. Payne's vehicle began to move toward White's truck cab, which caused Payne's wheel to rub on White's front bumper. Payne's vehicle then slid in front of White and collided with the bridge pillar. White denied swerving his truck at Payne's vehicle at any time.

Brian Blandford's account of the incident

Brian Blandford, another FedEx Freight driver, also witnessed the events leading to the crash. Blandford saw the UPS semi-truck in the middle lane and first noticed "something was going on" when he noticed Payne moving his hands out the window while trying to keep pace with the UPS truck, as though trying to get

White's attention. Payne slowed down and got behind the UPS truck "very, very closely" and then moved back into the left lane. At some point, Blandford recalled Payne moving into the exit lane and ramp, and then "immediately getting back off of it." The UPS truck did not react and continued at a consistent speed as Payne moved to pass him in the left lane. Blandford felt that Payne was becoming more erratic, so he slowed down to create more of a cushion. Blandford did not see the UPS truck make any maneuvers that required Payne to get out of the way. Blandford did not see the collision that caused the crash.

Payne's statement to the police

Lieutenant Bradley Todd of the Edwardsville Police Department interviewed Payne at the hospital the day after the crash. The interview was recorded and played to the jury. Payne recounted how he and his sons left a race and drove on Interstate 435 when he came upon a UPS semi-truck driving in the same direction. According to Payne, the semi-truck cut in behind him and nearly hit the tail end of his vehicle. Payne described how the semi-truck followed him closely while flashing its bright lights, so Payne switched lanes to avoid the truck. But as Payne would switch lanes, the truck switched into Payne's lane directly behind him four or five times. Payne pulled into a nearby exit lane and alleged that the truck swerved at him. Payne got back onto the highway and again came up to the truck. When Payne tried to pass on the left, the truck flashed its bright lights again, the two vehicles collided, and Payne's vehicle exploded.

Proceedings in district court

On August 25, 2020, the State charged Payne with second-degree murder for the death of Caden and a severity level 4 aggravated battery for the injuries to Ethan. The State's theory throughout the case was that Payne, in a fit of road rage, knowingly and recklessly drove his vehicle in a manner that resulted in the vehicle crash on the highway. Before trial, the State moved for an order determining that Payne's recorded interview was admissible

evidence. The district court held a hearing and found that the statement was not a custodial interrogation and that Payne voluntarily gave his statement to Todd.

The district court held a four-day jury trial starting on March 28, 2022. Along with the evidence already discussed, there was evidence that White gave a blood sample to investigators, and he was also required by UPS to give a sample the morning after the incident as part of its accident protocol. The test conducted by investigators showed White was positive for marijuana. The UPS sample was negative for marijuana. White denied ingesting marijuana in the 30 days leading up to the accident.

In Ethan's cross-examination, Payne impeached his testimony with a statement he gave to Todd a day after the incident. In his statement, which is not part of the record, Ethan told Todd that the UPS truck cut Payne off and that it also swerved at Payne. Ethan also stated that the UPS truck had its bright lights on and was switching lanes behind Payne. Ethan told Todd that he assumed the UPS truck sped up while Payne was merging to cause the accident. Ethan explained the discrepancies between his testimony and his statement to Todd as him not "want[ing] to believe that my dad did that." But Ethan testified that he was just trying to describe the events as he remembered them.

Todd testified about his interview with Payne. As part of the investigation, Todd searched Payne's cellphone and found a text message sent to the family group chat. The text, which was admitted into evidence, read "Upp234344" and was sent about a minute before the crash occurred. This matched White's assigned unit number on his truck. Todd searched the UPS truck four days after the crash and found no evidence of marijuana.

Patrick Johnson, a police officer who responded to the crash, testified that it did not appear that White was impaired that evening. James Taylor Jr. from the Kansas Highway Patrol Critical Highway Accident Reconstruction Team testified as to how he created a visual reconstruction of the crash. A chart of the reconstruction was admitted into evidence. Taylor opined that the damage to the vehicles was not consistent with White's truck swerving into Payne. But he admitted that the damage could be consistent

with Payne's statement that he was blinded by White's bright lights.

Payne did not call any witnesses and did not testify, but he introduced into evidence various photographs of the crash site. In closing argument, Payne's counsel described the incident as a "horrific accident" that may have been the result of negligence, but he argued there was no evidence of "knowing" or "reckless" conduct to constitute a crime. He also emphasized how White's driving contributed to the accident.

During the instruction conference, Payne requested an instruction on causation, arguing that the jury should be instructed to consider White's fault and whether that was the primary cause of Caden's death. The district court denied the proposed instruction.

The jury found Payne guilty of the lesser included offense of involuntary manslaughter and a lesser level of aggravated battery. The district court sentenced Payne to a controlling term of 47 months' imprisonment. Payne timely appealed the district court's judgment. Additional facts will be discussed to address the issues.

DID THE DISTRICT COURT ERR BY NOT PROVIDING A SEPARATE CAUSATION INSTRUCTION FOR THE JURY?

Payne first claims the district court erred by not providing a legally and factually appropriate jury instruction on causation. He also claims the district court failed to give his requested jury instruction on passing in the left lane. He argues that the district court erred by refusing the requested instructions simply because it had denied the State's request for a non-PIK instruction on recklessness. Payne asserts that the State cannot show that the refusal to instruct did not affect the outcome of the trial, so it was reversible error. The State argues that the district court did not err in denying the requested jury instructions and if there was any error, it was harmless.

When analyzing jury instruction issues, appellate courts follow a three-step process: (1) determining whether the appellate court can or should review the issue, in other words, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine

whether error occurred below; and (3) assessing whether the error requires reversal, in other words, whether the error can be deemed harmless. *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021). Payne requested both jury instructions and the issue is preserved for appeal.

At the second step, appellate courts consider whether the instruction was legally and factually appropriate, using an unlimited standard of review of the entire record. 313 Kan. at 254. In determining whether an instruction was factually appropriate, courts must determine whether there was sufficient evidence, viewed in the light most favorable to the requesting party, that would have supported the instruction. 313 Kan. at 255.

If the challenging party preserved the issue below, an appellate court applies one of two harmless error tests. If the instructional error impacts a constitutional right, an appellate court assesses whether the error was harmless under the federal constitutional harmless error standard, i.e., whether there was no reasonable possibility that the error contributed to the verdict. When no constitutional right is impacted, an appellate court assesses whether there is no reasonable probability the error affected the trial's outcome in light of the entire record. 313 Kan. at 256-57.

Appellate courts consider jury instructions as a whole, without focusing on any single instruction in isolation, to determine whether they properly and fairly state the applicable law or if it is reasonable to conclude that they could have misled the jury. *State v. Buck-Schrag*, 312 Kan. 540, 553, 477 P.3d 1013 (2020). The Kansas Supreme Court "'strongly recommend[s] the use of PIK instructions, which knowledgeable committees develop to bring accuracy, clarity, and uniformity to instructions.'" *State v. Zeiner*, 316 Kan. 346, 353, 515 P.3d 736 (2022). But a district court may modify or add clarifications to PIK instructions if the particular facts in a given case warrant such a change. 316 Kan. at 353.

The causation instruction

At trial, Payne requested the following non-PIK instruction on causation:

"The fault or lack of fault of Kelly Dean White is a circumstance to be considered along with all the other evidence to determine whether the defendant's conduct was or was not the direct cause of Taylor Caden Payne's death.

"While contributory negligence is no defense in a prosecution for Murder in the Second Degree, Involuntary Manslaughter or Vehicular Homicide, it is a circumstance to be considered along with all other evidence to determine whether defendant's conduct was or was not the proximate cause of Cayden Payne's death. Kelly Dean White's contributory negligence may have been a substantial factor in his death and a superseding cause thereof; it may have intervened between a defendant's conduct and the fatal result so as to be itself the proximate cause."

In arguing whether the causation instruction was legally and factually appropriate, the parties dispute the applicability of a string of cases decided under similar circumstances. Those cases begin with *State v. Chastain*, 265 Kan. 16, 960 P.2d 756 (1998). The *Chastain* court provided few facts in its opinion. But generally, the case arose after Chastain was in a car accident resulting in the death of another. At trial, Chastain argued that the victim caused his own death by driving through a stop sign and into an intersection. The State claimed Chastain was speeding while under the influence of alcohol. Chastain was charged with involuntary manslaughter but was convicted of the lesser included offense of driving under the influence of alcohol. 265 Kan. at 17-18.

Chastain appealed, but the State reserved a question on whether the district court properly instructed the jury on causation. During deliberations, the jury asked whether it should consider the fault of each driver when interpreting the phrase "'unintentionally killed'" in involuntary manslaughter. 265 Kan. at 23. The district court responded that the victim's "fault . . . was a circumstance to be considered along with all other evidence to determine whether [Chastain's] conduct was or was not the direct cause of [the victim's] death." 265 Kan. at 23. The State argued that the district court's instruction incorrectly told the jury that contributary negligence could be a defense to involuntary manslaughter.

The Kansas Supreme Court disagreed, and in a brief analysis found that even though the relevant statutes once, but no longer, included express language on proximate cause, crimes like involuntary manslaughter and vehicular homicide still required a jury to find the defendant proximately caused the death of the victim. 265 Kan. at 25. But the court added that the causation element "is reflected in the PIK instructions for each offense, both of which inform the jury that the State is required to prove that the defendant unintentionally killed the victim." 265 Kan. at 25. So while the

Chastain court found no error in the district court's response to the jury question, it also established that the PIK instructions for involuntary manslaughter and vehicular homicide generally tell the jury that the defendant's conduct must be the cause of the victim's death.

This court considered the causation issue more in depth in *State v. Collins*, 36 Kan. App. 2d 367, 138 P.3d 793 (2006). Collins was drinking at a bar in the early morning hours when he left in his truck, following his friend, Winsky, who was driving a motorcycle with a passenger, Curtis. Winsky drove ahead and out of Collins' sight, causing Collins to accelerate to try to catch up. When Collins reached the motorcycle, it was parked in the middle of the road. Winsky had stopped and walked away to urinate while Curtis was still on the bike. Collins hit the parked motorcycle and killed Curtis.

The State charged Collins with involuntary manslaughter while driving under the influence of alcohol. At trial, an accident reconstruction expert testified that Collins' intoxication was irrelevant because even a sober person would have hit the parked motorcycle based on circumstances like the curved road, the time of the accident, standard reaction times, and the stopping distance of Collins' truck. The district court instructed the jury that to establish involuntary manslaughter, the State must prove that Curtis' death was "'a proximate result of the operation of a vehicle by Brian Collins while under the influence of alcohol.'" 36 Kan. App. 2d at 368. The district court also instructed the jury that proximate cause "'is that cause which in natural continuous sequence, unbroken by an intervening cause, produces the injury and without which the injury would not have occurred, the injury being the natural and probable consequence or result of the defendant's act.'" 36 Kan. App. 2d at 368. The jury found Collins guilty of the lesser included offense of driving under the influence of alcohol.

The State appealed and reserved a question on whether the proximate cause instruction given by the district court changed the elements of the crime of involuntary manslaughter. This court's analysis discussed *Chastain* and noted that the statutes on involuntary manslaughter and vehicular homicide "'still require that the conduct of the defendant cause the death of the victim.'" 36 Kan.

App. 2d at 371. This court concluded that given the evidence in the case, "the district court did not err in instructing the jury on proximate cause." 36 Kan. App. 2d at 372.

Still, this court found that "the manner in which the court instructed the jury on proximate cause was confusing." 36 Kan. App. 2d at 372. This court suggested the district court should have instructed the jury: "'The fault or lack of fault of Robyn Curtis is a circumstance to be considered along with all the other evidence to determine whether the defendant's conduct was or was not the direct cause of Robyn Curtis' death.'" 36 Kan. App. 2d at 372. This court found that given the evidence of Curtis' fault and consistent with *Chastain*, "such an instruction would have been warranted in this case." 36 Kan. App. 2d at 372. But in a case without this evidence, the district court should use the standard PIK instruction on involuntary manslaughter. 36 Kan. App. 2d at 372.

This court next decided *State v. Bale*, 39 Kan. App. 2d 655, 182 P.3d 1280 (2008). Bale and her children, including 11-year-old Shawn Casey, were at a campground. Casey suffered from a medical condition that rendered him able to walk only with help from a walker; otherwise he could use a wheelchair or crawl. Casey was playing with his toy cars outside on the ground when Bale put the other children in her car and backed up. While backing up, she ran over Casey, who died as a result. Officers called to the scene noticed a smell of alcohol on Bale, and Bale told them she was intoxicated. The State charged Bale with involuntary manslaughter while driving under the influence of alcohol. At trial, in addition to giving the standard PIK instruction on involuntary manslaughter while driving under the influence of alcohol, the district court instructed the jury:

> "'Contributory negligence of Shawn Casey is no defense. It is a circumstance to be considered along with all other evidence to determine whether [Bale's] conduct was or was not the direct cause of Shawn Casey's death. Shawn Casey's negligence may have been such a substantial factor in his death as to be itself the cause.'" 39 Kan. App. 2d at 659.

The jury found Bale guilty as charged. On appeal, Bale argued that the district court should have instructed the jury to determine "'whether Shawn's death occurred as a proximate result of Ms. Bale's operation of a vehicle while under the influence of alcohol,

or whether there was an intervening cause, Shawn's act of crawling behind the car.'" 39 Kan. App. 2d at 659-60. Bale had not objected to the instruction given below, so this court reviewed for clear error. 39 Kan. App. 2d at 659.

In a manner different than in *Chastain* or *Collins*, this court in *Bale* separated causation generally from intervening causation. Starting with causation generally, this court considered the finding in *Chastain* that the requirement to find a defendant "killed" a victim inherently included that the defendant caused the victim's death. 39 Kan. App. 2d at 660. Considering that, and the Black's Law Dictionary definition of "kill," which included "'to cause physical death,'" this court concluded that a separate instruction for general causation is not needed when the PIK instructions required a finding that the defendant killed the victim. 39 Kan. App. 2d at 660.

Turning to intervening cause, the *Bale* court then considered whether the district court erred in failing to give Bale's proposed causation instruction. This court applied the rule in *Collins* that an intervening cause instruction is appropriate only if evidence supports a theory that some other person caused the victim's death. But this court found that Bale presented no evidence at trial suggesting that Casey was at fault for being behind the vehicle and causing his own death. 39 Kan. App. 2d at 661. In comparison to the obvious situation in *Collins* where there was evidence that Curtis caused her own death by sitting on a stopped motorcycle in an unavoidable position at night, there was nothing in *Bale* evidencing a cause of death other than Bale's conduct. Thus, consistent with the rule in *Collins*, this court found that the district court did not err in failing to give Bale's proposed instruction. *Bale*, 39 Kan. App. 2d at 661-62.

Finally, the parties argue the applicability of *State v. Kyando*, No. 123,009, 2022 WL 128851 (Kan. App. 2022) (unpublished opinion). While approaching an intersection with what Kyando claimed was a green light, three cars turned left in front of him at a controlled left-turn signal. He collided with the third car, killing its driver and passenger. Kyando was charged with two counts of involuntary manslaughter, and a jury convicted him as charged.

Kyando had requested causation instructions similar to the instructions given in *Collins*, and the district court denied those instructions on the ground that causation was adequately encompassed in the PIK instructions on involuntary manslaughter. The *Kyando* court walked through *Chastain*, *Bale*, and *Collins*. It found first that Kyando's proposed instructions were the same as the instructions in *Collins* that had been affirmed but criticized for being overly confusing. *Kyando*, 2022 WL 128851, at *8-9. This court then considered the holding in *Bale* that causation was inherent in the instructions requiring a jury to find that a defendant "killed" a victim. *Kyando*, 2022 WL 128851, at *9-10. This court observed that Kyando never requested an instruction that the victim failed to yield and did not direct the court to any evidence that the victim entering the intersection violated any law. This court found that Kyando had not presented evidence of another's fault, the factual predicate necessary for an instruction as in *Chastain* and *Collins*. Thus, this court concluded that the district court did not err in failing to give a non-PIK instruction on proximate cause. *Kyando*, 2022 WL 128851, at *12.

Returning to our case, we observe that the first paragraph of Payne's proposed jury instruction on causation adopts language from *Collins*. The second paragraph adopts language from *Chastain*, although nothing in *Chastain* suggests that this language should ever be a jury instruction. To the extent that the proposed instruction told the jury that crimes like involuntary manslaughter and vehicular homicide require a jury to find the defendant proximately caused the victim's death, the language was a correct statement of the law. Thus, Payne's proposed instruction was legally appropriate.

Payne does little to argue how the facts support a causation instruction in accordance with the rules in *Chastain* and *Collins*. He focuses on testimony and evidence that White had a positive blood test for marijuana and that he flashed his bright lights at Payne as evidence that White was the sole cause of the accident. In deciding whether a proposed jury instruction would have been factually appropriate, courts must view the evidence in the light most favorable to the requesting party. *Holley*, 313 Kan. at 255. For the sake of argument, we will assume without deciding that

the language in Payne's proposed jury instruction on causation would have been factually appropriate.

But the analysis does not end there. Even if Payne's proposed jury instruction on causation would have been legally and factually appropriate, that does not mean that the district court erred by giving the standard PIK instructions on the elements of the crimes Payne was charged with committing and not the separate instruction Payne requested. The courts in *Chastain* and *Collins* both emphasize that the causation element for involuntary manslaughter is reflected in the PIK instruction for that offense. *Chastain*, 265 Kan. at 25; *Collins*, 36 Kan. App. 2d at 372. There is no reported Kansas case that has found that a district court was *required* to give a separate non-PIK instruction on proximate cause in cases like Payne's. The closest any court has come is *Collins* where this court found a separate instruction on proximate cause "would have been warranted" under the facts. 36 Kan. App. 2d at 372. There, an accident reconstruction expert testified that Collins' intoxication was irrelevant because even a sober person would have hit the parked motorcycle based on the evidence presented to the jury.

Here, the district court instructed the jury that to find Payne guilty of involuntary manslaughter, the State must prove that "[t]he defendant killed Caden Payne." See PIK Crim. 4th 54.180 (2019 Supp.). The district court also instructed the jury: "The State must prove that the defendant committed the crime of Involuntary Manslaughter recklessly. A defendant acts recklessly when the defendant consciously disregards a substantial and unjustifiable risk that a result of the defendant's actions will follow." See PIK Crim. 4th 52.010 (2021 Supp.). As the court stated in *Chastain*, this language is generally sufficient to reflect the causation element of the crime of involuntary manslaughter. 265 Kan. at 25. The language in the aggravated battery instruction was even clearer. The district court instructed the jury that to find Payne guilty of aggravated battery, the State must prove that Payne "knowingly *caused* bodily harm to Ethan Payne in any manner whereby great bodily harm, disfigurement or death can be inflicted." (Emphasis added.) See PIK Crim. 4th 54.310 (2020 Supp.).

Appellate courts consider jury instructions as a whole to determine whether they properly and fairly state the applicable law. *Buck-Schrag*, 312 Kan. at 553. Even though the district court could have given a separate non-PIK jury instruction on causation, this does not mean the court erred by not giving the proposed instruction. The district court's jury instructions accurately covered the elements of each charged offense including the required causation and allowed Payne to present his defense to the charges. There was some evidence presented at Payne's trial that White's erratic driving may have contributed to the crash that resulted in the death and injuries to Caden and Ethan—mainly through Payne's recorded statement to Todd on the day after the incident. The jury was allowed to consider this evidence and Payne was allowed to argue how White's driving contributed to the accident. Based on the record presented, we conclude the district court did not err by not giving the separate proposed instruction on causation. Because we find no error, we need not address the State's argument that any error was harmless.

The passing on the left instruction

Payne also claims the district court failed to give his requested jury instruction on passing in the left lane. At trial, Payne proposed the following jury instruction:

> "The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle. The driver of an overtaken vehicle except when overtaking and passing on the right is permitted shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle."

The instruction is modeled after K.S.A. 8-1516(a) and (b), although Payne did not cite this statute as authority in his proposed jury instructions. The instruction is common in civil trials and car accident cases. See PIK Civ. 4th 121.19(A). The district court denied the instruction but gave no reason for doing so.

The State argues this jury instruction is inapplicable to a three-lane highway, citing K.S.A. 8-1514(a)(3). But this statute addresses when driving on the right side of a roadway is required.

There is no language in K.S.A. 8-1516, which addresses passing a vehicle on the left, indicating that the provisions of that statute do not apply to three-lane highways. Thus, the proposed instruction is an accurate statement of the law and there was testimony that Payne and White were passing each other leading up to the crash.

Even if we find the proposed instruction would have been legally and factually appropriate, we are confident there is no reasonable probability that failing to give the instruction affected the trial's outcome in light of the entire record. See *Holley*, 313 Kan. at 256-57. If the jury believed the bulk of the State's evidence, as it apparently did, Payne obviously failed to properly pass White's semi-truck on the left and safely merge to the center lane. Had the jury believed Payne's account of the incident provided in his recorded statement to Todd, they would have found Payne not guilty of the charges. But the jury did not need to be instructed on the basic and well-known rules of the road to decide the case. We find that any error in failing to give this instruction was harmless.

DID THE DISTRICT COURT ERR IN FINDING PAYNE GAVE A VOLUNTARY STATEMENT TO THE POLICE AND ADMITTING THE STATEMENT INTO EVIDENCE?

Next, Payne claims the district court erred in finding that Payne gave a voluntary statement to Todd and admitting the recorded statement into evidence. As a threshold issue, we must address whether the issue is preserved for appeal. "Generally, a party may not present an issue on appeal 'where no contemporaneous objection was made and where the trial court did not have an opportunity to rule.'" *State v. Dukes*, 290 Kan. 485, 487, 231 P.3d 558 (2010) (quoting *State v. Kirtdoll*, 281 Kan. 1138, 1148, 136 P.3d 417 [2006]). This rule prevents appellate review of evidentiary issues unless there was a timely and specific objection at trial. *Dukes*, 290 Kan. at 487-88.

K.S.A. 60-404 states that a verdict shall not be set aside, nor shall a judgment be reversed, because of the erroneous admission of evidence "unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection." The Kansas Supreme Court has made clear

that appellate courts must strictly enforce the contemporaneous objection rule. See *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009).

Payne argues the issue was preserved below because he raised the issue before trial and the district court heard argument and fully adjudicated the issue. The State counters that Payne failed to object at trial and thus did not contemporaneously object at the time the statement was admitted into evidence. The State is correct. When it moved to admit the recorded statement into evidence, Payne's counsel responded, "No objection, Judge." Payne does not attempt to address the failure to contemporaneously object at trial nor does he allege to have lodged a standing objection, and a review of the record does not show a standing objection was made. Thus, we decline to address Payne's claim about the admission of his recorded statement because the issue is not preserved for appeal.

DID THE STATE COMMIT PROSECUTORIAL ERROR IN ITS CLOSING ARGUMENT?

Next, Payne claims the prosecutor committed reversible error in closing argument and denied him a fair trial by defining the terms "accident" and "road rage." The State contends the prosecutor did not commit error in closing argument, but if there was error, it was harmless.

"To determine whether prosecutorial error has occurred, the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. If error is found, the appellate court must next determine whether the error prejudiced the defendant's due process rights to a fair trial. In evaluating prejudice, we simply adopt the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)]. In other words, prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, i.e., where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

The State began its closing argument as follows:

"Road rage. If you look it up in the dictionary, it says aggressive behavior caused by a stressful or frustrating situation. If you look up accident—that word has been used a lot—an event that begins by chance.

"Ladies and gentlemen, this crash did not happen by chance. The defendant's actions caused this crash."

Payne claims the prosecutor erred by defining the terms "accident" and "road rage" during closing argument. He argues the prosecutor confused the jury by replacing elements of the crimes charged with those definitions. But the record does not support Payne's claim. The prosecutor, in two sentences, gave brief definitions for road rage and accident before immediately pivoting to the evidence to argue that Payne acted recklessly with conscious disregard or indifference to human life. Payne concedes this in his brief.

Payne cites later in the closing argument where the prosecutor said Payne "had road rage that night, had no regard for anybody at all and killed his own son and burned up his other one." But the mere reference to road rage is unsurprising where the entire case centered on whether Payne or White drove aggressively and caused the crash. And nowhere in the State's closing argument did the prosecutor substitute or interchange elements of the crimes, nor did the prosecutor suggest that a road rage finding equated to a guilty finding. Instead, the prosecutor focused on the evidence and whether it showed Payne acted recklessly, which Payne concedes was an element to the crimes charged. Although the better practice would be to avoid adding definitions in a closing argument, the prosecutor did so here briefly and passingly before shifting to the evidence and elements of the crimes charged. We find no prosecutorial error.

DID CUMULATIVE ERROR DENY PAYNE A FAIR TRIAL?

Cumulative trial errors, when considered together, may require reversal of the defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of errors during the trial, appellate courts examine the errors in context and consider how the trial judge dealt with the errors as they arose; the nature and number of errors and whether they are interrelated; and the overall strength of the evidence. If any of the errors being aggregated are constitutional in nature, the cumulative effect must be harmless beyond a reasonable doubt. *State v. Guebara*, 318 Kan. 458, 483, 544 P.3d 794 (2024). The cumulative error rule does not apply if there are no

errors or only a single error. *State v. Lowry*, 317 Kan. 89, 100, 524 P.3d 416 (2023). At best, we have found only one harmless error committed in Payne's trial based on the arguments presented in the briefs—the failure to instruct the jury on passing on the left. As a result, Payne's claim of cumulative error fails.

Affirmed.

(564 P.3d 814)

No. 126,798

STATE OF KANSAS, *Appellee*, v. ANGELENE L. CALVERT, *Appellant*.

Petition for review filed March 3, 2025

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Proof of Two Prior Theft Convictions Not an Element of Felony Theft under Statute—Classifies Crime at Sentencing and Enhances Penalty.* Proof of two prior theft convictions is not an element of felony theft defined by K.S.A. 2021 Supp. 21-5801(a)(1) but is contained in the penalty section of the statute in K.S.A. 2021 Supp. 21-5801(b)(6) and serves only to classify the crime at sentencing and thus enhances the penalty.

2. SAME—*Date of a Prior Conviction Falls under* Apprendi *Exception for the Fact of a Prior Conviction.* A district court may find the date that a prior conviction occurred, for K.S.A. 2021 Supp. 21-5801(b)(6) purposes, falls under the same exception as the fact of a prior conviction established by *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Appeal from Sedgwick District Court; FAITH MAUGHAN, judge. Submitted without oral argument. Opinion filed January 31, 2025. Affirmed.

Emily Brandt, of Kansas Appellate Defender Office, for appellant.

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

Before GARDNER, P.J., MALONE and COBLE, JJ.

COBLE, J.: Angelene L. Calvert appeals her conviction of felony theft under K.S.A. 2021 Supp. 21-5801(a)(1), (b)(6). She claims that having two prior convictions in the preceding five years was an element of the crime, which the State was required to prove beyond a reasonable doubt. Calvert asks us to revisit our court's holding to the contrary in *State v. Hanks*, 10 Kan. App. 2d 666, 669, 708 P.2d 991 (1985), reasoning that under *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), facts other than the fact of a prior conviction which enhance a defendant's sentence must be proven to a jury. So, the State had to prove that her prior theft convictions occurred within

the preceding five years. While Kansas courts have not squarely considered *Apprendi*'s application to the date of a prior conviction, we follow other courts that have held that the date of a prior conviction falls under the *Apprendi* exception for the fact of a prior conviction. So, a sentencing judge's finding that a defendant's prior theft convictions occurred within the preceding five years does not violate *Apprendi* and we affirm Calvert's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

In November 2022, the State charged Calvert with one count of felony theft under K.S.A. 2021 Supp. 21-5801(a)(1), (b)(6). The complaint alleged that in October 2021, Calvert stole between $50 and $1,500 of property from Lowe's and had two prior theft convictions in 2018 and 2020.

At Calvert's preliminary hearing, the State admitted as evidence the journal entries from Calvert's two prior theft convictions from Wichita Municipal Court on January 3, 2018, and on July 27, 2020.

At trial, the senior asset protection manager at Lowe's testified regarding Calvert's actions at the department store which led to her arrest. The police officer who responded to the store also testified. After the State rested its case, Calvert moved for a directed verdict of not guilty, arguing that the State charged Calvert with theft after prior convictions but presented no evidence of her prior convictions. The State responded that it was not required to admit evidence of prior convictions until sentencing. The district court found the State was not required to prove Calvert's two prior convictions as an element of her theft charge, relying on this court's holding in *Hanks*.

Calvert testified in her own defense, claiming she had bought the tools that were in her car. She also claimed the asset protection manager coerced her into signing a statement admitting to shoplifting by telling Calvert she would let her go if she signed it. On cross-examination, Calvert admitted that she had previously been convicted of theft twice, but she did not indicate when those convictions occurred.

In the elements instruction on Calvert's theft charge, the district court did not require the jury to find that Calvert had two prior

theft convictions within the preceding five years. The jury convicted Calvert of theft. Calvert filed a motion for new trial claiming the evidence was insufficient for a conviction. The district court denied the motion.

Calvert's presentence investigation (PSI) report showed that she had three prior theft convictions in the five years before her current conviction: (1) January 3, 2018; (2) February 12, 2020; and (3) July 27, 2020. Calvert did not object to her criminal history. The district court sentenced Calvert to 12 months' probation.

Calvert timely appeals.

THE DISTRICT COURT DID NOT ERR IN CONCLUDING THAT CALVERT'S PRIOR CONVICTIONS WERE NOT AN ELEMENT OF THE OFFENSE

Calvert appeals the sufficiency of the evidence supporting her conviction. A criminal defendant does not have to challenge the sufficiency of the evidence at trial to preserve the issue for appeal. *State v. Pepper*, 317 Kan. 770, 776, 539 P.3d 203 (2023). Even so, at trial, Calvert moved for a directed verdict of not guilty, citing the State's failure to prove two prior convictions in the preceding five years. The district court denied the motion, and her claim is preserved for appeal.

Standard of Review

"'When the sufficiency of the evidence is challenged in a criminal case, we review the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt. An appellate court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.' [Citations omitted.]" *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

To the extent statutory interpretation is required, such an inquiry presents a question of law over which we exercise unlimited review. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022).

The Prior Conviction Language Appears in the Penalty Section of the Theft Statute

The State charged Calvert and the jury convicted her under K.S.A. 2021 Supp. 21-5801(a)(1), (b)(6). Those statutory provisions state:

"(a) Theft is any of the following acts done with intent to permanently deprive the owner of the possession, use or benefit of the owner's property or services:

(1) Obtaining or exerting unauthorized control over property or services;

. . . .

"(b) Theft of:

. . . .

(6) property of the value of at least $50 but less than $1,500 is a severity level 9, nonperson felony if committed by a person who has, within five years immediately preceding commission of the crime, excluding any period of imprisonment, been convicted of theft two or more times."

Calvert argues the State did not present evidence to the jury that she had two prior theft convictions within the preceding five years. Therefore, she argues, the evidence was insufficient to convict her of theft under K.S.A. 2021 Supp. 21-5801(b)(6). Calvert asks us to revisit the holding in *Hanks*, 10 Kan. App. 2d at 669, that proof of prior theft convictions was only used to determine the sentencing classification and was not an element of the offense. Calvert suggests *Hanks* is misguided in light of the holding in *Apprendi*, 530 U.S. at 490, that any fact that increases the penalty for a crime other than the fact of a prior conviction must be submitted to the jury. Calvert concedes that this case involves the fact of a prior conviction, but she submits that this case "also includes a question of timing" because a prior conviction under K.S.A. 2021 Supp. 21-5801(b)(6) must have occurred within the preceding five years. So, Calvert argues the district court erred in concluding that having two prior convictions within the preceding five years was not an element of the offense.

Hanks involved the same offense as in this case—theft after two prior convictions in the preceding five years. Hanks argued that as an element of the offense, the State must prove he had two prior theft convictions in the preceding five years. The *Hanks* court found because proof of prior convictions was only necessary in classifying the theft offense for sentencing, prior convictions did not form an element of the offense. 10 Kan. App. 2d at 669. Accordingly, the court concluded that because prior theft convictions were not an element of Hanks' theft charge, any evidence of prior convictions should not have been admitted at trial. 10 Kan. App. 2d at 670.

In its finding, the *Hanks* panel relied on the seminal case of *State v. Loudermilk*, 221 Kan. 157, 557 P.2d 1229 (1976). *Hanks*, 10 Kan. App. 2d at 668-69. In *Loudermilk*, our Supreme Court drew a distinction between crimes requiring proof of prior convictions as an element of the offense and crimes requiring proof of prior convictions only to enhance the sentence. The court explained: "It is important to note that in each case where a prior conviction of felony is a necessary element of the crime, the fact of prior conviction is contained in the statutory definition of the crime rather than in the penalty section of the statute." 221 Kan. at 160. The court interpreted K.S.A. 1975 Supp. 65-4127a—defining possession of narcotics—to require proof of prior convictions only to determine the sentence upon conviction. 221 Kan. at 161.

Again, we focus on the language of K.S.A. 2021 Supp. 21-5801(b)(6):

> "(b) Theft of:
> . . . .
> (6) property of the value of at least $50 but less than $1,500 is a severity level 9, nonperson felony if committed by a person who has, within five years immediately preceding commission of the crime, excluding any period of imprisonment, been convicted of theft two or more times."

This is similar to the prior conviction language of K.S.A. 1984 Supp. 21-3701 examined in *Hanks*:

> "'Theft of property of the value of $150 or more is a class E felony. Theft of property of the value of less than $150 is a class A misdemeanor, except that theft of property of the value of less than $150 is a class E felony if committed by a person who has, within five years immediately preceding commission of the crime, been convicted of theft two or more times.'" *Hanks*, 10 Kan. App. 2d at 667.

In each case, the prior conviction language appears in the penalty section of the theft statute, rather than the statutory definition of theft. Accordingly, under the distinction recognized in *Loudermilk*, the prior conviction language in K.S.A. 2021 Supp. 21-5801(b)(6) would constitute prior convictions enhancing a sentence rather than prior convictions forming an element of a theft offense.

Calvert's Timing Argument is Unpersuasive

Calvert acknowledges these holdings but asks the panel to revisit them considering *Apprendi*. In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

Although Calvert recognizes the issue here includes prior convictions, she argues it also "includes a question of timing." She maintains that the dates of her prior convictions—that they had to occur within the five years immediately preceding commission of the current crime—are facts which should have been proven to a jury.

Calvert also urges us, in her Notice of Additional Authority under Kansas Supreme Court Rule 6.09 (2024 Kan. S. Ct. R. at 40), to consider the recent decision by the United States Supreme Court in *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024). There, Erlinger had pleaded guilty to being a felon in possession of a firearm under federal law and sought to vacate his enhanced sentenced under the federal Armed Career Criminal Act (ACCA). The district court denied his request for a jury to determine whether Erlinger's prior burglary offenses were committed on separate occasions for ACCA purposes or whether they were part of a single episode. On review, the Supreme Court found that the Fifth and Sixth Amendments require a unanimous jury to make the determination beyond a reasonable doubt that a defendant's past offenses were committed on separate occasions *for ACCA purposes.* 602 U.S. at 838-40. But *Erlinger* is not dispositive of Calvert's claim.

In *Erlinger*, the Supreme Court's ruling was narrowly confined to the separate occasions inquiry for federal ACCA purposes. 602 U.S. at 847-48; see 602 U.S. at 861 (Kavanaugh, J., dissenting) ("The Court today has not overruled *Almendarez-Torres*; it has simply carved out the different-occasions inquiry from the general *Almendarez-Torres* rule."). *Erlinger* did not expansively find, as Calvert suggests, that the dates of her prior convictions must be found by a unanimous jury, and it is thus not relevant to our disposition here.

