REPORTS

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IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

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APPEAL AND ERROR:

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Claim of Cumulative Error—Appellate Review. Appellate courts analyzing a claim of cumulative error consider the errors in context, the way the trial judge addressed the errors, the nature and number of errors and whether they are connected, and the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test from *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), applies. Under that test, the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome.
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Continuance Denials Reviewed for Abuse of Discretion—Appellate Review. Appellate courts review continuance denials for abuse of discretion. A court abuses its discretion when its action is unreasonable or based on an error of law or fact. The party asserting an abuse of discretion must demonstrate it.
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Determination Whether Confession was Voluntary—Mixed Standard of Review—Appellate Review. On appeal from a trial judge's determination of whether the State met the burden of proving an individual voluntarily confessed, appellate courts apply a mixed standard of review. The appellate court reviews the trial judge's findings of fact about the totality of circumstances to see whether each is supported by substantial competent evidence. Appellate courts assess de novo the trial judge's legal conclusion based on those facts. This means the appellate court gives no deference to the trial judge's legal conclusion about voluntariness.
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Statute Provides Jurisdiction to Supreme Court to Vacate Act, Order, or Judgment. K.S.A. 60-2101(b) provides the Kansas Supreme Court with jurisdiction to vacate any act, order, or judgment of a district court or the Court of Appeals to ensure that such act, order, or judgment is "just, legal and free of abuse." *State v. Scheetz* 48

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Defendant Must Show Requisite Justifiable Dissatisfaction for Substitute Appointed Counsel.. If a defendant's dissatisfaction emanates from a complaint that cannot be remedied or resolved by the appointment of new counsel—such that replacement counsel would encounter the same conflict or dilemma—the defendant has not shown the requisite justifiable dissatisfaction for substitute appointed counsel. *State v. Turner* 162

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—— Attorney was suspended indefinitely from the practice of law in Kansas for violating KRPC 1.2(a) (scope of representation); KRPC 1.3 (diligence); KRPC 1.4(a) (communication); KRPC 1.16(a)((2), (3) (declining or terminating representation); and KRPC 8.4(d) (misconduct). If respondent applies for reinstatement, he shall comply with Rule 232 and be required to undergo a reinstatement hearing. *In re Cure* 742*

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— **Ninety-day Suspension**. Attorney entered into summary submission agreement admitting to violations of KRPCs. The Supreme Court ordered that Respondent's license to practice law in Kansas be suspended for 90 days but that suspension is stayed contingent upon the respondent's successful completion of a 12-month period of probation that begins on the filing of this opinion. Supreme Court Rule 225(a)(2). No reinstatement hearing is required upon the respondent's successful completion of probation.
In re Wiske 584

— **Published Censure.** A majority of the Supreme Court, after considering the evidence presented, the exceptions filed by Davis and the ODA, and the ABA Standards for Imposing Lawyer Sanctions, holds that published censure is the appropriate discipline in this case. In deciding on published censure as the appropriate discipline, the court relied on ABA Standard 5.13.
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— **Twelve-month Suspension, Stayed Pending Successful Completion of Twelve-month Period of Probation**. Attorney found to have violated KPRC 1.1, 1.15, 1.3, 1.5, and 8.4(g) by Supreme Court. Suspension is stayed pending completion of 12-month probation period.
In re Roy 184

— **Two-year Suspension**. Attorney failed to report a felony charge to the Disciplinary Administrator's office. Respondent stipulated to violations of KRPCs. The Supreme Court ordered that the temporary suspension previously imposed based on the respondent's felony conviction be lifted and Davis be disciplined by a two-year suspension in accordance with Supreme Court Rule 225(a)(3). The two-year suspension is stayed after six months, conditioned on successful participation and completion of a two-year probation period. No reinstatement hearing is required upon successful completion of probation. *In re Davis* 450

Evaluating Ineffective Assistance of Counsel Claim Using ABA Guidelines in Death Penalty Cases. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases are a relevant guidepost for evaluating an ineffective assistance of counsel claim in a capital case, but they are not coextensive with constitutional requirements.
State v. Flack 79

Motion for Discharge from Probation—Order of Discharge from Probation. Attorney filed motion for discharge from probation following nine months of suspension from the practice of law. ODA confirmed that Kupka complied with her probation and confirmed she is eligible for discharge from probation. The Supreme Court granted Kupka's motion for discharge from probation. *In re Kupka* 599

— — Attorney on three-years' probation files motion to discharge him from probation. The Disciplinary Administrator's office had no objections following his compliance with probation and eligibility to be discharged. The Supreme Court ordered Shepherd's discharge from probation. *In re Shepherd* 597

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— — Attorney previously suspended and on probation, filed motion for discharge from probation. Office of the Disciplinary Administrator confirmed Delaney successfully complied with probation and was eligible for discharge from probation. The Supreme Court granted Delaney's motion for discharge from probation. *In re Delaney* 598

Petition for Reinstatement—Reinstatement. Attorney petitions the court for reinstatement of his license following his suspension from the practice of law. Supreme Court reinstates his license conditioned upon payment of reinstatement and registration fees and completion of CLE requirements. *In re Pistotnik* 148

Sixth Amendment Right to Effective Assistance of Counsel—Trial Judge has Duty to Inquire if Dissatisfaction. A defendant has a right under the Sixth Amendment to the United States Constitution to effective assistance of counsel. Effective assistance includes a right to representation unimpaired by conflicts of interest or divided loyalties but, in situations with appointed counsel, it does not include the right to counsel of the defendant's choosing. When a defendant articulates dissatisfaction with counsel, the trial judge has a duty to inquire. Dissatisfaction can be demonstrated by showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication between counsel and the defendant. *State v. Coleman* 296

Voluntary Surrender of License—Disbarment. Attorney voluntarily surrendered her license to practice law before facing a formal disciplinary hearing for violations of the Kansas Rules of Professional Conduct. The Supreme Court accepted the voluntary surrender and ordered disbarment. *In re* Morehead 709*

— — Attorney voluntarily surrendered his license to practice law due to his noncompliance with registration and continuing legal education requirements. McCollum was also recently disbarred n the state of Missouri. The Kansas Supreme Court accepted the voluntary surrender and ordered disbarment. *In re McCollum* 710*

— — Attorney voluntarily surrendered his license to practice law following a formal disciplinary hearing at which a hearing panel concluded there was clear and convincing evidence that Baylor violated KRPC 8.4(g) and Rules 210 and 219. The Supreme Court accepted the voluntary surrender and ordered disbarment. *In re Baylor* 595

— — Attorney voluntarily surrendered his license to practice law in Kansas following a complaint filed by the Disciplinary Administrator's office that alleged Smith violated multiple KRPCs. His license had been administratively suspended in 2022 for noncompliance with registration and CLE requirements. The Supreme Court accepted the voluntary surrender and ordered disbarment. *In re Smith* 151

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CIVIL PROCEDURE:

Action for Wrongful Conviction and Imprisonment—Meaning of Statutory Language "the Charges were Dismissed. " The phrase "the charges were dismissed" in K.S.A. 2022 Supp. 60-5004(c)(1)(B) clearly and unambiguously means both terminating the criminal accusation presented in court and relieving the defendant of that accusation's criminal liability.
In re Wrongful Conviction of Sims 153

— Two Elements. K.S.A. 2022 Supp. 60-5004(c)(1)(B) requires a claimant to show two elements: (a) a court's reversal or vacating of a felony conviction; and (b) either the dismissal of charges or a finding of not guilty following a new trial. *In re Wrongful Conviction of Sims* 153

Applicable Statute of Limitations Period—Court's Considerations. Substance prevails over form when determining the applicable statute of limitations. A party's labeling of a claim in a civil petition as an action in negligence does not alter the character of that claim when deciding the applicable limitations period. A court must look to the particular facts and circumstances to properly characterize the cause of action.
Unruh v. City of Wichita 12

Civil Action for Compensation for Wrongful Conviction—Conviction for Lesser Included Offense in Second Trial Precludes Recovery under Statute. A defendant convicted of a lesser included offense after a second trial based on the same criminal conduct underlying the alleged wrongful conviction has engaged in illegal conduct that precludes the claimant's recovery under K.S.A. 2023 Supp. 60-5004.
In re Wrongful Conviction of Spangler 697*

Civil Action for Persons Wrongfully Convicted and Imprisoned—Compensation Prohibited When Conduct Causes Conviction. K.S.A. 2023 Supp. 60-5004(c)(1)(D), part of a statutory provision allowing persons wrongfully convicted and imprisoned to bring a civil action, prohibits compensation when the claimant's own conduct causes or brings about the conviction. *In re Wrongful Conviction of Spangler* 697*

Legal Error to Expand Scope of Hearing Beyond Adequate Notice to All Parties Before Hearing. It is legal error, and thus an abuse of discretion, for a district court to expand the scope of a hearing beyond the extent specified by adequate, clear, and unambiguous notice given to all parties before the hearing begins.
Jennings v. Shauck 711*

Motion to Dismiss for Failure to State a Claim—Appellate Review. When reviewing a motion to dismiss for failure to state a claim, courts do not evaluate the strength of the plaintiff's position, but rather whether the petition has alleged facts that may support a claim on either the petition's stated theory or any other possible theory.
Towne v. Unified School District No. 259 1

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Reversible Error if Prejudice Results from Improper Expansion of Scope of Hearing. When the improper expansion of the scope of a hearing results in prejudice to an affected party, the error is reversible. *Jennings v. Shauck* 711*

CONSTITUTIONAL LAW:

Application of Due Process Clause of Fourteenth Amendment When Reviewing Interrogation of Individual—Courts Required to Assess Totality of All Surrounding Circumstances. The Due Process Clause of the Fourteenth Amendment applies when the interrogation techniques were improper because, in the circumstances of the case, the confession is not the product of an individual's free and rational will. Applying this aspect of the due process protection requires courts to assess the totality of all an interrogation's surrounding circumstances—both the characteristics of the individual and the details of the interrogation—to determine if a confession is a free and unconstrained choice by its maker. *State v. G.O.* 386

Constitutionality of Statute or Ordinance—Question of Law—Burden on Challenging Party. The constitutionality of a statute or ordinance is a question of law subject to unlimited review. The party challenging the statute or ordinance as unconstitutionally overbroad has the burden to establish its overbreadth. *City of Wichita v. Griffie* 510

Double Jeopardy Clause—Prohibits Court from Imposing Multiple Punishments under Different Statutes for Same Conduct. The Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding when the Legislature did not intend multiple punishments. *State v. Martin* 538

Fifth Amendment Right to Remain Silent—Requirement of Voluntary Waiver—Voluntariness Standard Used to Review Waiver. The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment to the United States Constitution, protects the right of a person to remain silent, unless the individual chooses to speak in the unfettered exercise of the person's own will, and to suffer no penalty for such silence. Under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), law enforcement officers must inform individuals subject to custodial interrogation of this and other Fifth Amendment rights. Once the *Miranda* advisories are communicated, an individual may waive the right to remain silent, provided the waiver is made voluntarily, knowingly, and intelligently. Courts use this same voluntariness standard to evaluate a juvenile's waiver of *Miranda* rights. *State v. G.O.* 386

First Amendment Facial Overbreadth Analysis—Three Step Review. A First Amendment facial overbreadth analysis consists of three steps. First, the court interprets the language of the challenged law to determine its scope. If the scope of the law extends to prohibit protected activity, the court next decides whether the law prohibits a substantial amount of protected

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activity judged in relation to the law's plainly legitimate sweep. Finally, if the court finds substantial overbreadth, the court looks to see whether there is a satisfactory method of severing the law's constitutional provisions from its unconstitutional provisions. *City of Wichita v. Griffie* 510

First Amendment Facial Overbreadth Doctrine—Departure from Traditional Rule of Standing. The First Amendment facial overbreadth doctrine departs from the traditional rule of standing that a person may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court.
City of Wichita v. Griffie 510

Fourth Amendment Right to Protection from Unreasonable Searches and Seizure by Government. The Fourth Amendment to the United States Constitution protects the right of an individual to be secure in his or her person and not subject to unreasonable searches and seizures by the government. Section 15 of the Kansas Constitution Bill of Rights offers the same protections. *State v. McDonald* 486

Protections of Fifth and Fourteenth Amendments Applicable – State's Burden of Proof that Individual Waived Rights to Make Statement – Requirements. When the protections of the Fifth and Fourteenth Amendments apply, the State bears the burden of proving by a preponderance of the evidence that an individual voluntarily, intelligently, and knowingly waived rights guaranteed by the Fifth Amendment to the United States Constitution and voluntarily—that is, based on the person's unfettered will—made a statement. To do so, the State must establish that police or other state actors did not intimidate, coerce, deceive, or engage in other misconduct that, when considered in the totality of the circumstances, was the motivation for the individual to make a statement. *State v. G.O.* 386