1. *Kansas Courts Have Not Considered* Apprendi *Regarding Dates of Prior Convictions*

The State cites several cases to argue that Kansas courts have rejected Calvert's argument—that the dates of her prior convictions must be proven to a jury—in analogous situations, though only four of those cases were released after *Apprendi*. Two of

those cases, *State v. Reese*, 300 Kan. 650, 333 P.3d 149 (2014), and *State v. Key*, 298 Kan. 315, 312 P.3d 355 (2013), involved interpretation of Kansas' driving under the influence (DUI) statute, K.S.A. 8-1567. In both cases, the Supreme Court observed that a prior DUI conviction is treated as a sentencing enhancement rather than an element of a DUI offense. *Reese*, 300 Kan. at 655-56; *Key*, 298 Kan. at 319-20. The question in *Key* was whether this court had properly dismissed Key's appeal for lack of jurisdiction when he challenged one of his prior DUI convictions as resulting from an unauthorized guilty plea. 298 Kan. at 322. *Key* did not address an *Apprendi* issue.

The *Reese* court examined the sentencing provision in K.S.A. 2011 Supp. 8-1567(j)(3), requiring that "'only convictions occurring on or after July 1, 2001, shall be taken into account when determining the sentence to be imposed.'" *Reese*, 300 Kan. at 657. The court concluded the statute's phrasing "makes it clear that the new limited look-back period in K.S.A. 2011 Supp. 8-1567(j) was intended to be applied at sentencing." 300 Kan. at 657. The question the court ultimately ruled on was whether the statute's amended look-back period applied to Reese, not whether the State had to prove to a jury beyond a reasonable doubt that a prior conviction happened within the look-back period under *Apprendi*. *Reese*, 300 Kan. at 657. The current version of K.S.A. 8-1567 still contains the July 1, 2001 look-back period for prior convictions. K.S.A. 8-1567(i)(1). But Kansas courts have not yet considered whether *Apprendi* requires the State to prove to a jury that a prior conviction occurred within the look-back period.

The State also cites *Thompson v. State*, 32 Kan. App. 2d 1259, 96 P.3d 1115 (2004). There, Thompson claimed he was improperly sentenced for a severity level 1 offense for methamphetamine possession because the State failed to allege his prior convictions in the complaint. The *Thompson* panel rejected that argument, finding that because prior convictions were not an element of a methamphetamine possession offense, the State did not have to present evidence of Thompson's prior convictions until sentencing. 32 Kan. App. 2d at 1270.

Thompson demonstrates the distinction between prior convictions establishing an element of an offense and prior convictions

establishing only the penalty imposed. But like *Reese* and *Key*, it does not conclusively answer whether the *date* of a prior conviction is distinct from the *fact* of a prior conviction under *Apprendi*.

The State also directs us to *State v. Ingram*, No. 121,354, 2020 WL 5083839 (Kan. App. 2020) (unpublished opinion). In that case, Ingram challenged his conviction for criminal deprivation of a motor vehicle, claiming that "the State failed to present evidence of his prior convictions that rendered his crime a felony offense." 2020 WL 5083839, at *1. K.S.A. 2018 Supp. 21-5803(b)(1)(A) classified criminal deprivation of a motor vehicle as a misdemeanor for the first two convictions, but as a felony on the third or subsequent conviction. The *Ingram* panel found that because the statute's language on prior convictions was located in the penalty section, prior convictions were not an element of the crime. 2020 WL 5083839, at *6.

While *Ingram* provides another example of prior convictions not establishing an element of an offense, the statute at issue in that case did not include a time limitation or look-back period for prior convictions to classify the offense as a misdemeanor or felony. Therefore, *Ingram* also does not conclusively answer the question posed by Calvert. Indeed, Kansas courts do not appear to have considered whether the *Apprendi* exception for the fact of a prior conviction extends to the date of a prior conviction.

2. *Date of Prior Conviction as* Apprendi *Issue Considered by Other Courts*

Although Kansas courts have not weighed in on whether the date of a prior conviction is distinct from the fact of a prior conviction under *Apprendi*, other courts have answered this question. In *State v. Brinkley*, 192 Wash. App. 456, 369 P.3d 157 (2016), Brinkley claimed the trial court violated *Apprendi* by determining the '"temporal relationship"' between his prior convictions under a persistent offender sentencing law. 192 Wash. App. at 458-59. In relevant part, the statute at issue defined a person as a '"persistent offender"' if the person:

"(a)(i) Has been convicted in this state of any felony considered a most serious offense; and

"(ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious

offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted." 192 Wash. App. at 459.

See Wash. Rev. Code § 9.94A.030(a)(i)-(ii). Brinkley argued that a jury must determine whether his prior convictions occurred in the chronological order defined by the statute. The Washington Court of Appeals found Brinkley's argument unpersuasive. The court cited *State v. Jones*, 159 Wash. 2d 231, 241, 149 P.3d 636 (2006), where the Washington Supreme Court held that sentencing courts could "determine not only the fact of a prior conviction but also those facts 'intimately related to the prior conviction,'" to conclude that a court's determination of the date of a prior conviction was permitted under *Apprendi*. *Brinkley*, 192 Wash. App. at 461. The court noted that "[t]hese facts all appear on the face of the judgments." 192 Wash. App. at 462.

Other jurisdictions have reached the same conclusion under similar circumstances. See *United States v. Grisel*, 488 F.3d 844, 847 (9th Cir. 2007) (rejecting argument that dates of prior convictions not part of "'fact'" of prior convictions); *People v. Alvarado*, 284 P.3d 99, 104 (Colo. App. 2011) (finding determination defendant was charged with juvenile offense when current offense committed fell under "facts 'regarding'" prior conviction); *People v. Rivera*, 362 Ill. App. 3d 815, 821, 841 N.E.2d 532 (2005) (finding "defendant's age and prior convictions and the timing, degree, number and sequence of defendant's prior convictions" fell under *Apprendi* exception).

These conclusions by other jurisdictions appear to conform with the *Apprendi* court's concern over questions not decided by a jury that relate to the "'commission of the offense.'" 530 U.S. at 496. Recidivism, the *Apprendi* court noted, "'does not relate to the commission of the offense' itself." 530 U.S. at 496. Therefore, consistent with other jurisdictions that have ruled on this issue, we find that the date of a prior conviction as outlined in K.S.A. 2021 Supp. 21-5801(b)(6) falls under the *Apprendi* exception for the fact of a prior conviction. Accordingly, we decline Calvert's invitation to reexamine *Hanks* in light of *Apprendi*.

Affirmed.

(564 P.3d 1)

No. 125,137

STATE OF KANSAS, *Appellee*, v. ADREAN MARQUIS NEWSON, *Appellant*.

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Exculpatory Evidence—Determination if* Brady *Violation by State—Three Factors*. To determine whether the State has committed a *Brady* violation, *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), a court must evaluate three factors: (1) whether the disputed evidence was favorable to the accused because it was exculpatory or impeaching; (2) whether the disputed evidence was suppressed by the State, either willfully or inadvertently; and (3) whether the evidence was material, which establishes prejudice. To be material, the accused must show that there is a reasonable probability that but for the State's failure to disclose the disputed evidence to the defense, the result of the proceeding would have been different.

2. TRIAL—*Exculpatory Evidence*—Brady *Violation if Prosecutor Fails to Disclose Evidence*. A prosecutor's failure to disclose exculpatory evidence constitutes a *Brady* violation whether the prosecutor intentionally or mistakenly failed to disclose the evidence.

3. EVIDENCE—Brady *Violation—Law Enforcement's Knowledge of Evidence Imputed to State.* Because law enforcement's knowledge of evidence is imputed to the State, a *Brady* violation can occur when the prosecutor withholds material evidence that is not known to the prosecutor but is known to law enforcement.

4. SAME—Brady *Violation—Delayed Disclosure of Exculpatory Information May or May Not Qualify as* Brady *Violation—Requirement of Prejudice to be Established by Defendant.* Delayed rather than absent disclosure of exculpatory information may or may not qualify as a *Brady* violation, depending on whether the defendant can establish prejudice due to his or her inability to use the *Brady* material effectively at trial. If the defendant has sufficient time to effectively use evidence disclosed immediately before trial or during trial, the belatedly disclosed evidence does not qualify as *Brady* material. When the State delays disclosure of favorable evidence, the defendant must establish that the delayed disclosure of the discovery prejudiced his or her ability to present his or her defense.

5. APPEAL AND ERROR—*Reasonable Probability Test for Determination if* Brady *Violation—Materiality Standard.* Once a reviewing court has ap-

plied the reasonable probability test to determine if there is a *Brady* violation, there is no need for further harmless error review. There is no need to consider whether the *Brady* violation was harmless because the test whether the disputed evidence was material encompasses the constitutional harmlessness error test. Thus, if the State has failed to disclose material evidence, the accused is entitled to a new trial.

6. SAME—*Consideration of Prosecutorial Error on Appeal—Two-Step Review*. When a defendant argues prosecutorial error on appeal, this court considers the defendant's argument in two steps. First, this court considers whether the prosecutor's conduct fell outside the wide latitude that prosecutors have when presenting the State's case. Second, if the defendant establishes that the prosecutor erred by engaging in conduct outside this wide latitude, then this court must consider whether the error was harmless under the constitutional harmlessness error test. Under the constitutional harmlessness error test, an error is harmless if the State can establish that the prosecutor's error did not affect the outcome of the defendant's trial in light of the entire record.

7. TRIAL—*Prosecutor Error—Certain Phrases Cannot Be Used to Give Prosecutor's Personal Opinion.* The Kansas Supreme Court has held that a prosecutor must be careful when using phrases like "we know," "we submit," "I know," and "I submit" during closing arguments to the jury. Although a prosecutor may use phrases like "we know" and "I submit" when the prosecutor is speaking about uncontroverted evidence, a prosecutor cannot use these phrases to give the prosecutor's personal opinion. A prosecutor also errs whenever the prosecutor makes an argument that draws inferences for the jury about controverted evidence using such phrases.

Appeal from Wyandotte District Court; MICHAEL A. RUSSELL, judge. Oral argument held October 16, 2024. Opinion filed February 7, 2025. Reversed and remanded.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

Kayla Roehler, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., GREEN and HILL, JJ.

GREEN, J.: Under *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), prosecutors must disclose evidence that is favorable to the defendant when the evidence is material either to the defendant's guilt or punishment. A prosecutor's failure to disclose exculpatory evidence constitutes a *Brady* violation whether the prosecutor intentionally or mistakenly failed to disclose the evidence. 373 U.S. at 87. Additionally, "'[b]ecause

law enforcement's knowledge of evidence is imputed to the State, a *Brady* violation can occur when the prosecutor withholds material evidence that is not known to the prosecutor but is known to law enforcement.'" *State v. Hirsh*, 310 Kan. 321, 334, 446 P.3d 472 (2019) (quoting *State v. Warrior*, 294 Kan. 484, Syl. ¶ 8, 277 P.3d 1111 [2012]).

On appeal, Adrean Marquis Newson's primary argument is that the district court erred when it denied his mid-trial motion to dismiss and later a new trial motion; in both, he argued that the State violated *Brady*. Next, Newson contends that the prosecutor committed reversible error during closing arguments by making comments about what she and the State "knew" and "submitted" was undisputed evidence. According to Newson, the prosecutor's comments were erroneous because the evidence the prosecutor was discussing was actually disputed evidence. Last, Newson alternatively argues that cumulative error requires reversal of his rape conviction. We reverse and remand for a new trial.

BACKGROUND

S.C. (referred to herein by the pseudonym John) was from the Kansas City metropolitan area. Unfortunately, John's mother had cancer, and he started acting out, and he was sent to a group home in Omaha, Nebraska, called Boys Town. While there, his mom passed away.

John remained in the group home for about a year. Afterwards, he was moved to a traditional foster home in Omaha. But John repeatedly ran away from any foster home he was placed in.

In late March 2019, John had been absent from his current foster home for about three months. On March 29, 2019, John's acquaintance, Newson, agreed to drive John and his close friend, D.B., from Omaha to Kansas City, Kansas, because John wanted to visit family and friends. As of March 29, 2019, John was 16 years old, D.B. was 19 years old, and Newson was 27 years old.

Shortly after arriving in Kansas City, John, D.B., and Newson went to a Walgreens store in Shawnee. While John was in Walgreens, he posted a public video on his Facebook page saying that he was "in town." After John posted this video, his former

classmate, O.Y. (referred to herein by the pseudonym Jane), decided to meet John at the Walgreens store. Jane was 16 years old.

Ultimately, around 1 p.m. on March 29, 2019, John and Jane spent about 20 minutes together while at Walgreens. In addition to catching up, John and Jane made plans for that evening. Although Jane never spoke to D.B. or Newson while at Walgreens, she knew that D.B. and Newson traveled with John to Kansas City. And Jane learned that the group had rented a hotel room in Bonner Springs, Kansas, for that evening. In the end, Jane agreed to go to the hotel later that evening.

Then, Jane invited her two teenage friends, R.D. and T.E., to come with her to the hotel. So, around dusk, Jane, R.D., T.E., John, D.B., and Newson met and then drove to the hotel. On the way to the hotel, Jane rode in Newson's car along with John and D.B. Meanwhile, Jane's friends were driving behind Newson in a different car.

Once inside the hotel room, the group was talking, laughing, and listening to music. While doing this, some people smoked marijuana. This included John and Jane. Around 1 a.m. on March 30, 2019, Newson drove Jane and John to a 7-Eleven store and a liquor store. D.B., R.D., and T.E. remained at the hotel. Because Newson was the only person who could legally buy alcohol, Newson purchased the alcohol. He entered the liquor store alone, returning to the car with a fifth of New Amsterdam, which is vodka. Then, Newson drove John and Jane back to the hotel.

Upon returning to the hotel room, some people started drinking the vodka. This included Jane and John.

Eventually, R.D. and T.E. left the gathering. There was a discussion among Jane, R.D., and T.E. about Jane leaving and going home with them. Although R.D. and T.E. left, Jane stayed. Around this same time, Jane took a walk alone with John.

The hotel room had two queen size beds and a bathroom, which was located just inside the front door on the left side of the room. When John and Jane returned to the hotel room from their walk, Jane laid on the bed closest to the bathroom and hotel door. Then, John laid behind Jane. As John and Jane laid on this bed, Newson laid on the other bed. D.B. was lying on the floor by the bathroom wall. It seems that he had passed out.

Shortly after John laid behind Jane, he kissed her with enough force that he left hickies on her neck. Somehow, John and Jane became naked. Then, while remaining on the bed, John shifted to Jane's front side and put his penis inside her mouth. John later testified that Jane was "giving [him] oral." As John continued to put his penis inside Jane's mouth, Newson moved from the other bed, maneuvered his body behind Jane, and put his penis inside her vagina. Then, Newson had vaginal intercourse with Jane. When John and Newson finished their sex acts, Jane went to the bathroom.

Once in the bathroom, Jane immediately noticed that she had "hickies all over [her] neck" and her right breast. Jane texted her boyfriend's brother for advice. He told her to call the police. Jane took a shower. She got dressed. Then, after exiting the bathroom, Jane asked to be driven to R.D.'s house. As a result, sometime after 3 a.m. on March 30, 2019, Newson drove and then dropped Jane off at R.D.'s house. John was a passenger during this trip.

Although Jane told R.D.'s mother that she had been raped, R.D.'s mother told Jane that she needed to address the matter with her father. Later that morning, when Jane reached her father by cellphone, her father picked her up and drove her directly to the Bonner Springs Police Department (BSPD). On the way to the BSPD, Jane's father told her that she "was just trying to hide cheating" on her boyfriend by alleging that she had been raped.

At the BSPD station, Jane reported that John sodomized her and that Newson raped her. She told the police that she was very intoxicated when the nonconsensual sex acts occurred. She also told the police that to keep her mouth open as he sodomized her, John choked her, forcing her jaw open.

Because Jane alleged that John and Newson committed sex crimes against her, Jane was taken to a hospital. She was examined by a nurse who collected Jane's DNA and swabbed different parts of her body to determine whether someone else's DNA was on her body. Later, BSPD obtained John's DNA and Newson's DNA too.

When a forensic biologist with the Kansas Bureau of Investigation (KBI) tested John's DNA as compared to Jane's swabs, it showed that John's DNA was on Jane's neck, left breast, and right breast. The testing of Newson's DNA as compared to Jane's swabs

showed that Newson's DNA was on Jane's left breast swab, vaginal swabs, and anal swabs.

Based on Jane's allegations, the State charged Newson with five counts. First, it charged Newson with raping Jane by force or fear, or alternatively, raping Jane while she was unconscious or physically powerless. Both alternatives were severity level 1 person felonies contrary to K.S.A. 21-5503(a)(1)(A) and (a)(1)(B), respectively. Second, it charged Newson with the aggravated criminal sodomy of Jane by force or fear, or alternatively, the aggravated criminal sodomy of Jane while she was unconscious or physically powerless. Both alternatives were severity level 1 person felonies contrary to K.S.A. 21-5504(b)(3)(A) and (b)(3)(B), respectively. Third, the State charged Newson with the aggravated sexual battery of Jane based on his unlawful touching of Jane for his own sexual desires by force or fear, or alternatively, the aggravated sexual battery of Jane based on his unlawful touching of Jane for his own sexual desires while she was unconscious or physically powerless. Both alternatives were severity level 5 person felonies contrary to K.S.A. 21-5505(b)(1) and (b)(2), respectively. Fourth, the State charged Newson with contributing to a child's misconduct by buying minors alcohol, which was a Class A nonperson misdemeanor. Fifth, the State charged Newson with possessing marijuana, which was a Class B nonperson misdemeanor.

As for John, the State charged him with rape, aggravated criminal sodomy, aggravated sexual battery, marijuana possession, and minor in possession of alcohol. But in February 2020, John entered a plea agreement with the State. Under this agreement, John promised to testify on the State's behalf at Newson's future jury trial. In exchange for John's testimony, the State amended his charges to a single count of attempted aggravated criminal sodomy, *which John pleaded no contest to as a juvenile*. So, John served whatever sentence the juvenile court imposed on him in juvenile prison. In turn, by entering the plea agreement with the State, John avoided being prosecuted as an adult and avoided serving his sentence in adult prison.

Newson's five-day jury trial occurred in January 2022. At the beginning of his trial, Newson announced that he wanted to plead

guilty to contributing to a child's misconduct and possessing marijuana. As a result, Newson pleaded guilty to those crimes. After Newson pleaded guilty, the district court deferred sentencing Newson for the two misdemeanor convictions until after his jury trial on the State's remaining felony charges.

As for the State's remaining felony charges against Newson, both the State's case against Newson and Newson's defense against the State's charges hinged on Jane's and John's credibility. The State argued that even if Jane's memory was not perfect because she was intoxicated, Jane's initial report to the BSPD was largely what happened the evening of March 29, 2019, and the morning of March 30, 2019. It argued that the evidence established that Jane never consented to any sex acts with John or Newson. Newson argued that he and Jane had consensual sex.

Although John testified on the State's behalf, he seemed to do so reluctantly. During his cross-examination, he testified about the terms of his plea agreement. He explained that he never pleaded guilty to any sex crime, rather he pleaded no contest to attempted aggravated sodomy as a juvenile. He testified that after entering his plea agreement with the State, he wrote a letter to Newson stating that they both engaged in consensual sex acts with Jane. During John's direct examination, he testified that he lied when he told BSPD officers that Jane was "willing for it." But when asked by Newson's defense counsel during recross-examination whether his plea agreement required him to testify that Jane "was not willing for it," John confirmed that his plea agreement required him to testify that Jane never consented to any sexual acts. So, although the State called John on its behalf, John implied that he believed he had consensual sex with Jane. He further suggested that he pleaded no contest to receive an easier sentence.

Relying on this evidence, Newson sought to boost John's credibility with the jury about his relationship with Jane and about what occurred in the hotel room. At the same time, Newson sought to impeach Jane's credibility with the jury generally and more specifically, on the following issues: (1) her characterization of her relationship with John; (2) her explanation of her marijuana and alcohol use; and (3) her memories from the hotel room. Newson argued that Jane was afraid of what her boyfriend and her father

would do when they saw the hickies all over her neck. He argued that to avoid her boyfriend's and father's disapproval, she told the BSPD that he raped her although he had consensual vaginal intercourse with Jane. Newson's defense was that John's explanation about what happened on March 29, 2021, and March 30, 2021, was the truth while Jane was lying. He told the jury that Jane was "not the innocent, timid, small little victim that she wanted" the jury to believe.

While testifying on the State's behalf, John told the jury that he and Jane dated in middle school. He told the jury that Jane brought her own blunt to the hotel. He claimed that Jane flirted with him before the contested sex acts, which included when she French kissed him as they took a private walk together sometime during the early morning hours of March 30, 2019. John testified that he considered both himself and Jane tipsy. He further testified that at some point, Jane was talking to him about why her "boyfriend [was] not good to her."

As for the contested sex acts, John testified that when he and Jane returned from their walk, Jane started performing oral sex on him voluntarily. John told the jury that he did not see Jane motion Newson over to have vaginal intercourse with her. He testified that before their arrest, he and Newson discussed what to tell the police if Jane contacted law enforcement. John testified that he and Newson had this conversation (1) because they realized that Jane was upset about the obvious hickies on her neck and (2) because when she was in the bathroom after the contested sex acts, Jane told John that she believed that he was her boyfriend. John explained that around the same time that Jane said this to him in the bathroom, she also asked him how she was "supposed to cover [the hickies] up."

Nevertheless, John recognized that he had his eyes closed when Jane was performing oral sex on him. Thus, he admitted that it was possible that Jane motioned Newson over to have sex. John testified that Jane did not do anything different when Newson started having vaginal sex with her; as in, she continued to perform oral sex on him once Newson started having vaginal sex with her. John testified that Jane was awake the entire time the sex acts

occurred. Additionally, John affirmed defense counsel's question that as far as he knew, Jane was "aware of what was going on."

On the other hand, Jane's testimony directly contradicted most of John's testimony. Jane testified that she and John never dated in middle school. Rather, they were friends who just held hands. She testified that she did not bring any marijuana to the hotel. She told the jury that she does not have a high tolerance for alcohol or marijuana. For this reason, she explained that during the incident, she probably had four or five shots of vodka and "[t]wo puffs" of marijuana. She explained that after consuming the vodka and smoking the marijuana, her memory was fuzzy. Jane could not remember specific details of her walk with John, like French kissing him or telling him that her boyfriend was not good to her. Still, she testified that she remembered staggering and swaying to the bed after taking a walk with John.

Jane testified that once back in the hotel, she started performing oral sex because she believed that her boyfriend wanted oral sex. All the same, she also testified that she tried to move this person away from her. But this person, who she eventually identified as John by his voice, forced her jaw open so he could put his penis in her mouth. Jane testified that while this was happening, Newson put his penis inside her vagina without her consent. Jane concluded her testimony by alleging that she was too intoxicated to consent to having sex with anyone.

After the State rested its case against Newson, Newson made two motions. In his first motion, Newson moved for a directed verdict on the State's aggravated criminal sodomy and aggravated sexual battery charges against him. Although the district court determined that there was enough evidence to support the State's aggravated criminal sodomy charge, the district court granted Newson's directed verdict motion on the State's aggravated sexual battery charge.

In his second motion, Newson discussed his ongoing problems obtaining discovery from the State. Highly summarized, based on evidence that defense counsel learned through John's defense attorney and evidence presented by the State on the second day of evidence, defense counsel believed that she did not have all of the discovery from the BSPD involving its investigation of

Jane's rape allegation against Newson. So, on the evening of the second day of trial, she went to the BSPD to determine if Newson did not have all discovery for his case. At the BSPD office, with the help of Major Christopher Nicholson, defense counsel found hundreds of photographs taken by BSPD officers, hours of film recorded by BSPD officers on their Axon body camera equipment, and hours of surveillance footage from the hotel and convenience store that Jane and John went to on March 29, 2019.

At Newson's trial the next day, defense counsel tried to summarize what she had learned so far from the evidence that the BSPD disclosed to her the evening before. In particular, she stressed that there were 91 photographs of John's cellphone, which each depicted text messages from John and Jane starting on March 16, 2019, and ending on March 29, 2019. She explained that the text messages contained excellent impeachment material that she "would have loved to have when [Jane] was testifying." She argued that the evidence she found the night before was exculpatory and constituted *Brady* material. The prosecutor responded that the district court should deny Newson's motion because now that Newson had the evidence, he could present the evidence to the jury in his own defense. Also, the prosecutor argued that much of the new evidence merely corroborated evidence already admitted at trial. The district court agreed and denied Newson's motion to dismiss.

At the conclusion of Newson's trial, the jury found Newson guilty of raping Jane "when the victim did not consent and under circumstances when she was overcome by force or fear." But the jury acquitted Newson of committing aggravated criminal sodomy.

Before his sentencing, Newson moved for a new trial based on the State's delayed disclosure of the evidence related to Jane's sex-crime allegations against him. He argued that the delayed disclosure violated his right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, his right to cross-examine adversarial witnesses under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. But

at his sentencing hearing, the district court denied Newson's new trial motion. Essentially, the district court ruled that none of Newson's arguments supported that the jury would have acquitted him had he had the disputed discovery before trial. It further determined that Newson was able to mitigate the harm caused by the delayed disclosure of evidence because he was able to admit some of that evidence through the testimony of BSPD officers during his defense. Of note, at this hearing, defense counsel admitted a flash drive, which she labeled "Exhibit J," containing all the material that Major Nicholson of the BSPD gave her the evening after the second day of evidence at Newson's jury trial.

After denying Newson's motion for new trial, the district court sentenced Newson to 234 months' imprisonment followed by lifetime postrelease supervision for his rape conviction. The district court ran Newson's jail sentences for his contributing to a child's misconduct and marijuana possession convictions concurrently.

Newson timely appeals.

ANALYSIS

I. *Did the State violate* Brady v. Maryland*? And if so, should this court reverse Newson's rape conviction based on the State's* Brady *violation?*

Our Supreme Court has explained that this court exercises unlimited review when considering a district court's ruling regarding the existence of a *Brady* violation but must defer to the district court's fact-findings about the violation. *Hirsh*, 310 Kan. at 333. As for the district court's denial of a defendant's motion for a new trial, this court reviews the district court's decision for an abuse of discretion. 310 Kan. at 333. A district court abuses its discretion if its ruling is founded on an error of law, an error of fact, or some other unreasonable decision. 310 Kan. at 334.

As explained at the beginning of this opinion, a prosecutor's failure to disclose exculpatory evidence constitutes a *Brady* violation whether the prosecutor intentionally or mistakenly failed to disclose the evidence. *Hirsh*, 310 Kan. at 334. Likewise, "'[b]ecause law enforcement's knowledge of evidence is imputed to the State, a *Brady* violation can occur when the prosecutor withholds material evidence that is not known to the prosecutor but is

known to law enforcement.'" *Hirsh*, 310 Kan. at 334. Instead, to determine whether the State has committed a *Brady* violation, a court must evaluate three factors: (1) whether the disputed evidence was favorable to the accused because it was exculpatory or impeaching; (2) whether the disputed evidence was suppressed by the State, either willfully or inadvertently; and (3) whether the evidence was material, which establishes prejudice. *Hirsh*, 310 Kan. at 334. To be material, the accused must show that there is a reasonable probability that but for the State's failure to disclose the disputed evidence to the defense, the result of the proceeding would have been different. 310 Kan. at 334. Put another way, the disputed evidence is material if there is a reasonable probability that it undermines the confidence in the jury's decision. 310 Kan. at 334.

Yet, if the defense learns that the undisclosed material is important to determining whether a *Brady* violation has occurred, the defense must surmount the following hurdle: "[D]elayed rather than absent disclosure of exculpatory information may or may not qualify as a *Brady* violation, depending on whether the defendant can establish prejudice due to his or her inability to use the *Brady* material effectively at trial." *Hirsh*, 310 Kan. at 336. Relying on precedent from other jurisdictions, our Supreme Court has held that as long as the accused has sufficient time to effectively use evidence disclosed immediately before trial or during trial, the belatedly disclosed evidence does not qualify as *Brady* material. *Hirsh*, 310 Kan. at 336. So, when the State delays disclosure of favorable evidence, our Supreme Court has held that the accused must establish that the delayed disclosure of the discovery prejudiced his or her ability to present his or her defense. 310 Kan. at 335-36.

Also, "[o]nce a reviewing court has applied the reasonable probability test to determine if there is a *Brady* violation, there is no need for further harmless error review." *State v. Warrior*, 294 Kan. 484, Syl.¶ 14, 277 P.3d 1111 (2012). There is no need to consider whether the *Brady* violation was harmless because the test whether the disputed evidence was material encompasses the constitutional harmlessness error test. *Warrior*, 294 Kan. at 510.

Thus, if the State has failed to disclose material evidence, the accused is entitled to a new trial.

On appeal, Newson contends that this court must reverse his rape conviction and remand to the district court for a new trial based on the State's belated disclosure of the BSPD evidence for several reasons: (1) the time when defense counsel discovered the undisclosed evidence; (2) the "sheer volume" of the undisclosed evidence; and (3) the exculpatory nature of the undisclosed evidence. He argues that it was humanly impossible for his defense counsel to review the evidence that the BSPD gave to her the previous evening. Again, defense counsel stated that she could not start reviewing this evidence until 9:50 p.m. He argues that the belated disclosure forced his defense counsel to haphazardly admit the discovery she had found through the testimony of BSPD officers. And he forcefully argues that the late disclosure of the BSPD evidence hampered his defense counsel's ability to effectively cross-examine Jane. He asserts that if his defense counsel had certain surveillance video and text messages between Jane and John when preparing her defense, the jury would have discredited most of Jane's testimony because defense counsel could prove that Jane was being untruthful.

The State's response to Newson's *Brady* violation argument focuses on the fact that Newson received the undisclosed evidence during trial. Relying on our Supreme Court's holding in *Hirsh* that delayed disclosures of favorable evidence may not constitute *Brady* material if the defendant has time to use the evidence, the State contends that Newson had enough time to use the favorable evidence disclosed to him. See *Hirsh*, 310 Kan. at 336. According to the State, because Newson was able to admit some of the photographs, surveillance video, and text messages between Jane and John during his defense, Newson was not prejudiced by the belated disclosure of this evidence around 9:50 p.m. the evening before his defense started.

In his reply brief, Newson repeats that the sheer volume of the evidence withheld until 9:50 p.m. the night before presenting his defense, in and of itself, prevented his defense counsel from effectively representing him. He also points to an ongoing problem

with accessing the belatedly disclosed evidence. The record establishes that defense counsel, the jury, the Wyandotte County Clerk's Office, and this court have all had trouble playing the surveillance videos that were belatedly disclosed to Newson. Newson notes that it is possible that the jury was unable to view some of the belatedly disclosed exculpatory and contradictory evidence that he admitted during his defense (1) because he could not publish the disputed evidence and (2) because the jury also had technical problems reviewing the disputed evidence. Indeed, the jury—12 people—had to ask for help how to play a video exhibit admitted into evidence, which they should have been able to easily play from a flash drive.

A. *Additional facts on Newson's efforts to obtain discovery*

Before Newson's jury trial, defense counsel filed three motions to compel discovery from the State. In Newson's third motion to compel discovery, Newson essentially asked for all evidence collected by the BSPD that had any bearing on his criminal charges. Newson asked for all of the BSPD reports, the BSPD video footage, all of the photographs taken by the BSPD of the crime scene or of text messages, and all other exculpatory evidence the State had. In its March 2020 response to Newson's second motion to compel discovery, the State contended that it had given and would continue to give Newson any discovery, including *Brady* material, if it found such evidence. In reference to any text messages between Jane, John, or Newson, the State asserted that it had given Newson all discoverable material. In doing so, it noted that at Newson's preliminary hearing, Jane testified that she had deleted her text messages to John.

At the second day of evidence at Newson's trial, the only evidence the State presented was John's and Jane's testimonies. Immediately after Jane finished testifying, defense counsel told the district court that she did not believe that the State had turned over all discovery. She believed this based on her conversations with John's attorney, John's testimony that day, and Corporal Christopher Haney's testimony the day before. Defense counsel explained that neither her nor the prosecutor had a photograph of an alcohol bottle. So, she was working with Major Nicholson to see if the

BSPD had undisclosed discovery. Then, defense counsel asked the district court for a break to look at any discovery she may obtain:

> "So, I know the court is going to be pushing for going straight from the KBI agent straight into my case, but what I'm trying to say is I'm going to need time to look at those photographs. There's going to have to be a break for me to do that."

Afterwards, the district court did not say anything directly about defense counsel's request for time should she discover exculpatory evidence, like a photograph of an alcohol bottle, at the BSPD. Rather, it noted that it would "take up any motions the defense may have" after the State closed its case.

The next day, defense counsel moved to dismiss Newson's case while explaining that Major Nicholson provided more than 100 photographs as well as many videos related to the BSPD investigating Newson for raping Jane. She explained that 91 of the photographs were of text messages exchanged between Jane and John between March 16, 2019, and March 29, 2019. She explained that there was video footage from the hotel, from the 7-Eleven, and from BSPD officers' Axon body cameras. She explained that from her initial review, much of this evidence would have helped her cross-examination of Jane. She also explained that she was unable to start reviewing this substantial volume of new evidence that she had received until 9:50 p.m.

A close review of the documents the State and BSPD failed to give defense counsel until the evening after the second day of Newson's jury trial shows that Newson was belatedly given about 220 photographs; those photographs include the text messages between John and Jane as well as photographs of the crime scene. As for new video footage, Major Nicholson gave defense counsel about 315 minutes—over five hours—of video that BSPD officers filmed while investigating Newson for rape. Of note, this calculation excludes the digital video that the State belatedly disclosed but will not play.

As for the photographs of text messages between John and Jane, many of the text messages were flirtatious or involved drugs. John and Jane exchanged texts about bathing and about visiting a pornographic website. In one exchange, John strongly implied that

he had seen Jane naked before. Although Jane referred to her boyfriend in some text messages, she also said that her boyfriend was mean. She suggested that her boyfriend would not let her drink alcohol but that she could still smoke "weed." In the text messages sent on March 29, 2019, about planning the hotel gathering, Jane told John that she and her friends "ha[d] a blunt ready" and that they intended to "get fucked up tonight."

In any case, although nothing indicates that the prosecutor reviewed any of the evidence that defense counsel obtained from Major Nicholson, the prosecutor asked the district court to deny Newson's motion. She seemingly argued that the district court should reject Newson's argument because the belatedly disclosed evidence corroborated evidence that the State had already admitted in its case-in-chief. The district court adopted the prosecutor's approach and argument. Although nothing indicates that the district court reviewed any of the evidence that defense counsel obtained from Major Nicholson before denying Newson's motion to dismiss, the district court did so in a lengthy ruling:

"All right. Well, I gotta tell you it disturbs the Court that we are in our fourth day of trial and that there's this evidence that the Bonner Springs Police Department possesses and it was not turned over to the defense.

"They asked for discovery in this matter. Whether it's part of the State's case or not, I believe the law is pretty clear the State has a duty that whatever law enforcement has, they are to turn over to the defense. Especially if it is exculpatory.

"I've not heard [defense counsel] argue that there was a malicious intent on the part of the prosecutor regarding this.

"At best it's probably negligence in the fact that the prosecutor didn't check with the Police Department to determine what, if any, evidence they possessed as far as beyond reports and videos of statements . . . and photographs.

"It appears that [defense counsel] now has all this in her possession, and she's going to be able to present it.

"As far as it being used during the impeachment of [the State's] witnesses, that impeachment has already come out. I think it was very clear. I'm not sure how a photograph of no other bottles in the room would necessarily [*sic*] it can be used and impeach.

"You already have [John] saying there's one bottle. She said there was two. They're already inconsistent with that testimony. You can put this in now, and at this point, a jury will know.

. . . .

"As far as the interaction between the text messages between [Jane] and [John], I think that was clearly put before the jury that there was interactions before.

"*I will say I believe that if there is a text message that says, I have marijuana, I'm bringing it to the room, then that is relevant, and that does go to her consistency of*

whether she had hit or whether it was that she testified other people, but the fact that you have that now and can introduce it, I would assume through [Corporal] Haney or whoever collected it, then you'll be able to complete it.

"So, I don't know that your client has been prejudiced at this point, given that you have [John] testified that she had her own blunt, and she introduced it into the rotation of eight blunts that they all smoked at the time.

"The 7-Eleven video, I think there's been plenty of testimony already by [Corporal] Haney or [Officer] Hedrick about how the victim was walking and how she was performing. I don't think she indicated she was necessarily stumbling. . . .

"So, all of that, while it's obviously corroboration to [John's] testimony about it, again, if you're going to put it on now, the jury will have it to look at.

"Again, it's disturbing to this Court that the State didn't have this evidence and turn it over to the defense. It should have been obtained and should have been turned over.

. . . .

"It's all speculation, but given that you now have [the evidence], I'm going to find that I know this case is—it's been a while since I looked at the exculpatory *Brady* material cases, but given that there doesn't appear to be a malicious intent, it appears to be at least a negligence on the part of the State at this point, and the fact that you are aware of it, and you can put it before the jury now, I'm going to deny your motion for dismissal." (Emphasis added.)

During his defense, Newson admitted five exhibits that were disclosed to him the evening before he presented his defense through BSPD officers. The officer who found and then took a photo of a single bottle of a fifth of New Amsterdam vodka that was three-quarters full testified about taking the photo, which was admitted as Defense Exhibit E. Video surveillance from the hotel was admitted as Defense Exhibit F through Officer Brenden Hedrick's testimony. And video surveillance from the 7-Eleven was admitted as Defense Exhibit G through Corporal Haney's testimony. Then, during her direct examination of Corporal Haney, defense counsel asked Corporal Haney a few questions about the photographs he had taken of text messages between John and Jane from March 16, 2019, to March 29, 2019, that were on John's cellphone. Corporal Haney admitted that the photographs indicated that Jane intended to smoke marijuana and drink alcohol when she went to the hotel. The photographs of the text messages were admitted as Defense Exhibit H. Finally, Newson admitted a video of Corporal Haney giving John a cigarette although he knew that John was a minor as Defense Exhibit I; a different BSPD officer's Axon camera recorded this incident.

After the jury convicted Newson of rape but before Newson's sentencing, Newson moved for a new trial because the delayed disclosure was a *Brady* violation that infringed on his due process right to a fair trial. In his motion, Newson asserted that his trial was fundamentally unfair because the belated disclosure adversely affected his ability to confront adverse witnesses, to present a defense, and to "have a full and fair opportunity to defend himself against the State's allegations." Yet, the district court rejected Newson's argument again:

"The defense then utilized at least a couple of the—some of that evidence in their case. I don't know what's exactly on here and what would be considered prejudicial. I think I made the comments at the time it—the Court was bothered by the fact that this evidence had not been turned over and the State had not obtained this evidence from the Bonner Springs Police Department. But the issue then becomes is its, as the State pointed out was—is its materiality. Would it have changed the verdict?

"*I've not been presented anything at this point to tell me what exactly is on here*. The State indicated that there were potentially some impeachment material, and that may have been regarding who went where as far as afterwards. But the defense, as I recall, was able to impeach the victim in this case both with the testimony of the codefendant about what occurred in the room regarding—as I said earlier, about whether she had initiated—I think as I recall there was some testimony from him that she had called saying she was bringing some of her own marijuana, that she did participate. She denied it.

"So I'm not sure exactly—and it hasn't been presented today exactly what else is on those photographs or those exhibits, Exhibit J, that would have—that wasn't presented to the jury that would have potentially charged the verdict in this case.

"I think the defense obviously presented to the jury the—some impeachment material to the jury regarding the victim and regarding what occurred, and the jury was able to consider that and gave it what weight they did. But ultimately found, based on her testimony and based on the other testimony in the case, that they were—they believed the State had met its burden.

"*So unless there's something on those that's so clearly exculpatory, so material that it would change the verdict, which I don't have—that's not really been presented to me so I don't know what it is other than what I was—what I recall in the trial*. And I don't recall—I think the defense utilized some of that with—because the State—Defense called Chris Nicholson, Captain Kahn, [Officer Hedrick], [Corporal] Haney in their case. And so they were able to utilize some of that information in their case.

"So at this point, given—I don't believe that the defense has carried its burden to show the Court that the defendant—that *the State, while it may not have turned over and should have been turned over*, *clearly, that it was so prejudicial it deprived him of a fair trial, meaning that this occurred to the point where it was material and the verdict*—I think both of you have put in there that it's the

defendant's burden at that point to show that it's—likely would have produced a different result.

"For those reasons, I will deny." (Emphases added.)

B. *Should Newson's rape conviction be reversed?*

Having considered these additional facts, we will consider the merits of Newson's *Brady* violation argument. In a nutshell, there are multiple problems with the district court's reasoning for rejecting Newson's arguments.

To begin with, the district court never considered the evidence that Newson asserted was *Brady* material before denying his mid-trial motion to dismiss or his motion for a new trial. When Newson moved to dismiss the State's charges against him during his trial, it is readily apparent that the district court denied Newson's motion without considering the alleged *Brady* material for two reasons: (1) Defense counsel had just told the district court about the newly disclosed evidence; and (2) the district court used hypotheticals when it denied Newson's motion. Specifically, the district court discussed a hypothetical that "*if* there [was] a text message that says, I have marijuana, I'm bringing it to the room, then that is relevant, and that does go to her consistency of whether she had hit [*sic*] or whether it was that she testified other people." (Emphasis added.)

But as already discussed, the BSPD photographs of the text messages between John and Jane showed that Jane sent John a text message about having "a blunt ready" for the gathering at the hotel. So plainly, the district court had not reviewed the delayed discovery Newson took issue with before it denied his motion to dismiss. As for Newson's motion for a new trial, defense counsel admitted Exhibit J—a flash drive, which contained all the evidence that BSPD gave her, at Newson's sentencing hearing when the district court considered the new trial motion. Nevertheless, it seems that the district court never reviewed the evidence on this flash drive either. Instead, at Newson's sentencing hearing, it explained that it was denying Newson's motion because it had not "been presented anything at this to tell [it] what exactly [was] on [the flash drive]."

A district court must make fact-findings to determine whether the State violated *Brady*. This is why this court's standard of review requires us to defer to the district court's fact-findings while reviewing alleged *Brady* violations. *Hirsh*, 310 Kan. at 333. So, to determine whether a *Brady* violation exists, the district court must consider the evidence that the accused argues is undisclosed *Brady* material. It is an abuse of the district court's discretion to not consider the underlying facts needed to answer the accused's legal argument. See *State v. Horton*, 292 Kan. 437, 440, 254 P.3d 1264 (2011) (holding that it "is an abuse of discretion to refuse to exercise discretion or fail to appreciate the existence of the discretion to be exercised in the first place"). So, the district court's reasons for rejecting Newson's *Brady* violation arguments are all fundamentally flawed; the district court ruled why it was denying Newson's motions before it considered the evidence required to support its rulings.

Next, in addition to the preceding error, when the district court denied Newson's motion to dismiss, it speculated about what evidence would constitute *Brady* material. In doing so, it expressly stated that if there were any text messages from Jane to John about already possessing marijuana, those messages would be "relevant" because it concerned Jane's "consistency of whether she had hit [*sic*] or whether it was that she testified other people." Consequently, the district court recognized, rightly, that any text messages indicating that Jane was bringing marijuana to the hotel would help Newson undermine Jane's credibility. Regarding the district court's ultimate decision that Newson was not prejudiced because he had access to the delayed disclosure material, though, Newson correctly argues that the district court's ruling ignored (1) the extent of the evidence suppressed and (2) the importance of having this evidence before cross-examining Jane.

As already discussed, following the second day of evidence at Newson's jury trial, Major Nicholson of the BSPD gave defense counsel 220 photographs and over five hours of video footage from the hotel, from the 7-Eleven, and from BSPD officers' Axon body cameras. Put plainly, it takes substantial time to skim this amount of material, let alone thoroughly review this material to effectively and zealously represent a criminal defendant on trial

for rape, aggravated criminal sodomy, and aggravated sexual battery. On the third day of evidence at Newson's jury trial, defense counsel tried to explain her dilemma. She told the district court that she was only able to start reviewing the new discovery at 9:50 p.m. the previous evening.

Defense counsel should have never been placed in this position. The Sixth Amendment to the United States Constitution guaranteed Newson the right to effective assistance of counsel. Through no fault of defense counsel, the district court limited defense counsel's ability to effectively represent Newson in violation of his right to effective representation. No reasonable person could expect defense counsel to be adequately prepared to defend Newson after being given so much discovery, some of which was clearly exculpatory, late at night the evening before presenting Newson's defense.

For this same reason, the State's contention that the evidence from the delayed disclosure was not *Brady* material because Newson was able to effectively use the evidence at this trial is a crowning non sequitur (it does not follow). If we were to take the State's contention seriously, the State could simply delay in turning over *Brady* material to a defendant until after the complaining witness (here Jane is the complaining witness) has testified and has been released from his or her subpoena to appear. Indeed, this is exactly what happened in this case. Here, the State shielded Jane from meaningful cross-examination when it delayed the disclosure of the exculpatory evidence *until after* Jane had been released from her subpoena.

Surely, the State should not be in a stronger position because it delayed in turning over *Brady* material to Newson *until after* Jane was no longer available for cross-examination than the State would have been in if the defense could have cross-examined and impeached Jane's credibility based on her exculpatory and contradictory text messages she had previously made to John. Our Supreme Court has recognized the following important witness credibility factor: "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful." *State v. Scaife*, 286 Kan. 614,

624, 186 P.3d 755 (2008). Thus, Newson's inability to cross-examine Jane due to the State's delayed disclosure of *Brady* material cut off a vital line of impeachment evidence for him to use in testing the truthfulness of Jane's testimony.

Here, defense counsel was asking a law enforcement officer about photographs of text messages he took of a codefendant's cellphone that tend to undermine Jane's credibility about her relationship with the codefendant, John, her marijuana use, and her alcohol consumption, which does not have the same effect as cross-examining Jane, under oath, about those messages. Although the text messages between John and Jane were admitted into evidence, it seems that the jury was able to review the photographs only if it chose to do so by accessing the photographs on a flash drive during deliberations. As previously mentioned, the jury had trouble using the flash drive during its deliberations. So, we cannot be confident that the jury actually saw any of the defense exhibits containing material from the delayed discovery disclosure. Most importantly, the text messages are direct statements from Jane to John. This direct evidence was undoubtedly the best way for the jury to weigh whether Jane's or John's testimony was more credible. As a result, any argument that John's and Jane's text messages to each other merely corroborated previously admitted evidence is illusory.

Also, our Kansas Supreme Court decision that the State relies on to make this illusory argument—*Hirsh*—cites precedent that the opportunity to cross-examine the State's witnesses about the belatedly disclosed evidence is important to the determination whether the delayed disclosure of evidence constitutes *Brady* material. See *Hirsh*, 310 Kan. at 336. Here, the timing of the State's delayed disclosure of the evidence possessed by the BSPD prevented Newson from cross-examining Jane with any of the impeaching and contradictory evidence belatedly disclosed. Thus, the State's reliance on *Hirsh* is clearly misplaced.

Finally, Newson's defense hinged on bolstering John's credibility while impeaching Jane's credibility. Newson wanted the jury to believe John's testimony about what had happened in the hotel room because it was vague. His testimony implied that Jane and Newson may have had consensual sex. So, any evidence that

undermined Jane's credibility with the jury while supporting his consensual sex defense would be very important.

Here, when this court reviews John's and Jane's conflicting testimonies in the context of some of the messages that Corporal Haney photographed on John's phone, it seems that Jane either lied at Newson's trial or had no memory of her previous text message conversations with John. For instance, although John testified that he and Jane dated in middle school, Jane testified that she was never John's girlfriend in middle school. Rather, they were just friends. In a text message, though, John implies that he has seen Jane naked before. Additionally, Jane and John exchanged text messages about bathing and showering. John texted Jane when he was about to get on a porn website. And Jane complained to John that her boyfriend was mean. Concerning Jane's use of marijuana and alcohol during March 29, 2019, and the morning of March 30, 2019, she testified that she did not bring marijuana to the hotel. But in her text messages to John shortly before hanging out at the hotel, Jane tells John that she and her friends were "gonna get fucked up tonight." Jane told John that she and her friends had their own "blunt ready." She also told John if he could get her more marijuana "that would be amazing." This direct contradictory evidence would have called into question Jane's credibility.

As a result, the credibility of Jane and her ability to accurately perceive and to remember the events of March 29, 2019, and the morning of March 30, 2019, were critical to Newson's defense. In a trial where jurors are asked to accept the testimony of a witness, it is certainly proper for the opposing party to introduce evidence affecting the witness' credibility. Accordingly, it is readily apparent that the State interfered with Newson's defense, preventing him from presenting a complete defense when it precluded him from being able to question Jane about her rape accusation against him.

To summarize, there are three elements of a *Brady* violation: (1) that the evidence at issue was favorable to the accused, either because it is exculpatory or useful for impeachment purposes; (2) that the evidence was suppressed by the State, either willfully or inadvertently; and (3) that the evidence suppressed was material,

which means that there is a reasonable probability that if the accused had the evidence, the result of the proceeding would have been different. *Hirsh*, 310 Kan. 321, Syl. ¶ 1. Here, we conclude that the State's violation of *Brady* resulted in Newson not having the best evidence available to effectively present his defense based on undermining Jane's testimony and strengthening John's credibility with the jury. When compared to her testimony, Jane's text messages impeached her credibility. Given this factual scenario and that the evidence against Newson was not overwhelming, there is a reasonable probability that the jury would have acquitted Newson of rape if he had timely access to the text messages to properly incorporate the messages into his consensual sex defense. Indeed, the probability that the jury would have reached a different outcome seems especially reasonable since the jury acquitted Newson of aggravated criminal sodomy.

As a result, we reverse the district court's denial of Newson's new trial motion asserting that the State violated *Brady* for the following reasons: (1) The district court did not review the belatedly disclosed evidence before it denied Newson's motion; (2) the district court ignored that the amount of evidence that the State belatedly disclosed during the middle of Newson's jury trial would prevent any defense attorney from presenting an effective defense as meant under the Sixth Amendment to the United States Constitution; (3) the district court ignored that the content and the timing of the discovery of the *Brady* material prevented Newson from exercising his right to confront adversarial witnesses under the Sixth Amendment to the United States Constitution; and (4) the district court ignored that if Newson had the undisclosed text messages when Jane testified, Newson would have severely impeached Jane's credibility.

II. *Did the prosecutor commit reversible error during closing arguments and does cumulative error otherwise require reversal of Newson's rape conviction?*

When a defendant argues prosecutorial error on appeal, this court considers the defendant's argument in two steps. First, this court considers whether the prosecutor's conduct fell outside the wide latitude that prosecutors have when presenting the State's

case. *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). Second, if the defendant establishes that the prosecutor erred by engaging in conduct outside this wide latitude, then this court must consider whether the error was harmless under the constitutional harmlessness error test. 305 Kan. at 109. Under the constitutional harmlessness error test, an error is harmless if the State can establish that the prosecutor's error did not affect the outcome of the defendant's trial in light of the entire record. 305 Kan. at 109.

Previously, our Supreme Court has held that a prosecutor must be careful when using phrases like "we know," "we submit," "I know," and "I submit" during closing arguments to the jury. See *State v. King*, 308 Kan. 16, 34, 417 P.3d 1073 (2018); *State v. Corbett*, 281 Kan. 294, 315, 130 P.3d 1179 (2006). Although a prosecutor may use phrases like "we know" and "I submit" when the prosecutor is speaking about uncontroverted evidence, a prosecutor cannot use these phrases to give the prosecutor's personal opinion. *King*, 308 Kan. at 34; *Corbett*, 281 Kan. at 315-16. A prosecutor also errs whenever the prosecutor makes an argument that draws inferences for the jury about controverted evidence using such phrases. *King*, 308 Kan. at 34-35.

During closing arguments, the district attorney made some statements using these controversial phrases. Newson takes issue with the prosecutor saying that the "State submits to you what's not in dispute is that on that day, on that night . . . the defendant raped and sodomized [Jane]." He takes issue with her statement, "I submit to you we have proven [the] elements [of rape and the elements of aggravated criminal sodomy]." He takes issue with the prosecutor stating that "[t]here was a lot going on, . . . but what we do know is [he] raped [Jane] and sodomized [Jane]." He also takes issue with the prosecutor's repeated statements that he did not ask for consent and Jane never gave him consent. Newson rightfully points out that by pleading not guilty to rape and arguing that he and Jane had consensual sex, whether he and Jane had consensual sex was a controverted fact. In addition, he stresses that the State's case against him hinged on Jane's credibility. He stresses that the prosecutor's errors involve interjecting her personal opinion about Jane's credibility. So, under the assumption that this court rules that the prosecutor's disputed comments were

erroneous, he argues that the State cannot prove the prosecutor's errors were harmless.

The State's response to Newson's prosecutorial error arguments ignores his complaint about the prosecutor saying, "[The] State submits to you what's not in dispute is that . . . the defendant raped and sodomized [Jane]." The State also never responds to Newson's argument about the prosecutor stating, "I submit to you we have proven [the] elements [of rape and the elements of aggravated criminal sodomy]." Instead, the State wrongly contends that Newson only challenges the prosecutor's statement that "[t]here was a lot going on, . . . but what we do know is [he] raped [Jane] and sodomized [Jane]." Regardless, as to this last statement, the State expressly concedes that the prosecutor violated our Supreme Court's precedent in *King* that a prosecutor may not use such phrases indicating the prosecutor's opinion on controverted evidence. But by making this concession, the State implicitly concedes that the statements Newson challenges, which the State has not addressed, clearly violates the *King* holding.

As Newson asserts in his brief, the State cannot meet its burden of proving harmless error. Because the prosecutor's errant comments alleged that the State had already established that Newson had raped Jane, the prosecutor's errant comments bolstered Jane's credibility. This was improper vouching for Jane's credibility. Our Supreme Court has condemned the practice of inappropriately bolstering the credibility of a witness. Thus, a prosecutor may not bolster the credibility of a witness. *State v. Sprague*, 303 Kan. 418, 428, 362 P.3d 828 (2015) (Prosecutor's comments in closing argument bolstering the credibility of witnesses are improper.). Because the prosecutor's errant comments bolstered Jane's credibility and Newson's defense sought to impeach Jane's credibility with the jury, the State's harmless error argument about the strong evidence supporting Newson's rape conviction fails.

Relatedly, because the prosecutor's errant comments bolstered Jane's credibility and Newson's defense hinged on impeaching Jane's credibility with the jury, the prosecutor's errant statements magnified the harm stemming from the State's *Brady* violation. In short, Newson was denied the best evidence he could use to improve John's credibility while impeaching Jane's credibility—the

text messages between John and Jane. *And then*, the prosecutor made errant statements during closing arguments that bolstered Jane's credibility. As a result, the harm caused from the State's *Brady* violation aggregated with the harm caused by the prosecutor's improper statements during closing arguments is cumulative error. See *State v. Alfaro-Valleda*, 314 Kan. 526, 551-52, 502 P.3d 66 (2022) (explaining how cumulative error involves the aggregated harm of multiple errors within a proceeding). Thus, under the doctrine of cumulative error, the prosecutor's errant statements during closing arguments combined with the harm stemming from the State's *Brady* violation requires the reversal of Newson's rape conviction too.

Reversed and remanded for a new trial.

State v. Reynolds

(564 P.3d 404)

No. 126,940

STATE OF KANSAS, *Appellee*, v. HENRY REYNOLDS, *Appellant*.

Petition for review denied March 13, 2025

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Formal Corpus Delicti Rule—Requirement of State to Show Existence of Crime Independently of Extrajudicial Confession by Defendant.* Under the formal corpus delicti ("body of the crime") rule, the State is required to show the existence of a crime independently of an extrajudicial confession by the defendant. Recognizing that false confessions do occur for a variety of reasons, courts use this rule when the only evidence of a crime is the defendant's confession.

2. SAME—*Application of Formal Corpus Delicti Rule—State's Burden.* When applying the formal corpus delicti rule, the State's burden is met if there is some evidence which renders the corpus delicti more probable than it would be without the evidence.

3. SAME—*Formal Corpus Delicti Rule Not Followed for Crimes That Produce No Tangible Injury.* Kansas does not follow the formal corpus delicti rule for crimes that produce no tangible injury. The law only demands the best proof of the corpus delicti which is attainable given the nature of the crime. Under these circumstances, the State may show the corpus delicti through a trustworthy confession.

4. SAME—*Kansas Corpus Delicti Rule Requires Higher Burden on State Than More Probable Than Not Standard.* Under the Kansas corpus delicti rule (opposed to the formal corpus delicti rule), the State carries a higher burden than the more probable than not standard when establishing the corpus delicti solely through a trustworthy confession.

5. CONSTITIONAL LAW—*Due Process Clause Protects against Involuntary Confessions—Requirements.* The Due Process Clause protects against involuntary confessions: (1) that are inherently coercive and a per se violation of the Due Process Clause and (2) where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive.

6. SAME—*Aim of Due Process to Prevent Fundamental Unfairness in Use of All Confessions.* Unlike the aim of the corpus delicti rule to prevent convictions upon false confessions, the aim of due process is to prevent fundamental unfairness in the use of confessions whether true or false.

7. SAME—*Fifth Amendment Protection Applicable—State's Burden to Prove Individual Waived Rights to Make Voluntary Statement—Requirements.*

The State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment and voluntarily—that is based on the person's unfettered will—made a statement. In that vein, the State must establish that police or other state actors did not intimidate, coerce, deceive, or engage in other misconduct that, when considered in the totality of the circumstances, was the motivation for the individual to make a statement.

8. CRIMINAL LAW—*Involuntary Confession—Link between Coercive Police Activity and Resulting Confession.* Coercive police activity is a necessary predicate to a finding that a confession is involuntary. And there must be a link between the coercive police activity and the resulting confession.

9. SAME—*Involuntary Confession—If CVSA Used by Law Enforcement to Trick or Induce Defendant into False Confession.* An officer's exaggeration of the reliability of the Computer Voice Stress Analysis (CVSA) to identify the "truth" is deceptive. Although deceptive practices by law enforcement do not always constitute misconduct, if law enforcement uses the CVSA as subterfuge to trick or otherwise induce a defendant into a false confession, it can result in the confession being deemed involuntary.

10. SAME—*Key Difference Between Reliability and Voluntariness—Confession Can Be Trustworthy but Still Involuntary*. There is a key distinction between reliability and voluntariness. The reliability of a confession has nothing to do with its voluntariness. Proof that the defendant committed the crime to which he or she has confessed is not to be considered in deciding whether a defendant's will has been overborne and therefore the confession involuntary. A confession can be trustworthy, but still involuntary.

11. SAME—*Confession Could Be Untrustworthy Yet Still Voluntary—State Required to Prove Confession Is Trustworthy.* Likewise, a confession could be untrustworthy, yet still voluntary. This would come into play when there is no tangible injury and the State is required to prove that the confession, its sole evidence, is trustworthy. If it cannot establish trustworthiness, then it does not matter if it was voluntary.

12. SAME—*Determination of Trustworthiness and Voluntariness of Confession from Totality of Circumstances—Considerations* Both trustworthiness and voluntariness must be determined from the totality of the circumstances. This entails consideration of factors relating to the nature of the interrogation and the characteristics of the accused.

Appeal from Coffey District Court; TAYLOR J. WINE, judge. Submitted without oral argument. Opinion filed February 7, 2025. Conviction reversed and sentence vacated.

Sam Schirer, of Kansas Appellate Defender Office, for appellant.

Tyler W. Winslow, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

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

ARNOLD-BURGER, C.J.: Henry Reynolds appeals his conviction for aggravated indecent liberties with a child. He claims there was insufficient evidence to support his conviction, primarily because his confession was untrustworthy and involuntary. Because we agree with Reynolds and reverse his conviction and vacate his sentence, we need not address the other issues he raises.

FACTUAL AND PROCEDURAL HISTORY

The following facts are not in dispute.

Reynolds is an intellectually disabled man in his 40s. He completed ninth grade taking educable mentally handicapped classes and had an individualized education plan throughout his schooling. He repeated both kindergarten and fourth grade. He reads at a fourth-grade level. He has been unable to pass a GED test. He has moderate anxiety and depression. He was often teased and bullied growing up. As a result, he is frightened of others beating him up or yelling at him. To avoid this he often tries to please others even when it is not in his best interests. He has been married twice and had three live-in relationships. Each of these relationships were ended by his partners who complained about him letting people bully him.

Reynolds worked as a cook at a Tex-Mex restaurant. He started there as a dishwasher. He had joint custody with his ex-girlfriend, R.R., of their then three-year-old daughter.

In January 2021, R.R. reported that Reynolds had inappropriately touched their three-year-old daughter in December 2020. R.R. reported that her daughter told her "'Daddy touches my no-no and boobs.'" The girl used the term "no no" to refer to her vagina. A medical examination revealed no visible injuries. In an unrecorded forensic interview of the child, her sole statement to the examiner was that Daddy was in jail for touching her "'No-No.'" When asked to point to her "'No-No'" she pointed to her crotch area. When asked if Daddy did touch her there, she was unable to answer. When asked where she was when he touched her there, she was unable to answer. When asked her age, she was

unable to answer. The interview ended with no additional engagement from the child.

Police interviewed Reynolds twice. Initially, Deputy Jay Szambecki interviewed Reynolds outside Reynolds' place of work. Reynolds denied ever touching his daughter's vagina. Reynolds believed that R.R. had coached their daughter into making that statement. Reynolds agreed to take a Computer Voice Stress Analysis (CVSA), which the officer explained was a lie detector test that did not require him to be hooked up to a bunch of wires.

Detective Garen Honn interviewed Reynolds at the Coffey County Sheriff's Office. The interview lasted about one hour. Reynolds told the detective he was being "set up." The only time he touched her "down there" was if she had an accident. He never touched her in a sexual manner.

The detective asked Reynolds to take a lie detector test, referring to the CVSA. Reynolds responded that he had nothing to hide. The detective encouraged him to take the test and told him it would help clear his name. This was a reference to the reliability of the test to determine if Reynolds was telling the truth or not. If nothing happened, all would be fine, and they could just move on.

Before the CVSA, Reynolds told the detective he had a speech impediment. Detective Honn said it would not affect the CVSA. Detective Honn read Reynolds his *Miranda* rights. Detective Honn told Reynolds he was not under arrest, and he was free to leave. Reynolds said he understood his rights. Detective Honn admitted that Reynolds did not read the form before signing it. Instead, Reynolds simply stated his best friend's grandfather was an FBI agent. Detective Honn also admitted that he did not elaborate on any of the *Miranda* rights he read to Reynolds and did not know if Reynolds understood words like "appointed." He stated that he made no effort to determine Reynolds' level of education before interviewing him and even if he had known Reynolds fit the definition of "borderline mentally retarded" he would not have adjusted his interrogation techniques.

Detective Honn then explained and administered the CVSA. Prior to administering it, he handed Reynolds a liability waiver form for the test. He did not read it to Reynolds, and Detective Honn admitted Reynolds did not read it before signing it. He told

Reynolds that this was to protect the Coffey County Sheriff's Office if he fell out of the chair and got hurt. Reynolds was confused by the comment and responded, "Fall and get hurt?" Detective Honn explained that no one had ever fallen out of the chair. Detective Honn also explained that he was going to ask Reynolds to purposefully lie on a couple questions and told him to which questions he was supposed to lie. Reynolds had difficulty understanding what he was supposed to do and messed it up several times, requiring repeated explanations. When he was told it was about to begin, he repeated out loud the two things about which he was supposed to lie several times, apparently to help him remember them.

During the test, Reynolds denied ever touching his daughter's breasts or vagina for sexual gratification. On several occasions Detective Honn referred to it as a lie detector test or a test able to detect lies.

After administering the test, Detective Honn told Reynolds his answer to the question—have you ever touched your daughter's vagina for sexual gratification—showed signs of deception. Reynolds asked what "deception" meant, explaining he had a learning disability. Reynolds repeatedly denied ever touching his daughter "for sexual" gratification. Detective Honn said the test showed "a little bit of a lie." The detective said, "I'm not saying anything extravagant happened but if something happened I need to know." Reynolds still denied touching his daughter.

The detective then suggested, "So did you not do it for sexual gratification. Did you do it just to touch her to know what it feels like or anything else." Reynolds denied touching his daughter "for sexual," but suggested that his hand could have slipped when playing with her. He maintained, "I would never do anything sexual to my daughter." The detective then asked Reynolds to explain what he was thinking during the CVSA questioning, to explain the test result. In other words, come up with a reason this question would have shown deception because this machine is able to unequivocally tell if you are lying. Detective Honn implied the machine could not be wrong.

Reynolds still denied touching her but said—in response to Detective Honn's demand for an explanation—"if my hand

slipped or something like that. I was thinking that stuff, would that come up as a lie. Me tickling her. . . . I was worried about what happens if the test is rigged. . . . I was just going by what people were telling me." The detective said, in a clearly frustrated and defensive tone, "I can tell you with my experience, people who do research and try to figure out these machines is because they're guilty." Reynolds said the only time he touched his daughter "down there" was to "help her wash herself when she took baths. Yeah, I touched her. . . . I did it to clean her. But I don't understand why it would come up that I did it for sexual."

The detective pressed, "Did it do anything for you?" Reynolds responded, "It didn't give me an erection or anything like that. . . . But it does make me think about like how . . . sex [offenders] . . . could actually do this to another child. Why would it give them an erection?" Detective Honn continued to press Reynolds in spite of continuous denials. He said, "[Y]ou can't sit here and tell me that you didn't touch it just to see what it feels like." In an escalating and much louder and accusatory voice Detective Honn *suggested* that Reynolds touched her "just to see what it feels like. I'm not saying you stuck your penis in her." He went on. "I need to know did you touch her to see what it felt like . . . [and now yelling] Henry, come on. . . . Talk to me. I'm a man." Reynolds eventually said, "I've done it one time to see what the difference was and stuff like that." He said he did not put his finger "in her." Reynolds described touching her "around the lip part." He explained he "wanted to see what the difference was between a child and a grown woman." He stated that he has a learning disability, and he did not know much about human anatomy and wanted to see.

The detective pressed Reynolds for details. Reynolds responded it had happened about six months earlier on a Sunday at his house on Yuba Street when his daughter was two years old. Six months earlier would have been July 2020, but the detective determines that five months earlier would be September of 2020, and Reynolds agrees it must have been September. At that point there had been no allegations or evidence from R.R. or the child that Reynolds had sexually abused his daughter in July 2020, nor was any such evidence ever brought forward. The detective asked

if she was in the bath or if he was changing her. Reynolds responded that it was after his daughter had an accident and he cleaned her. He was getting her dressed and "got curious." Detective Honn *suggested* Reynolds touched her in her "clit area." Reynolds agreed he spread her vagina apart to see if there was a clitoris. He did not see a clitoris and did not believe a child that young has a clitoris. After the detective *asked* (unprompted) if Reynolds had licked or smelled his fingers, Reynolds admitted he smelled his fingers to see if there was a difference between a child and a grown woman. Reynolds insisted it was not done for sexual-gratification, and it did not arouse him. Reynolds stated, "[I]t was wrong. So I tried to forget it. But that's the only thing. I didn't penetrate or anything like that. I was just curious. It was a one time thing." The detective immediately placed Reynolds under arrest for rape. He again declared his innocence.

The State ultimately charged Reynolds with one count of rape of a child under 14 years of age and one count of aggravated indecent liberties with a child, both off-grid person felonies and both for the timeframe "on or between the 1st day of July, 2020 and the 1st day of January, 2021."

To prove the charge of aggravated indecent liberties with a child, the State must establish that Reynolds engaged in lewd fondling or touching of his daughter with the intent to arouse or satisfy his sexual desires. The fondling or touching must be in a manner that tends to undermine the morals of the child and is so clearly offensive as to outrage the moral senses of a reasonable person. K.S.A. 21-5506(b)(3)(B); PIK Crim. 4th 55.121 (2016 Supp.). To establish the charge of rape, the State must establish that Reynolds had sexual intercourse with his daughter. K.S.A. 21-5503(a)(3). Sexual intercourse, as it applies to these facts, means any penetration of the female sex organ, however slight, by a finger. K.S.A. 21-5501(a). Our Supreme Court has noted that a finger entering the vulva or labia is sufficient. *State v. Borthwick*, 255 Kan. 899, 914, 880 P.2d 1261 (1994), relying on *State v. Ragland*, 173 Kan. 265, 268, 246 P.2d 276 (1952).

Before trial, Reynolds moved to suppress his confession. The trial court heard the motion. Detective Honn testified the interview took place in the early afternoon. Reynolds was dropped off at the

sheriff's office by his girlfriend. The detective was dressed in plain clothes with a gun and badge. The interview took place in his office with the door closed but not locked. Reynolds was not handcuffed. He had his cell phone with him and took a phone call during the interview.

A clinical psychologist, Mitchell Flesher, testified for the State. He interviewed Reynolds once, on June 30, 2021, administered several testing instruments, and viewed the videotaped interview with Detective Honn. Dr. Flesher was originally asked to evaluate Reynolds only as to his understanding of the *Miranda* warnings and his report only addressed that issue. Dr. Flesher testified Reynolds' estimated IQ score was 62, within the "extremely low range." He testified that the tests he performed on Reynolds indicated that Reynolds has moderate anxiety, severe depression, and both his abstract thinking ability and his verbal comprehension are in the extremely low range.

Dr. Flesher then gave Reynolds two tests that he called "forced choice" tests to determine whether he understood the meaning of the *Miranda* language. This is not a standardized test, but one developed by Dr. Flesher solely for the purpose of evaluating Reynolds' understanding of second-grade vocabulary words and ultimately the *Miranda* warnings. Dr. Flesher did indicate that forced choice tests in general were accepted in the scientific community, but it appears each test is highly individualized. On the other hand, Dr. Flesher admitted that the "Grisso" test has been described in literature as the gold standard for testing understanding of *Miranda* warnings but argued that is because it is the *only* standardized test offered in the field. Dr. Flesher did not use that test.

In the first forced choice test, Reynolds was given a list of second-grade vocabulary words. He was asked to match each word with one of two choices that best represented the meaning of that word. He correctly matched only 9 of the 25 words. Dr. Flesher viewed this as valid because the results fell about the .05 probability of chance performance, with Reynolds being .06. To put another way, even though Reynolds was assessed to read at a fourth- or fifth-grade level, he legitimately struggled with second-

grade vocabulary. Dr. Flesher had no doubts about the validity of this test.

In the second test, Dr. Flesher presented Reynolds with the *Miranda* language. Components of each phrase were presented separately, and Reynolds was asked to identify which of two choices correctly expressed the meaning of each component. It is unknown which components were presented or which word choices were provided. The test itself is not in the record. It appears from Dr. Flesher's testimony that Dr. Flesher simply developed it on his own specific to this case. So, in Dr. Flesher's forced choice test related to the *Miranda* warnings, out of 17 components, Reynolds correctly identified only 2. Dr. Flesher concluded that this was *not* a valid result because the results fell below the .05 probability of chance performance, with Reynolds being .001. We do not know from where those probability numbers derived. However, Dr. Flesher concluded in his report,

"Several of Mr. Reynolds' responses were absurd and implausible. For example, when asked to identify the correct meaning of 'silent' in the phrase 'You have the right to remain silent,' Mr. Reynolds chose 'singing' instead of 'without talking.'"

It was this test along with his viewing of the interview tape that caused Dr. Flesher to conclude that Reynolds was purposely underperforming on the test. He believed that Reynolds knowingly and voluntarily waived his *Miranda* rights. He explained that Reynolds gave the detective nine different possible explanations for the abuse allegation or reasons why it could not be true. Reynolds was "cooperative, talkative, and self-advocating and he unambiguously indicated that he understood the rights described by the detective."

Dr. Flesher was then asked at the suppression hearing to opine if Reynolds was coerced by Detective Honn. Dr. Flesher did not know whether a detective's use of a pseudoscientific technique (referring to the CVSA) would be necessarily coercive for a low intellect individual. He agreed that false confessions were more common for low intellect individuals than for normal intellect individuals. He did not believe the interview with Detective Honn was coercive, despite the use of the CVSA. He based this on the fact that Reynolds did not have difficulty communicating, his vocabulary was sufficient to understand the detective, and he did not

just parrot the language of the detective. He did admit that the detective provided possible details to Reynolds to suggest possible motivation.