Right of Criminal Defendant to Present Their Theory of Defense—Exclusion of Evidence Violates Right to Fair Trial. Under both the United States and Kansas Constitutions, a criminal defendant has the right to present their defense theory, and excluding evidence integral to that theory violates their fundamental right to a fair trial. To constitute error, the excluded evidence supporting the defense theory must be relevant, admissible, and noncumulative. *State v. Waldschmidt* 633*

Right to Testify in One's Criminal Trial Is Fundamental Right. The right to testify on one's own behalf at a criminal trial is a fundamental right grounded in multiple provisions of the United States Constitution. *State v. Cantu* 759*

Unconstitutional Provisions May Be Severed From a Law Leaving Remainder in Force—Requirements. A court may sever unconstitutional provisions from a law and leave the remainder in force and effect if, after examining the law, it can conclude (1) the Legislature would have passed the law without the objectionable portion and (2) the law would operate effectively to carry out the intention of the Legislature with the objectionable portion stricken. *City of Wichita v. Griffie* 510

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COURTS:

Disciplinary Proceeding—Public Reprimand. Court reporter alleged to have violated Supreme Court Rule 367, Board Rule 9.F.2, 9.F.3, 9.F.6, and 9.F.11. Following a hearing to the Board, the Board recommended a six-month suspension. The Supreme Court ordered discipline by public reprimand. *In re Rogers* 365

— **Twelve Months' Probation**. Court reporter stipulates to violations of Supreme Court Rule 367, Board Rule 9.F.2 and 9.F.3. Supreme Court orders discipline of twelve-months' probation in accordance with Rule 367, Board Rule 9.E.4. of the rules adopted by the State Board of Examiners of Court Reporters. *In re Burkdoll* 248

CRIMINAL LAW:

Aggravated Assault and Aggravated Battery Can Both Be Predicate Felonies for Felony Murder. Under K.S.A. 2022 Supp. 21-5402(c)(2)(D) and (F), aggravated assault, as defined in K.S.A. 2022 Supp. 21-5412(b), and amendments thereto, and aggravated battery, as defined in K.S.A. 2022 Supp. 21-5413(b)(1), and amendments thereto, can both serve as predicate felonies for felony murder if they are so distinct from the killing as to not be an ingredient of the killing. *State v. Waldschmidt* 633*

Crime of Capital Murder—Killing of More than One Person. The State may allege the crime of capital murder was committed in a "heinous, atrocious, or cruel" manner with respect to any single victim of a capital murder conviction when the conviction is predicated on the killing of more than one person. There is nothing in the statute suggesting that each individual killing must be shown to have been committed in a heinous manner. *State v. Flack* 79

Crime of Possession of Firearm by Convicted Felon—Defendant May Request Court Approve Stipulation of Prior Felony. When requested by a defendant charged with unlawful possession of a weapon, a district court must approve a stipulation that the defendant had committed a prior felony that prohibited the defendant from owning or possessing a weapon on the date in question. *State v. Guebara* 458

Double Jeopardy Challenge Based on Multiple Punishments—Two-Part Test. When a defendant brings a double jeopardy challenge based on multiple punishments imposed in one case, courts conduct a two-part test to determine whether the convictions giving rise to those punishments are for the same offense. First, courts consider whether the convictions arose from unitary conduct. Second, courts consider whether by statutory definition there are two crimes or only one. In cases involving convictions under different statutes, this second part of the analysis requires courts to apply what has been called the "same-elements test." Under that test, courts consider if each statute requires proof of an element not necessary to prove the other offense. *State v. Martin* 538

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Failing to Affix Drug-Tax Stamp Not a Lesser Included Crime of Possession of Methamphetamine. The crime of failing to affix a drug-tax stamp is not a lesser included crime of possession of methamphetamine under K.S.A. 2019 Supp. 21-5109(b)(2) because not all elements of the former are identical to some elements of the latter. *State v. Martin* 538

Felony Murder—Definition. Felony murder holds a defendant strictly liable for homicides occurring in the commission of, attempt to commit, or flight from any inherently dangerous felony. Consequently, self-defense can never be a legal justification for the killing itself; it may be asserted only in felony-murder cases to the extent it may negate an element of the underlying inherently dangerous felony. *State v. Waldschmidt* 633*

Forensic DNA Testing Statute—Application of Law of Case Doctrine. The law of the case doctrine applies to motions for DNA testing under K.S.A. 21-2512 and prevents a party from relitigating an issue already decided in the same proceeding. *State v. Edwards* 567

— Court May Act on Filings after Docketed Appeal. The plain language of K.S.A. 21-2512 grants the district court jurisdiction to consider and act on filings made under the statute even after an appeal has been docketed. *State v. Edwards* 567

Grant of Motion for Continuance—Speedy Trial Exceptions—Appellate Review. Appellate courts review a district court's decision to grant a continuance under the speedy trial exceptions in K.S.A. 2019 Supp. 22-3402(e) for an abuse of discretion. A district court abuses its discretion if its decision (1) is based on an error of law—if the discretion is guided by an erroneous legal conclusion; (2) is based on an error of fact—if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based; or (3) is arbitrary, fanciful, or unreasonable—if no reasonable person would have taken the view adopted by the trial court. The party claiming error bears the burden to show the district court abused its discretion.
State v. Sinnard 261

Legal Duty of Care by Common Law or Legislative Enactment—Liability for Failure to Act. A person may be held criminally liable for a failure to act if that person owes a legal duty of care. Legal duties of care can arise out of either common law or legislative enactment.
State v. Burris 493

Lesser Included Crime under Statute—Lesser Crime Than Crime Charged. To be a lesser included crime under K.S.A. 2019 Supp. 21-5109(b)(2), a crime must be a "lesser" crime than the crime charged—meaning it carries a lesser penalty. And that "lesser" crime must also be "included" in the crime charged—meaning all elements of the lesser crime must be identical to some elements of the crime charged. *State v. Martin* 538

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Lesser Included Offense—Consider Whether Charges Based on Separate Acts. Just because one offense can technically be a lesser included offense of another does not always require such a finding if the charges are based on separate acts. *State v. Crudo* 32

Merger Doctrine—Factors to Assess Whether the Inherently Dangerous Felony Is Part of the Killing. The merger doctrine examines whether an inherently dangerous felony is part of the killing, or if it stands as an independent predicate felony supporting a felony murder charge. This assessment hinges on factors such as the temporal and spatial proximity between the predicate felony and the killing, as well as the causal relationship between them. *State v. Waldschmidt* 633*

Possession of Meth Not a Lesser Included Crime of No Drug-Tax Stamp. Possession of methamphetamine is not a lesser included crime of no drug-tax stamp under K.S.A. 2019 Supp. 21-5109(b)(2) because the former carries a greater penalty than the latter. *State v. Martin* 538

Self-defense Cannot Be Claimed in Aggravated Robbery. Self-defense cannot negate aggravated robbery, as the crime of aggravated robbery has no element that could justify the use of force in defense of oneself or another. *State v. Klesath* 72

Self-defense May Not Be Claimed if in Commission of Forcible Felony. A defendant may not assert self-defense if the defendant is attempting to commit, committing, or escaping from the commission of a forcible felony. *State v. Klesath* 72

Sentencing—BIDS Expenditures Taxed to Defendant—Considerations. If convicted, K.S.A. 22-4513 provides that the district court shall tax defendant with all expenditures made by the State Board of Indigents' Defense Services to provide counsel and other defense services. In determining the amount and method of payment, district courts must explicitly consider two circumstances on the record: (1) the financial resources of defendant; and (2) the nature of the burden that payment of the award will impose. *State v. Anderson* 425

— Sentence Effective When Pronounced from Bench. A sentence is effective when pronounced from the bench, which means a district court generally may not change its mind about a sentence after orally pronouncing it. But the court is not precluded from correcting or clarifying a sentence at the same hearing after misspeaking or miscalculating. *State v. D.W.* 575

— Statute Prohibits Multiple Punishments for Crime Charged and Lesser Included Crime Arising from Same Conduct. In K.S.A. 2019 Supp. 21-5109(b), the Kansas Legislature has identified a specific circumstance in which it did not intend multiple punishments. Under the statute, a defendant cannot be convicted of (and thus punished for) both the crime charged and a lesser included crime arising from the same conduct in the same prosecution. *State v. Martin* 538

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Specific Intent to Permanently Deprive Person of Property—Not Element of Aggravated Robbery. Specific intent to permanently deprive a person of their property is not an element of aggravated robbery.
State v. Klesath 72

Statements Made During Custodial Interview—Determination Whether Invocation of Right to Remain Silent. Whether a defendant's repeated statements during a custodial interview to "[t]ake me to jail" constitute an unambiguous invocation of the right to remain silent depends on their context.
State v. Flack 79

Statute Imposes Legal Duty of Care on Primary Caregiver of Dependent Adult. K.S.A. 2022 Supp. 21-5417 imposes a legal duty of care on the primary caregivers of dependent adults. *State v. Burris* 493

Statute Prohibits Appeals by Defendants who Plead Guilty or Nolo Contendere with Exceptions—No Direct Appeal of Ruling on Self-Defense Immunity Claim. K.S.A. 2022 Supp. 22-3602(a) prohibits most appeals by criminal defendants who plead guilty or nolo contendere except motions attacking a sentence under K.S.A. 60-1507 and its amendments by prisoners in custody. It does not permit direct appeal of a district court's ruling on a self-defense immunity claim under K.S.A. 2022 Supp. 21-5231 when a defendant subsequently pleads guilty or nolo contendere in the same proceeding. *State v. Jones* 600

Statutory Crime of Possession of Firearm by Convicted Felon—Stipulation to a Prior Felony Does Not Satisfy Prosecution's Burden. Because Kansas' statutory possession-of-a-weapon ban applies to people who have committed only certain felonies, a stipulation to only a prior felony does not satisfy the prosecution's burden because it fails to establish that the defendant had committed a felony that prohibited the defendant from possessing a weapon on the date in question. *State v. Guebara* 458

Statutory Phrase "Taking or Confining" Does Not Present Alternative Means of Committing Kidnapping and Aggravated Kidnapping. The phrase "taking or confining" in K.S.A. 21-5408(a) does not present alternative means of committing kidnapping and aggravated kidnapping; rather, it presents options within a means merely describing the factual circumstances that may prove the material element—the actus reus—of holding the victim to accomplish one of the four alternative means of committing kidnapping set forth in the statute. To the extent language in *State v. Haberlein*, 296 Kan. 195, 290 P.3d 640 (2012), may suggest "taking" and "confining" are distinct actus rei intended by the Legislature to create alternative means, we disapprove it. *State v. Garcia-Martinez* 681*

Sufficiency of Evidence Challenge—Appellate Review. When the sufficiency of the evidence is challenged in a criminal case, appellate courts 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. Appellate

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courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility. *State v. Hambright* 603*

Unconstitutional-Conditions Doctrine—Application. The unconstitutional-conditions doctrine states that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. The doctrine has been applied in situations in which the State either forced a criminal defendant to forfeit one constitutional right to exercise another or impaired the exercise of a constitutional right by needlessly penalizing the defendant for asserting that right. *State v. J.L.J.* 720*

— Considerations of Inquiry. In determining whether a government-imposed choice violates the unconstitutional-conditions doctrine, the threshold inquiry is whether the State's action impairs to an appreciable extent any of the policies behind the rights involved. In conducting this inquiry, it is appropriate to consider both the nature of the impairment and the legitimacy of the State's practice. *State v. J.L.J.* 720*

Voluntariness of Confession— Coercive Police Activity a Predicate to Finding of Involuntary Confession. Coercive police activity is a necessary predicate to a finding that a confession is not voluntary. And there must be a link between coercive activity of the State and a resulting confession by a defendant. *State v. G.O.* 386

— Consideration of Individual's Mental Condition. An individual's mental condition, by itself and apart from its relation to official coercion, can never dispose of the inquiry into constitutional voluntariness of a confession. *State v. G.O.* 386

— Potential Characteristics of Accused—Relevant Factors. Potential characteristics or circumstances of the accused that may be relevant to a determination of whether a confession was voluntary include, but are not limited to, the accused's age; maturity; intellect; education; fluency in English; physical, mental, and emotional condition; and experience, including experience with law enforcement. *State v. G.O.* 386

— Potential Circumstances of Interrogation—Relevant Factors for Determining Voluntariness of Confession. Potential circumstances of the interrogation that may be relevant to whether a confession was voluntary include, but are not limited to, the length of the interview; the accused's ability to communicate with the outside world; any delay in arraignment; the length of custody; the general conditions under which the statements took place; any physical or psychological pressure brought to bear on the accused; the officer's fairness in conducting the interview, including any promises, inducements, threats, methods, or strategies used to compel a response; whether the accused was informed of the right to counsel and the right against self-incrimination through the *Miranda* advisory; and whether the officer negated or otherwise failed to honor the accused's Fifth Amendment rights. *State v. G.O.* 386

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Voluntariness of Confession Determined from Totality of Circumstances. Even where there is a link between police misconduct and a confession, it does not automatically follow that there has been a violation of the Due Process Clause of the Fourteenth Amendment. Voluntariness must be determined from the totality of the circumstances. *State v. G.O.* 386