On the other hand, Dr. Robert Barnett, clinical psychologist, testified for the defense. Dr. Barnett was first asked to evaluate Reynolds' "psychological functioning, including a measurement of his intelligence and reading level." He interviewed Reynolds on or about April 1, 2021, administered several testing instruments, and viewed the videotaped interview with Detective Honn. He concluded that Reynolds read at a fourth-grade level and "should not be seen as capable of any further education or training that requires reading competency." He also testified that Reynolds "really did not comprehend and understand and appreciate his *Miranda* rights." He received similar results on his simple questions regarding Reynolds' understanding of the *Miranda* warnings as Dr. Flesher, although unlike Dr. Flesher, he found no problem with their reliability.

Dr. Barnett presented Reynolds "with a type[d] list of his *Miranda* rights and asked him to read them" out loud. He was able to do so, but Dr. Barnett noted that his understanding of them was notably impaired. For example,

> "1. You have the right to remain silent. Q: What does this mean? A: You mean like Silent Night? Q: What is the purpose of this right? A: Don't know.
> "2. Anything you say can and will be used against you in a court of law. Q: What does this mean to you? A: don't know.
> "3. You have the right to talk to an attorney for advice before we ask you any questions, and to have your attorney present with you while you are being questioned. Q: What does this mean? A: If you feel you were guilty.
> "4. If you cannot afford to hire an attorney, one will be appointed to represent you by the court, before any questioning, if you wish. Q: What does this mean? A: Why do it if you're not guilty?
> "5. If you decide to answer questions now, without an attorney present, you still have the right to exercise these right[s] and not answer any more [questions] or make any more statements. Q: What did you take this to mean? A: I'm lost—didn't know could stop this."

Based on this interaction, Dr. Barnett concluded that Reynolds "had no comprehension of what they meant and what his rights were."

Later Dr. Barnett was asked to evaluate the issue of coercion in the interview. He interviewed Reynolds again, this time on August 3, 2022, administered several testing instruments, and viewed the videotaped interview with Detective Honn. Dr. Barnett testified Reynolds was "mildly intellectually disabled" (formerly designated in the DSM as "mild mental retardation") with an IQ of 67. He testified that people with mild intellectual disabilities "try to be as agreeable as possible." When asked what effect the alleged failure of the CVSA test may have had on Reynolds, Dr. Barnett testified,

> "Well, persons who function in his range often are almost obsequious in the face of authority. They will substitute the authority figure's opinion for their own. They tend to believe that if somebody tells them what they're thinking is wrong that they will absorb that and say, well, I guess I was. And I believe that's what happened in this case."

Dr. Barnett testified Detective Honn's interview was coercive. Reynolds was "low functioning intellectually. He tries to please authority figures, he responds in a way that he believes they want him to respond. . . . I don't think he understood why he was there and why he was being questioned." Reynolds did not understand he had incriminated himself.

Barnett noted in his report, which was admitted by stipulation of the parties, that the "[CVSA] is universally viewed by everyone except the manufacturers of the test equipment to be 'pseudoscience.'" He cited studies in support of his statement. Because of this, he believed that Detective Honn was being deceptive. He noted that the National Research Council had concluded that there is "little or no scientific basis for the use of [CVSAs]." The detective "used this 'data' to coerce Mr. Reynolds into 'confessing' to behaviors Mr. Reynolds adamantly denied both before and after the use of the [CVSA]." His report indicated that "even a layperson could tell that Mr. Reynolds is low-functioning" and there was no attempt by law enforcement to assess his level of comprehension, even after Reynolds stated he did not understand simple words like "'deceptive.'"

The trial court denied the motion, adopting the State's proposed findings of fact and conclusions of law. The trial court's order made no mention of Dr. Barnett's report or testimony.

The case proceeded to a bench trial. The parties stipulated to the admission of certain evidence subject to Reynolds' continuing objection to the admission of his confession. Reynolds testified generally that R.R. should not be trusted. In the summer of 2019, R.R. had taken their daughter out-of-state for almost two months without informing him she was leaving. A few months later, R.R. alleged another man had sexually touched their daughter. Reynolds did not believe R.R. because she lied a lot.

Reynolds testified that after Detective Honn told him he failed the lie detector test, his anxiety was really high. He testified,

> "I just wanted to get out of the room so I just told them what they wanted to hear. Because they kept telling me that I was free to leave and stuff like that. But I didn't feel though I was free to leave. So I told them what they just wanted to hear. I lied through the whole thing thinking that I would be okay to go."

That evening after he was arrested, Reynolds was taken to the hospital because his anxiety was giving him "very bad" chest pains. He was given nitroglycerin.

The trial court found Reynolds not guilty of rape. The court found that the State failed to prove penetration. But the trial court found him guilty of aggravated indecent liberties with a child—which requires a finding that he fondled his daughter for his own sexual gratification.

He was subsequently sentenced to a 94-month prison sentence. The sentencing court also ordered lifetime postrelease supervision and electronic monitoring.

Reynolds timely appeals.

ANALYSIS

I. THE TRUSTWORTHINESS OF A CONFESSION V. THE VOLUNTARINESS OF A CONFESSION

A. *Trustworthiness*

Historically, the State was required to show the existence of a crime independently of an extrajudicial confession by the defendant. This has been called the formal corpus delicti rule, translated as "'body of the crime.'" *State v. Dern*, 303 Kan. 384, 399-401, 362 P.3d 566 (2015). Recognizing that false confessions do occur

for a variety of reasons, courts use this rule when the only evidence of a crime is the defendant's confession. But Kansas does not follow the formal corpus delicti rule for crimes, such as this one, that produce no tangible injury. The law demands, and only demands, the best proof of the corpus delicti which is attainable given the nature of the crime. 303 Kan. at 408. When the nature and circumstances of the crime are such that it did not produce a tangible injury, the State may show the corpus delicti through a trustworthy confession. 303 Kan. at 410.

When applying the formal corpus delicti rule, the State's burden is met if "'there is some evidence which renders the corpus delicti more probable than it would be without the evidence.'" *State v. Waddell*, 255 Kan. 424, 434, 874 P.2d 651 (1994). But our Supreme Court has noted that the State carries a higher burden than the more probable than not standard when establishing the corpus delicti solely through a trustworthy confession. *Dern*, 303 Kan. at 411.

B. *Voluntariness*

Similarly, the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution require that confessions be voluntary. The Due Process Clause recognizes that "'certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned.' [Citation omitted.]" *State v. G.O.*, 318 Kan. 386, 397, 543 P.3d 1096 (2024). Unlike the aim of the corpus delicti rule to prevent convictions upon false confessions, the aim of due process is to prevent fundamental unfairness in the use of confessions whether true or false. 318 Kan. at 413.

The Due Process Clause protects against involuntary confessions: (1) that are inherently coercive and a per se violation of the Due Process Clause and (2) where a state actor uses interrogation techniques that because of the unique circumstances of the suspect are coercive. 318 Kan. at 397. The former is rare. Under the latter, the Due Process Clause applies "when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the

product of a free and rational will." 318 Kan. at 398. Coercive police activity is a necessary predicate to a finding that a confession is involuntary. And there must be a link between the coercive police activity and the resulting confession. 318 Kan. at 398-99.

The State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment and voluntarily—that is based on the person's unfettered will—made a statement. In that vein, the State must "establish that police or other state actors did not intimidate, coerce, deceive, or engage in other misconduct that, when considered in the totality of the circumstances, was the motivation for the individual to make a statement." 318 Kan. 386, Syl. ¶ 8.

C. *Distinction Between Trustworthiness and Voluntariness*

There is a key distinction between reliability and voluntariness. The reliability of a confession has nothing to do with its voluntariness. Proof that the defendant committed the crime to which he or she has confessed is not to be considered in deciding whether a defendant's will has been overborne and therefore the confession involuntary. *State v. Milow*, 199 Kan. 576, 586, 433 P.2d 538 (1967).

So a confession can be trustworthy, but still involuntary. *G.O.*, 318 Kan. at 388 (reversing Court of Appeals decision finding that because the confession had indicia of reliability, it was voluntary). For example, a confession can be involuntary, although trustworthy, if police failed to advise the defendant of their *Miranda* rights or downplay their importance or otherwise contradict them. 318 Kan. at 415.

Likewise, a confession could be untrustworthy, but still voluntary. As already noted, in a case where there is no tangible injury and the sole evidence is a confession, the State has the burden to prove the testimony (upon which the entire case is based) was trustworthy. If they are unable to establish it is trustworthy, by something more than a preponderance of the evidence, then there is insufficient evidence to support the conviction. This would be true even if the defendant voluntarily and knowingly waived his or her *Miranda* rights prior to confessing.

And just like a dog can have ticks and fleas, a confession can be both untrustworthy and involuntary.

D. *Commonality Between Trustworthiness and Voluntariness*

Both trustworthiness and voluntariness must be determined from the totality of the circumstances. This entails consideration of factors relating to the nature of the interrogation and the characteristics of the accused. *G.O.*, 318 Kan. at 400; *Dern*, 303 Kan. at 410-11. As already noted, the State bears the burden of proof regardless of whether the defendant claims their confession was untrustworthy or involuntary. And we use the same standard of review—for the suppression of a confession.

"In reviewing a trial court's decision regarding the suppression of a confession, an appellate court reviews the factual underpinnings of the decision by a substantial competent evidence standard and the ultimate legal conclusion by a de novo standard. The appellate court does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence." *State v. Harris*, 293 Kan. 798, 807, 269 P.3d 820 (2012).

II. THE TRIAL COURT MAKES SEVERAL LEGAL CONCLUSIONS AND PROVIDES THE EVIDENCE UPON WHICH THEY ARE BASED

Here, the facts are not in dispute. The entire interrogation was captured on video. And the State does not submit any evidence of the abuse beyond the unrecorded statement from the child that her daddy was in jail for touching her "no-no." The statement of facts submitted by the State and adopted by the trial court is consistent with the record.

But in its legal conclusions, which we review de novo, the trial court found:

1. "*The evidence submitted and the testimony presented do not demonstrate that the age, intellect and background of the defendant support suppression of his statements made to law enforcement.*" (Emphasis added.) The court supports this legal conclusion with a conclusory statement that it is supported by its review of the video of the interview and Dr. Flesher's testimony.

2. "*The defendant did not appear under any undue pressure or influence when speaking to Lt. Detective Honn.*" (Emphasis added.) The court points to Dr. Flesher's testimony to support this legal conclusion. Dr. Flesher noted that Reynolds was able to follow the content of the conversation and respond appropriately and his answers were logical and organized. His "thought content" was coherent and relevant. He did not appear to be having any hallucinations or delusions.

3. *The video confirms Detective Honn's conclusion that Reynolds was not under the influence of any alcohol or drugs that affected his ability to communicate.* The court finds that Dr. Flesher's testimony "supported this conclusion" (referring only to the lack of any evidence that Reynolds was under the influence) by opining that Reynolds was "cooperative, talkative, and self-advocating, and he unambiguously indicated that he understood the [*Miranda*] rights described by the detective." The court concludes from this that Reynolds "*knew he was agreeing to when he signed the Miranda waiver form and agreed to speak to Lt. Detective Honn. The defendant's mental condition did not adversely impact this decision and does not support suppression.*" (Emphasis added.)

4. "*Lt. Detective Honn was fair in his interview with the defendant at all times.*" (Emphasis added.) The court supports this legal conclusion by referring to the videotaped interview and Reynolds' testimony that he touched his daughter's vagina to see the difference between a child and a woman. It is unclear how this supports the conclusion that the interview was "fair."

5. *Reynolds described in detail what he did to his daughter and that he felt bad about it and was trying to forget it.* The court does not describe how this fact supports admission of the confession. The court appears to be indicating that the confession was trustworthy because of the detail provided and thus was voluntary—improperly equating the two concepts.

6. "*There is no indication in the video interview that the CVSA impacted the defendant's ability to self-advocate for himself or to answer questions. There is also no indication that Lt. Detective Honn used the CVSA as subterfuge to trick or otherwise induce the defendant into a false confession.*" (Emphasis added.)

7. "*The defendant has failed to show how he was coerced into provid[ing] an incriminating statement and Dr. Flesher testified that the interview with Lt. Det. Honn was not coercive.*" (Emphasis added.) The court then lists the reasons Dr. Flesher believed the interview was not coercive. Those factors include that the detective did not tell Reynolds what to say; Reynolds was not threatened and Detective Honn's methods were confrontive but not threatening or aggressive; he had access to the outside world; he could communicate adequately; there was no sensory deprivation; he was not isolated; Reynolds was confident, self-advocating and was able to provide details when asked clarifying questions. This finding seems to flip the burden of proof from the State, which must show, by a preponderance of the evidence, that the defendant was not coerced, to requiring the defendant show he was coerced.

8. *Reynolds' intellect was adequate as demonstrated by his statements and as such he made a knowing and voluntary waiver of his* Miranda *rights.*

9. "*In the present case, no single factor or combination of factors, argued by the defendant, considered under the totality of the circumstances, leads to the conclusion that the defendant's will was overborne, making the confession not a free and voluntary act. . . . [T]he record demonstrates that the defendant possessed the ability to understand . . . the purpose of the interview. In turn, there is nothing in the record presented to this court for the court to conclude that Lt. Det. Honn 'create[d] a coercive envi-*

ronment.'. . . As such, the totality of the circumstances definitively shows the defendant's statement to Lt. Detective Honn was a free and voluntary act and the statements made to Lt. Det. Honn were not the result of police coercion. This finding and conclusion is also supported by the testimony and expert opinion of Dr. Flesher. [Citations omitted.]" (Emphasis added.)

10. "*Given the totality of the circumstances, neither the defendant's intelligence nor his general mental condition interfered with his ability to understand his* Miranda *rights or to voluntarily and knowingly waive those rights, to understand Lt. Detective Honn's questions, or to provide responses to those questions. In addition, there is no evidence in the record that supports coercive police activity on behalf of Lt. Det Honn in coercing the defendant into confessing.*" (Emphasis added.)

The court denied Reynolds' motion to suppress.

III. REYNOLDS' CONFESSION WAS NEITHER TRUSTWORTHY NOR VOLUNTARY

A. *We first examine the factors that are unique to a trustworthiness analysis.*

Independent of Reynolds' statement, the evidence here is insufficient, as a matter of law, to establish that the charged crime—aggravated indecent liberties of a child—is more likely than not to have occurred. The child's reported disclosure did not suggest that Reynolds had touched her in a noncaregiving manner. And there were no reports of sexual abuse by Reynolds six months earlier. Yet it was his statement that he touched his daughter's genital area out of curiosity, that formed the basis of the charges. Thus the State has the burden to establish that the confession was trustworthy. And as already noted, the State carries a higher burden when establishing the commission of a crime solely through a trustworthy confession. *Dern*, 303 Kan. at 411.

A determination of trustworthiness of the confession depends on the totality of the circumstances and includes consideration of the following nonexclusive factors or indicia of reliability:

"(1) independent corroboration of details or specific facts contained in the confession; (2) the number of times the confession was made and the consistency or lack thereof between different versions of the confession; (3) the circumstances of the confession, including the identity of the person or persons to whom the confession was made and the state of mind of the defendant at the time of the confession; (4) the availability of the facts or details contained in the confession from sources outside the defendant's personal knowledge; (5) the defendant's age, education, experience, and mental health; and, (6) if the confession was made to law enforcement, then the overall fairness of the exchange including whether there was deception, trickery, undue pressure, or excessive length." 303 Kan. at 410-11.

(1) *Independent corroboration of details or specific facts contained in the confession*

The State presented no evidence that independently corroborated Reynolds' confession. The child's mother reported her daughter told her, "'Daddy touches my no-no and boobs.'" The child used the term "no no" to refer to her vagina. During a forensic interview, the child said her daddy was in jail for touching her "no, no." She placed her hand over her private area. No other evidence was provided. Moreover, there was no independent corroboration of an unlawful touching six months earlier.

As noted above, under these facts, we find that a hearsay statement that a father has touched his child's private area and boobs with no confirmation by the child and no other evidence pointing to a touching for sexual gratification rather than normal caregiving is insufficient independent corroboration to establish the trustworthiness of a confession.

(2) *Number of times the confession was made*

Reynolds confessed only once to touching his daughter's vaginal area when it was not necessary to clean her. He did so after repeated denials and never admitted it was for sexual gratification. He indicated it happened six months earlier, when there had been no allegation at all of sexual abuse.

(3) *Circumstances of the confession, including the identity of the person to whom the confession was made and the state of mind of the defendant*

Reynolds confessed during an interrogation by a detective at the sheriff's office. Reynolds was cooperative and talkative throughout the

interview. But he was also nervous, angry, and afraid. In fact, he was hospitalized for the anxiety immediately after the interrogation.

(4) *The availability of the facts or details contained in the confession from sources outside the defendant's personal knowledge*

There were no additional facts or details available from outside sources.

(5) *The defendant's age, education, experience, and mental health*

Reynolds is an intellectually disabled man in his 40s. He completed ninth grade taking mentally handicapped classes. He reads at a fourth-grade level—although this was thrown into question by Dr. Flesher's testing that revealed he could not identify 16 of the 25 second-grade vocabulary words presented to him. He has an IQ score in the 60s, or the "extremely low range." Both experts agreed that Reynolds suffers from anxiety and depression.

Although the State and the trial court relied exclusively on Dr. Flesher's testimony, the State did not dispute the evidence submitted by Dr. Barnett. According to Dr. Barnett, Reynolds was often teased and bullied growing up. As a result he is frightened of others beating him up or yelling at him. To avoid this he often tries to please others even when it is not in his best interests. He has been married twice and had three live-in relationships. Each of these relationships were ended by his partners who complained about him letting people bully him. Dr. Barnett testified that people with mild intellectual disabilities "try to be as agreeable as possible." Dr. Flesher agreed that false confessions were more common for low intellect individuals than for normal intellect individuals.

(6) *The overall fairness of the interrogation including whether there was deception, trickery, undue pressure, or excessive length*

The interrogation was not excessively long—it lasted only an hour, Detective Honn made no promises or threats, Reynolds was free to leave, and Reynolds had his cell phone throughout.

However, our review of the videotape of the confession makes it clear to us that Detective Honn manipulated Reynolds by claiming the CVSA showed he was lying, conveying absolute certainty of his guilt, minimizing the weight of the offense of lewd touching by framing it as a denial of sexual penetration, asking leading questions, and raising his voice.

The CVSA was recently discussed by our Supreme Court in *State v. Garrett*, 319 Kan. 465, 555 P.3d 1116 (2024). There the officers had claimed the CVSA was 100% accurate, but a witness testified it was only 15-50% accurate in detecting truthfulness or "'[n]o better than flipping a coin.'" 319 Kan. at 467-68. The officers' claim that the CVSA was 100% reliable was deceptive. But the court went on to conclude that Garrett "was a grown man of apparently average intelligence." 319 Kan. at 477. Although Garret argued he was stressed and tired, the majority concluded that there was no evidence that this condition "'made [Garrett] seem confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent.'" 319 Kan. at 477-78. As the Supreme Court noted in Garrett, "[s]ometimes deceptive practices by law enforcement constitute misconduct, but not always. The difference is a matter of degree, gauged by what the officers knew or could have ascertained about the defendant." 319 Kan. at 479-80.

Here, Detective Honn was not faced with a man of average intelligence. Instead everyone agrees that Reynolds has an extremely low IQ and minimal reading ability. Reynolds displayed confusion, not knowing the meaning of the word deception. He did not understand when Honn told him he had to sign the waiver so he would not sue the sheriff if he fell out of his chair. He could not follow the basic instructions of the test related to when he was supposed to purposefully lie.

In addition, no reasonable person could view the videotape of the confession and fail to see the intimidation by Detective Honn. He suggested explanations for a "failed" test to include just checking to see if his daughter's genitalia was different from that of a woman, suggesting to Reynolds that he smelled his finger after examining her, and suggesting that all of this would explain the test result. He certainly left anyone listening with the impression

that such an explanation would be understandable. Although Reynolds insisted he did not penetrate his daughter, he was certainly not aware of the legal nuances of penetration that could result in a charge of rape. And even though Reynolds appeared to be trying to please Detective Honn, Reynolds continued to deny examining his child's genitalia for sexual gratification.

And the State presented no evidence regarding the reliability of the CVSA in support of Detective Honn's claims to Reynolds. Dr. Flesher opined that the use of the test was not relevant in his analysis. He knew nothing about the test. Accordingly, Dr. Barnett was unchallenged in the statement in his report that CVSA is universally viewed by everyone except the manufacturers of the test equipment to be "'pseudoscience.'" He quoted a study from the National Research Council that found that there is little or no scientific evidence to support the reliability of CVSA. So continuing to insist that the CVSA was unassailable and Reynolds was lying was deceptive and coercive.

(7) *Totality of the circumstances*

Reynolds' low intellect, history of being bullied, and anxiety made him unusually susceptible to being coerced by a detective telling him he failed a lie detector test. The question is whether the detective's technique and reliance on the CVSA result made Reynolds believe he had committed a crime that he had not committed. We believe it did.

When confronted with the fact that the test showed he was lying, Reynolds suggested that the test was rigged, at least that is what friends had told him. Detective Honn was forceful in advising Reynolds that if you challenge the reliability of the CVSA you must be guilty. So Reynolds, while still denying he touched his daughter in any way other than as part of normal caregiving, was forced to come up with an explanation to satisfy Detective Honn. It was apparent the interview was not going to end until Detective Honn was satisfied.

Detective Honn then led Reynolds down a path of suggested reasons it could be showing deception, such as an innocent explanation for the touching—curiosity. He then insisted on more details and again suggested Reynolds smelled his fingers after he touched his daughter,

obviously trying to establish a sexual motivation. These were all scenarios invented and initiated by Detective Honn, not Reynolds. The totality of the circumstances shows unequivocally that Reynolds' confession was not trustworthy.

In sum, we reject the trial court's legal conclusion that the evidence did not support a finding that Reynolds' confession was the product of coercion. And even given Reynolds' limited mental capacity, the trial court accepted the truthfulness of his confession by entering a finding of guilty to the charge. To the contrary, we find that, on the undisputed facts, the State failed to meet its high burden of establishing that Reynolds' conviction—based solely on a confession with no tangible injuries—was nonetheless trustworthy.

B. *We examine the factors that are unique to a voluntariness analysis.*

Voluntariness must be determined from the totality of the circumstances. *G.O.*, 318 Kan. at 400. This entails consideration of factors relating to the nature of the interrogation and the characteristics of the accused. Relevant details of the interrogation may include:

"[T]he length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statement took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises of benefit, inducements, threats, methods, or strategies used to coerce or compel a response; whether an officer informed the accused of the right to counsel and right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights." 318 Kan. at 403.

Relevant characteristics of the accused may include: "the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement." *G.O.*, 318 Kan. at 403. There is some overlap in factors courts are required to examine related to trustworthiness and voluntariness.

(1) *Waiver of* Miranda *rights*

Reynolds argues that even though he waived his *Miranda* rights, Detective Honn intentionally downplayed the significance of the *Miranda* warning. We agree.

After reading the *Miranda* rights, the detective asked, "You understand those?" Reynolds did not say anything. The detective said, "You're not under arrest. This is part of my paperwork . . . You're free to walk out of this office right now. But I wanted to make sure you understand your rights." Reynolds then quickly responded, "Oh, I understand. I had a best friend in Colorado, his grandfather was an FBI agent and his grandmother is a . . . sheriff's officer."

An officer's attempt at minimizing a defendant's constitutional rights can, in certain circumstances, contribute to a coercive atmosphere and lead to an involuntary statement. *Garrett*, 319 Kan. at 479; *G.O.*, 318 Kan. at 415.

In *Garrett*, a detective preceded the *Miranda* advisory by saying he needed to "'jump through some hoops.'" 319 Kan. at 466. This is very similar to Detective Honn's statement that he just needed to do this as part of his paperwork. Like Reynolds, Garrett denied the allegations against him. The officers then asked Garrett to take a CVSA. Before administering the test, an officer read Garrett his *Miranda* rights from a release form and Garrett initialed beside each one. There is no evidence here that Reynolds initialed each *Miranda* paragraph, only that he signed it without reading it. On appeal, the court concluded: "While the reasons and importance of the first *Miranda* advisory were minimized, the second advisory repeated the ones already given and Garrett acknowledged each one. . . . This clearer and more forceful recitation of Garrett's rights alleviated any coercive effect that the initial reading caused." 319 Kan. at 479.

But in *G.O.*, a confession was deemed involuntary because the detective downplayed the *Miranda* warnings, encouraged G.O. to confess to avoid prosecution, misrepresented the true purpose of the interview, telling G.O. he would not be arrested, and G.O.'s emotional state, age, and lack of experience with law enforcement made him vulnerable to coercion. 318 Kan. at 414, 421.

Here, the detective downplayed the *Miranda* warning by saying it was part of his "paperwork." He stressed that Reynolds was not under arrest but followed that with a statement that as long as he told the truth they could "move on," suggesting that he could only leave or move on if he told the truth as defined by the results of the CVSA.

(2) *Fairness in conducting interrogation*

Reynolds contends the interrogation was unfair because Detective Honn repeatedly told him his protestations of innocence were definitively disproven by a lie detector test that was, in fact, incapable of detecting lies.

The district court concluded that the CVSA did not impact Reynolds' ability to self-advocate for himself or to answer questions. The court concluded Detective Honn did not use the CVSA as subterfuge to trick or otherwise induce Reynolds into a false confession. We disagree.

Voice stress analysis and polygraph testing have been used by law enforcement for years and do not necessarily render a subsequent confession involuntary. But our Supreme Court has found that an officer's exaggeration of the reliability of CVSA to identify the "truth" is deceptive. *Garrett*, 319 Kan. at 473. Although deceptive practices by law enforcement do not always constitute misconduct, if law enforcement uses the CVSA as subterfuge to trick or otherwise induce a defendant into a false confession, it can result in the confession being deemed involuntary.

> "Sometimes deceptive practices by law enforcement constitute misconduct, but not always. The difference is a matter of degree, gauged by what the officers knew or could have ascertained about the defendant; a lie told to a child, after all, will have a far greater impact than a falsehood given to an adult. Here, nothing about Garrett himself or the other surrounding circumstances of the interrogation could have exacerbated the effect of the deception. While our threshold assessment of misconduct differs from the ultimate question of voluntariness, we note that many cases have found a voluntary confession even when presented with law enforcement's deceptive tactics." 319 Kan. 479-80.

In *Garrett*, officers repeatedly represented to Garrett that the CVSA is 100% accurate. However, at the motion to suppress hearing an expert testified the CVSA is only 15-50% accurate in detecting truthfulness or "'[n]o better than flipping a coin.'" 319 Kan. at 468. The CVSA "cannot discriminate general stress from 'case-specific' stress." 319 Kan. at 468. In holding the officers' deception was not misconduct, the court stated the deception was not pervasive because the officers did not rely heavily or repeatedly on the results. The officers did not say the exam proved Garrett lied or

proved his guilt. The officers asked Garrett about the results just once or twice. 319 Kan. at 480-81.

Here, although Detective Honn never verbalized that the CVSA was 100% reliable, in response to Reynolds' concern that the test could be rigged, the detective said "[t]he test is not rigged" and indicated that Reynolds' concern about the test showed he was guilty. The detective also assured Reynolds that him being angry or stressed about being accused would have no effect on the test. Those statements were undisputably deceptive because the CVSA is not a reliable measure of truthfulness and cannot distinguish general stress from specific stress.

Detective Honn did rely heavily on the CVSA result. Detective Honn told Reynolds his answer to the question—have you ever touched your daughter's vagina for sexual gratification—showed "signs of deception." Reynolds asked what "deception" meant, explaining he had a learning disability. The detective said, "Deception means that you weren't being honest with me. There's a little bit there. There's a little bit of a lie there, not the truth is what it's telling me." Detective Honn then relied repeatedly on the results of the CVSA, suggesting the test showed Reynolds was lying over his continuous denials. Detective Honn relied upon Reynolds to come up with an explanation for the CVSA result.

(3) *Psychological pressure*

Reynolds contends that Detective Honn downplayed conduct that carried a life sentence as nothing "extravagant," elicited admissions to lewd touching by framing the admissions as denials to sexual penetration, and used leading questions to flesh out the details of Reynolds' confession. We agree.

A confession may not be the product of the defendant's free and independent will when the detective uses an interrogation technique where the defendant does not volunteer facts but rather merely adopts facts suggested by the detective. *State v. Stone*, 291 Kan. 13, 29-33, 237 P.3d 1229 (2010) (confession mirrored the details suggested by law enforcement officers).

Here, Detective Honn asserted psychological pressure. "I'm not saying anything extravagant happened but if something hap-

pened I need to know." The detective then suggested that Reynolds touched his daughter to "know what it feels like." Reynolds did not adopt that suggested fact. Rather, Reynolds said he touched his daughter to clean her. Reynolds denied that he got aroused, but said it made him think about why sex offenders could be aroused by a child. Reynolds did not understand why they would be.

After Reynolds repeatedly denied touching his daughter for sexual gratification, the detective again suggested Reynolds touched her "just to see what it feels like" and minimized that touching a couple of times by saying, "I'm not saying you stuck your penis in her." Eventually, Reynolds relented and said, "I've done it one time to see what the difference was [between a child and a grown woman]." After Reynolds made his first admission, the detective did not immediately ask leading questions, but instead said, "Describe to me how you touched her." Reynolds drew with his finger how he touched her. Then the detective asked leading questions to get the details of the incident.

Dr. Barnett concluded that Detective Honn "employed pseudoscientific procedures to convince a mentally retarded adult that he is being deceptive." Particularly when Reynolds made clear he did not know what the word "deceptive" meant. "Mr. Reynolds, in my opinion 'confessed' to illegal behavior only because Detective Honn convinced him that the [CVSA] indicated he was lying, and that if he told the 'truth' he would be allowed to go home." We find Dr. Barnett's analysis and conclusion convincing and supported by the videotape of the interview.

(4) *Education and intellect*

Reynolds argues his poor education and low intellect made him unusually susceptible to the psychological pressure of interrogation.

The district court concluded Reynolds' statements and responses to Detective Honn demonstrated Reynolds' intellect was adequate. Reynolds' intelligence and mental condition did not interfere with his ability to understand his rights, voluntarily waive his rights, and respond to questions. We do not believe this conclusion was supported by any competent evidence.

Although Reynolds was talkative, coherent, self-advocating, and ultimately remorseful, he was also frustrated, nervous, and stressed during the interview.

Reynolds is an intellectually disabled man with an IQ score in the 60s, or the "extremely low range." He completed ninth grade taking mentally handicapped classes. He reads at a fourth- or fifth-grade level. During the CVSA test, Reynolds got confused on which questions he was supposed to tell the truth and lie to. He did not know the meaning of the word "deception" and told the detective he had a learning disability.

Although low intelligence alone does not make a confession involuntary, a defendant's low intelligence and mental condition are relevant to an individual's susceptibility to police coercion but do not render a confession involuntary in the absence of police coercion. *State v. Randolph*, 297 Kan. 320, 330, 301 P.3d 300 (2013) (collecting cases); see *G.O.*, 318 Kan. at 420 (defendant's anxiety increased his vulnerability to coercion); *State v. Barrett*, 309 Kan. 1029, 1044-45, 442 P.3d 492 (2019); *State v. Swanigan*, 279 Kan. 18, 39, 106 P.3d 39 (2005) (low IQ and anxiety of defendant considered in totality of circumstances).

In *Randolph*, though a low intellect defendant had trouble reading the word "'coercion,'" his confession was voluntary because he understood the word once its meaning was explained, there was no indication during the interview that his intelligence interfered with his ability to understand his rights, waive those rights, understand the officer's questions, or understand the incriminating nature of his statements. 297 Kan. at 330-31.

Here, Reynolds' low IQ did prevent him from understanding his rights or responding to questions as well as making him susceptible to police coercion.

Dr. Barnett went over the *Miranda* rights with Reynolds and his understanding of them on two different occasions. The transcript of this questioning was included in Dr. Barnett's report. It was clear to Dr. Barnett that Reynolds had cognitive problems preventing his full understanding of his rights. It was clear to Dr. Barnett that "even though he gave the impression of reading them originally, he had no meaningful or sophisticated comprehension

of what they meant and what his rights were." When this is coupled with Reynolds' "history of subservient compliance with instructions by authority figures, it seems that the entire purpose of the *Miranda* warning in this case was bypassed."

Dr. Barnett stressed the primary indicators of understanding *Miranda* warnings, in his opinion, are IQ and reading ability. He stressed that in his 40 years of experience, the vast majority of people that score in Reynolds' IQ range are unable to competently understand the *Miranda* warnings. He estimated that reading at a sixth- or seventh-grade level would be conducive to understanding the warnings. But coupled with his low IQ, Reynolds could only read at most at a fourth-grade level. He may have said he was waiving his rights, but did he have any concept of what he was waiving. Dr. Flesher agreed with Dr. Barnett's assessment of Reynolds' IQ and reading level and agreed that these were important indicators, but he believed observation of the police interview is also important and it contradicted these indicators.

Even the ad hoc forced choice test administered by Dr. Flesher regarding Reynolds' understanding of his *Miranda* rights showed he could only correctly identify 2 of the 17 components of the *Miranda* warning, again showing significant cognitive impairment. But Dr. Flesher discounted those results as unreliable. We do not know what those 17 components were or the forced choices given to Reynolds because they were not included in his report. Dr. Flesher also testified that after reviewing Dr. Barnett's report and questions related to *Miranda* warnings, he thought Reynolds was "suppressing his actual ability level" making Dr. Barnett's conclusions incorrect regarding Reynolds' understanding of the *Miranda* warnings.

Discounting the one test that he devised himself, and also his discounting of Dr. Barnett's test and its conclusions, Dr. Flesher seems to rely exclusively on his viewing of the videotape which disclosed that Reynolds was "cooperative, talkative, and self-advocating, and he unambiguously indicated that he understood his rights described by the detective." In other words, because Reynolds "unambiguously" indicated he understood his rights, he must have understood them. He does not address how a person, who he found to be functioning at an extremely low intellectual level and

who agrees was legitimately having trouble recognizing second-grade vocabulary words, could nevertheless understand complex and nuanced legal rights.

Dr. Barnett emphasized that people that are as low functioning as Reynolds may sometimes appear to be normal functioning. They develop strategies to be as agreeable as possible and not "make waves." They will pretend to understand things when they really don't know what's going on.

"[They] are almost obsequious in the face of authority [and] will substitute the authority figure's opinion for their own. They tend to believe that if somebody tells them what they're thinking is wrong that they will absorb that and say, well, I guess I was. And I believe that's what happened in this case."

We agree and reject the trial court's legal conclusion to the contrary. The trial court never discusses why it so fully rejected all of Dr. Barnett's testimony and report, even though other than his final conclusion, it was undisputed.

(5) *Totality of the circumstances*

In sum, the district court drew a legal conclusion from the undisputed evidence that Reynolds' statements were free and voluntary and not the result of police coercion.

Here, the interrogation was only about an hour, Reynolds had access to the outside world, Reynolds understood the purpose of the interview, and the detective offered no direct threats or inducements. But the detective downplayed the *Miranda* warning by saying it was part of his "paperwork," an attempt to minimize its importance. The detective used many leading questions. The detective relied repeatedly on the CVSA result over Reynolds' repeated denials. Before even starting the test, Detective Honn told Reynolds that if he passed the test, they could just move on. In other words, everything would be fine. The logical conclusion from such a statement is that if he does not pass the test, one that is universally accepted as unreliable, everything would not be fine. After the test the detective said the CVSA result showed that Reynolds had lied. The pressure was increased by the detective. He quickly corrected Reynolds when he suggested the test might be rigged, saying that only people who are guilty question the test.

He raised his voice and said they were talking man to man, Reynolds should just tell the truth. Again, Detective Honn is drawing the conclusion that Reynolds must be lying because the CVSA suggested he was. In addition, Detective Honn stated unequivocally that had he known of Reynolds' intellectual and psychological challenges including his undisputed diagnosis of "borderline mentally retarded"—which he made no effort to determine before interviewing him —he would not have adjusted his interrogation techniques.

Our legal conclusion, contrary to that of the trial court, is that Detective Honn convinced an intellectually challenged man that he must be lying. Reynolds was stressed, nervous, and scared. He was intellectually susceptible to coercion and intellectually incapable of fully understanding the *Miranda* warnings given. His whole life he had been the victim of bullying and, as a result he is frightened of others beating him up or yelling at him. To avoid this he often tries to please others even when it is not in his best interests. That is what he did here when faced with Detective Honn's coercive questioning.

IV. EVEN IF THE "CONFESSION" WAS VOLUNTARY AND TRUSTWORTHY, THERE WAS INSUFFICIENT EVIDENCE TO CONVICT REYNOLDS OF AGGRAVATED INDECENT LIBERTIES

Finally, Reynolds argues that there was insufficient evidence to convict him of aggravated indecent liberties. We agree and find that even if the "confession" was voluntary and trustworthy, there was still insufficient evidence to convict Reynolds of aggravated indecent liberties.

The total undisputed evidence is that R.R. reported to police that her daughter told her that the child's father, Reynolds, had touched her no-no and boobs just a few days earlier. The child did not confirm this in any interviews and only stated that her father was in jail for touching her "no-no." Reynolds did not confess to anything related to an unlawful touching of the child in December 2022. There is no evidence that any touching took place at that time, let alone touching unrelated to caregiving. R.R. did not testify at the trial or the suppression hearing.

Accordingly, the aggravated indecent liberties charge was based solely on Reynolds' confession that six months earlier he had looked at the child's genital area by parting her labia to see if she had a clitoris. He concluded she did not. His testimony was that this was not done for sexual gratification, but just out of curiosity. The State presented no evidence to rebut this claim, to corroborate the incident, or to establish that whatever Reynolds did was done for sexual gratification.

We have no trouble finding as a matter of law that the evidence was insufficient to support Reynolds' conviction for aggravated indecent liberties.

Reynolds has now been in jail or prison for over three years—since his arrest by Detective Honn on January 4, 2021—based on insufficient evidence and an involuntary and untrustworthy confession. Today we reverse Reynolds' conviction, vacate his sentence, and order him released from prison on this charge upon issuance of the mandate.

Conviction reversed and sentence vacated.

State v. Hall

(564 P.3d 786)

No. 126,078

STATE OF KANSAS, *Appellee*, v. MAURICE ANTONIO HALL, *Appellant.*

Petition for review filed March 14, 2025

SYLLABUS BY THE COURT

1. STATUTES—*Party's Challenge to Statute as Facially Unconstitutional—Requirement.* A party challenging a statute as facially unconstitutional must show that every reasonable reading of the statute would be constitutionally impermissible.

2. KANSAS CONSTITUTION—*Section 4's Right to Possess Firearms—Independent of Second Amendment to United States Constitution.* Section 4 of the Kansas Constitution Bill of Rights establishes a right to possess firearms to be applied independently of and not in lockstep with the Second Amendment to the United States Constitution.

3. SAME—*Section 4 Establishes Fundamental Right to Possess Firearms.* Section 4 of the Kansas Constitution Bill of Rights establishes a fundamental right to possess firearms.

4. CONSTITUTIONAL LAW—*Fundamental Constitutional Rights Are Not Absolute—Subject to Limitations Advancing Compelling Governmental Interests.* Fundamental constitutional rights, including Section 4 of the Kansas Constitution Bill of Rights, are not absolute. They are subject to narrowly tailored limitations advancing compelling governmental interests.

5. STATUTES—*Statute Not Presumed to Be Constitutional if Impinging on Fundamental Right.* A statute impinging on a fundamental right is not presumed to be constitutional. The State must establish the statute is narrowly tailored and advances a compelling governmental interest.

Appeal from Sedgwick District Court; TYLER J. ROUSH, judge. Oral argument held April 10, 2024. Opinion filed February 14, 2025. Affirmed.

David L. Miller, of The Law Office of David L. Miller, of Wichita, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

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

ATCHESON, J.: Is a statute criminalizing the possession of firearms by some convicted felons compatible with a person's fundamental "right to keep and bear arms" protected in the Kansas Constitution Bill of Rights section 4? Having examined the legal landscape in 2010 when Kansans voted to amend section 4 to make clear that the constitutional right belongs to individuals rather than to the citizenry collectively, we conclude a limited statutory prohibition may coexist with that right. As with other constitutional rights, section 4 is not absolute and remains subject to narrowly cast limitations advancing compelling governmental interests. Especially given the lethality of firearms, some circumscribed legislative regulation may be justified to promote public safety, including temporary prohibitions on their possession linked to convictions for identified classes of felonies involving violent or otherwise potentially dangerous conduct.

CASE BACKGROUND

Defendant Maurice Antonio Hall contends his conviction for being a felon in possession of a firearm, itself a felony violation of K.S.A. 2020 Supp. 21-6304(a)(3)(A), cannot stand because the criminal statute impermissibly impairs the constitutional rights secured in section 4. A jury sitting in Sedgwick County District Court in August 2022 convicted Hall of violating K.S.A. 2020 Supp. 21-6304(a)(3)(A) and found him not guilty of first-degree murder. We understand Hall had a handgun, although the type of firearm is not germane to the constitutional issue. The jury heard evidence related to Hall's claim of self-defense, and the district court instructed the jury on the law governing the defense. The incident prompting the charges occurred in October 2020, so Hall's challenge pertains to the constitutionality of K.S.A. 2020 Supp. 21-6304 as it was then.

In a pretrial motion, Hall challenged K.S.A. 2020 Supp. 21-6304(a)(3)(A) and the charge against him on the grounds the statute was a facially unconstitutional violation of section 4. The district court denied the motion. The record on appeal indicates that Hall did not file any posttrial motions in the district court disputing his conviction. The district court ordered Hall to serve a 10-month prison term with postrelease supervision for 12 months and

placed him on probation for 18 months, reflecting a presumptive guidelines sentence. Hall has duly appealed.

The Legislature substantively amended K.S.A. 2020 Supp. 21-6304 in 2021, and we do not directly consider those revisions or the constitutionality of the current version of the statute, although many of the changes relax restrictions on felons possessing firearms.

Likewise, in this appeal, Hall has not argued that the Second Amendment to the United States Constitution, preserving "the right of the people to keep and bear arms," negates his conviction or otherwise precludes enforcement of K.S.A. 2020 Supp. 21-6304(a)(3)(A). As we explain, the language of section 4 sets it apart from the Second Amendment and establishes a distinct, if kindred, constitutional right. So we have no reason to examine the intersection of the Second Amendment and the Kansas prohibition on felons possessing firearms or to consider federal caselaw generally construing the Second Amendment. But, as we explain, the United State Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), markedly altering Second Amendment jurisprudence, directly influenced the Legislature's decision to propose the amendment of section 4 and, therefore, does inform our review.

LEGAL ANALYSIS

A. *Summary*

Hall principally contends K.S.A. 2020 Supp. 21-6304(a)(3)(A) is unconstitutional on its face in violation of section 4's protections. In considering the facial challenge, we necessarily construe a constitutional right and then determine if the challenged statute comports with that right. The exercise presents a question of law, and we undertake the task without any special deference to the district court. *State v. Patton*, 315 Kan. 1, 6, 503 P.3d 1022 (2022) ("a statute's constitutionality raises a question of law subject to unlimited review"). Moreover, as Hall has framed this argument, the relevant facts are limited and undisputed. *State v. Mejia*, 58 Kan. App. 2d 229, 231-32, 466 P.3d 1217 (2020) (when material facts are undisputed, issue presents question of law; no deference is given to district court). To prevail, Hall must show

that no application of K.S.A. 2020 Supp. 21-6304(a)(3)(A) could survive constitutional review under section 4—a formidable legal task even with a fundamental right. He has failed in the endeavor.

Alternatively, Hall offers a limited argument that the statute has been unconstitutionally applied to him. He raises the as-applied argument for the first time on appeal, and it depends upon a factual premise that lacks support in the appellate record. The insufficiency of the record is itself legally determinative. Hall's point fails because it is factually unsupported.

B. *Hall's Facial Challenge*

1. *Rights protected in Section 4, as amended in 2010*

We first examine the constitutional shield extended to Kansans in section 4. In 2009, the Legislature approved placing an amendment to section 4 on the general election ballot the following year. The voters approved the change—the only revision of section 4 in the State's history. The amendment replaced the opening clause of the amendment that had read, "The people have the right to bear arms for their defense and security;" with this language, "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose[.]" The other clause of section 4 remained the same and provides "but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power."

As a starting place, we recognize that the legislators promoting the amendment of section 4 intended the revision to constitutionally overrule *Salina v. Blaksley*, 72 Kan. 230, 232-33, 83 P. 619 (1905), that had recognized a limited collective right to possess firearms associated only with service in the militia or a comparable governmental military force. Sen. Journal, p. 481 (March 24, 2009); House Journal, p. 436 (March 25, 2009). Based on that narrow construction of the original language in section 4, the *Blaksley* court upheld a municipal ordinance precluding intoxicated persons from carrying firearms within the city limits. The amendment materially altered the scope of section 4 to identify a

personal right keyed to self-defense and other lawful conduct—a protection far broader than the one recognized in *Blaksley*.

Given the present language of section 4, we may safely conclude it establishes enumerated protections distinct from "the right to keep and bear arms" described in the Second Amendment. In other words, the amended version of section 4 does not create a lockstep right that merely (and automatically) mirrors the current reading the United States Supreme Court has given the Second Amendment and would then change to reflect that Court's future readings.

The Kansas Supreme Court has, however, construed some sections of the Kansas Constitution Bill of Rights worded like parts of the United States Constitution to create parallel protections that shift in scope to match the United States Supreme Court's changing interpretation of the federal right. See *State v. Petersen-Beard*, 304 Kan. 192, 210, 377 P.3d 1127 (2016) (noting court's "general practice of giving an identical interpretation to identical language appearing in both the Kansas Constitution and our federal Constitution"); see, e.g., *State v. Johnson*, 293 Kan. 1, 5, 259 P.3d 719 (2011) (Fourth Amendment and section 15 offer same protections against unreasonable search and seizure); *State v. Wittsell*, 275 Kan. 442, 446, 66 P.3d 831 (2003) (protection against double jeopardy in Section 10 Kansas Constitution Bill of Rights "'equivalent to" that in United States Constitution) (quoting *State v. Mertz*, 258 Kan. 745, 749, 907 P.2d 847 [1995]). So with those sections of the Kansas Constitution Bill of Rights, the enumerated right morphs as the United States Supreme Court reshapes the contours of the comparable federal constitutional right. The state constitutional right then exists in lockstep with the federal constitutional right. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law, 174 (2018) (describing "lockstepping" as "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution"); Boldt & Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 Md. L. Rev. 309, 341-43 (2017).

The substantial gulf in wording between section 4 and the Second Amendment cuts strongly against a lockstep interpretation of the Kansas constitutional right. Had the Legislature intended the 2010 amendment of section 4 to establish a right that would shift over time to match whatever some future United States Supreme Court might say the Second Amendment protects, it would have incorporated the language of the Second Amendment into section 4. The Legislature plainly did not. And the voters did not approve such a change.

The Second Amendment, in full, declares: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The contrast with section 4 is striking. First, of course, the amended language of section 4 refers to the right of "a person" replacing a more collectively framed right of "the people," which did parallel the Second Amendment. The Kansas right is directedly tied not only to self-defense but to much more expansively stated uses of firearms. The Second Amendment offers no explicit purpose for bearing arms, apart from the recited need for a militia that functioned immediately after the Revolutionary War as a citizen-based alternative to a regular army. Conversely, the other clause of section 4 describes the dangers of standing armies.

As reflected in the 2009 legislative journals, the legislators supporting the amendment of section 4 intended that change to constitutionalize the rights of gun owners the United States Supreme Court recognized in *Heller*. Sen. Journal, p. 481 (March 24, 2009). That is, the amendment would permanently establish in the Kansas Constitution the specific interpretation of the Second Amendment the Court majority rendered in *Heller*, even if a future Court were to reject that view of the federal right. Several senators expressed concern that as a 5-4 decision, *Heller* might be especially vulnerable to revision or rejection with even a limited change in the Court's composition. Sen. Journal, p. 481 (March 24, 2009).[1]

[1] Although the Kansas House overwhelmingly approved placing the amendment of section 4 before the voters, the House journal includes only one joint statement of three representatives

briefly identifying an intent to reject the *Blaksley* decision's restrictive reading of the constitutional protection in section 4. House Journal, p. 436 (March 25, 2009). All of the other recorded legislative statements on the amendment appear in the Senate journal. Sen. Journal, pp. 480-81 (March 24, 2009) (statement of only senator voting against amendment and three joint statements in favor reflecting declared views of 17 senators).

The *Heller* decision has routinely been described as a landmark ruling—and even revolutionary—in redefining the Second Amendment's protection of gun ownership. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1322-23 (11th Cir. 2015) (characterizing *Heller* as "landmark" case that "revolutionized Second Amendment jurisprudence"); *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (landmark decision); *United States v. Seay*, 620 F.3d 919, 923 (8th Cir. 2010) (landmark decision). The *Heller* majority found the Second Amendment entailed an individual right to possess firearms principally for self-defense and cleaved the right from a collectivist notion of a protection afforded "the people" for the principal purpose of maintaining militias. 554 U.S. at 595 ("Second Amendment conferred an individual right to keep and bear arms"); 554 U.S. at 630 (Second Amendment shields "core lawful purpose of self-defense"); see also *Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211, 226 (4th Cir. 2024); *Seay*, 620 F.3d at 923 (*Heller* established "an individual right unconnected to service in the militia").

The United States Supreme Court had not comprehensively examined the scope of the Second Amendment before *Heller*. See *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (describing "[t]he Supreme Court's jurisprudence" on Second Amendment as "quite limited"); Note, *Under the Gun: Will States' One-Gun-Per-Month Laws Pass Constitutional Muster After* Heller *and* McDonald*?* 38 Seton Hall Legis J. 163, 167-69 (2013) (reviewing Supreme Court's Second Amendment caselaw); Howell, *Come and Take It: The Status of Texas Handgun Legislation After* District of Columbia v. Heller, 61 Baylor L. Rev. 215, 218-19 (2009). In 1939, the Court upheld the prosecution of two men for transporting a short-barreled shotgun in interstate commerce in violation of federal law because such a weapon could not be

considered reasonably related to the maintenance of a well-regulated militia and, therefore, fell outside the protections of the Second Amendment. *United States v. Miller*, 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206 (1939). In his majority opinion in *Heller*, Justice Scalia characterized *Miller* as a narrow Second Amendment decision resting on the type of weapon and not on the ostensible relationship between the protected right to bear arms and the prefatory clause addressing militias—a discussion in *Miller* he dismisses as cursory, at best. 554 U.S. at 623-24.[2]

[2] In *Blaksley*, the court read the original version of section 4 of the Kansas Constitution Bill of Rights in the same way the United States Supreme Court later construed the Second Amendment in *Miller*. And in support of that reading, the *Blaksley* court suggested the language of the Second Amendment described a comparably limited right resting on the need for militias. *Blaksley*, 72 Kan. at 232. The United States Supreme Court has characterized the *Blaksley* court's view of the Second Amendment as "clearly erroneous." *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 68, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

In an exhaustive dissent in *Heller*, Justice Stevens, joined by three of his colleagues, submitted that despite its lack of detail, *Miller* hewed to the history of the Second Amendment and to a protection of a collective right grounded in mutual defense against a hostile enemy rather than in personal self-defense. 554 U.S. at 636-38, 645-46 (Stevens, J., dissenting). The Kansas legislators supporting the amendment of section 4 feared the efficacy of that dissent with a reconfigured Court majority.

Relevant here, the *Heller* majority pointed out that Second Amendment rights are not absolute and may be subject to reasonable limitations. The Court specifically identified "longstanding prohibitions on the possession of firearms by felons and the mentally ill" and restrictions on carrying guns in "sensitive places," such as schools and governmental offices. 554 U.S. at 626-27 & n.26. And the Court recognized that certain types of firearms—the short-barreled shotgun at issue in *Miller*, for example—may be restricted or banned. 554 U.S. at 627. The dissenters had no quarrel with the proposition that Second Amendment rights could be

constrained, as set out in Justice Breyer's lengthy dissent, joined by the other dissenting justices. 554 U.S. at 682-83 (Breyer, J., dissenting). So the constitutionalization of *Heller* in section 4 embodies a set of rights subject to some restrictions.

In short, the majority opinion in *Heller* provides a template for construing the current language of section 4. That language directly appropriates and describes key interpretive conclusions drawn in *Heller*—most significantly, the possession of firearms is a personal right linked to individual self-defense. So section 4 ought to be applied compatibly with Justice Scalia's opinion and not with some future (and as yet unrealized) reexamination of Second Amendment rights.

In that limited respect, we disagree with the panel opinion in *State v. McKinney*, 59 Kan. App. 2d 345, 359, 481 P.3d 806 (2021), that section 4 "should be interpreted as coextensive to the Second Amendment." The *McKinney* decision holds section 4 to be a lockstep right dependent upon whatever the United State Supreme Court presently says the Second Amendment means. 59 Kan. App. 2d at 355-56. The panel dismissed the plain differences in wording as inconsequential and suggested lockstep treatment of section 4 would be appropriate simply because it addresses the same general subject as the Second Amendment. For the reasons we have outlined, we find that reasoning to be reductive. We may (and do) stake out a different position. See *State v. Urban*, 291 Kan. 214, 223, 239 P.3d 837 (2010) (one Court of Appeals panel not bound by decisions of other panels).

But the *McKinney* panel correctly understood that in 2021, the *Heller* majority opinion continued to reflect the governing articulation of the substantive rights secured in the Second Amendment. And *Heller* still does today. The panel properly drew on the principles in *Heller* to construe section 4—not because a lockstep analysis should be used but because section 4 itself constitutionalizes those principles.

Our concurring colleague offers two contradictory ways of reading section 4 without acknowledging the contradiction or the analytical dissonance they create. Ultimately, the concurrence promotes applying section 4 in lockstep with the Second Amendment.

65 Kan. App. 2d at 402 (In construing section 4, "one can confidently find that Kansas should remain in lockstep with the federal interpretation of the Second Amendment."). As we have explained, a lockstepped state constitutional right expands and contracts to match the United State Supreme Court's contemporaneous interpretation of the corresponding federal constitutional right. But the concurrence also submits "the 2010 amendment [of section 4] permanently safeguarded the *Heller* decision in Kansas." 65 Kan. App. 2d at 400. That's essentially what we have concluded, and the conclusion is antithetical to a lockstep treatment of section 4 because it constitutionalizes a particularized set of rights—those the *Heller* majority found in the Second Amendment—and does so even if some future United States Supreme Court were to abandon *Heller*. The concurrence's approach then disjointedly embraces our treatment of section 4 yet rejects the interpretive tool necessary to that treatment. We have no need to critique the concurrence's substantive constitutional analysis of K.S.A. 2020 Supp. 21-6304(a)(3)(A) using Second Amendment principles; but silence should not be taken as endorsement of the enunciated rationale.

Finally, in wrapping up this portion of our analysis, we impute to the 2009 Legislature a certain constitutional prescience. When the Legislature approved the proposed amendment to section 4, the Second Amendment remained one of the few parts of the Bill of Rights that had not yet been incorporated through the Fourteenth Amendment and, therefore, did not apply to the states. *Heller*, 554 U.S. at 620 & n.23. It thus limited only federal law and federal actors. But incorporation had begun to percolate in the federal courts. And the *Heller* majority implied the time might be at hand to reconsider 19th century precedent rendering the Second Amendment a brake on only the federal government. 554 U.S. at 620 n.23 (suggesting the legal foundation for *United States v. Cruikshank*, 92 U.S. 542, 23 L. Ed. 588 [1876]; *Presser v. Illinois*, 116 U.S. 252, 6 S. Ct. 580, 29 L. Ed. 615 [1886]; and *Miller v. Texas*, 153 U.S. 535, 14 S. Ct. 874, 38 L. Ed. 812 [1894], had substantially eroded given later cases incorporating other parts of Bill of Rights, though recognizing "question [of incorporation] not presented by this case").

Between the legislative approval of the amendment to section 4 in March 2009 and the public vote on it in November 2010, the United States Supreme Court accepted review of a case from the Seventh Circuit Court of Appeals and held that the Second Amendment should be applied to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 750, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). So the Second Amendment then provided a shield against state laws limiting the possession of firearms. But *Heller*'s interpretation of the Second Amendment remained no stronger than the willingness of at least five justices to adhere to it. In turn, the amendment of section 4 to include the substantive protections recognized in *Heller* afforded Kansans an expansive constitutional right wholly independent of the Second Amendment. See *Hodes & Nauser, P.A. v. Schmidt*, 309 Kan. 610, Syl. ¶ 3, 440 P.3d 461 (2019) (Kansas Constitution may afford greater rights than federal Constitution); *Marcus v. Swanson*, No. 122,400, 2022 WL 3570349, at *4 (Kan. App. 2022) (unpublished opinion), *aff'd* 317 Kan. 752, 539 P.3d 605 (2023).

2. *Analytical framework for assessing statutory limitations on section 4*

As part of the Kansas Constitution Bill of Rights, the protections in section 4 should be presumptively considered fundamental. A hundred and forty years ago, Justice Brewer famously declared that the Kansas Bill of Rights "is something more than a mere collection of glittering generalities," so each section is "binding on legislatures and courts, and no act of the legislature can be upheld which conflicts with their provisions." *Atchison Street Rly. Co. v. Missouri Pac. Rly. Co.*, 31 Kan. 660, Syl. ¶ 1, 3 P. 284 (1884); see *Hodes & Nauser*, 309 Kan. at 633 (quoting *Atchison Street Rly. Co.* in construing fundamental rights in section 1). The court has expressly recognized that various sections of the Kansas Bill of Rights embody fundamental rights. See *Hodes & Nauser v. Kobach*, 318 Kan. 940, Syl. ¶ 3, 551 P.3d 37 (2024) (section 1 includes fundamental right to personal autonomy); *State v. Hirsh*, 310 Kan. 321, 338, 446 P.3d 472 (2019) (section 10 protects crim-

inal defendant's fundamental right against double jeopardy); *Hilburn v. Enerpipe Ltd.*, 309 Kan. 1127, 1133, 442 P.3d 509 (2019) (section 5 protects fundamental right to jury trial). We have no reason to conclude section 4 would be an exception to that rule. The Kansas Supreme Court recently assumed section 4 declares a fundamental right in declining to consider a defendant's challenge to K.S.A. 2020 Supp. 21-6304(a) raised for the first time on appeal. *State v. Kemmerly*, 319 Kan. 91, 104, 552 P.3d 1244 (2024). The court's assumption neither assists nor deters us.[3]

[3] We need not decide whether inclusion in the Kansas Constitution Bill of Rights is a sufficient condition to declare a stated right to be fundamental. Section 21, added in 2016, to protect the people's "right to hunt, fish, and trap" using "traditional methods" might test that proposition, especially in the post-frontier society of the 21st century with its supermarkets, online shopping, and dearth of tanneries. Unlike section 4, section 21 had no analog in the original Kansas Constitution Bill of Rights and thus evaded Justice Brewer's consideration in *Atchison Street Rly. Co.*

The Kansas Supreme Court has recognized a specific analytical framework for assessing whether a statute conflicts with a fundamental constitutional right. See *Hodes & Nauser*, 318 Kan. at 950-51; *Hodes & Nauser*, 309 Kan. at 670, 673. The usual presumption of constitutionality does not apply to the statute. *Hodes & Nauser*, 309 Kan. at 673. Rather, the State needs to show the statute advances a compelling governmental interest and does so in a narrowly tailored way. *Hodes & Nauser*, 318 Kan. at 950-51; *Hodes & Nauser*, 309 Kan. at 670. Even a fundamental right is not, therefore, absolute. But a statute impinging on that right must survive strict judicial scrutiny—an especially exacting and demanding standard—and if it does not, the courts must conclude the measure amounts to a constitutionally impermissible impairment.

If we were mistaken in treating section 4 as a fundamental right and in applying strict scrutiny, the error would be harmless. That standard affords Hall the most favorable legal consideration he could receive under any circumstance. And his constitutional claims, nonetheless, fail. He could do no better under a less rigorous standard.

Before engaging in that review of K.S.A. 2020 Supp. 21-6304(a)(3)(A), we consider how statutes impinging on the Second

Amendment are analyzed and why that method does not apply here. The United States Supreme Court recently forged a unique constitutional tool for Second Amendment rights that asks whether a governmental restriction on those rights has an anchor in "the historical tradition" of firearms possession and regulation dating from the enactment of the Bill of Rights. *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 19, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022); see *United States v. Rahimi*, 602 U.S. 680, 689, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024) (summarizing rule in *Bruen*). If the challenged limitation has no comparable analog in the nation's history, then it impermissibly burdens Second Amendment rights. 602 U.S. at 692 (test asks whether present restriction sufficiently analogous to historical restrictions, though "not precisely match[ing] its historical precursors"). So *Bruen*'s historical assessment supplants recognized constitutional means-ends tests, including rational basis review and strict scrutiny. *Bruen*, 597 U.S. at 22.

Because the *Bruen* decision governs challenges to statutes, regulations, and other government actions impinging on the Second Amendment right to possess firearms, it has no bearing on the claim before us. We are applying distinct protections embodied in the Kansas Constitution Bill of Rights, and the Kansas Supreme Court has prescribed the analytical process for assessing statutes arguably curtailing those fundamental rights. Moreover, the issue here rests on the amended version of section 4 the Legislature considered in 2009 and the voters approved in 2010. We, therefore, needn't plumb the legal antiquities of the Kansas territory or even the law of the first century and half of Kansas statehood to assess Hall's section 4 challenge to K.S.A. 2020 Supp. 21-6304(a)(3)(A). Dodge City's regulation of firearms in the 1870s and 1880s might add historical color to our discussion, but those measures offer no particularly useful perspective on the modern version of section 4 crafted a decade ago. See Jancer, *Gun Control Is as Old as the Old West*, Smithsonian Magazine (February 2018), smithsonianmag.com/history/gun-control-oldwest-180968013/ (describing firearm regulation in cattle towns of latter 19th century, including Dodge City). We decline a picturesque retrospective as legally beside the point.

3. *Facial challenge considered*

As we have said, Hall principally attacks K.S.A. 2020 Supp. 21-6304(a)(3)(A) as a facially unconstitutional restriction of firearm rights protected in section 4. A facial challenge is commonly described as an argument that a statute is unconstitutional in every way it reasonably could be applied. *State v. Ryce*, 303 Kan. 899, Syl. ¶ 4, 368 P.3d 342 (2016); *Hodges v. Johnson*, 288 Kan. 56, 73, 199 P.3d 1251 (2009). But appellate courts may consider a facial attack on a discrete section of a broad statute. See *Rahimi*, 602 U.S. at 693; *Creecy v. Kansas Dept. of Revenue*, 310 Kan. 454, 455, 466, 447 P.3d 959 (2019). We, therefore, consider only subsection (a)(3)(A), consistent with how Hall has framed the issue. His attack on that part of the statute (and, in turn, on his conviction) fails should any of the statutory limitations be constitutionally acceptable—meaning the particular limitation is narrowly tailored to promote a compelling governmental interest.

When Hall was charged and convicted under K.S.A. 2020 Supp. 21-6304(a)(3)(A), it criminalized the possession of a firearm by a person who had within the preceding 10 years been convicted of or completed a prison sentence for a felony under about a dozen designated statutes in the criminal code; a felony drug offense; or attempting, aiding and abetting, or conspiring to commit any of those crimes. That subsection applied only if the person did not possess a firearm when they committed the designated crime. If the person committed various felonies while carrying a firearm, they faced a lifetime ban on possessing a firearm and could be prosecuted under K.S.A. 2020 Supp. 21-6304(a)(1). The constitutionality of K.S.A. 2020 Supp. 21-6304(a)(1) is not before us, and we offer no opinion on that question. Also not relevant here, the statute covered comparable convictions from other jurisdictions and proscribed the possession of defined types of knives.[4]

[4] The full text of K.S.A. 2020 Supp. 21-6304 is included as an appendix at the end of the concurring opinion.

The record indicates Hall had been convicted of possession of marijuana with the intent to distribute, a drug felony supporting the charge and conviction under K.S.A. 2020 Supp. 21-6304(a)(3)(A) in this case. But his facial challenge is not defined by that predicate crime. We should reject the claim if *any* application of the subsection would be constitutionally permissible. As a

forensic exercise for this purpose, we consider a conviction for intentional second-degree murder under K.S.A. 21-5403(a)(1), a severity level 1 felony; it is one of the crimes listed in K.S.A. 2020 Supp. 21-6304(a)(3)(A). The crime entails the purposeful, though unplanned, killing of another person without a legally recognized excuse or mitigation, such as self-defense or heat of passion. As a predicate conviction for a charge under K.S.A. 2020 Supp. 21-6304(a)(3)(A), the defendant could not have been in possession of a firearm at the time of the murder and, therefore, must have used another means to kill the victim. Murder stands above other serious crimes in its moral turpitude and irrevocable impact. *Graham v. Florida*, 560 U.S. 48, 69, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). To state an obvious and especially significant fact, an element of the crime requires the death of the victim.

In 2020, when Hall violated K.S.A. 2020 Supp. 21-6304(a)(3)(A), a defendant with no relevant criminal history convicted of intentional second-degree murder faced a presumptive sentence of imprisonment for between 147 and 165 months (about 12 to 14 years) followed by postrelease supervision for 36 months. The 10-year prohibition on possessing a firearm under K.S.A. 2020 Supp. 21-6304(a)(3)(A) would begin upon the defendant's completion of the prison portion of the sentence. See *State v. LaGrange*, 294 Kan. 623, 629, 279 P.3d 105 (2012) (construing legally comparable language in predecessor statute and holding 10-year prohibition begins upon defendant's "release from prison"). So the restriction would overlap with the period of postrelease supervision.

Although an objective of punitive incarceration is reformation or rehabilitation, the realization of that goal is unpredictable, perhaps especially with those persons committing particularly violent or morally repugnant crimes. Murder falls in that category. Prohibiting a convicted murderer from possessing firearms for 10 years after their release from prison reflects an appropriate legislative concern for the safety of the general public—a compelling governmental interest and, indeed, a basic purpose of an organized social and political entity. See *State ex rel. Stephan v. Lane*, 228 Kan. 379, 384, 614 P.2d 987 (1980) (describing exercise of police power to secure public safety and welfare); see also Locke, Two

Treatises of Government, Bk. II, sec. 7, para. 88 (discussing "legislative and executive power of civil society . . . to judge by standing laws how far offences are to be punished when committed within the commonwealth").

The very nature of firearms justifies the limitation on a person convicted of murder. By design, firearms are lethal weapons capable of inflicting fatal wounds quickly and efficiently at some comparatively safe distance from the targeted individual. Unlike other weapons, they also pose a significant danger to anyone else caught in what may be a sweeping line of fire. Apart from the overlapping right to hunt in section 21, no other portion of the Kansas Constitution Bill of Rights protects the possession of a lethal instrumentality and, in doing so, potentially collides with the State's overarching obligation to ensure public safety, welfare, and tranquility. Governments are instituted for that very purpose, and even fundamental rights may be carefully circumscribed to serve that objective. See U.S. Const. preamble; Declaration of Independence, para. 2. On balance, then, the restriction in K.S.A. 2020 Supp. 21-6304(a)(3)(A) was narrowly tailored to promote a compelling governmental interest when it comes to defendants convicted of second-degree murder. The prohibition is temporary but sufficiently long for the murderer to demonstrate a moral reformation warranting entrusting them with an instrumentality that would permit them to easily replicate their past criminality by quickly inflicting grave harm on numerous victims."

That alone is enough to turn aside Hall's facial challenge to the constitutionality of K.S.A. 2020 Supp. 21-6304(a)(3)(A).

More broadly, the prohibition in K.S.A. 2020 Supp. 21-6304(a)(3)(A) advanced the basic and essential role of government in securing the public's safety and welfare by temporarily restricting access to an especially dangerous instrumentality for a select group of convicted felons. Apart from drug offenders, only persons convicted of homicides and other felonies requiring violence or in-person threats of bodily harm to the victims—such as rape, aggravated battery, and aggravated robbery—suffered a diminution of their section 4 rights. Most of the conduct criminalized as felonies in Kansas did not prompt any limitation under

K.S.A. 2020 Supp. 21-6304(a)(3)(A) on a convicted defendant's right to possess firearms.

The temporary prohibition in K.S.A. 2020 Supp. 21-6304(a)(3)(A) did not preclude covered individuals from possessing and using other means of self-defense, such as electronic stun devices, debilitating chemical sprays, and even other weapons. We neither endeavor to catalogue those means nor assess their effectiveness in various circumstances. We also presume firearms in the hands of someone skilled in their use would be more effective in those uncommon situations necessitating lethal force to terminate an imminent threat of great bodily harm or death. See K.S.A. 21-5222(b) (permissible use of deadly force in self-defense). But for that very reason, firearms also become effective and exceptionally dangerous tools in the hands of the criminally disposed in a way other means of self-defense do not.

The concept of narrow tailoring abides no formulaic definition, but as the term suggests, the limitations or restrictions must further the compelling governmental interest without substantially impairing the otherwise protected constitutional right. In legal parlance, the imposition cannot be demonstrably underinclusive—reaching too little conduct to effectively secure the governmental interest—or overinclusive—sweeping in conduct too removed from that interest to be essential for its achievement. *Johnson v. California*, 543 U.S. 499, 515, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546-47, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); *Hodes & Nauser*, 318 Kan. at 954-55. The fit must be precise, but it need not be perfect. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015). And narrow tailoring depends at least in part on the nature of the fundamental right and the recognized governmental interest. 575 U.S. at 453-54; *Hodes & Nauser v. Stanek*, 318 Kan. 995, 1013-14, 551 P.3d 62 (2024). Here, as we have said, we deal with a temporary restriction precluding a limited group of convicted criminals from possessing an especially dangerous type of weapon.

In the context of free speech and other expression protected in the First Amendment, the Court has equated narrow tailoring to the "least restrictive means" necessary to advance a compelling

governmental interest. See *McCullen v. Coakley*, 573 U.S. 464, 478, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2021) (content-based limitation on speech); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) (speech); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) (free exercise religion); see also 5 Rotunda & Nowak, Treatise on Const. L. § 20.10 (2024). Even then, the phrase should not be literally construed in a given circumstance to reflexively permit only what would be wholly inadequate means. See *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 159 L. Ed. 2d 690 (2004) ("[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives."); *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989) (Constitution permits least restrictive means "designed to serve those [governmental] interests without unnecessarily interfering with First Amendment freedoms"). A similar concept of minimally necessary restrictions infuses a due process liberty interest of persons involuntarily committed to government custody because of mental infirmity. See *Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).[5]

[5] The concept of least restrictive means of governmental intrusion or limitation on individual rights in service of public policy objectives or interests has been codified in addressing various recurrent situations. See 42 U.S.C. § 2000bb-1(b) (government "may substantially burden" individual's "exercise of religion" only in furtherance of compelling interest and by "least restrictive means"); 20 U.S.C. § 1412(a)(5) (federal grants to states for education of children with disabilities require approved plan to provide services in "least restrictive environment"); K.S.A. 2023 Supp. 59-3075(b)(4) (judicially appointed guardian has statutory duty to "assure that the ward resides in the least restrictive setting appropriate to the needs of the ward"); K.S.A. 2023 Supp. 59-2972(b) (involuntarily committed individual with "intellectual disability" to be placed in institutionally "least restrictive alternative available").