EVIDENCE:

Admission or Exclusion of Hearsay Statements—Appellate Review. Like many evidentiary determinations considered on appeal, an appellate court reviews a trial court's admission or exclusion of hearsay statements for an abuse of discretion. Hearsay is defined as evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated. Out-of-court statements that are not offered to prove the truth of the matter stated are not hearsay under K.S.A. 2022 Supp. 60-460. The theory behind the hearsay rule is that when a statement is offered as evidence of the truth of the matter stated, the credibility of the declarant is the basis for its reliability, and the declarant must therefore be subject to cross-examination. *State v. Sinnard* 261

All Relevant Evidence Is Admissible by Statute—Exceptions. Under K.S.A. 60-407(f), all relevant evidence is admissible unless barred by statute, constitutional provisions, or caselaw. When a defendant's intent is in question, a trial court must allow the defendant to testify about the defendant's motive and actual intent, or state of mind, provided that such testimony aligns with our legal principle. *State v. Waldschmidt* 633*

Circumstantial Evidence May Be Used to Prove Identity of Controlled Substance. The identity of a controlled substance may be proven by circumstantial evidence if that evidence supports a reasonable inference that the defendant distributed or possessed the substance in question. *State v. Anderson* 425

Contemporaneous Objection Rule—Requires Timely and Specific Objection at Trial to Preserve Challenge for Appellate Review. The contemporaneous objection rule under K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court. *State v. D.W.* 575

— Timely and Specific Objection Required at Trial to Preserve Challenge. The contemporaneous objection rule under K.S.A. 60-404 requires a party to make a timely and specific objection at trial to preserve an evidentiary challenge for appellate review. The statute has the practical effect of confining a party's appellate arguments to the grounds presented to the district court. *State v. Scheetz* 48

Contemporaneous Objection at Trial Required to Reverse or Set Aside Judgment. K.S.A. 60-404 directs that a verdict "shall not" be set aside, or the judgment reversed, based on the erroneous admission of evidence without a contemporaneous objection at trial. *State v. Scheetz* 48

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Definition of Relevant Evidence—All Relevant Evidence Is Admissible—Exceptions. Relevant evidence under K.S.A. 60-401(b) means evidence having any tendency in reason to prove any material fact. Relevancy has both a probative element and a materiality element. Evidence is probative if it has any tendency in reason to prove a fact. Evidence is material if it addresses whether a fact has a legitimate and effective bearing on the decision of the case and is disputed. Our well-established law is that all relevant evidence is admissible unless prohibited by statute, constitutional provision, or court decision. *State v. Scheetz* 48

Determination if Violation of Due Process Clause by Officers—Purpose to Prevent Fundamental Unfairness in Use of Evidence. Neither K.S.A. 2022 Supp. 60-460(f)(2)(B), a hearsay exception, nor the reliability standard it incorporates apply when a court decides whether an accused's statements to law enforcement officers violate the Due Process Clause of the Fourteenth Amendment. The purpose of the Due Process Clause is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. Holdings to the contrary in *State v. McCarther*, 197 Kan. 279, 285, 416 P.2d 290 (1966), and its progeny are overruled. *State v. G.O.* 386

District Court's Evidentiary Determination—Appellate Review. An appellate court reviews a district court's evidentiary determination on materiality de novo, while it reviews the decision on probative value for abuse of discretion. A district court abuses its discretion when no reasonable person could agree with its decision or when its exercise of discretion is founded on a factual or legal error. *State v. Scheetz* 48

Guidelines for Admissibility of Lay and Expert Opinion Testimony under Statute. K.S.A. 2022 Supp. 60-456 provides guidelines for the admissibility of lay and expert opinion testimony. The distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field. *State v. Sinnard* 261

Hearsay Testimonial Evidence—Admissible under Confrontation Clause of Sixth Amendment—Conditions. Hearsay testimonial evidence in criminal prosecutions is admissible under the Confrontation Clause of the Sixth Amendment only when (1) the witness is unavailable, and (2) the accused had a prior opportunity to cross-examine the witness. *State v. Showalter* 338

Motion to Suppress Evidence—No Factual Dispute—Appellate Review. When the facts material to a decision on a motion to suppress evidence are not in dispute, the inquiry on appeal becomes a question of law. *State v. Flack* 79

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Preserving Evidentiary Claims for Appellate Review. Under K.S.A. 60-404, evidentiary claims, including those concerning questions and responses during witness examination, must be preserved for appellate review by a contemporaneous and specific objection at trial.
State v. Waldschmidt 633*

Review of Admission of Video Evidence—Determination Whether Challenged Evidence Is Relevant—Appellate Review. An appellate court reviews the admission of video evidence by first determining whether the challenged evidence is relevant. If the video evidence is relevant, and a challenging party's objection is based on a claim that the video evidence is overly repetitious, gruesome, or inflammatory, i.e., unduly prejudicial, the standard of review is abuse of discretion. The burden of showing an abuse of discretion rests with the party asserting the error. *State v. D.W.* 575

Sanction for Discovery Violation—Abuse of Discretion Review—No Due Process Right to Have Evidence Excluded If Violation of Discovery Order. A district court's decision about whether to impose a sanction for a discovery violation, and which sanction to impose, is reviewed for an abuse of discretion so long as due process rights are not implicated. And generally, defendants do not have a due process right to have evidence excluded when a party violates a discovery order. An abuse of discretion occurs if the decision is arbitrary, fanciful, or unreasonable, or if it is based on an error of law or fact. The party asserting error has the burden to establish an abuse of discretion. *State v. Anderson* 425

Statutory Hearsay Exception for Depositions—Showing of Unavailability Not Required—Requirements. The K.S.A. 2022 Supp. 60-460(c)(1) hearsay exception for depositions does not require a showing of unavailability, so the party seeking to introduce the deposition under this exception need not show it acted in good faith or made a diligent effort to secure the witness' attendance at trial. Subject to other rules of evidence, when a deposition testimony taken in a criminal trial qualifies as a hearsay exception because it was taken for use in the trial of the action in which it is offered, the party seeking to introduce it must only show (1) the witness is out of the state and the witness' appearance cannot be obtained, unless the offering party procured the witness' absence; or (2) the party offering the deposition has been unable to procure the attendance of the witness by subpoena or other process. *State v. Showalter* 338

Statutory Requirement That Defense Be Permitted to Inspect and Copy Certain Evidence upon Request— Discovery Violation if Not Permitted. K.S.A. 2022 Supp. 22-3212(a) requires that the prosecuting attorney permit the defense to inspect and copy certain evidence upon request by the defense. Thus, to establish a discovery violation under that statute, the record must show the defendant requested inspection or copies of the evidence at issue. *State v. Anderson* 425

Timely and Specific Objection Required to Preserve Challenge on Appeal under Statute. K.S.A. 60-404 directs that a verdict shall not be set aside, or a judgment reversed, based on the erroneous admission of evidence without a timely and specific objection. In other words, the statute is a legislative mandate limiting

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the authority of Kansas appellate courts to address evidentiary challenges. Thus, much like jurisdictional issues, appellate courts may consider a party's compliance with K.S.A. 60-404 on their own initiative. *State v. Sinnard* 261

HABEAS CORPUS:

Exceptional Circumstance—Unusual Events or Intervening Changes. Exceptional circumstances are unusual events or intervening changes in the law.
State v. Brown 446

Motion May Not Raise Issue Not Raised on Direct Appeal—Exceptional Circumstances. A K.S.A. 60-1507 motion cannot serve as a vehicle to raise an issue that should have been raised on direct appeal, unless the movant demonstrates exceptional circumstances excusing earlier failure to bring the issue before the court.
State v. Brown 446

No Second or Successive Motion for Relief under K.S.A. 60-1507—Exceptions. A district court may not entertain a second or successive motion for relief under K.S.A. 60-1507 unless the alleged errors affect constitutional rights and exceptional circumstances justify raising the successive motion. *State v. Brown* 446

Statutory Vehicle for Collateral Attack on Conviction and Sentence. K.S.A. 60-1507 provides a statutory vehicle for a collateral attack on a criminal conviction and sentence. Appeal from Sedgwick District Court; JEFFREY GOERING, judge. Submitted without oral argument December 15, 2023. Opinion filed March 1, 2024. Affirmed. *State v. Brown* 446

INSURANCE:

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

Medical Benefit Plan Offered by Self-Insured School District Is a Health Benefit Plan under Statute. Under the facts of this case, the medical benefit plan offered by U.S.D. No. 259 is a "health benefit plan" under K.S.A. 40-4602(c) because it is a "hospital or medical expense policy." An entity that chooses to self-insure under K.S.A. 72-1891 can still be said to offer a "health benefit plan," as that statute plainly contemplates a self-insurer will "provide health care services."
Towne v. Unified School District No. 259 1

Self-Insured School District Is a Health Insurer under Facts of this Case. Under the facts of this case, U.S.D. No. 259 is a "health insurer" under K.S.A. 40-4602(d) because it is an "entity which offers a health benefit plan subject to the Kansas Statutes Annotated."
Towne v. Unified School District No. 259 1

Self-Insured School Districts Not Exempt from Regulation under Insurance Code. K.S.A. 40-202(b) exempts the "*employees* of a particular person, firm, or corporation" from regulation under the Insurance Code of the state of Kansas, K.S.A. 40-101 et seq. This provision does not exempt self-insured school districts

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from regulation under the Code. The holding of *U.S.D. No. 259 v. Sloan*, 19 Kan. App. 2d 445, 871 P.2d 861 (1994), to the contrary is overruled.
Towne v. Unified School District No. 259 1

JUDGES:

Disagreement with Judge's Rulings Not a Basis for Judge's Recusal. Disagreement with a judge's rulings cannot serve as the basis for a judge's recusal under K.S.A. 20-311d(d). *State v. Turner* 162

LIMITATIONS OF ACTIONS:

Duty of Reasonable Investigation to Determine When Injury Becomes Reasonably Ascertainable. The phrase "reasonably ascertainable" implicates a duty of reasonable investigation under the circumstances. In determining whether an investigation was reasonable, the court considers reliable sources contemporaneously and reasonably available to the injured party that would have provided him information about the injury and its causation. *Murray v. Miracorp. Inc.* 615*

Two-year Statute of Limitations for Several Civil Actions under K.S.A. 60-513. K.S.A. 60-513(a) provides a two-year statute of limitations for several civil actions. K.S.A. 60-513(b) provides that, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. For such situations, there are thus two questions involved in determining when a statute of limitations begins to run: (1) When did the plaintiffs suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) When did the existence of that injury become reasonably ascertainable to them?
Murray v. Miracorp. Inc. 615*

MARRIAGE:

Legal Duty of Care Imposed by Marriage—Voluntary Assumption to Care for Another. A legal duty of care is imposed at common law when a person is in a special relationship with another. One such relationship is marriage. A legal duty of care also arises when a person has voluntarily assumed the care of another and has prevented others from rendering aid.
State v. Burris 493

MOTOR VEHICLES:

Statutory Definition of Operation of Vehicle Distinguished from Attempted Operation. K.S.A. 8-1002(a) distinguishes operation of a vehicle from attempted operation of a vehicle. The word "operate," as used in K.S.A. 8-1002(a), is synonymous with the word "drive," which requires that the vehicle must move. A would-be driver's physical control over the vehicle does not establish "operation" of the vehicle.
Jarmer v. Kansas Dept. of Revenue 671*

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Suspension of Person's Driving Privileges for Operating Vehicle— Not for Attempting to Operate Vehicle. When an individual fails a breath alcohol test, K.S.A. 8-1002(a)(2) authorizes the Kansas Department of Revenue to suspend that person's driving privileges if they were operating a vehicle, but not if they were attempting to operate a vehicle.
Jarmer v. Kansas Dept. of Revenue 671*

SEARCH AND SEIZURE:

Probable Cause to Search Vehicle—Extends to Entire Travelling Unit. Probable cause to search a stopped vehicle does not have to be "localized" and thus limited to one particular area or part of the travelling unit. That is, under the automobile exception, once probable cause to search is established, it extends to the entire travelling unit.
State v. Crudo 32

Public Safety Stop Is Exception to Warrant Requirement. A public safety stop is a seizure and an exception to the Fourth Amendment warrant requirement. *State v. McDonald* 486

Recognized Exception to Warrant Requirement— Incident to Lawful Arrest. Incident to a lawful arrest, an arresting officer may search the arrestee's person and the area within the arrestee's immediate control, including personal property immediately associated with the person of the arrestee. *State v. Martin* 538

— Warrantless Search Preceding Arrest Is Valid—Requirements. A warrantless search preceding an arrest is a valid search incident to arrest if (1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search.
State v. Martin 538

Warrantless Search Unreasonable under Fourth Amendment and Section 15 Unless Recognized Exception—Exceptions. A warrantless search is presumptively unreasonable under the Fourth Amendment to the United States Constitution and section 15 of the Kansas Constitution Bill of Rights unless the search falls within a recognized exception to the warrant requirement. Those recognized exceptions are: consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses. *State v. Martin* 538