We doubt the least restrictive means test applies here considering the right at stake, the nature of the restriction, and the governmental interest. Those circumstances obviously differ from content-based limitations on constitutionally protected speech or involuntary civil commitment. Moreover, the least restrictive means arguably might be a prohibition of firearms for a single day or a week—a prudentially stunted conclusion that would not tangibly further any governmental interest.

So, even examined systemically, K.S.A. 2020 Supp. 21-6304(a)(3)(A) was narrowly tailored to advance a compelling governmental interest and thus did not run afoul of section 4. The limited prohibition covered a short list of violent or otherwise dangerous crimes and required convicted defendants to demonstrate a law-abiding character and disposition upon their release from prison before they could possess a particularly dangerous type of weapon.[6]

[6] The 2021 amendments to K.S.A. 21-6304 reduced the period of prohibition from ten 10 years to 8 years. That sort of relatively limited reduction does not establish that the 10-year period was constitutionally suspect. The difference between the two is modest and reflects legislative finetuning rather than a dramatic shift in policy or purpose.

Hall attempts to avert the result we reach with an argument that section 4 must be read as a set of absolute rights subject to no limitation, even statutory restrictions narrowly tailored to advance paramount public purposes. Basically, he contends section 4 categorically and without exception protects the right of any "person" to "keep and bear arms," meaning to possess firearms, for self-defense or "any other lawful purpose." On that theory, K.S.A. 2020 Supp. 21-6304(a)(3)(A) was constitutionally infirm because it precluded a carefully circumscribed group of convicted felons from temporarily possessing firearms. The premise—rooted in an absolutist reading of section 4—reflects faulty constitutional jurisprudence.

The protections enumerated throughout the Kansas Constitution Bill of Rights are, for the most part, broadly stated principles designed to shield the citizenry from intrusive, overbearing, and oppressive governmental actions whether embodied in statutes,

written policies, or the conduct of individual officials or agents. As such, those principles command paramount consideration. But—contrary to Hall's assertion—they are not categorically impervious to limited qualification consonant with their purpose as part of the social compact between the government and the governed that balances individual liberties with public safety and welfare.

For example, the right to "appear and defend in person" at a criminal trial protected in the Kansas Constitution Bill of Rights section 10 may be constrained in the face of a defendant's conduct aimed at or otherwise disrupting the trial in a way that thwarts the truth-seeking function of the proceedings. See *State v. Cantu*, 318 Kan. 759, 766-67, 547 P.3d 477 (2024) (recognizing district court has authority to remove obstreperous defendant from courtroom after due warning to cease disrupting trial); 318 Kan. at 772 ("a constitutional right may be properly denied, in full or in part, only when a legitimate, overriding interest is present"). Similarly, the section 10 right to a public trial may be curtailed in exceptional circumstances. *State v. Reed*, 302 Kan. 227, 237, 352 P.3d 530 (2015) (recognizing right to public trial "'fundamental'" but "'not inviolate'" and may yield to limited exceptions to ensure fair trial or to prevent disclosure of sensitive information) (quoting *State v. Cox*, 297 Kan. 648, 655, 304 P.3d 327 [2013]). Perhaps even more relevant, the court, in *Hodes & Nauser*, recognized that a fundamental right in section 1 without a direct analog in the United States Constitution could be limited through narrowly tailored legislation advancing an identifiable and compelling governmental interest. 309 Kan. at 614, 674.

The same is true of the rights identified in section 4—they may be constrained in furtherance of an overarching public good. As we have explained, the temporary prohibition in K.S.A. 2020 Supp. 21-6304(a)(3)(A) on some felons possessing firearms is such a limitation. Were Hall's absolutist reading constitutionally correct then neither the Legislature nor the courts could impose any restrictions however slight or reasonable on section 4 rights. In that world, the prohibitions in K.S.A. 21-6301(a)(5) on the possession of short-barreled shotguns and fully automatic firearms would violate section 4. So, too, the prohibition in K.S.A. 21-

6301(a)(11) and (j) on students carrying firearms in elementary or secondary schools. Any person could possess any firearm for self-defense in any place. Eight year olds could bring their machine guns to school to ward off bullies.

We decline to credit, let alone endorse, an interpretive theory that would create patently unreasonable and even absurd constitutional doctrine. See *Tennessee Wine and Spirits Retailers Association v. Thomas*, 588 U.S. 504, 518-19, 139 S. Ct. 2449, 204 L. Ed. 2d 801 (2019) (Court declines to impute literalist reading of section 2 of Twenty-first Amendment to United States Constitution that would lead "to absurd results that the provision cannot have been meant to produce"); *Trustees of The United Methodist Church v. Cogswell*, 205 Kan. 847, 860, 473 P.2d 1 (1970) ("A strict construction of tax exemption provisions in the constitution and statutes does not warrant an unreasonable construction of such laws."). Hall's argument for his facial challenge to K.S.A. 2020 Supp. 21-6304(a)(3)(A) is constitutionally untenable.

C. *Hall's As-Applied Challenge*

Hall has alternatively argued that K.S.A. 2020 Supp. 21-6304(a)(3)(A) was unconstitutionally applied to him in defiance of section 4 because he used the firearm in his possession to lawfully defend himself. Unlike a facial challenge, an as-applied claim looks at whether the particular factual circumstances create a constitutional violation. *State v. N.R.*, 314 Kan. 98, 101-02, 495 P.3d 16 (2021); *State v. Hinnenkamp*, 57 Kan. App. 2d 1, 4, 446 P.3d 1103 (2019). As the party asserting the constitutional violation, Hall must establish the necessary predicate facts by a preponderance of the evidence. See *Wilkins v. Gaddy*, 559 U.S. 34, 40, 130 S. Ct. 1175, 175 L. Ed. 2d 995 (2010) (to prevail on Eighth Amendment claim for cruel and unusual punishment, inmate must prove facts showing guards actually assaulted him and did so maliciously and sadistically); *State v. Yurk*, 203 Kan. 629, 634, 456 P.2d 11 (1969); *Camacho v. Brandon*, 317 F.3d 153, 160 (2d Cir. 2003) (claimed First Amendment violation). To go forward with his as-applied claim, Hall must show that he more probably than not acted in self-defense, thereby bringing his conduct within the scope of section 4. Only then would a court need to consider

whether K.S.A. 2020 Supp. 21-6304(a)(3)(A) impermissibly impinged on a right protected in section 4. As we explain, Hall's reliance on the jury verdict alone does not satisfy that burden.

Hall neither asserted an as-applied constitutional challenge to K.S.A. 2020 Supp. 21-6304(a)(3)(A) in his written motion to the district court nor otherwise outlined one in arguing the motion. Appellate courts typically decline to consider an issue a party has not presented to the district court. But there are a few recognized exceptions. An appellate court has the discretion to act if the new issue: (1) presents a question of law arising from proved or admitted facts that would be outcome determinative; (2) furthers "the ends of justice" or advances a "fundamental right"; or (3) provides a substitute for a district court's erroneous reason for reaching an otherwise correct result. *State v. Holley*, 315 Kan. 512, 524, 509 P.3d 542 (2022).

Hall suggests the district court denied an as-applied challenge because in its bench ruling it said there was no reason "to declare the statute unconstitutional, either as a whole, or as applied in this case." But Hall had made no as-applied argument to be denied. Immediately after the district court ruled, Hall's lawyer commented that the underlying conviction supporting the felon-in-possession charge was for "possession of narcotics." But the lawyer did not elaborate on that remark and did not otherwise mention, let alone discuss, Hall's underlying conviction in the motion or during his argument. That's the legal equivalent of no argument at all. See *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017) (inadequate briefing amounts to abandonment of appellate argument); *State v. Llamas*, 298 Kan. 246, 264, 311 P.3d 399 (2013) (same). Moreover, even if Hall made an as-applied challenge to the district court based on his predicate conviction (and he didn't), that would be legally different from the self-defense argument he offers on appeal and would be insufficient to preserve his new argument. *State v. Warledo*, 286 Kan. 927, 938, 190 P.3d 937 (2008); *State v. Collins*, No. 125,761, 2024 WL 2872044, at *3 (Kan. App. 2024) (unpublished opinion); *State v. Turner*, No. 105,433, 2012 WL 1352831, at *2 (Kan. App. 2012) (unpublished opinion).

On appeal, Hall says we may consider his as-applied challenge under the first exception and argues his possession of a firearm was constitutionally protected because he acted in self-defense. In turn, Hall relies on the jury's verdict finding him not guilty of murder to establish the factual foundation for the argument. But his contention falters on both preservation and substantive deficiencies.

First, Hall would have us infer from a general verdict of not guilty that the jury came to that conclusion based on the trial evidence bearing on self-defense. A general verdict—unlike a jury's answers to special interrogatories—is by its very nature inscrutable. In a given case, an appellate court might infer the jury relied on particular evidence supporting an articulated defense in rendering a not guilty verdict. Here, we can't take even that initial step because the appellate record does not include a trial transcript or the exhibits admitted for the jury's consideration. And it's hardly apparent what legal value might attach to the inference. A jury should acquit a defendant if evidence on an affirmative defense, such as self-defense, does no more than creates a reasonable doubt as to guilt. In other words, the State must disprove an affirmative defense beyond a reasonable doubt to convict. K.S.A. 21-5108(c); *State v. Buck-Schrag*, 312 Kan. 540, 553, 477 P.3d 1013 (2020). The State would fail in that mission even if the jurors simply concluded from the evidence that Hall might have acted in self-defense. That's well short of proving the defense to be more probably true than not. The jury verdict in Hall's trial, then, does not factually establish by a preponderance of the evidence that he acted in self-defense. His as-applied challenge fails on that basis alone.

Second, the trial testimony and exhibits factually depicted Hall's actions, including his claimed defense of self. While the jury evaluated that evidence, its conclusion didn't provide the requisite factual foundation for Hall's constitutional argument. We presume that had Hall filed a posttrial motion asserting his as-applied challenge to K.S.A. 2020 Supp. 21-6304(a)(3)(A), the district court could have made a factual finding on whether a preponderance of the evidence established self-defense as a necessary threshold for deciding the constitutional question. A factual determination that Hall acted in self-defense is a necessary condition

for resolving the constitutional challenge in his favor, although it would not be a sufficient condition to do so.

The district court heard the evidence, just as the jury did, and could have received any additional evidence either side properly might have wanted to present on a posttrial motion. We, of course, are in no position to replicate that decision-making and, therefore, cannot say Hall has satisfied the necessary factual condition. We have no way of reviewing the trial testimony and exhibits because they are not in the record on appeal. Even if they were, we almost certainly could not make adequate credibility findings from those evidentiary materials. See *State v. Franco*, 49 Kan. App. 2d 924, 936-37, 319 P.3d 551 (2014) (appellate courts do not make credibility determinations from transcripts of evidentiary hearings because they have no opportunity to observe witnesses as they testify, especially on cross-examination).

Because we are unable to conclude Hall acted in self-defense, we need not—and really cannot—then consider the legal proposition he advances: K.S.A. 2020 Supp. 21-6304(a)(3)(A) was unconstitutionally applied to him because he carried a firearm and used it to defend himself in an otherwise lawful manner. Hall makes no other precisely framed argument that K.S.A. 2020 Supp. 21-6304(a)(3)(A) was impermissibly applied to him based on some characteristic specific to him or the facts of this case. He does submit that his facial attack on the statute also amounts to an as-applied challenge. But switching the label of that argument doesn't change its basic attributes or its legal flaws.

In sum, we find K.S.A. 2020 Supp. 21-6304(a)(3)(A) to have been a narrowly tailored limitation on Kansans' section 4 rights to possess firearms that promoted a compelling governmental interest in public safety tied to the demonstrable rehabilitation and reformation of persons convicted of a small number of felonies the Legislature has designated as especially violent or dangerous. We reject Hall's facial and as-applied challenges and affirm his conviction for violating K.S.A. 2020 Supp. 21-6304(a)(3)(A).

Affirmed.

* * *

PICKERING, J., concurring: I concur that K.S.A. 2020 Supp. 21-6304(a)(3)(A) is facially constitutional under section 4 of the Kansas Constitution Bill of Rights and that Hall's as-applied constitutional challenge fails. That said, I would find that section 4 of the Kansas Constitution Bill of Rights is coextensive with the Second Amendment to the United States Constitution. Thus, I disagree with the majority opinion's Syllabus paragraph 2. Instead, I would reject the defendant's claim that section 4 should be interpreted differently than the Second Amendment.

The grounds for finding the Second Amendment and section 4 are coextensive are three-fold. First, Kansas has historically remained in lockstep with the United States Supreme Court's interpretation of corresponding federal constitutional provisions, "notwithstanding any textual, historical, or jurisprudential differences." *State v. Lawson*, 296 Kan. 1084, 1091, 297 P.3d 1164 (2013). Second, the United States Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), was the impetus behind the Kansas Legislature's 2009 decision to amend section 4 of the Kansas Constitution Bill of Rights. Third, the goal of emulating *Heller*'s recognition of an individual's Second Amendment right to keep and bear arms is borne out by section 4's amended language, guaranteeing a person "the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose." Kan. Const. Bill of Rights, § 4. Accordingly, I would find that we should interpret section 4 as the United States Supreme Court has interpreted the Second Amendment.

By remaining in lockstep with the United States Supreme Court's interpretation of the Second Amendment, we consider "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. [*Bruen*,] 597 U.S. at 26-31." *United States v. Rahimi*, 602 U.S. 680, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024). While we are not aware of a founding-era Kansas law that specifically disarmed felons, such a statute is not needed. See *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 30, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022).

Rather, K.S.A. 2020 Supp. 21-6304(a)(3)(A)'s temporary ban of felons—depending on the nature of their conviction—possessing firearms is consistent with the principles that are found in Kansas' history of disarming dangerous or unlawful persons by restricting firearm use by those prone towards violence. Therefore, I would find that this shared principle of disarming dangerous or unlawful persons is consistent with section 4 of the Kansas Constitution Bill of Rights.

We should hold that section 4 of the Kansas Constitution Bill of Rights is coextensive with the Second Amendment to the United States Constitution.

Standard of review

To evaluate Hall's arguments, we must engage in interpretation of constitutional provisions, which is subject to de novo review. *State v. Rupnick*, 280 Kan. 720, 736, 125 P.3d 541 (2005).

Kansas' judicial history of coextensive analysis of constitutional rights

Our Kansas courts have continuously adopted the "general practice of giving an identical interpretation to identical language appearing in both the Kansas Constitution and our federal Constitution." *State v. Petersen-Beard*, 304 Kan. 192, 210, 377 P.3d 1127 (2016). "[F]or the past half-century, this court has generally adopted the United States Supreme Court's interpretation of corresponding federal constitutional provisions as the meaning of the Kansas Constitution, notwithstanding any textual, historical, or jurisprudential differences." *State v. Lawson*, 296 Kan. 1084, 1091, 297 P.3d 1164 (2013); see *Murphy v. Nelson*, 260 Kan. 589, 597, 921 P.2d 1225 (1996); *State v. Coutcher*, 198 Kan. 282, 287-89, 424 P.2d 865 (1967) (defendant challenged Habitual Criminal Act under both Kansas Constitution and Eighth Amendment; court relied on United States Supreme Court cases to reject challenge without distinguishing between Constitutions); see also *State v. Blanchette*, 35 Kan. App. 2d 686, 699, 134 P.3d 19 (2006) ("While the Kansas Supreme Court may interpret the Kansas Constitution in a manner different than the United States Constitution has been construed, it has not traditionally done so.").

Infrequently, the Kansas Supreme Court has found an enumerated right within the Kansas Constitution Bill of Rights is independent of the United States Supreme Court's interpretation of a corresponding federal constitutional right. See *State v. Albano*, 313 Kan. 638, 646, 487 P.3d 750 (2021) (analyzing section 5 separately from Sixth Amendment); *Hodes & Nauser, MDs, P.A. v. Schmidt*, 309 Kan. 610, Syl. ¶ 6, 440 P.3d 461 (2019) (finding section 1 "sets forth rights that are broader than and distinct from the rights in the Fourteenth Amendment"); *State v. McDaniel & Owens*, 228 Kan. 172, 184-85, 612 P.2d 1231 (1980) (independently interpreting section 9 of Kansas Constitution Bill of Rights).

Still, overall, our courts have a strong tendency to adopt the United States Supreme Court's interpretation of a federal constitutional provision as the meaning of the Kansas Constitution. See *State v. Wood*, 190 Kan. 778, 788, 378 P.2d 536 (1963) ("[T]he command of the Fourth Amendment in the Federal Constitution to federal officers is identical to the command of Section 15 of the Kansas Bill of Rights to law enforcement officers in Kansas."). This standard practice is illustrated in *State v. Boysaw*, 309 Kan. 526, 439 P.3d 909 (2019). There, the Kansas Supreme Court mandated that a litigant advocating for a different reading of a Kansas constitutional provision from its federal counterpart must "explain why this court should depart from its long history of coextensive analysis of rights under the two constitutions." 309 Kan. at 538. The defendant must articulate something in "the history of the Kansas Constitution or in our caselaw that would suggest a different analytic framework" should apply to differentiate section 4 from the Second Amendment. 309 Kan. at 536; see also *State v. Zapata-Beltran*, No. 122,414, 2021 WL 4932039, at *4 (Kan. App. 2021) (unpublished opinion) (finding defendant did not "provide any factual, historical, or legal reason why Kansans intended the protections of the Kansas Constitution 'to apply more broadly' to persons convicted of felonies than the United States Constitution does").

Despite this, the majority opinion places no such burden on the defendant and, instead, embraces the defendant's argument that section 4 does not provide coextensive protection to the Second Amendment.

a. *Even when there are textual differences, generally the Kansas and United States Constitutions are interpreted similarly.*

The majority's conclusion contradicts the general rule that "the Kansas Constitution is interpreted similarly to its federal counterpart even though the language may differ." *State v. McKinney*, 59 Kan. App. 2d 345, 355, 481 P.3d 806 (2021); see, e.g., *Boysaw*, 309 Kan. at 536-38 (despite textual differences, sections 10 and 18 of the Kansas Constitution Bill of Rights do not provide greater protection than the federal Due Process Clause); *State v. Johnson*, 293 Kan. 1, 5, 259 P.3d 719 (2011) (Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights offer same protections against unreasonable search and seizure); *State v. Wittsell*, 275 Kan. 442, 446, 66 P.3d 831 (2003) (protection against double jeopardy in section 10 of Kansas Constitution Bill of Rights "'equivalent to" that found in the Fifth Amendment to United States Constitution).

One such example can be found in the federal and state confrontation clauses. "The Confrontation Clause provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . *to be confronted with the witnesses against him*.' U.S. Const. amend. VI." (Emphasis added.) *State v. Bennington*, 293 Kan. 503, 507, 264 P.3d 440 (2011). Section 10 states: "In all prosecutions, the accused shall be allowed . . . *to meet the witness face to face*." (Emphasis added.) Kan. Const. Bill of Rights, § 10. Despite these textual differences, our courts have construed section 10 of the Kansas Constitution Bill of Rights to be parallel to the Sixth Amendment to the United States Constitution regarding confrontation of witnesses. *Bennington*, 293 Kan. at 507-08; *State v. Busse*, 231 Kan. 108, 110, 642 P.2d 972 (1982).

And in a recent civil case, *Rivera v. Schwab*, 315 Kan. 877, 894, 512 P.3d 168 (2022), the Kansas Supreme Court interpreted our state equal protection provision to be consonant with the corresponding federal provision: "[T]he equal protection guarantees found in section 2 are coextensive with the equal protection guarantees afforded under the Fourteenth Amendment to the United States Constitution." The Equal Protection Clause of the Four-

teenth Amendment, section 1 states: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 2 states: "[A]ll free governments are . . . instituted for [the people's] equal protection and benefit." Kan. Const. Bill of Rights, § 2. The *Rivera* court explained:

"Kansas courts shall be guided by United States Supreme Court precedent interpreting and applying the equal protection guarantees of the Fourteenth Amendment of the federal Constitution when we are called upon to interpret and apply the coextensive equal protection guarantees of section 2 of the Kansas Constitution Bill of Rights." *Rivera*, 315 Kan. at 894.

Numerous cases illustrate how coexisting with the federal counterpart modifies our interpretation of the corresponding Kansas constitutional right. *State v. Ryce*, 306 Kan. 682, 396 P.3d 711 (2017), is one such example. In defining what is a search within the meaning of the Fourth Amendment, the *Ryce* court reviewed the then recently issued United States Supreme Court decision in *Birchfield v. North Dakota*, 579 U.S. 438, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016). The *Ryce* court noted how "[t]he *Birchfield* majority distinguished between breath and blood tests." 306 Kan. at 689. Consequently, the *Ryce* court followed *Birchfield*, which had "extended the search-incident-to-lawful-arrest exception to 'warrantless breath tests incident to arrest for drunk driving,'" while also finding warrantless blood tests violated the Fourth Amendment. 306 Kan. at 699-700.

And in *State v. Chisholm*, 250 Kan. 153, 167-68, 825 P.2d 147 (1992), the Kansas Supreme Court held the district court did not violate the defendant's right to confrontation of a witness under the Kansas and United States Constitutions by analyzing the then recent United States Supreme Court opinion, *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990). Keeping with the United States Supreme Court, the *Chisholm* court revisited its decision in *State v. Eaton*, 244 Kan. 370, 769 P.2d 1157 (1989), and overruled the portion of the *Eaton* opinion that set forth the standard for use of child-victim witness testimony under K.S.A. 22-3434: "Because the United States Supreme Court decision in *Craig* no longer requires the State's burden to be so great, we abandon the standard set out in *Eaton* for use of testimony by

way of closed-circuit television under K.S.A. 22-3434 and adopt the standard set forth in this opinion." *Chisholm*, 250 Kan. at 168.

> *An attempt to establish section 4's independence by comparing the texts of the two constitutional provisions falls short.*

The majority opinion relies on the textual differences between the state and federal constitutional provisions to find that section 4's right to possess firearms should "be applied independently of and not in lockstep with the Second Amendment." 65 Kan. App. 2d 369, Syl. ¶ 2.

As a reminder, the Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The relevant part of section 4 presently states: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose." Kan. Const. Bill of Rights, § 4. (Before 2010, section 4 provided in relevant part that "[t]he people have the right to bear arms for their defense and security." Kan. Const. Bill of Rights, § 4 [adopted July 29, 1859]).

In its literal comparison of the two provisions, the majority states: "The Second Amendment offers no explicit purpose for bearing arms, apart from the recited need for a militia that functioned immediately after the Revolutionary War as a citizen-based alternative to a regular army." 65 Kan. App. 2d at 374. The *Heller* Court, however, rejected this limited purpose reading of the Second Amendment. The Court explained the prefatory clause of the Second Amendment "announces the purpose for which the right was codified: to prevent elimination of the militia[, t]he prefatory clause does not suggest that preserving the militia was the *only reason* Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." (Emphasis added.) *Heller*, 554 U.S. at 599. As a result, this literal comparison that disregards the Court's own interpretation of the Second Amendment is highly questionable. Any dependence on these textual differences to support interpreting section 4 independently thus falls short.

In sum, remaining parallel to the United States Supreme Court's interpretation of the Constitution has allowed our state constitutional provisions to adapt in a similar manner as their federal counterparts. Likewise, here, by coexisting with the Second Amendment, our state constitutional rights would adapt much like the Second Amendment. See *McDonald v. City of Chicago,* 561 U.S. 742, 750, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (holding Second Amendment applies to states).

b. *Kansas amended section 4 due to the* Heller *decision.*

Until 2010, there had never been an amendment to the Kansas Constitution regarding Kansans' right to keep and bear arms. Unquestionably, the *Heller* decision was the impetus behind our Legislature moving to amend the Kansas Constitution. As the Kansas Supreme Court stated: "The importance of understanding the intentions of the legislature in proposing the amendment cannot be understated. "'[T]he polestar in the construction of constitutions is the *intention* of the *makers* and *adopters*.'" *State ex rel. Stephan v. Finney*, 254 Kan. 632, 655, 867 P.2d 1034 (1994).

In 2008, the United States Supreme Court issued its watershed decision in *Heller*, which interpreted the Second Amendment and found there was "no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595. That right supports the basic right of "individual self-defense." 554 U.S. at 599. The Court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 582. In holding that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," the *Heller* Court reasoned that in the home, "the need for defense of self, family, and property is most acute." 554 U.S. at 592, 628.

The Court did, however, acknowledge that "the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. One such example of "presumptively lawful regulatory measures" was the "prohibitions on the possession of firearms by felons . . . ." 554 U.S. at 626 & n.26. *Heller* clarified this point: "[N]othing in our

opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . ." 554 U.S. at 626.

In light of the historical *Heller* decision, at the 2009 legislative session, the Kansas Legislature sought to amend section 4 of the Kansas Constitution Bill of Rights to ensure the state enumerated right protected an individual's right to keep and bear arms. As one senator noted:

"For many years, the citizens of Kansas have operated under the assumption that they possess an individual, Constitutional right to gun ownership. And we celebrated the decision last summer of the U.S. Supreme Court in Heller vs. D.C. confirming this individual right is enshrined in our U.S. Constitution." Sen. Journal, p. 481 (Mar. 24, 2009).

Due to the majority opinion's slim margin in *Heller*, one member of the Kansas Legislature expressed concern that any change in the makeup of the Supreme Court could jeopardize the holding in *Heller* and thus risk a Kansan's individual right to keep and bear arms. And in discussing the holding of *City of Salina v. Blaksley*, 72 Kan. 230, 83 P. 619 (1905), another senator noted:

"The U.S. Supreme Court rejected this erroneous 'collective right' holding on the Second Amendment in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). The Kansas Legislature and the people of Kansas should also reject this erroneous application to the Kansas Bill of Rights by exercising their right to amend the Kansas Constitution." Sen. Journal, p. 481 (Mar. 24, 2009).

Thus, the purpose of the 2010 amendment—as Hall acknowledges—was to ensure that section 4 of the Kansas Constitution Bill of Rights preserved rights consistent with the United States Supreme Court's interpretation of the Second Amendment in *Heller*.

In essence, the 2010 amendment permanently safeguarded the *Heller* decision in Kansas. This was also noted in *Zapata-Beltran*, 2021 WL 4932039, at *4, which found that the defendant provided "no reason why the 2010 amendment to the Kansas Constitution, adopted less than two years after *Heller* held that the Second Amendment conferred an individual right to bear arms, aimed to provide different protections than existing federal law." *Heller*'s instrumental role in the Kansas Legislature amending section 4 supports a finding that this section should remain coextensive with the Second Amendment.

It is therefore disappointing in my reading of the majority opinion not to see the *Heller* decision receive its fair due. The majority decision states that "[t]he amendment materially altered the scope of section 4 to identify a personal right keyed to self-defense and other lawful conduct—a protection far broader than the one recognized in *Blaksley.*" 65 Kan. App. 2d at 372-73. Of course, the 2010 amendment gave broader protection than the century-old *Blaksley* decision, but not before the *Heller* decision had effectively overruled *Blaksley* two years earlier by finding "the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595.

In *Bruen*, the United States Supreme Court specifically recognized that the *Heller* decision overruled *Blaksley.* There, the Court referenced *Heller* as it related to *Blaksley:*

"For example, the Kansas Supreme Court upheld a complete ban on public carry enacted by the city of Salina in 1901 based on the rationale that the Second Amendment protects only 'the right to bear arms as a member of the state militia, or some other military organization provided for by law.' *Salina v. Blaksley*, 72 Kan. 230, 232, 83 P. 619 (1905). That was clearly erroneous. See *Heller*, 554 U.S. at 592." *Bruen*, 597 U.S. at 68.

Undoubtedly, *Heller* first overruled *Blaksley*, which is then later expressed in the 2010 amendment.

Indeed, the Court's post-*Heller* rulings support remaining in lockstep with the highest Court's analysis of the Second Amendment. See, e.g., *Bruen*, 597 U.S. at 32. In *McDonald*, 561 U.S. at 786, the Court held the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment. See also *Caetano v. Massachusetts*, 577 U.S. 411, 412, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016) (holding Second Amendment protection of right to bear arms not limited to "'weapons useful in warfare'").

c. *The goal of emulating* Heller*'s recognition of an individual's Second Amendment right to keep and bear arms is borne out by section 4's amended language*.

Finally, the rights guaranteed to Kansans under section 4 are already found in the Second Amendment. Both provisions confer

an individual right to keep and bear arms. U.S. Const. amend. II; Kan. Const. Bill of Rights, § 4.

As noted, section 4 as amended reads: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose." Kan. Const. Bill of Rights, § 4. The *Heller* decision established the individual right to keep and bear arms, which supports the basic right of "individual self-defense." 554 U.S. at 599. While the Second Amendment uses the word "people," and section 4 uses the word "person," the Court removed any doubt that "on the basis of both text and history, . . . the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. Since *Heller*, the Court has continually affirmed the individual right to keep and bear arms. For example, *Bruen* states: "In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. There, in analyzing *Heller*, the Court found that the basic right to keep and bear arms for self-defense is not confined to the home. *Bruen*, 597 U.S. at 32.

As for section 4's wording—"for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose"—the *McKinney* panel explained that this language "merely enumerates or provides examples of the protections inherently conferred by the Second Amendment." 59 Kan. App. 2d at 356. Section 4's amended language therefore emulates *Heller*'s recognition of an individual's right to keep and bear arms.

To summarize, understanding how instrumental the *Heller* decision was in prompting Kansas to amend section 4 is essential. The 2010 amendment to section 4 secured an individual's right to bear arms by explicitly drawing from this watershed decision, and hence one can confidently find that Kansas should remain in lockstep with the federal interpretation of the Second Amendment. To find otherwise results in Kansas courts applying section 4 without considering the United States Supreme Court's Second Amendment decisions—such as *Bruen*, *Caetano*, and *Rahimi*—and any of the Court's future Second Amendment decisions. See 65 Kan.

App. 2d at 381 (stating the *Bruen* decision "has no bearing on the claim before us").

d. *K.S.A. 2020 Supp. 21-6304(a)(3)(A), which criminalizes possession of a firearm by a convicted felon, does not violate section 4 of the Kansas Constitution Bill of Rights.*

Hall's facial challenge to the constitutionality of K.S.A. 2020 Supp. 21-6304(a)(3)(A) is "'the most difficult challenge to mount successfully, since the challenger must establish that *no set* of circumstances exists under which the [legislative] Act would be valid.'" (Emphasis added.) *State v. Watson*, 273 Kan. 426, 435, 44 P.3d 357 (2002) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 [1987]).

Our standard for constitutional interpretation is well established: The rule for determining the intention of the drafters "'is to abide by the language they have used; and this is especially true of written constitutions, for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed, and that none are inserted, and none omitted without a design for so doing.'" *Hodes & Nauser*, 309 Kan. at 622-23.

K.S.A. 2020 Supp. 21-6304(a) states, in relevant part:

"(a) Criminal possession of a weapon by a convicted felon is possession of any weapon by a person who:

. . . .

(3) within the preceding 10 years, has been convicted of a:

(A) Felony under K.S.A. 2020 Supp. 21-5402, 21-5403, 21-5404, 21-5405, 21-5408, subsection (b) or (d) of 21-5412, subsection (b) or (d) of 21-5413, subsection (a) of 21-5415, subsection (b) of 21-5420, 21-5503, subsection (b) of 21-5504, subsection (b) of 21-5505, and subsection (b) of 21-5807, and amendments thereto; article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto; K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3442, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a, 65-4127b, 65-4159 through 65-4165 or 65-7006, prior to their repeal; an attempt, conspiracy or criminal solicitation as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 2020 Supp. 21-5301, 21-5302 or 21-5303, and amendments thereto, of any such felony; or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for such felony, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of such felony, was not found to have been in possession of a firearm at the time of the commission of

the crime, and has not had the conviction of such crime expunged or been pardoned for such crime."

K.S.A. 2020 Supp. 21-6304(b) makes criminal possession of a weapon by a convicted felon a severity level 8 nonperson felony.

Hall's plain language argument fails.

Hall contends that the 2010 amendment to section 4 of the Kansas Constitution Bill of Rights added language that prohibits the Legislature from criminalizing the mere possession of a firearm, regardless of past criminal history. Hall asserts that changing "the people" to "a person" and adding the word "keep" were "significant changes." He also argues that the added language—"for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose"—was significant. Hall relies on dictionary definitions of "keep," "person," "people," and "purpose" to argue that section 4 explicitly guarantees the individual the right to possess and retain arms for any lawful purpose, including self-defense, and that nothing in the plain language limits or qualifies that right based on a person's criminal history.

This interpretation departs substantially from the United States Supreme Court's interpretation that the Second Amendment does not disallow laws prohibiting possession of firearms by felons. *Heller*, 554 U.S. at 626; see also *Rahimi*, 602 U.S. at 716 ("American law has long recognized, as a matter of original understanding and original meaning, that constitutional rights generally come with exceptions.") (Kavanaugh, J., concurring).

Hall compares the language of section 4 to other Kansas constitutional provisions that explicitly limit or restrict fundamental rights and to other states' constitutional provisions that explicitly limit or restrict the right to keep and bear arms. Hall then argues that because section 4 does not explicitly limit or restrict firearm possession to nonfelons, the drafters must have intended section 4's rights to be extended to felons. Yet, "[w]hen the current version of section 4 was adopted by Kansas voters in 2010, it was done with the knowledge that it was unlawful in Kansas to possess a firearm if you had been convicted of a felony in the preceding five years. K.S.A. 2010 Supp. 21-6304(a)(2)." *State v. Foster*, 60 Kan.

App. 2d 243, 261-62, 493 P.3d 283 (2021) (Arnold-Burger, C.J., concurring). *Foster* involved an almost identical issue, except that Foster's felony resulted in a five-year ban. The concurrence concluded "that the regulation of firearms related to felons provided in K.S.A. 2020 Supp. 21-6304(a)(2) is not prohibited under section 4 of the Kansas Constitution Bill of Rights." *Foster*, 60 Kan. App. 2d at 263 (Arnold-Burger, C.J., concurring).

Furthermore, a ban on felons possessing firearms less than 12 inches in length has been in the Kansas Statutes since at least 1969. See L. 1969, ch. 180, § 21-4204. And a total ban on convicted felons possessing any firearms was enacted in 1994. See L. 1994, ch. 348, § 4. Therefore, the drafters of the 2010 section 4 amendment intended to continue to prohibit possessing a firearm by felons. In advocating a different reading of a Kansas constitutional provision from its federal counterpart, Hall's burden is to "explain why this court should depart from its long history of coextensive analysis of rights under the two constitutions." *Boysaw*, 309 Kan. at 538. Hall has failed to carry this burden.

Effect of New York State Rifle & Pistol Assoc. v. Bruen

The United States Supreme Court revisited the Second Amendment in *Bruen*. There, law-abiding citizens who applied for unrestricted licenses to carry handguns in public sued the superintendent of the New York State Police and a licensing officer under 42 U.S.C. § 1983, seeking declaratory and injunctive relief, claiming that the denial of their license applications, which failed to satisfy New York's "'proper cause'" standard, violated their Second and Fourteenth Amendment rights. *Bruen*, 597 U.S. at 16. The Court held New York's "'proper cause'" standard, which is shown when an applicant can "'demonstrate a special need for self-protection distinguishable from that of the general community,'" was unconstitutional. 597 U.S. at 70-71.

Significantly, *Bruen* reset the analogical reasoning under the Second Amendment by doing away with the two-step approach that lower courts used post-*Heller* to evaluate the constitutionality of gun laws. *Bruen* explained: "Not only did *Heller* decline to engage in means-end scrutiny generally, but it also specifically ruled out the intermediate-scrutiny test[.]" 597 U.S. at 23.

Bruen held: "In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 597 U.S. at 17. Consequently, when a firearm regulation is challenged under the Second Amendment, the government must affirmatively prove that its firearms regulation "is consistent with this Nation's historical tradition of firearm regulation." 597 U.S. at 17. The reasoning "is neither a regulatory straightjacket nor a regulatory blank check." 597 U.S. at 30. The Court explained:

"On the one hand, courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.' On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*. [Citation omitted.]" 597 U.S. at 30.

Important to this case, before *Bruen*, the United States Supreme Court has stressed that the Second Amendment does not prohibit laws prohibiting the possession of firearms by felons. *Heller*, 554 U.S. at 626; *McDonald*, 561 U.S. at 786. Justice Kavanaugh's concurrence in *Bruen* repeated this: "'Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'" 597 U.S. at 81 (Kavanaugh, J., concurring).

While this case was pending and after our court heard oral arguments, the United States Supreme Court decided *Rahimi.* In *Rahimi*, the Court again applied the *Bruen* analysis, holding that the federal temporary ban on possession of firearms by domestic abusers is constitutional. 602 U.S. at 702. The *Rahimi* Court reviewed the *Bruen* analysis and explained: "[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." 602 U.S. at 692. In considering whether the challenged regulation comports with the principles underlying the Second Amendment, *Rahimi* emphasized: "Why and how the regulation burdens the right are central to this inquiry." 602 U.S. at 692. Of

note, the Court reaffirmed the lawfulness of restricting felons from possession of firearms. 602 U.S. at 699.

Notably, Justice Sotomayor's concurrence discusses how the majority opinion "clarifies an important methodological point that bears repeating: Rather than asking whether a present-day gun regulation has a precise historical analogue, courts applying *Bruen* should 'conside[r] whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition.'" 602 U.S. at 703-04 (Sotomayor, J., concurring, Kagan, J., joining).

Bruen *and* Rahimi *are instructive here*.

Being in lockstep with the United States Supreme Court's interpretation of the Second Amendment, the post-*Heller* analysis as outlined in *Bruen* and *Rahimi* should apply. The question is thus whether the challenged regulation, K.S.A. 2020 Supp. 21-6304, is consistent with the principles that underpin Kansas' regulatory tradition.

Before proceeding, I note the majority opinion suggests that this historical review is not "particularly useful perspective on the modern version of section 4" that was drafted in 2009. 65 Kan. App. 2d at 381. I disagree. Otherwise, such a limited review would be incomplete. A historical review beginning when the Kansas Constitution was first ratified is essential to our methodological approach.

In the context of analyzing the constitutionality of a felon in possession of a firearm statute—K.S.A. 2020 Supp. 21-6304(a)(3)(A)—we can look at the rights that existed in the years surrounding Kansas' adoption of its Constitution in 1859 and its 1861 statehood and early development. Because evidence of "*the public understanding* of a legal text in the period after its enactment or ratification" is probative of its original meaning, a court should consider how section 4 was understood in the post-founding era. *Heller*, 554 U.S. at 605.

Bruen, as noted, does not require a specific level of specificity: "[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." 597 U.S. at 30. This is repeated by the *Rahimi* Court: "The law must comport with the principles underlying the

Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" 602 U.S. at 692. While an examination of the historical record establishes that Kansas had no specific prohibition against convicted felons possessing firearms until 1955, Kansas has a long tradition of disarming categories of people who were not law-abiding and were dangerous if they possessed a firearm. This is shown even without a historical "dead ringer" for K.S.A. 2020 Supp. 21-6304(a)(3)(A). See *Bruen*, 597 U.S. at 30. As in *Rahimi*, this shared principle does prove to be sufficient. 602 U.S. at 704 (Sotomayor, J., concurring).

We begin with a historical review of Kansas' statehood.

The Kansas Constitution "was adopted by constitutional convention in July 1859, ratified by the electors of the State of Kansas on October 4, 1859, and became law upon the admission of Kansas into statehood in 1861." *Albano*, 313 Kan. at 641. Section 4 of the Kansas Constitution was included within the Constitution's Bill of Rights.

During the period leading up to the ratification of the Kansas Constitution, abolitionists in Kansas supported disarming groups responsible for violence. Senator (and future United States Vice President) Henry Wilson complained that "armed bandits" were "violating law, order, and peace," and called for legislation "to disarm any armed bands, from the slave States or the free States, who enter the Territory for unlawful purposes." Cong. Globe App., 34th Cong., 1st Sess., 1090 (Aug. 7, 1856). When the government went too far, these opponents of slavery criticized Kansas authorities for disarming "peaceable" free-state settlers. See, e.g., New-York Daily Tribune (Oct. 2, 1856), https://chroniclingamerica.loc.gov/lccn/sn83030213/1856-10-02/ed-1/seq-4/ ("When [a Kansas official] entered the houses of peaceable citizens and demanded that they should deliver up their arms, he . . . violated one of those provisions of the Constitution which a free people should guard with the most jealous care."); *High-Handed Outrage in Kansas*, Holmes County Republican (Oct. 30, 1856) (denouncing the disarmament of "[p]eaceable American [c]itizens" in Kansas as a violation of their "constitutional rights").

In keeping with *Heller*'s direction to assess the "postratification history" of section 4, see *Bruen* 597 U.S. at 21, in 1867, less than a decade after the Constitution was ratified, the Kansas Legislature enacted the first statutory prohibition against carrying a dangerous weapon.

"Any person who is not engaged in any legitimate business, any person under the influence of intoxicating drink, and any person who has ever borne arms against the Government of the United States, who shall be found within the limits of this State, carrying on his person a pistol, bowie-knife, dirk or other deadly weapon, shall be subject to arrest upon charge of misdemeanor; and upon conviction shall be fined in a sum not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or both, at the discretion of the court." L. 1867, ch. 12, § 1.

The prohibition was codified at G.S. 1868, ch. 31, § 282. While there was no specific mention of convicted felons, the statutory tradition of banning possession of firearms to those people believed to be nonlaw abiding due to being under the influence, not engaged in "legitimate business," or who had "borne arms" in the Civil War against the Union, began. See L. 1867, ch. 12, § 1. The same statute appeared in the 1883 General Statutes, prohibiting a person from selling, trading, giving, loaning "or otherwise furnish[ing] any pistol, revolver or toy pistol, by which cartridges or caps may be exploded, or any dirk, bowie knife, brass knuckles, slung shot, or other dangerous weapons, to any minor, or to any person of notoriously unsound mind.'" *Parman v. Lemmon*, 120 Kan. 370, 372, 244 P. 227 (1925) (citing L. 1883, ch. 105).

A year after the Civil War ended, Senator Wilson defended Congress' "power to disarm ruffians or traitors, or men who are committing outrages against law or the rights of men . . . ." Cong. Globe, 39th Cong., 1st Sess. 915 (1866). Another article referred to the "constitutional right of every peaceable citizen to carry arms for his own defense." *Kansas Legislature: Some Criticisms on Pending Bills*, The Topeka Daily Capital (Feb. 2, 1883). While not using the term "felon," Kansas sought to ban dangerous or unlawful persons from possessing firearms:

"It is the dangerous man, whether drunk or sober, who should be arrested and punished; and whenever a person presents himself anywhere and by offensive or abusive conduct, or by exhibiting himself as a walking arsenal; or as a 'thug,' or

by both such conduct or exhibition, he should be deemed an offender, and arrested and punished." *Kansas Legislature: Some Criticisms on Pending Bills*, The Topeka Daily Capital (Feb. 7, 1883).

To curb violence and lawlessness, Kansas cattle towns restricted firearms in town.

Historically, growing Kansas cattle towns such as Abilene, Ellsworth, and Dodge City restricted carrying firearms in town to curb violence. When arriving in town, the guns were either temporarily turned in (until leaving town), or the guns were left at home. Jancer, *Gun Control Is as Old as the Old West*, Smithsonian Magazine (February 2018), smithsonianmag.com/history/gun-control-oldwest-180968013. For instance, in 1870, the town of Ellsworth enacted Ordinance No. 1, a handwritten county ordinance prohibiting the discharge of any "gun or pistol" within specified limits around the town.

That same year, Abilene started enforcing a ban of possessing firearms in town to ensure peace. At the time, Abilene, the last stop on the Chisholm Trail where the cattle were sold and shipped eastward, was "a rough and rowdy cowtown." https://abilenekansas.org/news/2021/12/08/a-cowtown-winter-wonderland. As noted by one historian: "News of an arriving cattle herd was met with conflicting emotions in old Abilene. It meant money for shopkeepers, saloon owners and brothels. It also meant fear and alarm to the common citizen, who had to deal with the drunken dangerous cowboys." Richard, *Chronology of Life of James Butler (Wild Bill) Hickok*, Kansas Heritage Server, "Old West Kansas" (Adapted from Joseph G. Rosa's book, They Called him Wild Bill, the Life and Adventures of James Butler Hickok, 181-82 [1974]).

When Abilene was first being established, several ordinances were passed to ensure lawfulness. "The particular ordinance which caused the most comment and turmoil [w]as the one forbidding the carrying of firearms within the city limits." Cushman, *Abilene, First of the Kansas Cow Towns*, The Kansas Historical Quarterly, 250 (August 1940). The ordinance, which took effect on May 20, 1870, banned "any person" from carrying "within the limits of the town of Abilene, or commons: a pistol, revolver, gun, musket, dirk, bowie-knife, or other dangerous weapon upon his or

their person or persons." See *Abilene Weekly*, May 12, 1870 (ordinance mandating violators "shall be imprisoned in the common gaol of the town not less than twenty-four hours nor more than ten days"). In addition to appearing in the *Abilene Weekly*, the ordinance "was announced on large bulletin boards at all the important roads entering town. These were first looked upon with awe and curiosity, and only gradually was their significance comprehended." Cushman, *Abilene, First of the Kansas Cow Towns*, The Kansas Historical Quarterly, 250. In response: "The cowboys insolently ridiculed the officers and the disregard for law continued. The posters upon which the ordinances were published were shot so full of holes that they became illegible." Cushman, *Abilene, First of the Kansas Cow Towns*, The Kansas Historical Quarterly, 250.

In furtherance of the ordinance, "[e]ach business house had a sign which read, 'You are expected to deposit your guns with the proprietor until you are ready to leave town.'" Cushman, *Abilene, First of the Kansas Cow Towns*, The Kansas Historical Quarterly, 251. The first marshal hired to enforce the firearm ban was killed in the line of duty. Abilene's mayor then hired James Butler "Wild Bill" Hickok as its next marshal. In what was later widely chronicled in print and film, Hickok enforced the ordinance through his "'hip artillery' [which] was always conspicuously worn. His main dependence was on his quick draw and accurate marksmanship." Cushman, *Abilene, First of the Kansas Cow Towns*, The Kansas Historical Quarterly, 252-53.

In November 1875, the famed frontier town of Dodge City became incorporated and was led by a mayor whose "mandate was to enact laws to reduce the violence." Clavin, Dodge City: Wyatt Earp, Bat Masterson, and the Wickedest Town in the American West, 133 (2017). The council's first enactment was restricting carrying of guns in town. Jancer, *Gun Control Is as Old as the Old West*, Smithsonian Magazine (February 2018). That December, the council passed an ordinance:

"No person shall in the city of Dodge City, carry concealed about his or her person any pistol, bowie knife, slung shot, or other dangerous or deadly weapon except United States[,] State[,] council, township or city officers and any person convicted of a violation of this section shall be fined not less than [ ] three nor

more than twenty five dollars." Dodge City Ordinance, Section VII, approved December 24, 1875.

At the time, given Dodge City's boundaries, the "guns could not be worn or carried north of the 'deadline' which was the railroad tracks." Ford County Historical Society, *Dodge City, Kansas History, Queen of the Cowtowns, The Cowboy Capital*, https://fordcountyhistory.org/dodge-city-kansas-history/. To illustrate this point, *Gun Control Is as Old as the Old West*, the Smithsonian article referenced by the majority opinion, 65 Kan. App. 2d at 381, includes a photo of a sign placed on Dodge City's Front Street that reads: "Carrying of Firearms Strictly Prohibited." (Provided courtesy of the Kansas Historical Society.)

From 1876 to 1879, the renowned lawmen W.B. "Bat" Masterson, sheriff of Ford County; his brother, Edward Masterson, Marshal of Dodge City; Wyatt Earp, assistant city marshal; along with other lawmen, worked to enforce the mandate. As with other Kansas cattle towns, the ordinance was to prevent the lawlessness that came when the cowboys brought in their cattle herds. See *Dodge City Times*, April 13, 1878 (Marshal Edward Masterson was killed while attempting to disarm two "cattle drivers" who were "under the influence of bad whiskey and carrying revolvers."). At the start of the 1879 cattle season, the Dodge City lawmen "were warning one and all to 'Leave off your concealed weapons, and don't undertake 'to take the town' . . ." Ford County Historical Society, *Wyatt Barry Stapp Earp's Activities in Dodge City, KS* https://fordcountyhistory.org/people/wyatt-earp/wyatt-barry-staap-earps-activities-in-dodge-city-ks/ (from Frederick Young's book Dodge City: Up through a Century In Story and Pictures). As this historical review illustrates, Kansas has a tradition of disarming dangerous or nonlaw-abiding people.

The United States has a similar tradition of disarming categories of people who are not law-abiding, responsible citizens. See *Bruen*, 597 U.S. at 8-9 (using phrase "law-abiding, responsible citizens" and the like more than a dozen times to describe Second Amendment's protections); *Heller*, 554 U.S. at 635 (holding Second Amendment's scope is limited to "law-abiding, responsible citizens"); see also *United States v. Davey*, No. 23-20006-01-

DDC, 2024 WL 340763, at *5 (D. Kan. 2024) (recognizing historical tradition of "disarming dangerous people" and upholding constitutionality of 18 U.S.C. § 922[g][3], the federal ban on habitual drug users possessing firearms).

Kansas history and tradition establish that section 4, like the Second Amendment, allows the Legislature to disarm people who are not law-abiding, responsible citizens. Here, K.S.A. 2020 Supp. 21-6304(a)(3)(A) is consistent with the principles that support Kansas' regulatory tradition of temporarily banning dangerous or unlawful persons from possessing firearms. See *Bruen*, 597 U.S. at 26-31; see also *State v. LaGrange*, 294 Kan. 623, 630, 279 P.3d 105 (2012) ("One of the obvious purposes of prohibiting firearm possession by a person who has previously been convicted of a serious felony is to protect the public."). Similar to Kansas' early years as a state, this present regulation temporarily bans those persons who have shown to be dangerous or nonlaw abiding from possessing firearms, e.g., imposing a 10-year ban for those convicted of distributing illegal substances. See *Rahimi*, 602 U.S. at 692 ("Why and how the regulation burdens the right are central to this inquiry."). And the statute fits comfortably within the tradition of disarming people who are not law-abiding, responsible citizens. Thus, under the *Bruen* test as explained in *Rahimi*, 602 U.S. at 692, K.S.A. 2020 Supp. 21-6304(a)(3)(A) does not violate section 4.

To conclude, section 4 should be interpreted in the same manner as its federal counterpart, the Second Amendment. Following the United States Supreme Court's methodological reasoning from *Heller* and its progeny, *Bruen* and *Rahimi*, K.S.A. 2020 Supp. 21-6304(a)(3)(A) is facially constitutional under section 4 of the Kansas Constitution Bill of Rights.

APPENDIX

K.S.A. 2020 Supp. 21-6304. Criminal possession of a firearm by a convicted felon.

(a) Criminal possession of a weapon by a convicted felon is possession of any weapon by a person who:

(1) Has been convicted of a person felony or a violation of article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, K.S.A. 21-36a01 through 21-36a17, prior to their transfer, or any violation of any provision of the uniform controlled substances act prior to July 1, 2009, or a crime under a law of another jurisdiction which is substantially the same as such felony or violation, or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a person felony or a violation of article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, K.S.A. 21-36a01 through 21-36a17, prior to their transfer, or any violation of any provision of the uniform controlled substances act prior to July 1, 2009, and was found to have been in possession of a firearm at the time of the commission of the crime;

(2) within the preceding five years has been convicted of a felony, other than those specified in subsection (a)(3)(A), under the laws of Kansas or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for a felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was not found to have been in possession of a firearm at the time of the commission of the crime; or

(3) within the preceding 10 years, has been convicted of a:

(A) Felony under K.S.A. 21-5402, 21-5403, 21-5404, 21-5405, 21-5408, subsection (b) or (d) of 21-5412, subsection (b) or (d) of 21-5413, subsection (a) of 21-5415, subsection (b) of 21-5420, 21-5503, subsection (b) of 21-5504, subsection (b) of 21-5505, and subsection (b) of 21-5807, and amendments thereto; article 57 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto; K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420,

21-3421, 21-3427, 21-3442, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a, 65-4127b, 65-4159 through 65-4165 or 65-7006, prior to their repeal; an attempt, conspiracy or criminal solicitation as defined in K.S.A. 21-3301, 21-3302 or 21-3303, prior to their repeal, or K.S.A. 21-5301, 21-5302 or 21-5303, and amendments thereto, of any such felony; or a crime under a law of another jurisdiction which is substantially the same as such felony, has been released from imprisonment for such felony, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of such felony, was not found to have been in possession of a firearm at the time of the commission of the crime, and has not had the conviction of such crime expunged or been pardoned for such crime. The provisions of subsection (j)(2) of K.S.A. 21-6614, and amendments thereto, shall not apply to an individual who has had a conviction under this paragraph expunged; or

(B) nonperson felony under the laws of Kansas or a crime under the laws of another jurisdiction which is substantially the same as such nonperson felony, has been released from imprisonment for such nonperson felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a nonperson felony, and was found to have been in possession of a firearm at the time of the commission of the crime.

(b) Criminal possession of a weapon by a convicted felon is a severity level 8, nonperson felony.

(c) As used in this section:

(1) "Knife" means a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character; and

(2) "weapon" means a firearm or a knife.

(564 P.3d 820)

No. 127,211

STATE OF KANSAS, *Appellee*, v. DUSTIN LEE LUND, *Appellant*.

Petition for review denied March 27, 2025

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Illegal Sentence—Erroneous Application of Special Sentencing Rule Can Result in Illegal Sentence.* Erroneous application of a special sentencing rule can result in an illegal sentence that does not conform to the applicable statutory provision, either in character or punishment under K.S.A. 22-3504(c)(1).

2. SAME—*Special Sentencing Rule in K.S.A. 21-6805(f)(1) Implicated Only When Defendant Has Two Qualifying Convictions.* The special sentencing rule in K.S.A. 21-6805(f)(1), which creates a presumptive term of imprisonment for a "third or subsequent felony conviction" for unlawful possession of a controlled substance, is implicated only when the defendant has two qualifying felony convictions before the conviction to which the special rule is being applied.

Appeal from Saline District Court; AMY NORTON, judge. Submitted without oral argument. Opinion filed February 14, 2025. Sentence vacated and case remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Ethan C. Zipf-Sigler, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

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

HURST, J.: In 2022 Dustin Lee Lund received two felony convictions for unlawful possession of a controlled substance in different counties, the first in January and the second in February. Lund had previously received a similar felony drug conviction more than a decade earlier. At sentencing for the January 2022 conviction, the district court applied a special sentencing rule called Special Rule 26 that creates a presumption of incarceration for a defendant's third or subsequent felony conviction for unlawful possession of a controlled substance. The issue on appeal is whether his conviction in this case—in which the district court

applied that special sentencing rule—represented his third or subsequent felony conviction for unlawful possession of a controlled substance.

The special sentencing rule statute plainly applies to a third or subsequent conviction—requiring two prior convictions—before it can be imposed against a defendant. The district court erred in applying the special sentencing rule to Lund's second felony conviction for unlawful possession of a controlled substance which resulted in an illegal sentence under K.S.A. 22-3504(c)(1) because it "does not conform to the applicable statutory provision." Lund's sentence is therefore vacated, and the case is remanded to the district court for sentencing anew after considering the parties' arguments, motions, and the relevant Kansas Sentencing Guidelines Act provisions.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are reasonably straightforward and undisputed. Lund received multiple felony convictions for unlawful possession of controlled substances under K.S.A. 21-5706 and its precursor statute K.S.A. 21-36a06, the first in 2008 and then two more in 2022. On January 21, 2022, in case No. 20-CR-1050, Lund pled no contest to felony unlawful possession of methamphetamine and fleeing or eluding law enforcement in Saline County. On February 14, 2022, after conviction but before sentencing in case No. 20-CR-1050, Lund was convicted of felony unlawful possession of a controlled substance in case No. 19-CR-639 in Geary County. Before his convictions in 2022, Lund was convicted of unlawful possession of oxycodone on May 20, 2008.

At sentencing for this case, No. 20-CR-1050—Lund's second felony conviction for unlawful possession of a controlled substance—Lund's criminal history score was classified as "E" with no objection. The district court then found that this case was subject to special sentencing rule 26 pursuant to K.S.A. 21-6805(f)(1), which created a presumption of prison for a "third or subsequent felony conviction" of unlawful possession of a controlled substance under K.S.A. 21-5706. The district court imposed a 20-month prison sentence with 12 months of postrelease supervision for the unlawful possession conviction. For the other

count of misdemeanor fleeing and eluding, the court imposed a 6-month jail sentence to run concurrent with the felony possession sentence, which created a controlling prison sentence of 20 months.

Lund filed motions objecting to the imposition of Special Rule 26 in case No. 20-CR-1050 before and after sentencing, and the district court denied each motion. On August 21, 2023, the district court held a hearing on Lund's postsentencing motion to modify and correct an illegal sentence. Lund argued he should have been offered Senate Bill 123 drug treatment pursuant to K.S.A. 21-6824 because the Saline County conviction at issue was only his second of three felony convictions for unlawful possession of a controlled substance under K.S.A. 21-5706. The State argued that all the cases occurring before sentencing would "cross score" against each other and that the February 2022 conviction was a "prior conviction," making him ineligible for Senate Bill 123 treatment. Although Lund was convicted in Geary County after the Saline County conviction, the district court in the Saline County case denied application of Senate Bill 123 explaining:

> "Pursuant to K.S.A. 21-6810, subsection (a), in determining a person's criminal history and their categorization and criminal history score, you are to count all classifiable prior convictions. And it defines a prior conviction as any conviction 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. And under Kansas case law a person is convicted upon the entry and acceptance of a plea. . . . [B]ased upon the timing and the cases . . . even though you had not been sentenced for the Geary County case . . . you were found to have two prior convictions which would render you ineligible for Senate Bill treatment as both of those prior convictions were for a felony drug possession offense."

Lund appealed the denial of his motion.

DISCUSSION

Lund's sole claim on appeal is that the district court erred by applying Special Rule 26 to his felony conviction for possession of an unlawful substance in case No. 20-CR-1050. Although this court generally lacks subject matter jurisdiction to hear objections to presumptive sentences imposed in accordance with the Kansas Sentencing Guidelines Act (KSGA), Lund does not challenge the

propriety or reasonableness of his sentence under the guidelines. See K.S.A. 21-6820(c)(1); *State v. Albano*, 313 Kan. 638, 640, 487 P.3d 750 (2021) (appellate courts ordinarily lack jurisdiction to review presumptive sentences). Rather, Lund challenges the legality of his sentence—claiming it does not comply with the guidelines—and appeals the district court's denial of his motion to correct an illegal sentence. See K.S.A. 22-3504(a).

This court may review and correct an illegal sentence at any time while the defendant is serving the sentence. K.S.A. 22-3504(a); see also *State v. Dickey*, 301 Kan. 1018, Syl. ¶ 1, 350 P.3d 1054 (2015). An illegal sentence is one that (1) is imposed by a court without jurisdiction; (2) does not conform to the applicable statutory provisions, either in character or the term of punishment; or (3) is ambiguous about the time and manner in which it is to be served. K.S.A. 22-3504(c)(1); *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022); *State v. Hayes*, 307 Kan. 537, 538, 411 P.3d 1225 (2018). Lund argues that the district court's sentence does not conform to the applicable statutory provisions in that it incorrectly interpreted and applied the special rule in K.S.A. 21-6805(f)(1). This court therefore has jurisdiction to review Lund's claim that his sentence is illegal.

In relevant part, the special sentencing rule in K.S.A. 21-6805(f)(1) provides:

> "The sentence for a *third or subsequent felony conviction* of K.S.A. 65-4160 or 65-4162, prior to their repeal, K.S.A. 21-36a06, prior to its transfer, or K.S.A. 21-5706, and amendments thereto, shall be a presumptive term of imprisonment and the defendant shall be sentenced to prison as provided by this section." K.S.A. 21-6805(f)(1). (Emphasis added.)

Determining whether Lund's sentence is illegal requires interpretation of this sentencing statute, which is a question of law over which this court exercises unlimited review. *State v. Alvarez*, 309 Kan. 203, 205, 432 P.3d 1015 (2019). A sentence "that does not conform to the applicable statutory provision" is illegal. K.S.A. 22-3504(c)(1); see *Dickey*, 301 Kan. at 1034; *State v. Trotter,* 296 Kan. 898, 902, 295 P.3d 1039 (2013). Erroneous application of a special sentencing rule can result in an illegal sentence that does not conform to the appliable statutory provision either in character or punishment under K.S.A. 22-3504(c)(1).

Lund challenges the district court's reliance on K.S.A. 21-6805(f)(1) in sentencing him in case No. 20-CR-1050 because it was his second—not third—felony conviction for unlawful possession of a controlled substance. Lund contends that but for the district court's erroneous application of K.S.A. 21-6805(f)(1), with his criminal history score of "E" and just one qualifying felony drug conviction before his conviction in case No. 20-CR-1050, he would have qualified for mandatory drug treatment under K.S.A. 21-6824 in this case.

When interpreting a statute, the fundamental rule "is that the intent of the legislature governs if that intent can be ascertained." *Stewart Title of the Midwest v. Reece & Nichols Realtors*, 294 Kan. 553, 557, 276 P.3d 188 (2012). In determining the legislative intent, this court begins its review with the "plain language of the statute," and when that language is unambiguous this court "refrain[s] from reading something into the statute that is not readily found in its words." *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021). When reviewing the statutory language, an appellate court must give common words their ordinary meanings. *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). When 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 341 (2022).

The plain language of Special Rule 26 in K.S.A. 21-6805(f)(1) applies to a "third or subsequent felony conviction," which contains no ambiguity. According to the statutory language, the special sentencing rule only applies to the third or later qualifying conviction—which means there must be a first and second conviction *before* Special Rule 26 can be applied. The district court—and now the State on appeal—contends that K.S.A. 21-6805(f)(1) should be read to apply to "prior convictions" as defined in K.S.A. 21-6810(a) rather than the chronologically third or subsequent conviction as stated. This argument lacks statutory support.

Lund received his first applicable felony conviction for unlawful possession of a controlled substance in May 2008 and his second—the one at issue in this case—in January 2022. Before

sentencing in this case, Lund received a third qualifying felony conviction for unlawful possession of a controlled substance in February 2022. To be clear, as of Lund's *sentencing* in this case, he had three felony convictions for unlawful possession of controlled substances. The sentencing dispute apparently arose because Lund was sentenced in this case—his second qualifying felony drug conviction—after he received his third qualifying felony conviction for unlawful possession of a controlled substance. Such an occurrence is not unusual, but it does not change the plain statutory language dictating how Special Rule 26 applies to these convictions.

The State contends that Lund's sentence should be affirmed because the KSGA uses "prior convictions" for calculating a defendant's criminal history score and that the same methodology should apply to the special sentencing rule for a "third or subsequent" conviction. A "prior conviction" is defined as "any conviction . . . 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." K.S.A. 21-6810(a). Using this definition, the State argues that rather than chronologically counting convictions, if a defendant has at least three qualifying convictions at the time of sentencing, the court could apply Special Rule 26 to any of those convictions. However, this interpretation defies the common meaning of the statutory language and there is no indication that the Legislature intended these phrases to mean the same thing.

The State argues that a panel of this court previously determined that the "prior conviction" definition in K.S.A. 21-6810(a) should be used to identify the "third or subsequent" qualifying felony drug conviction for imposition of Special Rule 26. See *State v. Mangold*, No. 118,996, 2019 WL 3756091, at *5-6 (Kan. App. 2019) (unpublished opinion). First, *Mangold* does not appear to stand for the proposition that Special Rule 26 applies to a second felony drug conviction. See 2019 WL 3756091, at *5-6. The court convicted Mangold with various crimes in two cases, 17-CR-124 and 17-CR-133, with each case containing a single qualifying felony charge of unlawful possession of a controlled substance. 2019 WL 3756091, at *1. In *Mangold*, the panel explained that in case

No. 17-CR-133, "the court applied a special rule since it was a third subsequent felony drug conviction and the crime was committed while Mangold was on felony bond." 2019 WL 3756091, at *3. The *Mangold* opinion does not provide Mangold's felony drug conviction history, but the court's statement that Special Rule 26 was properly applied to a "third subsequent felony drug conviction" is sound. See 2019 WL 3756091, at *3, 5. While the *Mangold* panel quotes the "prior conviction" definition from K.S.A. 21-6810(a) in its abbreviated analysis of the district court's application of Special Rule 26, the purpose appears related to counting Mangold's same-day convictions. See 2019 WL 3756091 at *5. However, to the extent the panel considered a conviction that occurred after the case being sentenced to count as a qualifying conviction for application of Special Rule 26 in K.S.A. 21-6805(f)(1), this panel disagrees.

First, the common, ordinary meaning of the phrases "prior conviction" and "third or subsequent felony conviction" are different. The phrase "prior conviction" has no sequential requirement or condition precedent, unlike the phrase "third or subsequent." Additionally, the phrases have different temporal conditions. "Prior" commonly means "before," and "subsequent" commonly means "after," and thus they apply to a different set of possible convictions. As set forth in K.S.A. 21-6810, the phrase "prior conviction" generally refers to any conviction that has occurred before sentencing in any case. However, "third or subsequent felony conviction" provides a specific numerical modifier on an applicable "conviction," requiring that the defendant have at least two qualifying convictions before the conviction subject to the special sentencing rule.

Second, the two statutory provisions, although both related to sentencing, appear to have different purposes. The "prior conviction" language applies to all types of criminal convictions when calculating a defendant's criminal history generally. Lund's "prior convictions" will be used to calculate the type and length of his potential sentence for any criminal conviction, and he will suffer its application regardless of the applicability of Special Rule 26. However, the "third or subsequent" language in K.S.A. 21-6805(f)(1) applies only to Lund's felony convictions for unlawful

possession of a controlled substance. This is more akin to habitual offender enhancements. See *State v. Ruiz-Reyes*, 285 Kan. 650, 654, 175 P.3d 849 (2008) (analyzing a sentencing enhancement after enactment of the KSGA which "radically altered" the court's previous criminal sentencing philosophy). While previous judicial interpretations of the Habitual Criminal Act (HCA) "have no place in [the court's] interpretation of the KSGA," the enactment of the KSGA does not alter the plain meaning of statutory language. See *Ruiz-Reyes*, 285 Kan. 650, Syl. ¶ 4. In *Ruiz-Reyes*, the Kansas Supreme Court analyzed a since repealed statute with roots in the HCA—the former basis for sequential conviction requirements superseded by the KSGA in 1992. The court found that the KSGA's broad definition of "prior conviction . . . also applies to the determination of an offense's criminal severity level unless the legislature specifically indicates a contrary intent." *Ruiz-Reyes*, 285 Kan. 650, Syl. ¶ 5. The plain language of K.S.A. 21-6805(f)(1) specifically indicates an intent to impose a sequential sentence enhancement for a third or subsequent specific, qualifying conviction. This demonstrates the Legislature's intent to impose Special Rule 26 in more particular circumstances than the broad "prior conviction" definition used to calculate a criminal history score.

A panel of this court recently addressed this issue and held that the broad definition of "prior conviction" in K.S.A. 21-6810 did not permit application of the special sentencing rule in K.S.A. 21-6805(f)(1) to a second qualifying conviction. *State v. Bell*, 65 Kan. App. 2d 160, 168-69, 561 P.3d 562 (2024). The panel in *Bell* found that Special Rule 26's plain language applying to "third or subsequent" convictions required a preexisting first and second conviction of unlawful possession of a controlled substance. 65 Kan. App. 2d at 168-69. Unlike the facts here, Bell received two convictions for unlawful possession of a controlled substance at the same time through a global plea agreement. Like the panel's decision in *Bell*, this court finds that Special Rule 26 in K.S.A. 21-6805(f)(1) permitting a presumptive prison sentence for a third or subsequent qualifying felony drug conviction only applies to the

sequentially third or later such conviction. A third qualifying conviction necessarily requires a first and second qualifying conviction.

CONCLUSION

The plain language of K.S.A. 21-6805(f)(1) is clear and unambiguous, and its sentencing enhancements apply to a defendant's chronological third or subsequent felony conviction for unlawful possession of a controlled substance. At the time of his sentencing, Lund had three total qualifying felony drug convictions, but Special Rule 26 can only apply to one of those convictions—his third. To find otherwise would ignore the clear statutory language. The district court erred when it applied Special Rule 26 in K.S.A. 21-6805(f)(1) to Lund's second felony conviction for unlawful possession of a controlled substance, and therefore Lund's sentence is illegal. Lund's sentence is vacated, and the case is remanded to the district court for resentencing with directions.

Sentence vacated and case remanded with directions.

State v. Kemp

(564 P.3d 827)

No. 126,238

STATE OF KANSAS, *Appellee*, v. LEVI WILLIAM KEMP, *Appellant*.

Petition for review filed April 1, 2025

SYLLABUS BY THE COURT

1. EVIDENCE—*Hearsay Generally Inadmissible unless Statutory Exception Applies—Business-Records Exception to Hearsay Rule.* Hearsay is generally inadmissible unless a statutory exception applies. K.S.A. 2023 Supp. 60-460(m) sets forth the requirements for a writing to meet the business-records exception to the rule against hearsay.

2. SAME—*Hearsay Exception for Business Records—Requirement of Self-Authenticating Certification*. For a party to admit a domestic business record under K.S.A. 2023 Supp. 60-460(m) without live testimony from the record's custodian or through a business-records subpoena, the party must produce a self-authenticating certification that complies with K.S.A. 2023 Supp. 60-465(b)(7). K.S.A. 2023 Supp. 60-465(b)(7) requires in part that any "[c]ertified domestic records of a regularly conducted activity" be certified by a custodian or other qualified person "in an affidavit or a declaration pursuant to K.S.A. 53-601."

3. SAME—*Statute Allows Unsworn Written Declaration Subscribed by Person as True to Have Same Force and Effect as Sworn Written Declaration.* K.S.A. 53-601 generally allows an unsworn written declaration subscribed by the person as true under the penalty of perjury to have the same force and effect as a sworn written declaration, verification, certificate, statement, oath, or affidavit.

4. SAME—*Written Declaration Executed Outside Kansas Must Substantially Comply with Statute.* Any such written declaration executed outside the state of Kansas must substantially comply with the form of K.S.A. 53-601(a)(1). Substantial compliance may be found where the declaration complies with the spirit and intent of the law, but not with its absolute letter.

5. SAME—*Statutory Requirement for Out-of-State Declaration Ensures Reliability of Statement by Meeting Objectives—Substantial Compliance with Statutory Form.* The spirit and intent of K.S.A. 53-601(a)(1)'s requirement that an out-of-state declaration be under penalty of perjury under "'the laws of the state of Kansas'" is to ensure reliability of the statement by: (1) requiring the declarant to make their statement under penalty of perjury; and (2) allowing the possibility of criminal prosecution in Kansas for knowingly making a false representation. If an out-of-state declaration meets these objectives, it is likely to be in substantial compliance with the form in K.S.A. 53-601(a)(1).

6. TRIAL—*Prosecutor Commits Error by Suggesting Jurors Vote on Meaning of "Beyond a Reasonable Doubt."* A prosecutor does not impermissibly dilute the State's burden to prove the defendant guilty beyond a reasonable doubt by discussing in voir dire the fact that the judge is not going to define "beyond a reasonable doubt." But a prosecutor does commit error by suggesting that the jurors discuss and vote on the meaning of "beyond a reasonable doubt."

Appeal from Sedgwick District Court; DAVID DAHL, judge. Submitted without oral argument. Opinion filed February 28, 2025. Affirmed.

Jacob Nowak, of Kansas Appellate Defender Office, for appellant.

Lance J. Gillett, assistant district attorney, *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before COBLE, P.J., GARDNER, J., and CARL FOLSOM III, District Judge, assigned.