Warrantless Traffic Stop Justified for Public Safety Reasons—Must Be Based on Specific and Articulable Facts. A warrantless traffic stop can be justified for public safety reasons if the safety reasons are based upon specific and articulable facts. Suspicion of criminal activity is not a legitimate basis for a public welfare stop. In this case, the facts are insufficient to allow a warrantless seizure and do not support a valid public safety stop. *State v. McDonald* 486

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STATUTES:

Double Jeopardy Analysis—Same-Elements Test Is Rule of Statutory Construction—Consideration of Legislative Intent—Factors. Under a Fifth Amendment double jeopardy analysis, the same-elements test is a rule of statutory construction, and the rule should not be controlling where there is a clear indication of contrary legislative intent. In determining whether there is contrary legislative intent, courts consider factors such as the language, structure, and legislative history of the statutes as well as the social evil each statute seeks to address. *State v. Martin* 538

Statutory Offenses of Possession of Meth and Failure to Affix Drug-Tax Stamp—Consideration of Legislative Intent—Multiple Punishments under Different Statutes. Based on the targeted conduct and objectives of the statutory offenses of possession of methamphetamine and failure to affix a drug-tax stamp, as well as the language and structure of the relevant statutes, the Legislature intended to impose multiple punishments under the different statutes. *State v. Martin* 538

TORTS:

Civil Battery and Negligence Actions—Different Elements of Proof. Civil battery and negligence are discrete concepts in tort with different elements of proof. *Unruh v. City of Wichita* 12

Civil Battery Definition—Elements. Civil battery is the unprivileged touching or striking of one person by another, done with the intent of bringing about either a contact or an apprehension of contact that is harmful or offensive. Intent to inflict such contact or apprehension of such contact is a necessary element for the intentional tort of battery. *Unruh v. City of Wichita* 12

Language in *Dauffenbach v. City of Wichita* is Disapproved. Language in *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 1033, 667 P.2d 380 (1983), suggesting a police officer owes a special duty anytime "there is an affirmative act by the officer causing injury" is disapproved.
Unruh v. City of Wichita 12

Negligence Claim—Elements. A negligence claim requires a plaintiff to prove: (a) the defendant owed plaintiff a legally recognized duty; (b) the defendant breached that duty; (c) the defendant's breach caused plaintiff's injuries; and (d) plaintiff suffered damages. None of these concerns the defendant's mental state. *Unruh v. City of Wichita* 12

Negligence Claim Alleging Excessive Use of Force by Police Officer—Requirement of Legally Recognized Duty of Care Independent of Excessive Force. A negligence claim alleging excessive use of force by a police officer requires the plaintiff to show the officer owed that plaintiff a legally recognized duty of care that arose independent of the force the plaintiff alleges to be excessive. A court must be able to analyze the distinct elements of negligence separately from the distinct elements of battery and its associated defense of privilege. *Unruh v. City of Wichita* 12

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TRIAL:

Constitutional Errors Reviewed for Harmlessness—Reversal Not Required if Determined to Be Harmless. Most constitutional errors can be reviewed for harmlessness. A constitutional error is harmless only if the party benefitting from the error establishes beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record. Constitutional errors determined to be harmless do not require reversal. *State v. Cantu* 759*

Cumulative Error Analysis—Unpreserved Instructional Issues Not Clearly Erroneous Not Aggregated in Analysis. Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 2022 Supp. 22-3414(3) limits a party's ability to claim them as error. Our caselaw suggesting otherwise is disapproved. *State v. Waldschmidt* 633*

Denial of Defendant's Right to Testify by Striking Testimony—Structural Error. The complete and wrongful denial of a defendant's constitutional right to testify by improperly removing a defendant from the stand and striking the defendant's entire testimony is structural error because it renders the criminal trial fundamentally unfair, regardless of whether the outcome of the trial would have been different had the defendant been permitted to testify and his or her testimony been left intact.
State v. Cantu 759*

Deprivation of Defendant's Right to Testify—Forfeiture and Striking Defendant's Testimony. While a finding of forfeiture is the most overt way in which a defendant may be deprived of the right to testify, a court may also infringe on the right to testify by striking the defendant's testimony. *State v. Cantu* 759*

Determination Whether Counsel's Failure to Advocate for Instruction—Appellate Review. When determining whether counsel's failure to advocate for an instruction supporting the defendant's only line of defense was prejudicial, a jury verdict that clearly reveals the jury would have rejected that defense and strong evidence cutting directly against that defense can inform the analysis. *State v. Turner* 162

Determining Whether Testimony Properly Admitted as Lay Opinion—Based on Nature of Testimony. The determination of whether testimony is properly admitted as lay opinion is based upon the nature of the testimony, not whether the witness could be qualified as an expert. A careful case-by-case review must be made of evidentiary questions which come before a district court. *State v. Crudo* 32

Discovery Violation—Wide Discretion by Trial Court in Imposing Sanctions—Considerations. The trial court has wide discretion in deciding which, if any, sanctions to impose for a discovery violation. In reaching this decision, the trial court should consider the reasons why disclosure was not

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made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. The court may also consider whether there are recurring problems or repeated instances of intentional failure to disclose or to abide by the court's discovery rulings. Ordinarily, the court should impose the least drastic sanctions which are designed to accomplish the objects of discovery but not to punish. *State v. Anderson* 425

Discretion of Court to Impose Sanctions for Violations of Discovery Statutes—Sanctions. K.S.A. 2022 Supp. 22-3212(i) grants the district court discretion to impose sanctions for violations of the criminal discovery statutes. Such sanctions may include allowing the opposing party to inspect any materials not previously disclosed, ordering a continuance, excluding any materials not disclosed, or other orders the district court deems just under the circumstances. *State v. Anderson* 425

Establishing Witness Unavailability under Statutory Hearsay Exception—Two Requirements. To establish witness unavailability under the K.S.A. 2022 Supp. 60-460(c)(2) hearsay exception for depositions and prior testimony, the party seeking to introduce the deposition or prior testimony must show it acted in good faith and made a diligent effort to secure the witness' attendance at trial. *State v. Showalter* 338

Jury Instruction—Element of Crime Omitted—Legally Erroneous. A jury instruction that omits an essential element of the crime charged is legally erroneous.. *State v. Sinnard* 261

Jury Instructions—Claim of Error in Giving or Failing to Give Instruction. K.S.A. 2022 Supp. 22-3414(3) provides that no party may claim as error the giving or failing to give an instruction unless that party timely objects by stating a specific ground for objection or unless the instruction or failure to give an instruction is clearly erroneous.
State v. Waldschmidt 633*

— No Error if Properly and Fairly State the Law. When jury instructions properly and fairly state the law and are not reasonably likely to mislead the jury, no error exists. It is immaterial whether another instruction, upon retrospect, was also legally and factually appropriate, even if such instruction might have been more clear or more thorough than the one given.
State v. Coleman 296

Motion for Continuance—Speedy Trial Exceptions—Appellate Review. When a defendant argues the district court abused its discretion by making an error of fact because the record does not support the district court's crowded-docket finding, we review that finding for substantial competent evidence. Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. An appellate court does not reweigh conflicting evidence, evaluate witness credibility, or determine questions of fact, and the court presumes the district court found all facts necessary to support its judgment. *State v. Sinnard* 261

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— Speedy Trial Exceptions— Conditions on Granting Continuance. K.S.A. 2019 Supp. 22-3402(e)(4) imposes several conditions on the use of the crowded-docket exception to Kansas' speedy trial statute. First, the district court may order only one continuance based on a crowded docket. Second, the district court must order the continuance within the original speedy trial deadline. Third, the new trial date must be not more than 30 days after the limit otherwise applicable. And fourth, the record must show that other pending cases, rather than secondary matters such as witness availability, prevented the court from setting the trial within the speedy trial deadline. *State v. Sinnard* 261

No Objection Needed at Trial to Preserve Prosecutorial Error Claim. Generally, a defendant need not object at trial to preserve a claim of prosecutorial error for appellate review. But a defendant may not bypass the contemporaneous-objection rule in K.S.A. 60-404 by reframing an evidentiary challenge as prosecutorial error. *State v. J.L.J.* 720*

Premeditation Includes Time and Consideration—Prosecutorial Error if Closing Argument Contradicts Definition. Premeditation includes both a temporal element (time) and a cognitive element (consideration). A prosecutor thus commits error during closing arguments by making statements that contradict or obfuscate the cognitive aspect of premeditation by saying premeditation only requires time. *State v. Coleman* 296

Prosecutor Did Not Err under Facts of This Case—Conflicting Evidence. Under the facts presented, a prosecutor did not err by downplaying a theory of defense because the prosecutor acknowledged there is conflicting evidence and merely presented a path for resolving the conflict that favors the State's theory of the case. *State v. Coleman* 296

Prosecutorial Error—Arguing Facts Not in Evidence Is Error. Prosecutors err by arguing facts not in evidence. *State v. Coleman* 296

Prosecutorial Error Claims—Appellate Review—Two-Step Analysis. An appellate court reviews prosecutorial error claims by employing a two-step analysis: error and prejudice. To decide error, the court must determine whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case in its attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial. Upon finding error, the court must consider whether that error prejudiced the defendant's due process rights to a fair trial. *State v. Scheetz* 48

Prosecutorial Error to State Opinions to Jury. Prosecutors commit error by stating their opinions to the jury. *State v. Waldschmidt* 633*

Prosecutors Have Wide Latitude Crafting Arguments—Shifting Burden of Proof Is Improper. Prosecutors generally have wide latitude in crafting arguments and commenting on the weaknesses of the defense. But an argument attempting to shift the burden of proof is improper. A prosecutor does not shift the burden of proof by pointing out a lack of evidence to support a defense or to corroborate a defendant's argument regarding holes

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in the State's case. Likewise, when the defense creates an inference that the State's evidence is not credible because the State failed to admit a certain piece of evidence, the State may rebut the inference by informing the jury that the defense has the power to introduce evidence. But when discussing the defense's subpoena power, the State crosses the line when it suggests the defendant must disprove the State's case or offer evidence to support a finding of reasonable doubt. *State v. Anderson* 425

Structural Errors Affect Fundamental Fairness—Require Automatic Reversal. Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings. Structural errors are not amenable to a harmless error outcome-based analysis and thus require automatic reversal. *State v. Cantu* 759*

To Avoid Prosecutorial Error—State Must Show There Is No Reasonable Possibility Error Contributed to Verdict. To avoid reversible prosecutorial error, the State must demonstrate beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial considering the entire record, i.e., that there is no reasonable possibility that the error contributed to the verdict. *State v. Coleman* 296

Unavailability of Witness at Trial—Prosecutor Must Make Good-Faith Effort to Obtain Witness' Presence at Trial. A witness is unavailable for Confrontation Clause purposes only if prosecutorial authorities have made a good-faith effort to obtain the witness' presence at trial. Constitutional provisions do not require the doing of a futile act, and the lengths to which the prosecution must go to produce a witness is a question of reasonableness. *State v. Showalter* 338

Under Facts of This Case Prosecutor's Statement Was Not Error. Under the facts, a prosecutor's use of "we don't know" when discussing inconclusive evidence was not error and was not an expression of the prosecutor's opinion. *State v. Coleman* 296

Wide Latitude of Prosecutors in Closing Arguments. Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect the evidence presented at trial and accurately state the controlling law. But a prosecutor errs by arguing that it is the jury's job to convict a criminal defendant when the State proves its case beyond a reasonable doubt. *State v. J.L.J.* 720*

Witness in Foreign Country Is Unavailable for Confrontation Clause Purposes. A witness residing in a foreign country is necessarily unavailable for purposes of the Confrontation Clause. *State v. Showalter* 338

State v. Hambright

No. 124,878

STATE OF KANSAS, *Appellee*, v. GERALD D. HAMBRIGHT, *Appellant*.

(545 P.3d 605)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Sufficiency of Evidence Challenge—Appellate Review.* When the sufficiency of the evidence is challenged in a criminal case, appellate courts review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 28, 2023. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Oral argument held December 14, 2023. Opinion filed April 5, 2024. Judgment of the Court of Appeals reversing the district court is reversed, and the case is remanded to the Court of Appeals. Judgment of the district court on the single issue before us is affirmed.

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

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: The Legislature has made it a crime for certain felons to possess a weapon. In doing so, the Legislature defined a weapon as "a firearm or a knife" and defined "knife" as "a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character." K.S.A. 2018 Supp. 21-6304(c). The State first charged Gerald D. Hambright with violating this statute by possessing a knife. Before trial, it amended the charge to unlawful possession of a dagger.

A jury convicted Hambright. He appealed to the Court of Appeals, raising multiple claims of error and seeking reversal of his conviction. The Court of Appeals addressed only one issue—Hambright's claim the State failed to present sufficient evidence that he possessed a dagger. The Court of Appeals agreed with his claim, holding that "the State failed to present sufficient evidence

of what characteristics the object Hambright possessed made it a dagger." *State v. Hambright*, No. 124,878, 2023 WL 3143654, at *6 (Kan. App. 2023) (unpublished opinion).