FOLSOM, J.: Levi Kemp appeals his convictions of six counts of sexual exploitation of a child. Kemp challenges the district court's admission of certain emails and computer records at his jury trial, claiming that the records were inadmissible hearsay and failed to meet the business-records exception under K.S.A. 60-460(m). He also asserts a claim of prosecutorial error in voir dire. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In October 2019, Oath Holdings, Inc.—the parent company of Yahoo—sent a cyber tip to the National Center for Missing and Exploited Children (NCMEC) regarding suspected child-sexual-abuse materials detected in one of its accounts. NCMEC referred the matter to Detective Stephanie Neal with the Wichita Police Department, who then obtained a series of search warrants to investigate the matter. On October 29, 2019, Detective Neal obtained a search warrant for email and computer records from Oath Holdings, which is based in California. A legal analyst for Oath Holdings subsequently provided the documents sought by the search warrant—the contents of which are the subject of this appeal.

The legal analyst, Maria Abruzzini, mailed the records to Detective Neal on November 11, 2019, explaining in an accompanying letter that "Oath [Holdings] hereby produces the enclosed responsive data in accordance with state and federal law, including the Stored Communications Act. A declaration authenticating these records is also enclosed." This letter was Exhibit 22 at Kemp's trial.

In the business-records declaration, Abruzzini identified herself as the custodian of records for Oath Holdings. She explained that Oath Holdings was located in California and stated, "I make this declaration in response to a search warrant dated October 29, 2019 ('the request'). I have personal knowledge of the following facts . . . and could testify competently thereto if called as a witness."

The declaration then stated that the records included subscriber information, dates, times, and IP addresses for logins and authentication events, and content of the email account. The declaration also explained how the records were accurate copies and that the data was kept in the "regularly conducted business activity, as was made by Oath as a regular practice." Thus, it stated the declaration was intended to satisfy Rules 902(11) and 902(13) of the Federal Rules of Evidence. Lastly, Abruzzini signed the declaration "under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Prior to trial, the State filed a motion to determine the admissibility of this evidence. The motion stated, "The State intends to admit these business records pursuant to K.S.A. § 60-460(m) business entries, 60-460(g) admission by party, and 60-460(j) declarations against interest." The district court held a pretrial hearing on the motion.

At the motion hearing, the State explained the relevance of this evidence:

"[T]he State anticipates the evidence in this trial will begin with the search of the defendant's phone and ultimately locating images on the defendant's phone that are classified as child pornography. There are five specific images of an individual with the initials A.C., and those five specific images do qualify as child pornography and were taken by the defendant's phone and include the defendant, either his hands or parts of his body, in this series of images, as well as some additional images that were taken at the same time which would not qualify as

child pornography but are part of what I would call the same series that show the defendant more clearly or show parts of his clothing that are also taken in other images.

"So, primarily, the search of the defendant's phone results with these five child
pornography images of A.C. located on the phone, and then the search continues on his phone, and there are several hundred images of child pornography located on his phone, as well, either videos or images. . . .

"For this motion, the State would like to admit some additional evidence related to all nine of these charges, and specifically it's relevant to the issue of whether the defendant promoted a performance of sexually explicit material knowing the content and the character of that—those images or of that performance. So, additionally, after the search of the phone, the detective served a number of other search warrants, but two specific are relevant for this motion. One is a search warrant to Dropbox for the defendant's account, and then another is a search warrant to Oath Holdings, which is the company that owns and operates Yahoo e-mail.

"So when the detective receives the response back from the search warrants, both sets of records are accompanied by a certificate of business records or an authentication declaration by both of the respective businesses, and then the contents of those accounts, which include subscriber information, as well as images containing child pornography that were in the accounts, are sent back to the detective and those records are maintained by law enforcement because of the nature of those images."

Defense counsel objected to the offer of business records:

"The business records exception applies to people who are familiar with the business, and me serving warrants or subpoenas on the company and getting their records doesn't make me somebody involved in the company to allow them to come in and testify about the business records exceptions. So I think that the State needs to provide some link to the purported communications and my client, not just having an officer come in and say, 'This is what I saw and it's reliable because I saw it.'"

The State countered:

"I would submit that the certification that is returned with the search warrant return and with the contents should stand in place of an individual person from that business coming in to testify. They would be testifying and merely authenticating the records, and that's what this certification does, and the certification for the business records from both of these respective companies satisfies the requirements of 60-460(m).

". . . So I believe that the certificate of business records is going to satisfy all that is required within that hearsay exception so the State would submit that the certificate of business records satisfies the authentication concerns and qualifies the content of those records to be admitted through 60-460(m)."

The court agreed with the State and ruled that the documentary exhibits could be authenticated by a business-records affidavit, without a witness from the business having to testify. The court ruled that the documents would not be excluded as hearsay—"[t]hey are admissible under the business records exception, they are admissible also under the admission by parties." There was no specific discussion about any constitutional right to confront witnesses.

At the start of trial, for the first time, the State provided Kemp's counsel with a copy of the business-records declaration from Oath Holdings. Kemp's counsel then objected to the admission of the emails based on failure to meet the requirements of K.S.A. 60-460(m):

"I would still object. I think under 60-460(m) it does not qualify. I believe it says if the testimony of the custodian or other qualified witness or by a certification that complies with 60-465(b)(7), I believe it is, I still think that they need to bring somebody in just to go through the manner and the form of it and that it is in fact a business record for Oath Holdings, and, again, I would just note our objection."

The court ruled again that the evidence would not be excluded as hearsay. Citing *In re Care & Treatment of Quary*, 50 Kan. App. 2d 296, 324 P.3d 331, *rev. denied* 300 Kan. 1103 (2014), the court found that "the State is permitted to introduce business records with an affidavit pursuant to 60-460(m). Doesn't affect the State's burden of proof, but the manner in which that burden may be carried. Once again, I find this is tantamount to an affidavit which has been submitted."

The district court also stated to Kemp's counsel that "the objections that you raised [at the evidentiary hearing] are still objections that will continue on through the end of trial." Nonetheless, Kemp contemporaneously objected to admission of the business-records declaration, saying, "I'd renew my previous objection." Kemp also contemporaneously objected to the admission of the subscriber data of the Yahoo account from Oath Holdings and to the relevance of the emails themselves. But the district court overruled all three objections.

The Yahoo email evidence was thus presented to the jury. It included emails from Kemp discussing the explicit materials,

sharing the images though Dropbox links, and other explicit conversations relevant to the charges.

The jury convicted Kemp of six counts of sexual exploitation of a child. The district court sentenced Kemp to concurrent hard 25 life sentences on counts 1 through 5, with a consecutive 34-month sentence on count 6. Additional facts relevant to the prosecutorial-error claim will be presented below.

ANALYSIS

I. *The district court did not err when it admitted out-of-state business records under K.S.A. 2023 Supp. 60-460(m) and K.S.A. 2023 Supp. 60-465(b)(7), because the custodian's declaration certifying the records substantially complied with K.S.A. 53-601(a)(1).*

Kemp argues that the Oath Holdings records should have been excluded from trial as hearsay under K.S.A. 60-460. He claims the business-records declaration failed to comply with K.S.A. 53-601(a)(l) because the certification was sworn to be true under the penalty of perjury of "the laws of the United States of America" instead of "the laws of the state of Kansas." For this reason, he argues that the evidence did not meet the business-records exception to the hearsay rule in K.S.A. 60-460(m). Kemp maintains the district court made a legal error on this issue and thus abused its discretion by admitting this evidence.

Appellate courts review a district court's determination of hearsay admissibility for abuse of discretion. *State v. Gutierrez-Fuentes*, 315 Kan. 341, 351, 508 P.3d 378 (2022). An abuse of discretion may occur if: "(1) no reasonable person would take the view adopted by the trial court; (2) the action is based on an error of law; or (3) the action is based on an error of fact." 315 Kan. at 351. To the extent that statutory interpretation is necessary to resolve this issue, our review is unlimited. *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022).

Under the Kansas Rules of Evidence, hearsay is inadmissible unless a statutory exception applies. K.S.A. 60-460. In other words, hearsay is a general rule of exclusion. If an exception applies, the evidence may not be excluded as hearsay. But the evidence is not automatically admissible for that reason. It still must

be relevant, and it cannot be inadmissible for some other reason. *State v. Hunt*, No. 125,629, 2023 WL 7983814, at *3 (Kan. App. 2023) (unpublished opinion).

K.S.A. 2023 Supp. 60-460(m) defines the business-records exception to the hearsay rule. This hearsay exception applies to writings offered as memoranda or records of acts, conditions, or events to prove the facts stated therein,

"if the following conditions are shown by the testimony of the custodian or other qualified witness, or by a certification that complies with K.S.A. 60-465(b)(7) or (8), and amendments thereto: (1) They were made in the regular course of a business at or about the time of the act, condition or event recorded; and (2) the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness." K.S.A. 2023 Supp. 60-460(m).

For a domestic business record to meet this hearsay exception using a certification under K.S.A. 2023 Supp. 60-465(b)(7), the certification of the custodian or another qualified person must meet the requirements in K.S.A. 53-601—which states the certification may be established through an unsworn written declaration. K.S.A. 53-601 also requires that if the declaration is executed outside the state of Kansas, it must be in substantially the same form as: "'I declare . . . under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct.'" K.S.A. 53-601(a).

Kemp argues that Abruzzini's declaration for Oath Holdings failed to comply with the plain language of K.S.A. 53-601(a)(1) for declarations executed outside the state of Kansas—that the statement be true under penalty of perjury "'under the laws of the state of Kansas.'" For this reason, the accompanying records failed to meet the business-records hearsay exception of K.S.A. 60-460(m) and thus should have been excluded from the trial as hearsay. To decide this issue, we must decide if Abruzzini's declaration substantially complied with K.S.A. 53-601(a)(1).

A. *Kemp preserved this issue for appeal.*

The State argues that Kemp failed to preserve this issue for appeal because Kemp's "only objection below was that he wanted

a custodian to testify in person to lay foundation for Oath Holdings' records, and he added a relevance objection to State's Exhibit 23 at trial." The State notes that there was never any specific discussion about the validity of the business-records declaration or whether it met the statutory requirements of K.S.A. 53-601(a)(1).

Kemp counters that this issue is properly preserved for appeal. He states that after viewing Abruzzini's declaration for the first time at trial, he cited both K.S.A. 60-460(m) and K.S.A. 2023 Supp. 60-465(b)(7) in his hearsay objection regarding the records from Oath Holdings. We agree with Kemp that this issue was preserved for review.

K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record. *State v. Ballou*, 310 Kan. 591, 613-14, 448 P.3d 479 (2019). Here, the discussion at the pretrial hearing and again at trial involved defense counsel's request for the Oath Holdings' employee to testify. Kemp nonetheless objected that the records did not meet the requirements of K.S.A. 60-460(m), the business-records exception in the hearsay statute. Kemp also specifically cited K.S.A. 2023 Supp. 60-465(b)(7) in his trial objection. While the State is correct that there was never any specific discussion about Abruzzini's unsworn declaration and whether it met the statutory requirements of K.S.A. 53-601(a), Kemp still made a timely and specific objection to the evidence under K.S.A. 60-460(m) and K.S.A. 2023 Supp. 60-465(b)(7). We find this sufficient to review the hearsay issue on appeal.

The State also argues that Kemp's brief ignored the district court's "alternative bases" for admitting the email records from Oath Holdings (the court ruled that the records were business records and "admission by parties"). But in our view, the district court admitted the Oath Holdings records generally under the business-records hearsay exception and admitted Kemp's statements within the records (hearsay within hearsay) as admissions of a party. Because Kemp only challenges the *documents* under K.S.A. 60-460(m), he need not independently challenge the *content* of the email conversations—the second layer of hearsay—contained within the documents. Thus, Kemp properly preserved his argument for appeal.

B. *The business-records declaration here substantially complied with K.S.A. 53-601(a)(1).*

Kemp argues that the records from Oath Holdings were inadmissible hearsay and that the business-records exception in K.S.A. 60-460(m) did not apply because the business-records certification did not comply with K.S.A. 2023 Supp. 60-465(b)(7). This is because K.S.A. 2023 Supp. 60-465(b)(7) requires in part "[c]ertified domestic records of a regularly conducted activity" to be certified by a custodian "in an affidavit or a declaration pursuant to K.S.A. 53-601."

This court reviews the admissibility of hearsay for abuse of discretion. *Gutierrez-Fuentes*, 315 Kan. at 351. Kemp argues that the district court abused its discretion by making an error of law in applying K.S.A. 2023 Supp. 60-460(m), K.S.A. 2023 Supp. 60-465(b)(7), and K.S.A. 53-601. The court's review of this potential legal error is unlimited. See 315 Kan. at 351.

The business-records hearsay exception and the self-authenticating certification

Hearsay is generally inadmissible unless a statutory exception applies. K.S.A. 60-460. K.S.A. 2023 Supp. 60-460(m) defines the business-records exception to the rule against hearsay:

> "Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the following conditions are shown by the testimony of the custodian or other qualified witness, or by a certification that complies with K.S.A. 60-465(b)(7) or (8), and amendments thereto: (1) They were made in the regular course of a business at or about the time of the act, condition or event recorded; and (2) the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness."

For a party to admit a business record under K.S.A. 2023 Supp. 60-460(m) without live testimony from the record's custodian or through a business-records subpoena, the party must produce a self-authenticating certification that complies with K.S.A. 2023 Supp. 60-465(b)(7).

K.S.A. 2023 Supp. 60-465(b)(7) requires in part that any "[c]ertified domestic records of a regularly conducted activity" be certified by a custodian or other qualified person "in an affidavit

or a declaration pursuant to K.S.A. 53-601." And under K.S.A. 53-601(a)(1)—for any unsworn written declaration *executed outside the state of Kansas*—the declaration must be in substantially the same form as: "'I declare (or verify, certify or state) under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct.'" K.S.A. 53-601(a). Practically speaking, because the declaration must only be in "substantially" the same form as is provided, a declaration need not strictly comply with the language provided by K.S.A. 53-601(a).

Substantial compliance with K.S.A. 53-601(a)(1)

Substantial compliance requires "'compliance in respect to the essential matters necessary to assure every reasonable objective of the statute.'" *A & S Rental Solutions, Inc. v. Kopet*, 31 Kan. App. 2d 979, 982, 76 P.3d 1057 (2003) (quoting *Mendenhall v. Roberts*, 17 Kan. App. 2d 34, 43, 831 P.2d 568, *rev. denied* 251 Kan. 939 [1992]). Stated another way, substantial compliance may be found where conduct "'complies with the spirit and intent of the law, but not with its absolute letter.'" *A & S Rental Solutions*, 31 Kan. App. 2d at 982 (quoting *Geiger-Schorr v. Todd*, 21 Kan. App. 2d 1, 6, 901 P.2d 515 [1995]).

Kemp argues that the declaration in this case failed to substantially comply with K.S.A. 53-601(a)(1) because for any declaration executed outside the state of Kansas, the declarant must certify "'under penalty of perjury under the *laws of the state of Kansas* that the foregoing is true and correct.'" (Emphasis added.) K.S.A. 53-601(a)(1). Kemp notes that the out-of-state business-record certification in this case was declared to be true under the penalty of perjury of "the laws of the United States of America" instead of "the laws of the state of Kansas." To determine whether this certification is in substantial compliance with the statute, the court must analyze the spirit, intent, and reasonable objectives of K.S.A. 53-601(a).

Generally, K.S.A. 53-601 allows a statement subscribed by the person as true under the penalty of perjury to have the same force and effect as a sworn written declaration, verification, certificate, statement, oath, or affidavit. In determining the "spirit and intent" of K.S.A. 53-601(a)(1), the legislative history is helpful.

When this statute was originally proposed as 1989 House Bill 2436, it was more limited and intended only to remove notary requirements for corporations executing annual reports, for persons assisting disabled voters, and for persons applying to become lobbyists. But the Kansas Bar Association requested the Legislature broaden the application of the bill and adopt the language in 28 U.S.C. § 1746. The KBA testified that "HB 2436 is such a good idea it should be expanded." Kansas Bar Association Testimony before House Judiciary Committee, HB 2436, Att. X, p.1 (February 28, 1989). The bill was then broadened, and K.S.A. 53-601 was passed into law, effective July 1, 1989, in substantially its current form. The Legislature thus followed the KBA's advice and codified K.S.A. 53-601 with very similar wording to that in 28 U.S.C. § 1746. The intent for both 28 U.S.C. § 1746 and K.S.A. 53-601 was to broadly reduce the requirement of using a notary public in lieu of a declaration under penalty of perjury.

This court has previously held that the Legislature's intent in enacting K.S.A. 53-601 was to codify the principle set forth in *State v. Kemp*, 137 Kan. 290, 20 P.2d 499 (1933). *Double S, Inc. v. Northwest Kansas Production Credit Ass'n*, 17 Kan. App. 2d 740, 744, 843 P.2d 741 (1992). *Kemp* held that a verified affidavit (through a notary public) had the same legal effect as if defendant was sworn according to the formalities prescribed for administration of an oath—despite lacking certain statutory requirements. 137 Kan. at 293. Consistent with the rationale of the *Kemp* opinion, under K.S.A. 53-601, if a declarant understands the statement is true and understands they are under oath, the statement is valid despite the absence of the statutory formalities. *Double S, Inc.*, 17 Kan. App. 2d at 745. This purpose of the statute is at the heart of the substantial-compliance question in this case.

In *Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999), the court analyzed 28 U.S.C. § 1746 and flexibly construed the statute for an issue similar to the issue presented here. The court upheld an out-of-country declaration that stated, "'I declare the foregoing to be true and correct under penalty of perjury under the laws of Hong Kong or any applicable jurisdiction.'" 205 F.3d at 1112. The court held that the out-of-country declaration "'under the laws of . . . any applicable

jurisdiction'" substantially complied with the language of 28 U.S.C. § 1746, which required the declaration to be under the penalty of perjury of "'the laws of the United States of America.'" 205 F.3d at 1112.

Just as with 28 U.S.C. § 1746, the spirit and intent of K.S.A. 53-601 is to allow flexibility for receiving sworn testimony. In our view, the spirit and intent of K.S.A. 53-601(a)(1)'s requirement that the declaration be under penalty of perjury under "'the laws of the state of Kansas'" is to ensure reliability of the statement by: (1) requiring the declarant to make their statement under penalty of perjury; and (2) allowing the possibility of criminal prosecution in Kansas for knowingly making a false representation. Thus, if an out-of-state declaration meets these objectives, it is likely to be in substantial compliance with the form in K.S.A. 53-601(a)(1).

Kemp argues, "The declaration does not subject Ms. Abruzzini to penalty of perjury under the laws of the State of Kansas as required by K.S.A. 53-601(a)(1)." Kemp emphasizes that K.S.A. 53-601(a)(1) only has one single requirement for out-of-state declarations—that the statement be true under penalty of perjury "'under the laws of the state of Kansas.'" Kemp thus contends that "failing to comply with the lone requirement of a statute could never be said to be substantial compliance." While Kemp's argument has some persuasive value, the spirit and intent of K.S.A. 53-601 is to allow flexibility for receiving sworn testimony. After careful review, we hold that the specific declaration in this case substantially complied with the form of declaration in K.S.A. 53-601(a)(1).

Again, the objective of K.S.A. 53-601(a)(1) is to ensure reliable declarations—similar to those signed under oath with a notary—while allowing some flexibility. This objective and the spirit and intent of this statute were met by the declaration of Abruzzini.

Although Abruzzini stated that her declaration was under penalty of perjury of "the laws of the United States of America"—instead of "the laws of the state of Kansas"—the declaration also stated that, "I make this declaration in response to a search warrant dated October 29, 2019 ('the request'). I have personal knowledge of the following facts . . . and could testify competently thereto if

called as a witness." The search warrant was from a Kansas judge, and any such testimony would have been in Kansas if required. Abruzzini also included a letter with the records, which stated "Oath [Holdings] hereby produces the enclosed responsive data in accordance with state and federal law, including the Stored Communications Act. A declaration authenticating these records is also enclosed."

Thus, Abruzzini's unsworn declaration included the solemnity of being under the penalty of perjury, and it stated that this declaration was to be used to introduce evidence in a (Kansas) court in response to a specific (Kansas) search warrant. So Abruzzini both made her statements under penalty of perjury—albeit citing the wrong jurisdiction—but she also faced the possibility of a prosecution for perjury in Kansas if she knowingly provided false information in the business-records certification. See K.S.A. 21-5903(a)(2); K.S.A. 53-601(a); PIK Crim. 4th 59.010 (2018 Supp.) (stating the elements of perjury); see also K.S.A. 21-5106(b)(3) (a crime is partly committed in Kansas if "the proximate result of such act, occurs within the state").

In other words, Abruzzini's unsworn declaration ensured reliability of the statement by: (1) requiring the declarant to make her statement under penalty of perjury; and (2) allowing the possibility of criminal prosecution in Kansas if she knowingly provided false information in the business-records certification. Given the flexibility that was originally intended by K.S.A. 53-601, we hold that Abruzzini's unsworn declaration was in substantial compliance with the form stated in K.S.A. 53-601(a)(1). See also *Chubb v. Sullivan*, 50 Kan. App. 2d 419, 446-47, 330 P.3d 423 (noting that an affidavit signed stating "'I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct'" was sufficient to satisfy K.S.A. 53-601), *rev. denied* 300 Kan. 1103 (2014).

We pause, however, to explain what we do not hold in this opinion. We do not hold that a declaration under penalty of perjury of "the laws of the United States of America" is generally in substantial compliance with K.S.A. 53-601(a)(1). The out-of-state written declaration under K.S.A. 53-601(a)(1) has many uses in the law—and if done correctly, has the same force and effect as a

sworn written declaration, verification, certificate, statement, oath, or affidavit. Despite the holding in this case, any party seeking to use such an out-of-state declaration should pay close attention to the declaration to ensure that it is sworn to under penalty of perjury of "the laws of the state of Kansas." The facts of the declaration providing substantial compliance here will likely not be replicated by many of the intended uses for an unsworn declaration under K.S.A. 53-601(a)(1).

Nonetheless, the unsworn declaration in this case contained enough additional information to substantially comply with the form stated in K.S.A. 53-601(a)(1). Because the declaration stated that it was in response to a specific (Kansas) search warrant, included the solemnity of being under the penalty of perjury, and it allowed the possibility of criminal prosecution in Kansas if the declarant knowingly provided false information, the declaration was in substantial compliance with K.S.A. 53-601(a)(1). This interpretation is consistent with the original objective of K.S.A. 53-601—to allow for flexibility over form when receiving sworn statements in lieu of live testimony in Kansas courts.

We also pause to note that we do not make any ruling on the constitutionality of the admission of the records from Oath Holdings. Kemp has not suggested the introduction of the records implicated any constitutional right under the Confrontation Clause in the Sixth Amendment to the United States Constitution or section 10 of the Kansas Constitution Bill of Rights, so we do not consider that possibility.

Accordingly, the district court did not err by admitting the out-of-state records from Oath Holdings. The records were otherwise admissible, and the records were not subject to exclusion as hearsay because they met the statutory hearsay exception for business records under K.S.A. 2023 Supp. 60-460(m). The out-of-state declaration under K.S.A. 2023 Supp. 60-465(b)(7) was in substantial compliance with K.S.A. 53-601(a)(1).

II. *The prosecutor committed error in voir dire during the discussion of the meaning of "beyond a reasonable doubt." But this error was harmless.*

Kemp also argues that the prosecutor misstated the law and diluted the State's burden of proof during voir dire by asking the prospective jurors whether they could set a personal standard for reasonable doubt. He argues that this constituted reversible prosecutorial error under the holding of *State v. Magallanez*, 290 Kan. 906, 914, 235 P.3d 460 (2010). The State contends that the prosecutor's closing remarks were not error and, alternatively, that any error was harmless.

We use a two-step process to evaluate claims of prosecutorial error: error and prejudice. *State v. Sieg*, 315 Kan. 526, 535, 509 P.3d 535 (2022). To determine whether an error occurred, "'the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial.'" 315 Kan. at 535.

If there is error, we next determine whether that error "'prejudiced the defendant's due process rights to a fair trial.'" 315 Kan. at 535. Kansas has adopted "'the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)].'" *Sieg*, 315 Kan. at 535. Prosecutorial error is harmless if the State can demonstrate "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" 315 Kan. at 535.

A. *Voir dire discussion*

Before either party began their portions of the voir dire, the district court told the potential jurors:

"The State has the burden of proof—and we'll talk to you about this—to try to show that Mr. Kemp is guilty beyond a reasonable doubt. And he pleads not guilty to every one of these charges. To establish this and to try to prove their case, the State will have elements that they have to reach. We will instruct you as to what those elements are as we get near the end of the trial."

The prosecutor opened the State's questioning by asking a few potential jurors whether they had ever heard of the phrase "beyond a reasonable doubt." Those potential jurors replied that they had heard the phrase in popular media such as movies and TV.

The prosecutor next asked, "would it surprise you to learn that no one, none of the attorneys in this room, are going to tell you what that phrase means?" The first potential juror answered "[n]o" and followed up that "[t]hey want us to form our own opinion." The prosecutor agreed, "Yeah. Absolutely." The prosecutor then asked the next potential juror the same question. They stated, "I'm going to agree with the last statement because, I mean, they want everybody to have their own opinion. That way it stays fair."

The prosecutor continued with this topic and asked multiple potential jurors the same basic question—"do you feel that you can set for yourself where that standard lies in your mind?" The prosecutor also asked the potential jurors if they could "talk about that standard with a group of 11 other people and decide as a group where that line is?" Throughout this topic, the prosecutor asked multiple potential jurors if they could "give those words [beyond a reasonable doubt] the meaning that they deserve?"

After this discussion of the lack of a definition for "beyond a reasonable doubt," the prosecutor then explained that the jurors would get instructions at the end of trial, and one of those instructions would talk about the State's burden of proof. The prosecutor proposed a hypothetical where the jury felt the State proved the first three elements of a crime, but the fourth element was lacking. The prosecutor asked various potential jurors whether they would select "guilty" or "not guilty" on the verdict form.

The first potential juror replied, "Gosh. Since it's lacking information, I guess it'd be not guilty." The prosecutor replied, "Okay. Yeah, because I haven't done my job; right? I haven't proven that element of the case. All right." The next potential juror responded, "Not guilty," explaining that the State would not have "proven without a reasonable doubt all four items." The prosecutor then asked a similar hypothetical to eight more potential jurors, each with similar responses.

On the eleventh potential juror, the prosecutor asked, "I think we've kind of hit—beat this horse at this point, but if I only prove

three of the elements out of four that I'm required to prove, would you find someone guilty or not guilty in that situation?" This potential juror replied, "Not guilty." The next potential juror agreed, "No free passes."

The prosecutor then moved on to the concept of "presumption of innocence." She asked a potential juror whether he had ever heard of the phrase, and he replied, "Not really." The prosecutor then asked him what he thought it meant, to which the potential juror replied, "You're innocent until proven guilty." The prosecutor affirmed—"Exactly. Innocent until proven guilty."

The prosecutor then proposed a hypothetical scenario where it presented no witnesses, no pictures, no discussion of anything, and the jurors were sent back to start deliberating. Would the potential juror choose guilty or not guilty? The potential juror replied, "Not guilty because I wasn't given anything to deliberate for." The prosecutor replied, "Yeah. Exactly."

The prosecutor also addressed any concern that potential jurors' personal bias could impact Kemp's right to a fair trial. One potential juror raised his hand and said that he might be biased due to the subject matter and had the following discussion with the State:

"MS. HOYT: . . . [Potential Juror], just since you raised your hand this last time. So if I'm required to prove those four elements, you are picked to be a juror and you are told immediately to start your deliberations without seeing any evidence whatsoever, what would your verdict be? Guilty or not guilty in this situation?

"POTENTIAL JUROR []: Without any evidence it would have to be not guilty.

"MS. HOYT: Okay. And I know we're talking about a subject matter that some people find, you know, concerning, reprehensible. There's lots of other adjectives or words we can use for that, but when it comes to those three elements, if I do not prove that fourth element, are you giving me a free pass?

"POTENTIAL JUROR []: No.

"MS. HOYT: Even though it's a case involving child pornography?

"POTENTIAL JUROR []: I go by a code: It's better to have ten guilty men go free lest one innocent man goes to jail.

"MS. HOYT: There we go. So if I prove those four elements to you and there is something else that you want to know more about but it's not one of those required elements, do you want me to prove more than what's required under the law?

"POTENTIAL JUROR []: No. I might ask the judge for guidance on something though.

"MS. HOYT: Okay. Yeah."

These various exchanges reflect the general tone of the State's voir dire. Kemp's attorney even highlighted the prosecutor's theme when he began his questioning:

"MR. MANK: . . . As Ms. Hoyt said, we're trying to pick 12 jurors who we feel are fair and impartial to the State and to the defendant. I like to say I'm looking for 12 jurors that I like, she's looking for 12 jurors that she likes, and we end up with 12 jurors that don't like either one of us.

"(Courtroom laughter.)

"MR. MANK: But that's what I'm doing. I mean, I'm trying to do the best job that I possibly can for Mr. Kemp. I represent him and it's my job to make sure that the State proves him guilty beyond a reasonable doubt. And that's what she's asking you. Can you hold her to that standard, and if they don't meet that standard, he's not guilty."

At the close of trial, the court instructed the jury on the State's burden of proof in Instruction No. 2:

"The State has the burden to prove the defendant is guilty. The defendant is not required to prove he is not guilty. You must presume that he is not guilty unless you are convinced from the evidence that he is guilty.

"The test you must use in determining whether the defendant is guilty or not guilty is this: If you have a reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty. If you have no reasonable doubt as to the truth of each of the claims required to be proved by the State, you should find the defendant guilty."

Consistent with Kansas law, the district court did not define the phrase "beyond a reasonable doubt."

B. *The voir dire discussion of "beyond a reasonable doubt" included some prosecutorial error.*

Kemp argues for the first time on appeal that the prosecutor committed error during voir dire by agreeing with a potential juror that there would be no definition of "beyond a reasonable doubt" because "[t]hey want us to form our own opinion"—and by asking multiple potential jurors, "do you feel that you can set for yourself where that standard lies in your mind?" Kemp does not argue that the prosecutor erred during closing arguments or any other part of the trial.

Appellate courts will review a prosecutorial-error claim based on a prosecutor's comments made during voir dire, opening statement, or closing argument even without a timely objection. But the court may figure the presence or absence of an objection into its analysis of the alleged error. *State v. Bodine*, 313 Kan. 378, 406, 486 P.3d 551 (2021).

Kemp claims that asking the prospective jurors whether they could set a personal standard for reasonable doubt is no different than the prosecutorial error in *State v. Magallanez*, 290 Kan. 906. In *Magallanez*, the prosecutor stated during closing arguments that "'[r]easonable doubt is not beyond any doubt, it's an individual standard. It's a standard that when you believe he's guilty you've passed beyond a reasonable doubt.'" 290 Kan. at 912.

Generally, the prosecutor's comments in voir dire at Kemp's trial were not in the same ballpark as the prosecutor's closing arguments in *Magallanez*. Kemp's prosecutor talked to the jury panel about the fact that the judge was not going to define "beyond a reasonable doubt." She discussed with the panel that each juror would have to make that decision for themselves. She also asked the potential jurors if they could set where that standard was in their own mind. These comments were not prosecutorial error.

The erroneous phrase in *Magallanez* was the prosecutor telling the jury "'when you believe he's guilty you've passed beyond a reasonable doubt.'" This was the phrase that incorrectly defined and impermissibly diluted the State's burden to prove the defendant guilty "beyond a reasonable doubt." 290 Kan. at 914-15. The court reasoned, "A juror's mere belief that an accused individual is guilty does not automatically mean that the State has met its burden." 290 Kan. at 914 (citing *State v. Brinklow*, 288 Kan. 39, 49-50, 200 P.3d 1225 [2009] [prosecutor erred when they told jury reasonable doubt was satisfied when the jury "'just know[s]'" defendant was guilty]).

The prosecutor's questions emphasized most strongly by Kemp—whether potential jurors could "set for yourself where that [beyond-a-reasonable-doubt] standard lies in your mind"—were not the same type of argument as in *Magallanez* and *Brinklow*. This discussion was more similar to the closing arguments in *State*

v. Wilson, 281 Kan. 277, 286, 130 P.3d 48 (2006), where a prosecutor said to the jury, "'I want you to look at the evidence, remember all the testimony that you heard, and go back to that definition of reasonable doubt that, unfortunately, *no one can say in precise words what it is*. *You just have to intuitively know when you see it.*'" (Emphasis added.) This statement in *Wilson* complied with the appropriate description for reasonable doubt that "'[N]o definition or explanation can make any clearer what is meant by the phrase "reasonable doubt" than that which is imparted by the words themselves.'" 281 Kan. at 287 (quoting *State v. Walker*, 276 Kan. 939, 956, 80 P.3d 1132 [2003]).

Like the prosecutor's argument in *Wilson*, the prosecutor in Kemp's trial asked potential jurors "would it surprise you to learn that no one, none of the attorneys in this room, are going to tell you what that phrase [beyond a reasonable doubt] means?" She also discussed with the panel that each juror would have to make that decision for themselves. And she asked the potential jurors if they could set where that standard was in their own mind. These questions were much more like the acceptable statements in *Wilson* than the erroneous arguments in *Magallanez* and *Brinklow*. The prosecutor did not argue that the beyond-a-reasonable-doubt standard is met when a juror merely "believes" the defendant is guilty or when a juror "just knows" that the defendant is guilty. Instead, the prosecutor asked the prospective jurors if they could make that determination even though the court was not going to define that term for them. That is a key difference and is generally permissible.

But the prosecutor's questions in voir dire were not error-free. During the discussion of "beyond a reasonable doubt," the prosecutor asked multiple potential jurors if they could "talk about that standard with a group of 11 other people and decide as a group where that line is?" This suggested that the jury could discuss and then vote on the standard for "beyond a reasonable doubt."

We find that these questions impermissibly diluted the State's burden to prove the defendant guilty "beyond a reasonable doubt." See *Magallanez*, 290 Kan. at 914-15. Generally, jurors are tasked with deciding whether the evidence in a case exceeds the fixed legal standard of "beyond a reasonable doubt." But jurors do not

get to decide "where that line is." Thus, for this series of questions, we conclude that the prosecutor's comments diluted the State's burden to prove Kemp guilty "beyond a reasonable doubt" by suggesting that the jurors could discuss and vote on the meaning of the phrase "beyond a reasonable doubt." For this reason, these questions fell outside the wide latitude afforded the prosecutor at trial.

C. *The prosecutorial error was harmless.*

Because we find that Kemp's trial included some prosecutorial error, the next step is to determine whether that error "'prejudiced the defendant's due process rights to a fair trial.'" *Sieg*, 315 Kan. at 535. Kansas has adopted "'the traditional constitutional harmlessness inquiry demanded by *Chapman* [*v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)].'" 315 Kan. at 535. Prosecutorial error is harmless if the State can demonstrate "'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.' [Citation omitted.]" 315 Kan. at 535.

The State argues in its brief that the prosecutor's comments regarding reasonable doubt—if erroneous—"did not adversely affect the outcome of the trial in any way." We agree.

The prosecutor's erroneous comments were limited to voir dire, were included within a broader appropriate discussion of the presumption of innocence and the burden to prove every element beyond a reasonable doubt, were followed by error-free closing arguments from both counsel, and were mitigated by jury instructions that correctly stated the law regarding reasonable doubt. In addition, the evidence against Kemp, although not thoroughly discussed here, was significant.

For these reasons, the State can demonstrate beyond a reasonable doubt that the prosecutorial error did not affect the outcome of the trial in light of the entire record. In other words, there is no reasonable possibility that the error contributed to the verdict.

III. *Cumulative error did not deny Kemp a fair trial.*

Lastly, Kemp argues that cumulative error denied him the right to a fair trial in this case. But the cumulative error rule does not apply if there are no errors or only a single error. *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021). Thus, the cumulative-error rule does not apply here because Kemp has failed to establish more than one trial error.

For these reasons, we reject Kemp's challenges to his convictions and his sentence.

Affirmed.