On review of that decision, we reverse the Court of Appeals and hold the State presented sufficient evidence for a jury to determine beyond a reasonable doubt that Hambright possessed a dagger. The jury saw the dagger and heard details about the length of its blade and other descriptive characteristics, including that it had a sharp edge and pointed end. From this physical evidence, the jury could—and did—apply its knowledge and common sense to determine beyond a reasonable doubt that Hambright possessed a dagger. Our rejection of Hambright's sufficiency issue does not end Hambright's appeal, however, because he raised other issues the Court of Appeals did not need to reach after it determined the evidence was insufficient. We remand his appeal to the Court of Appeals for it to consider whether any other error occurred.

FACTUAL AND PROCEDURAL BACKGROUND

A Sedgwick County sheriff's deputy was dispatched to a rural area to investigate a "suspicious character." He found Hambright resting on the side of a dirt road and asked about Hambright's welfare. The deputy offered to give Hambright a ride to a gas station. Hambright accepted and stood up to go with the deputy. The deputy noticed an object in a sheath on Hambright's belt and asked Hambright to put the object in Hambright's backpack. The deputy explained he would put the backpack in the trunk. Hambright complied. The deputy later learned that Hambright had been convicted of a felony about two years before the encounter. The conviction meant Hambright could not possess a weapon, such as a knife or dagger.

The State charged Hambright with the unlawful possession of a knife in violation of K.S.A. 2018 Supp. 21-6304. Shortly before trial, Hambright moved to dismiss the prosecution, citing *State v. Harris*, 311 Kan. 816, 467 P.3d 504 (2020), for support. In *Harris*, this court held the words "or any other dangerous or deadly cutting instrument of like character" in the residual clause of K.S.A. 2019 Supp. 21-6304's definition of "knife" are unconstitutionally vague

on their face because they provide no explicit and objective standard of enforcement. 311 Kan. at 824-25. Citing this holding, Hambright argued that post-*Harris* "a defendant is guilty of a violation of K.S.A. 21-6304 only if it is found that the defendant possessed a dagger, dirk, switchblade, stiletto, or straight-edged razor. . . . In this matter, there is no evidence or accusations establishing that Mr. Hambright possessed a 'knife' within the definition provided by K.S.A. 21-6304(c)(1)."

During a pretrial hearing on the motion, the State told the judge it would file an amended information changing the charge from possession of a "knife" to possession of a "dagger." The State specifically referenced language in the *Harris* dissent that quoted a dictionary and defined "dagger" as a "'short, pointed blade, used for stabbing.'" *Harris*, 311 Kan. at 832 (Biles, J., dissenting) (citing Webster's New World College Dictionary 372 [5th ed. 2014]). The district court allowed the State to amend the charge, which the State did.

At the jury trial, the deputy testified about his interaction with Hambright. The State also showed the jury a video recorded by the deputy's body camera. A sheathed object hanging from Hambright's belt is visible in the recording. The State also admitted the object and photographs of it. The photographs show a fixed, sharp-edged blade with a pointed end and the nylon sheath. Two photographs include a ruler positioned to show the length of the blade and the handle. The blade and the handle each measure roughly 4.5 to 5 inches long, making the object about 9 to 10 inches long. The deputy also described the sharp, nonserrated blade. The deputy frequently used the word "knife" when referring to the object but never used the word "dagger" during his testimony. The State presented no evidence other than the deputy's testimony and the exhibits of the object that had been on Hambright's belt, the photographs, and the video.

Hambright moved for a judgment of acquittal after the State presented its evidence. He argued the State failed to prove the object he possessed was a dagger. The district court denied the motion, and the case was ultimately submitted to the jury for determination of Hambright's guilt.

The district court instructed the jury about the elements of criminal possession of a weapon. In doing so, the court defined "weapon" to include a "firearm or knife" and defined "knife" to mean a "dagger, dirk, switchblade, stiletto or straight razor." No definition of "dagger" was included in the jury instructions. Nor did the instructions include the residual clause in the definition of knife found in K.S.A. 2018 Supp. 21-6304(c) that refers to "any other dangerous or deadly cutting instrument of like character." The jury convicted Hambright of criminal possession of a weapon by a felon.

Hambright appealed, making several arguments. Along with the sufficiency argument before us, he contended the instruction defining a "knife" was overly broad, the prosecutor committed misconduct, and cumulative error required reversal of this conviction. The Court of Appeals three-member panel considered only the sufficiency argument. A majority of the panel held that the State had failed to present sufficient evidence that Hambright possessed a dagger. That holding alone required reversal of Hambright's conviction, leaving no need to address his other claims. 2023 WL 3143654, at *6.

On the sufficiency issue, the Court of Appeals majority noted the jury instructions did not define "dagger" and it concluded there was no commonly understood definition. Based on those circumstances, the majority held that "the State provided no evidence, expert or otherwise, that the object Hambright handed the officer . . . was a dagger. Faced with these circumstances, we cannot say that the State proved beyond a reasonable doubt Hambright possessed a dagger in violation of K.S.A. 2018 Supp. 21-6304(c)(1)." 2023 WL 3143654, at *6.

One panel member dissented. She concluded the evidence sufficed to show Hambright's object fit within a "reasonable and practical" understanding of the term "dagger," which she defined to be "'a weapon with a short, pointed blade, used for stabbing.'" 2023 WL 3143654, at *7 (Cline, J., dissenting) (quoting Webster's New World College Dictionary 372 [5th ed. 2016]). She also criticized the majority for viewing the evidence in the light most favorable to the defense rather than the State as required by the standard for

reviewing sufficiency issues. 2023 WL 3143654, at *6-9 (Cline, J., dissenting).

The State petitioned for review. Hambright conditionally cross-petitioned for review of the issues the panel had declined to address. We granted the State's petition for review and Hambright's conditional cross-petition and have jurisdiction under K.S.A. 20-3018(b) (providing for petition for review of Court of Appeals decisions) and K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions).

ANALYSIS

1. *Sufficient Evidence*

Appellate courts apply a well-established standard of review when a party challenges the sufficiency of the evidence: We "review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt." *State v. Buchanan*, 317 Kan. 443, 454, 531 P.3d 1198 (2023). In that review, we do not reweigh evidence, resolve evidentiary conflicts, or weigh witness credibility. 317 Kan. at 454.

It is through that lens we consider the Court of Appeals majority's holding that the State failed to prove the charge that Hambright possessed "a weapon, to wit: dagger" in violation of K.S.A. 2018 Supp. 21-6304(a)(3)(A). *Hambright*, 2023 WL 3143654, at *6. We reach a different conclusion than did the Court of Appeals majority and hold the evidence, when viewed in the light most favorable to the State, was sufficient for a rational fact-finder to return a verdict finding Hambright guilty of possessing a dagger.

Our analysis is straightforward and relies on two well-established legal principles. First, we apply the principle that jurors may use their common knowledge and experience when assessing witness testimony and examining evidence and may apply their understanding of the common, ordinary words. *State v. Sieg*, 315 Kan. 526, 531-32, 509 P.3d 535 (2022) (jurors could use common knowledge and experience to conclude a spoon was drug paraphernalia; evidence sufficient even though no direct evidence). Second, we apply a corollary legal principle providing that courts

will assume the Legislature intends a word to be used in its """ordinary, contemporary, common meaning""" if the Legislature does not define it. *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017) (quoting *Walters v. Metro. Educ. Enterprises, Inc.*, 519 U.S. 202, 207, 117 S. Ct. 660, 136 L. Ed. 2d 644 [1997]); see also *State v. Sandoval*, 308 Kan. 960, 425 P.3d 365 (2018) (applying same rule to interpretation of Kansas sentencing statute). A common dictionary definition is a good source to discern the ordinary, contemporary, and common meaning of a word. *Midwest Crane*, 306 Kan. at 851.

Applying these principles to the facts in the light most favorable to the State, we begin with a common dictionary's definition of dagger as a "weapon with a short, pointed blade used for stabbing." Webster's New World College Dictionary 372 (5th ed. 2017). This definition was quoted in the dissent in *Harris*, 311 Kan. at 832 (Biles, J., dissenting), and referred to by the court, the prosecutor, and Hambright's attorney throughout the court proceedings. While Hambright's attorney argued the definition was not found in the *Harris* majority or in Black's Law Dictionary, those points are irrelevant because we are not looking for a legal definition but for the ordinary, contemporary, and common meaning of the word. See *Midwest Crane,* 306 Kan. at 851.

Considering that common meaning and using common knowledge, a reasonable jury could conclude Hambright's object was a dagger. Dagger is not an unfamiliar term, and the jury had the knife itself to examine. It also had pictures of the knife, two of which included a ruler to help determine the length of the blade (about 4.5 to 5 inches) and the handle (of equal length). Those pictures depict a blade with a pointed end. From this evidence, a reasonable person could conclude the weapon was short, it had a pointed blade, and it could be used for stabbing. From common knowledge and experience, a jury could conclude the object was a dagger without having a witness use the term or describe or define what is meant by "dagger."

With that analysis in mind, we next explain why we disagree with the Court of Appeals majority and its holding that the evidence failed to support the jury verdict. The Court of Appeals began its analysis on common ground with ours; it recited the well-

established standard of review for claims of insufficient evidence. But rather than looking at the evidence in a light most favorable to the State, it examined the evidence in Hambright's favor. In doing so, the Court of Appeals majority referred to illustrations in some dictionaries and concluded the object Hambright possessed was more like a hunting or Bowie knife than a dagger. 2023 WL 3143654, at *5. Reaching this conclusion required the majority to reweigh the evidence.

To justify this reweighing, the Court of Appeals majority first noted that the jury instructions did not define the word "dagger" and that no witness described the characteristics of a dagger or identified the object in Hambright's possession as a dagger. This led the majority to conclude that no evidence "support[ed] the jury finding the object was actually a dagger as opposed to merely being a 'dangerous or deadly cutting instrument of like character.' K.S.A. 2019 Supp. 21-6304(c)(1)." *Hambright*, 2023 WL 3143654, at *2. This statement, quoting the residual clause from the statutory definition of "knife," frames two of the majority's rationales for its decision. Neither rationale justifies reversing Hambright's conviction.

First, the majority seemed concerned the jury might have relied on the portion of the statute we found unconstitutionally vague in *Harris*. 2023 WL 3143654, at *2 (citing *Harris*, 311 Kan. at 826). But as the State argues in its petition for review, there is no reason to believe the jury relied on the unconstitutional residual clause. The judge did not include language about a dangerous or deadly cutting instrument of like character in the jury instruction. Nor did the parties or the court otherwise make the jury aware of the residual clause. The majority's concern was thus misplaced.

Second, the *Hambright* Court of Appeals majority extended the *Harris* holding and its underlying discussion of the legal concepts surrounding unconstitutional vagueness to the circumstance of this case. The majority concluded that the State was "effectively only paying lip service" to *Harris* because it left "the jury to resolve a point of vagueness or ambiguity by its own subjective interpretation." 2023 WL 3143654, at *2. But *Harris*' holding and its rationale do not apply here.

For starters, Hambright brings a sufficiency challenge, not a constitutional vagueness challenge to the statute. He has thus

waived any vagueness arguments. See *State v. Betts*, 316 Kan. 191, 197, 514 P.3d 341 (2022). Given the difference in the issue presented here and the one considered in *Harris*, the *Harris* analysis has little relevance to the outcome of this appeal. Beyond that fundamental disconnect, we do not agree with Hambright's argument and the majority's conclusion that requiring the jury to consider whether an object is a dagger, dirk, switchblade, stiletto, or straight razor "effectively only pay[s] lip service to *Harris*'" holding. 2023 WL 3143654, at *2. As written, K.S.A. 2018 Supp. 21-6304 conveys that the Legislature perceived the words dagger, dirk, switchblade, stiletto, or straight razor to be ones that "are easily and reasonably understood to describe per se dangerous or deadly cutting instruments." 311 Kan. at 832 (Biles, J., dissenting). We can reach this conclusion because courts assume the Legislature intends the word to be used in its ""ordinary, contemporary, common meaning,"" if the Legislature does not define the word. *Midwest Crane & Rigging, LLC*, 306 Kan. at 851.

Throughout the proceedings, the district court implicitly adopted this concept. The parties and the court discussed the common meaning of "dagger" during pretrial hearings and at the instruction conference. At the pretrial hearing, the State referred to the dictionary definition of "dagger" cited in the *Harris* dissent. 311 Kan. at 832 (Biles, J., dissenting) (quoting Webster's New World College Dictionary 372 [5th ed. 2014]). Then, the State asked the district court to include that definition in the jury instructions. Hambright objected because the definition was not in the *Harris* majority opinion or Black's Law Dictionary. The district court chose not to define the word "dagger" for the jury. This decision aligns with the principle the Legislature intended for the word to have its ordinary meaning.

The district court's decision also reflects another corollary principle providing that district courts need not define a term in a jury instruction if the term is widely used, readily comprehensible, and has no technical, legal meaning. *State v. Armstrong*, 299 Kan. 405, 440, 324 P.3d 1052 (2014). The court also told the jury it could use its common knowledge and experience when weighing the evidence. And the parties' arguments to the jury implicitly

acknowledged that the jurors could apply their common understanding of the term "dagger." Both the prosecutor and defense counsel told the jurors it was for them to decide whether the object was a dagger. These principles justify the district court's decision.

On appeal, however, Hambright argues the State had to present evidence about the characteristics of a dagger or provide expert testimony that the object Hambright possessed was a dagger. The State, in its petition for review, argues the Court of Appeals majority erred in entertaining Hambright's argument. It contends that Hambright, by objecting to the State's proposed definition in the jury instructions, invited any error arising from the failure to define the word "dagger." In making the argument, the State concedes invited error usually has no role in a sufficiency analysis.

The State's concession correctly reflects our caselaw, and this appeal presents no reason to deviate from that typical situation. Our task is to examine the evidence, and Hambright's objection did not restrict the admission of evidence. Instead, it impacted the wording of the jury instruction. But Hambright presents no issue of instructional error. We thus conclude the invited error doctrine does not preclude Hambright's argument.

Our disagreement with the State on that procedural ground does little to advance Hambright's overall argument because we reject his contention that the State had to present expert testimony or that of another witness discussing the characteristics of a dagger. The Court of Appeals majority also rejected this argument, at least in part, by concluding "the State need not necessarily present expert testimony." 2023 WL 3143654, at *5.

Hambright in his conditional cross-petition for review presents no authorities suggesting the majority reached the wrong conclusion. In his briefing, he had cited cases from other jurisdictions in which the government presented expert testimony about whether a particular object was a dagger. See *State v. Threlkeld*, 314 Or. App. 433, 435-36, 496 P.3d 1147 (2021); *People v. Castillolopez*, 63 Cal. 4th 322, 324-27, 371 P.3d 216 (2016); *People v. Willson*, 272 A.D.2d 959, 959, 708 N.Y.S.2d 668 (2000). But none of those cases suggest that discerning whether an object is a dagger requires scientific, technical, or other specialized

knowledge requiring expert testimony. See K.S.A. 2023 Supp. 60-456 (admission of opinion evidence).

That brings us to the fundamental point of our disagreement with the Court of Appeals majority. While the majority recognized the general proposition that a jury may rely on its common understanding of words in jury instructions, unless instructed otherwise, it concluded "there does not appear to be a common definition of dagger for the jury to apply. At the very least, there are ambiguities among the universe of potential definitions of that term." 2023 WL 3143654, at *5. To support this conclusion, the majority quoted 12 definitions of "dagger." These definitions span almost 50 years of dictionary publications. They differ slightly from each other, and the Court of Appeals majority seized on these differences and pointed out how Hambright's object did not match every aspect of the various definitions.

For example, the Court of Appeals majority pointed out that a few definitions refer to daggers as having "sharp edges" unlike the single, sharp edge on Hambright's object. 2023 WL 3143654, at *4 (citing, e.g., Webster's II New Riverside University Dictionary 344-45 [1988]). Other definitions referred to a "swordlike" object or a "sword," which again has dual, sharp edges. E.g., Random House Webster's College Dictionary 342 (1991); Random House American Dictionary and Family Reference Library 304 (1968).

Concluding these differences created ambiguities, the majority applied the rule of lenity, a rule of statutory construction under which courts read any statutory ambiguity in favor of the criminal defendant. The majority said little more about how a rule of statutory interpretation applied to a sufficiency claim before it held that the State failed to provide "evidence, expert or otherwise, that the object Hambright handed to the officer—which the officer repeatedly described as a 'knife'—was a dagger. Faced with these circumstances, we cannot say that the State proved beyond a reasonable doubt Hambright possessed a dagger in violation of K.S.A. 2018 Supp. 21-6304(c)(1)." 2023 WL 3143654, at *6. Again, much of this reasoning focuses on whether the statute is vague—a separate issue from sufficiency. In this way, as the Court of Appeals dissent notes, the majority reached "beyond the issue

Hambright brought before us." 2023 WL 3143654, at *8 (Cline, J., dissenting).

The remaining portion of the majority's holding is that "there does not appear to be a common definition of dagger for the jury to apply." 2023 WL 3143654, at *5. We disagree. While there are differences in the 12 definitions cited by the Court of Appeals majority, at their core they say the same thing, which is captured in the most recent of the quoted definitions. That definition states a common, contemporary understanding of a dagger as a "weapon with a short, pointed blade used for stabbing." Webster's New World College Dictionary 372 (5th ed. 2017).

The Court of Appeals majority also held that the evidence was insufficient to meet that basic definition. It pointed out that, "[h]ere, the State presented no evidence the object Hambright possessed was, by its design, to be used for stabbing." 2023 WL 3143654, at *4. Although the majority recognized Hambright's "object obviously *could* be used for stabbing," it added "the same is true of many paring knives, letter openers, kitchen knives, and numerous other pointed objects, all of which would not be considered a dagger under K.S.A. 2018 Supp. 21-6304(c)(1)." 2023 WL 3143654, at *4. With this analysis, the majority again strayed into vagueness principles not relevant to Hambright's sufficiency challenge. As relevant to the evidence's sufficiency, the majority's requirement of direct evidence about the purpose of the knife's design ignores that circumstantial evidence can prove even the gravest offense. See *State v. Gibson*, 311 Kan. 732, 742, 466 P.3d 919 (2020).

Hambright's arguments to the jury implicitly recognized the object's design meant it could be used as a weapon, but he told the jury he did not intend to use it as a weapon or for stabbing. He suggested it view the video, which showed his peaceful behavior to support that conclusion. His intent was not at issue, however. And the circumstantial evidence and the jury's common knowledge could establish what the Court of Appeals majority recognized: The object could be used for stabbing. Any reliance on a lack of evidence about the possible use of the object for stabbing thus does not undermine the sufficiency of the evidence.

In sum, a rational jury could use its knowledge and experience to apply the common, contemporary, and ordinary meaning of the word "dagger" and conclude Hambright's object was a "weapon with a short, pointed blade used for stabbing." Webster's New World College Dictionary 372 (5th ed. 2017). In other words, the evidence viewed in the light most favorable to the State was sufficient to prove beyond a reasonable doubt that Hambright possessed a dagger.

2. *Remand of Other Issues*

Hambright raised other challenges that the Court of Appeals majority declined to address because it concluded those issues were moot after it reversed Hambright's conviction. We granted Hambright's conditional cross-petition for review on these issues. See *Hambright*, 2023 WL 3143654, at *6.

When issues were presented to but not decided by the Court of Appeals and then preserved for our review, we may "consider and decide the issues, remand the appeal to the Court of Appeals for decision of the issues, or dispose of the issues as [we] deem appropriate." Kansas Supreme Court Rule 8.03(j)(5) (2024 Kan. S. Ct. R. at 60). Here, we remand to the Court of Appeals for its decision on the remaining issues.

Judgment of the Court of Appeals reversing the district court is reversed, and the case is remanded to the Court of Appeals for further proceedings. Judgment of the district court on the single issue before us is affirmed.

No. 124,965

TRACEY MURRAY and the ESTATE OF ROBERT MURRAY, *Appellants*, v. MIRACORP, INC., NTTS, INC., LANE GOEBEL, and SHANE GOEBEL, *Appellees*.

(545 P.3d 1009)

SYLLABUS BY THE COURT

1. LIMITATIONS OF ACTIONS—*Two-year Statute of Limitations for Several Civil Actions under K.S.A. 60-513.* K.S.A. 60-513(a) provides a two-year statute of limitations for several civil actions. K.S.A. 60-513(b) provides that, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party. For such situations, there are thus two questions involved in determining when a statute of limitations begins to run: (1) When did the plaintiffs suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) When did the existence of that injury become reasonably ascertainable to them?

2. LIMITATIONS OF ACTIONS—*Duty of Reasonable Investigation to Determine When Injury Becomes Reasonably Ascertainable.* The phrase "reasonably ascertainable" implicates a duty of reasonable investigation under the circumstances. In determining whether an investigation was reasonable, the court considers reliable sources contemporaneously and reasonably available to the injured party that would have provided him information about the injury and its causation.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 13, 2023. Appeal from Johnson District Court; ROBERT J. WONNELL, judge. Oral argument held September 12, 2023. Opinion filed April 5, 2024. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Stanley B. Bachman, of Morefield Speicher Bachman, LC, of Overland Park, argued the cause, and *Andrew L. Speicher* and *Sue L. Becker*, of the same office, were with him on the briefs for appellants.

Ryan M. Paulus, of Cornerstone Law Firm, of Kansas City, Missouri, argued the cause and was on the brief for appellees.

The opinion of the court was delivered by

WILSON, J.: Tracey Murray and the Estate of Robert Murray have asserted both legal and equitable claims against Miracorp, Inc., NTTS, Inc., Lane Goebel, and Shane Goebel (collectively,

Miracorp) based on conduct that took place before 2012. But the district court granted summary judgment to Miracorp on the Murrays' claims, reasoning that they were barred by the applicable statutes of limitations. On appeal, a majority of a panel of the Kansas Court of Appeals held that the Murrays' claims were time-barred because their injuries were reasonably ascertainable in 2011 and thus affirmed the district court. *Murray v. Miracorp, Inc.*, No. 124,965, 2023 WL 176652, at *10 (Kan. App. 2023) (unpublished opinion).

We agree with the panel majority and the district court. Under the uncontroverted facts before us, the Murrays simply waited too long to investigate—and ultimately seek redress for—their injuries. We thus affirm the lower courts.

FACTS AND PROCEDURAL BACKGROUND

Underlying Facts

Because the district court resolved this matter on summary judgment, the uncontroverted facts before us are limited. On December 1, 1989, Robert Murray entered into an agreement that granted him a 5% interest in Miracorp, Inc. and listed him as Secretary and Lane as President of the company. But it appears Murray had little to no involvement with Miracorp: although the Murrays received annual K-1 tax returns from Miracorp from at least 1998 to 2015, they never received any other information about the company. If Miracorp ever held shareholder meetings, the Murrays did not know about them. Nor did Miracorp ever pay the Murrays any dividends. Still, based on the K-1 statements, the Murrays did not believe Miracorp was making much money.

In March 2009, Lane and Miracorp were sued in two sexual harassment lawsuits filed in the United States District Court of Kansas. Miracorp prevailed in one of these suits on summary judgment and resolved the other by paying a settlement on October 26, 2011. On May 27, 2011, one of the plaintiffs filed a "Petition for Registration of Foreign Judgment" of $2,298,000 against "MiraCorp, Inc. d/b/a National Truck and Trailer Services" and of $250,000 against Lane. Tracey Murray later admitted that she learned of these lawsuits in 2016 by searching online and finding

that they "resulted in judgments over $2,000,000." No one at Miracorp told the Murrays of these lawsuits.

On June 17, 2011, Lane incorporated a new business, NTTS, Inc. (Somewhat confusingly, Miracorp had previously sometimes been known as "National Truck and Trailer Services," or "NTTS".) The Murrays claim that, right after incorporating NTTS, Lane "caused Miracorp . . . to cease to conduct new business." By the end of 2011, Lane had transferred most of Miracorp's assets to NTTS.

Miracorp also entered into a licensing agreement with Garmin Ltd. in 2009, under which Garmin's global positioning system would feature a Miracorp directory. The Murrays learned Garmin was using Miracorp's name and logo sometime in 2011, which caused them to become "'curious of the value of Rob's stock in Miracorp.'"

On July 22, 2011, the Murrays' attorney sent a letter on their behalf to Lane. The letter read:

> "Rob Murray has been in to see me. He has told me that (1) he is a 5% shareholder of Miracorp; (2) no meetings have ever been held; (3) no distributions have been made; and (4) many other things. Now he has seen Garmin using Miracorp's name and logo.
>
> "We are not yet making a formal demand for inspection pursuant to Kansas law, but reserve the right to do so. If you and the company have a lawyer I suggest you have him or her call me so that we can try to resolve matters as easily as possible.
>
> "If nobody calls me by the close of business on Friday, July 29th, I shall assume the worst and act accordingly."

Neither Lane nor anyone else at Miracorp responded. The uncontroverted facts do not show that the Murrays sent any more communications to Miracorp. (As an aside, the panel majority also referenced two more letters the Murrays sent Miracorp in August 2011. *Miracorp, Inc.*, 2023 WL 176652, at *2, *7-8. But the Murrays did not present these letters until after the district court entered summary judgment, and in denying their Motion to Amend, the district court noted that it had "limited its analysis to the matters that were before the court on Summary Judgment." Thus, because these other letters lie beyond the scope of the uncontroverted facts on summary judgment, they form no part of our decision.)

In 2012, Robert went to Miracorp's office to try to meet with Lane but was unable to. The parties dispute whether Robert ever tried to contact Lane about the value of his shares or tried to otherwise complain. In any event, the Murrays focused on Robert's declining health from 2012 to 2015.

On October 13, 2016, the Murrays' attorney sent Lane a letter demanding an inspection of Miracorp's books. Among other things, the letter said:

> "As a stockholder in the Company, Mr. Murray has the right to information relating to (i) litigation involving the Company; (ii) the financial condition of the Company; (iii) the use of assets of the Company (including cash reserves and/or insurance proceeds) to satisfy judgments against the same; and (iv) possible mismanagement of the Company."

The letter also noted the judgment paid by Miracorp in one of the lawsuits on November 11, 2011.

On October 25, 2016, the Murrays filed a shareholder inspection lawsuit against Miracorp under K.S.A. 17-6510(c). Among the other grounds listed, the lawsuit alleged that Miracorp did not disclose the settlement that concluded one of the 2011 lawsuits and did not describe how the attorney fees and expenses for that defense were paid. The district court ordered that the Murrays should receive a shareholder inspection under K.S.A. 17-6510(b). Miracorp produced various documents for the Murrays to inspect, and on August 9, 2018, the district court entered an order terminating the inspection case.

District Court Proceedings

The Murrays' first Petition, filed on February 7, 2019, alleged claims of breach of fiduciary duty, conversion, accounting, and fraud by silence. In their Fourth Amended Petition, filed March 31, 2021, they set forth eight theories for relief: (1) breach of fiduciary duties, (2) unjust enrichment, 3) breach of implied contract, (4) conversion, (5) fraud, (6) an action for declaratory judgment, (7) an action for an accounting, and (8) misappropriation of trade secrets.

Miracorp moved for summary judgment, claiming that the Murrays' claims were barred by the statute of limitations or res judicata, among other arguments. Miracorp focused its statute of limitations arguments on the Murrays' failure to sue in the years following 2011, claiming that they had all the relevant knowledge as of the July 22,

2011 letter. The Murrays responded to Miracorp's motion and filed their own motion for summary judgment.

At a hearing on the motions—and later in a written order—the district court granted summary judgment to Miracorp on all eight of the Murrays' claims. In reaching this decision, the district court set forth these findings of uncontroverted fact:

"1. Plaintiffs Googled the judgments and information related to the lawsuits in 2016.

"2. In their affidavit, Defs. MSJ Ex. 13, Plaintiffs stated that sometime in 2011 they learned that Garmin was using Miracorp's name and logo.

"3. On or about July 22, 2011, as shown in Defs. MSJ Ex. 15, Plaintiffs had a knowledge that there hadn't been any distributions and confirmed they had seen Garmin using the Miracorp name and logo.

"4. In the same letter dated July 22, 2011 (Defs. MSJ Ex. 15), the Plaintiffs' attorneys also wanted to discuss with Lane Goebel 'many other things.'

"5. These 'many other things' followed the two specific subsections of events regarding Miracorp, Inc., such as no distributions. Id. It is also a finding of fact and undisputed in the record that the Plaintiffs never received a response from Defendants to the letter dated July 22, 2011 (Defs. MSJ Ex. 15).

"6. In a letter dated October 13, 2016, Defs. MSJ Ex. 21, the Plaintiffs' attorney sent a demand letter to Lane Goebel which demonstrates the Plaintiffs' actual knowledge of the sexual harassment lawsuits and an attempt to investigate the matters.

"7. It is undisputed that Miracorp, Inc. issued Schedule K-1 returns from 2010 to 2012 showed no additional ordinary business income and assets had been disposed for Miracorp.

"8. Plaintiffs acknowledge there had been no meetings since the original agreement in 1989.

"9. There is a potential dispute for one meeting in 2006.

"10. The timing of the following alleged dates of actionable conduct, potentially actionable conduct is:

"a. a jet was purchased in [2009]

"b. The two lawsuits filed against Defendants in 2008, 2009 were finalized in 2011.

"c. There was an enormous jump in the rent in 2011.

> "d. The most recent alleged actionable conduct was the Chapter 11 bankruptcy proceedings in 2015 of All Freight, and there is no other actionable act alleged after that.
>
> "11. Plaintiffs had knowledge of never receiving a financial statement even though listed as a treasurer in the filings for almost 20 years."

The district court then concluded that "All of the alleged acts, with the exception of maybe the All Freight bankruptcy in 2015, were reasonably ascertainable by July of 2011." The court focused on "the knowledge of the lawsuits in 2011, which is part of Ms. Murray's affidavit, the belief that there were problems [with] the company and no distributions, no meetings, [and] the change in information on the tax forms" in finding that the Murrays' duty to investigate was "triggered . . . back in 2011." The court also reasoned that the Murrays' shareholder inspection case "could" have been filed in 2011 and so the Murrays' claims were time-barred.

The Murrays moved to amend the judgment, arguing that fraudulent concealment tolled the applicable statutes of limitations and claiming that several genuine disputes of material fact precluded judgment. The district court denied the motion, and the Murrays appealed.

Appellate Proceedings

A majority of the Court of Appeals panel affirmed. *Miracorp, Inc.*, 2023 WL 176652, at *1. The majority first addressed the Murrays' five claims subject to a two-year statute of limitations. Because K.S.A. 60-513(b) provides that this period of limitations "shall not commence until the fact of injury becomes reasonably ascertainable to the injured party," the majority focused on when the Murrays' injuries became reasonably ascertainable. 2023 WL 176652, at *4. Based on *Foxfield Villa Assocs. v. Robben*, 57 Kan. App. 2d 122, 127, 449 P.3d 1210 (2019), *rev. denied* 311 Kan. 1045 (2020), the majority framed this analysis around when the Murrays had "'a duty to reasonably investigate available sources containing facts relevant to the party's claim.'" 2023 WL 176652, at *5. Although the majority acknowledged that the Murrays had a "reduced duty to investigate" because Lane was their fiduciary, it held that "if the Murrays were aware of something that put them

'on inquiry' of suspected wrongdoing then the law would not protect their continued reliance on Lane's and Miracorp's statements." 2023 WL 176652, at *5-6. Because the majority concluded the Murrays "knew that all was not as it seemed" in 2011—"when the Murrays learned that Garmin was using Miracorp's name and logo"—it held that the statute of limitations for all five claims began to run then. 2023 WL 176652, at *7-10. Among its other conclusions, the majority wrote:

> "If the Murrays had chosen to continue to pursue their suspicions in 2011, they could have inspected Miracorp's books and records—as they stated they intended to do—and *likely would have learned about many, if not all, of their current complaints*. At the very least it would have given them enough information to realize that they needed to conduct further investigation." (Emphasis added). *Miracorp, Inc.*, 2023 WL 176652, at *7.

The majority extended this reasoning to the first of the misappropriation of trade secrets claims, one of the claims subject to a three-year statute of limitations. *Miracorp, Inc.*, 2023 WL 176652, at *10. See K.S.A. 60-3325 ("An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered."). The majority also quickly disposed of the breach of implied contract claim, because—unlike the other claims—K.S.A. 60-512 lacks a "reasonably ascertainable provision," making the claim time-barred regardless of when the Murrays' injury was reasonably ascertainable. 2023 WL 176652, at *10-11. Finally, the parties failed to address the Murrays' claim for an accounting, so the majority deemed it waived. 2023 WL 176652, at *11.

Judge Hurst dissented. While she agreed with the majority's holdings about the implied breach of contract and accounting claims, she argued that questions of fact remained about the reasonable ascertainability of the Murrays' injury. *Miracorp, Inc.*, 2023 WL 176652, at *13-14 (Hurst, J., dissenting). Specifically:

> "In 2011, the Murrays may have done what a reasonable minority shareholder in their position would have done—hired an attorney to obtain the relevant information from Miracorp—and nevertheless were unable to ascertain their injuries. Therefore, the trier of fact could determine that the Murrays' injuries were not reasonably ascertainable in 2011 and, by extension, that the statute of limitations did not begin to run until a later date. This is particularly relevant given the

Murrays' reduced burden to investigate because the defendants owed them a fiduciary duty. Additionally, whether defendants acted intentionally to conceal their wrongdoing, and thus tolling or negating the statute of limitations is a question of fact. To toll the applicable statute of limitations, the defendants' 'concealment must be fraudulent or intentional.' The parties obviously dispute whether the defendants intentionally concealed their wrongdoing. [Citations omitted.]" 2023 WL 176652, at *13 (Hurst, J., dissenting).

The Murrays petitioned this court for review, which we granted.

ANALYSIS

The Murrays raise several challenges to the panel majority's decision, including several asserted issues of first impression. But our ultimate inquiry is much simpler: in light of the uncontroverted facts, is there a genuine dispute of material fact as to whether the Murrays reasonably investigated their suspicions in 2011? Because we hold that the uncontroverted facts do not show that the Murrays' efforts were reasonable, we affirm the district court and the panel majority's conclusion that the Murrays' claims are barred because they waited too long to file their lawsuit.

Standard of Review

An appellate court reviews a district court's summary judgment order de novo:

"'Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.'" *Fairfax Portfolio v. Carojoto*, 312 Kan. 92, 94-95, 472 P.3d 53 (2020) (quoting *Hansford v. Silver Lake Heights*, 294 Kan. 707, 710-11, 280 P.3d 756 [2012]).

The Murrays' arguments also require the interpretation of Kansas precedent and statutes, which we review de novo. E.g., *In*

re Wrongful Conviction of Bell, 317 Kan. 334, 337, 529 P.3d 153 (2023); *Scott v. Hughes*, 294 Kan. 403, 412, 275 P.3d 890 (2012).

Discussion

Of the Murrays' eight claims, we begin by summarily affirming the panel's unanimous conclusion that the breach of implied contract claim was time-barred—since K.S.A. 60-512, which governs this claim, lacks any "reasonably ascertainable" language—and that the Murrays waived their accounting claim. *Miracorp, Inc.*, 2023 WL 176652, at *10-11; 2023 WL 176652, at *14 (Hurst, J., dissenting) (agreeing with the majority on both counts). The Murrays challenge neither conclusion on review, and so the panel's decision on these points stands.

This leaves us with the Murrays' five claims governed by K.S.A. 60-513(a) and (b)'s two-year statute of limitations—breach of fiduciary duties, unjust enrichment, conversion, fraud, and an action for declaratory judgment—and their misappropriation of trade secrets claim, which is subject to a three-year statute of limitations under K.S.A. 60-3325. Although the latter statute uses slightly different language than K.S.A. 60-513(b)—"reasonable diligence" rather than "reasonably ascertainable"—our inquiry is essentially the same. A review of the Murrays' Fourth Amended Petition reveals that the underlying acts involved in all six claims occurred, at the latest, by the end of 2012.

Under K.S.A. 60-513(b), the statute of limitations provided in K.S.A. 60-513(a) only begins to run once an injury becomes "reasonably ascertainable" to the injured party—which is not necessarily when the party has actual knowledge of the injury. E.g., *Davidson v. Denning*, 259 Kan. 659, 678, 914 P.2d 936 (1996). "The phrase 'reasonably ascertainable' means that a plaintiff has the obligation to reasonably investigate available sources that contain the facts of the" injury and its causation. *Denning*, 259 Kan. at 678-79. In determining whether an investigation was reasonable, the court considers reliable sources contemporaneously and reasonably available to the injured party that would have provided him information about the injury and its causation. Moreover, "fraud and fraudulent concealment can toll a statute of limitations" if the "'concealment [is] fraudulent or intentional and, in the absence of a

fiduciary or confidential relationship, there [is] something of an affirmative nature designed to prevent, and which does prevent, discovery of the cause of action.'" *Robben*, 57 Kan. App. 2d at 130. Further, "objective knowledge of the injury, not the extent of the injury, triggers the statute" of limitations. *P.W.P. v. L.S.*, 266 Kan. 417, 425, 969 P.2d 896 (1998). Thus, there are "two inquiries relevant to determining when the statute of limitations . . . began to run: (1) When did the [plaintiffs] suffer an actionable injury—i.e., when were all the elements of the cause of action in place? and (2) When did the existence of that injury become reasonably ascertainable to them?" *LCL v. Falen*, 308 Kan. 573, 583, 422 P.3d 1166 (2018).

In *Armstrong v. Bromley Quarry & Asphalt, Inc.*, 305 Kan. 16, 378 P.3d 1090 (2016), the court explored the concept of reasonable investigation in the context of summary judgment. *Armstrong* centered on tortious conduct related to subterranean limestone mining on the property of landowners—conduct which, like Miracorp's activity here, would not have been immediately apparent to the plaintiffs "without more." *Armstrong*, 305 Kan. at 28. In *Armstrong*, that "something more must have been the house shaking that Armstrong discerned to be from blasting somewhere on the property and the suspicions of unauthorized mining based on previous business dealings with Bromley Quarry." 305 Kan. at 28.

But as the court clarified, the "ground shaking"—to borrow the same metaphor ultimately applied by the district court here—only triggers "an obligation to investigate." *Armstrong*, 305 Kan. at 29. The focus then turns to what, if anything, a potentially aggrieved party does next "to ascertain the fact of this injury." 305 Kan. at 29. In *Armstrong*, the landowner took additional steps by obtaining maps from the regulatory agencies, "some of which Bromley Quarry had prepared. Without exception, those maps incorrectly showed there had been no mining on the Armstrong property." 305 Kan. at 29. And in response to Bromley Quarry's assertion that the landowner should have done even more, the *Armstrong* court asked, "But what would cause a reasonably prudent landowner to take this additional action under the circumstances—after reviewing maps on file with regulatory agencies that showed no mining had occurred on his or her property?" 305 Kan. at 29.

The district court here also considered "when the ground began to shake," thus triggering the need for additional investigation by the Murrays. The district court concluded that, between the changes on the K-1 forms, the knowledge that Garmin was using Miracorp's name and logo, and the knowledge that there had never been any distributions or shareholder meetings, the facts of the Murrays' injuries would have been reasonably ascertainable by July 2011—when the Murrays sent their unanswered letter to Miracorp. The district court thus held that the Murrays' claims were time-barred.

The panel majority agreed, focusing on the July 22, 2011 letter the Murrays sent to Miracorp. 2023 WL 176652, at *7. The majority reasoned that:

> "If the Murrays had chosen to continue to pursue their suspicions in 2011, they could have inspected Miracorp's books and records—as they stated they intended to do—and likely would have learned about many, if not all, of their current complaints. At the very least it would have given them enough information to realize that they needed to conduct further investigation. The Murrays complain on appeal that Lane is a 'master of deceit and concealment,' but in 2011, when they first had suspicions that something was not right at Miracorp they took initial steps to investigate those suspicions. But they dropped their search, understandably, in favor of focusing on Robert's health. That does not change the fact that they were suspicious, if not outright aware, that Lane and Miracorp were not behaving as they should." *Miracorp, Inc.*, 2023 WL 176652, at *7.

The majority noted that the Murrays next acted in 2016, when Tracey Murray learned that Miracorp and Goebel had been sued and paid out a large judgment. *Miracorp, Inc.*, 2023 WL 176652, at *7. This discovery prompted the Murrays to file a shareholder inspection lawsuit, which they ultimately prevailed on. After Miracorp provided documents, the Murrays filed this case—but by that point, the panel held, the Murrays' claims were already time-barred. 2023 WL 176652, at *8.

Broadly, we agree. But before turning to the substance of our agreement with the lower courts, we first pause to clarify several matters. First, we note that the district court erred by suggesting that the Murrays knew of the sexual harassment lawsuits against Miracorp in 2011, which the uncontroverted facts do not support. Second, although the uncontroverted facts do not reveal when the Murrays *received* their 2011 and 2012 K-1 forms, the copies of

those documents attached to Miracorp's Motion for Summary Judgment suggest that Miracorp sent the 2011 K-1 form sometime around March 13, 2012, and the 2012 K-1 form around August 27, 2013. Third, although the panel referenced two additional letters the Murrays sent in July and August 2011 as further proof that the Murrays should have done more, these letters—as noted above—were not presented as part of the uncontroverted facts on summary judgment, and thus cannot impact either the district court's decision or our review of that decision. Finally, the parties' assertions presented on summary judgment suggest that there may be a dispute of fact as to whether Robert Murray tried to follow up the July 2011 letter by visiting Miracorp's office or trying to contact Lane sometime in 2012—but, in either case, Robert could not speak with him.

But none of this alters our conclusion. By July 2011, the Murrays knew that Garmin was using Miracorp's name and logo. They also knew that they had never received any payments from Miracorp and that there had never been any shareholder meetings. Through the 1989 agreement included as part of the record, the Murrays *also* knew that Robert Murray was, at least on paper, Miracorp's secretary and the stockholder of a 5% stake in the company. As such, Robert had the right to make good on his July 22, 2011 insinuation that he would file a stockholder inspection lawsuit under Kansas law if Miracorp failed to work things out. Though it is controverted that Murray was ever an officer of the company, the results of the Murrays' 2016 inspection lawsuit proved the Murrays could have prevailed on such a lawsuit earlier and, thereby, discovered the true extent of their injury. See K.S.A. 2022 Supp. 17-6510(c). Indeed, had the Murrays taken any additional investigatory steps, we could consider the reasonableness of those steps. But the Murrays did nothing until they filed their 2016 inspection lawsuit, which we hold to be unreasonable even in light of the admittedly limited information available to them.

Even if we held that the Murrays' suspicions in July 2011 did not trigger their duty to reasonably investigate—and thus serve as the bedrock date of reasonable ascertainability—the subsequent 2011 and 2012 K-1 statements only added to the mounting evidence that something was rotten in Miracorp. As noted, the 2012

K-1 was dated August 27, 2013. The Murrays did not file their shareholder inspection lawsuit until October 25, 2016, more than three years later. By then, under any set of facts, their investigation was too late.

The Murrays rightly point out that Goebel and Miracorp owed them fiduciary duties, and they highlight precedent suggesting that a party's duty to reasonably investigate a potential injury is lessened in the presence of a fiduciary duty. *Wolf v. Brungardt*, 215 Kan. 272, 284, 524 P.2d 726 (1974). And, as noted, intentional or fraudulent concealment *can* toll the statute of limitations. *Robben*, 57 Kan. App. 2d at 130. But even assuming fraud on Miracorp's part and granting that the Murrays had a "reduced" duty to investigate because of the fiduciary relationship, the Murrays still did *nothing* to investigate their suspicions between July 2011 and October 2016—except, arguably, by trying and failing to contact Lane sometime in 2012, and then failing to follow up. They still did nothing after they received the 2011 and 2012 K-1 forms, which showed unusual changes in Miracorp's business—such as the disposition of assets or the transition from ordinary business income to royalties as the sole source of income. However "reduced" the Murrays' duty to investigate may have been, that duty was not reduced to *nothing*—which is what the uncontroverted facts showed they did between the end of 2012 and October 2016.

The Murrays also complain that, even if some of their injuries were reasonably ascertainable in 2011, not *all* of them were. But we agree with the panel's assessment of this argument: the Murrays' claims were closely related, and thus "each of the causes of action discussed above could have been discovered by the Murrays through a books and records inspection." *Miracorp, Inc.*, 2023 WL 176652, at *9. And even if all their injuries were not reasonably ascertainable in July 2011—when their knowledge of Garmin using Miracorp's logo first aroused their suspicions—they would have been, at the latest, by the time they received the 2012 K-1 statement at the end of August 2013.

The Murrays argue that they had no duty to investigate "unavailable" sources, such as corporate records guarded by Miracorp. We need not speculate about what the Murrays should have done,

although—as noted—their successful prosecution of a shareholder inspection lawsuit in 2016 suggests that they *could* have filed a similar lawsuit earlier. The point is that the Murrays did nothing besides possibly—accepting for the sake of argument—Robert's attempt to speak with Lane in 2012, which he failed to follow up on. Whatever the Murrays *should* have done to investigate their suspicions, their failure to do *anything* until October 2016 renders the ultimate lawsuit untimely.

We acknowledge Judge Hurst's concern that the uncontroverted facts, as of now, are too speculative to permit summary judgment on behalf of Miracorp. *Miracorp, Inc.*, 2023 WL 176652, at *13 (Hurst, J., dissenting) ("It is possible that in 2011 the Murrays could have reasonably done more to investigate whether they had suffered an injury, and that such reasonable investigation would have demonstrated the injury. However, it may also be possible that such additional investigation would not have disclosed the injury."). But we reiterate that our concern lies not with specific actions the Murrays *should* have taken, but rather with the Murrays' failure to do *anything* to investigate their suspicions.

In *Armstrong*, we highlighted a concern about whether a possible investigatory approach "would have been possible, practical, or effective." 305 Kan. at 29. But here, we know the Murrays could have prevailed on a shareholder inspection lawsuit under K.S.A. 17-6510 at any relevant time, given their demonstrated success in maintaining such an action in 2016. And even if the records Miracorp produced under any such lawsuit did not reveal the wrongful conduct—for instance, as Judge Hurst noted, it is possible that Lane and Miracorp could have fraudulently concealed the records—at least then the *Murrays* might have satisfied their duty to reasonably investigate and the statute of limitations would be tolled by any such fraud. Cf. *Armstrong*, 305 Kan. at 29 (landowner obtained survey maps from regulatory agencies, but never obtained his own survey; the limited factual record precluded summary judgment about whether he should have done more). But what was *not* reasonable, as a matter of law, was what the Murrays did: nothing.

Thus, despite the factual uncertainties that linger, the district court correctly granted summary judgment to Miracorp, and the panel majority correctly affirmed the district court.

CONCLUSION

Because the Murrays acted too late on their suspicion, the applicable statutes of limitation bar all six of their remaining claims. We thus affirm the decision of the panel majority and the district court.

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

BILES, J., concurs in the result.

* * *

WALL, J., concurring in part and concurring in the judgment: I join the majority's decision to affirm the panel's unanimous conclusion that the Murrays' breach-of-implied-contract claim was time-barred and that the Murrays waived their accounting claim. I also agree that the applicable statutes of limitations bar the Murrays' six remaining claims. But I write separately because I believe the majority's statute-of-limitations rationale is flawed.

The Murrays' remaining claims are for breach of fiduciary duties, unjust enrichment, conversion, fraud, a declaratory judgment about Lane Goebel's personal liability, and the misappropriation of trade secrets. Those claims are based on conduct that happened before 2012.

Under the applicable statutes of limitations, the Murrays needed to bring their action within two years, except for the misappropriation-of-trade-secrets claim which had to be brought within three years. See K.S.A. 60-513 (two-year limit for bringing breach-of-fiduciary-duties, unjust-enrichment, conversion, fraud, and declaratory-judgment actions); K.S.A. 60-3325 (three-year limit for bringing a misappropriation-of-trade-secrets claim). The two-year time limit began to run when the injury became "reasonably ascertainable to the injured party." K.S.A. 60-513(b). And the three-year time limit began to run when the injury "should have

been discovered" by using "reasonable diligence." K.S.A. 60-3325.

The majority focuses on when the alleged injuries were reasonably ascertainable to Robert Murray based on his status as a Miracorp shareholder—a fact the Murrays established at the summary-judgment stage by pointing to a 1989 agreement giving him a 5% stake in the corporation. The majority believes the injuries became reasonably ascertainable in 2011 when Robert first began to have suspicions about Miracorp's operations. For the majority, those suspicions triggered a duty to investigate. And as a shareholder, Robert could have brought a shareholder-inspection lawsuit to examine the corporate books. See K.S.A. 17-6510(b)(1). Had he taken that step, the majority assumes the Murrays would have discovered the alleged wrongdoing, as they did when they successfully brought an inspection action in 2016. Thus, the majority concludes that the statutes of limitations expired long before this action was filed in 2019.

In my view, the majority's reliance on Robert's duty as a shareholder to investigate is, at best, beside the point. At worst, it is erroneous. For one, "'Kansas imposes a very strict fiduciary duty on officers and directors of a corporation to act in the best interests of the corporation and its stockholders.'" *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 416, 77 P.3d 130 (2003) (quoting *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 246 Kan. 450, 467, 790 P.2d 404 [1990]). So, in such a fiduciary relationship, we have long recognized that the beneficiaries (shareholders) have a diminished duty to inspect and discover corporate wrongdoing—we trust officers and directors, who have direct access to and control over the corporation, to fulfill their fiduciary duties. See *Wolf v. Brungardt*, 215 Kan. 272, 284, 524 P.2d 726 (1974) (party who depends on trustee in fiduciary relationship has a "reduced" "duty of due diligence to discover the true facts"). Based on the summary judgment record here, it is not clear to me that a shareholder's diminished duty of inspection would have been triggered in 2011 as a matter of law.

However, the 1989 agreement the Murrays rely on to establish Robert's shareholder status did more than give him a 5% stake in Miracorp—it also made him a corporate officer, the secretary. As

an officer of Miracorp, Kansas law charges Robert with "'knowledge of . . . the financial condition of the corporation'" and "'of facts which the corporate books and records disclose.'" *Weigand v. Union Nat'l Bank of Wichita*, 227 Kan. 747, 756, 610 P.2d 572 (1980) (quoting *Noll v. Boyle*, 140 Kan. 252, 255, 36 P.2d 330 [1934]). This rule is grounded in logic and reason. As noted, officers and directors are charged with very strict fiduciary duties. To fulfill these duties, officers and directors must remain actively involved in the affairs of the corporation. If an officer or director chooses to ignore these obligations, the law charges them with knowledge and holds them accountable for failing to discharge their duties. See *Burcham*, 276 Kan. at 416.

Thus, the Murrays' injuries were not reasonably ascertainable because Robert was a shareholder who could have filed an inspection action in 2011. Instead, the injuries were reasonably ascertainable (thereby triggering the statutory time limits to sue) because Robert was a corporate officer charged with knowledge of Miracorp's financial affairs, including the transfer of Miracorp's assets to NTTS in 2011. See *Weigand*, 227 Kan. at 754 ("As an officer of the corporation he is charged with knowledge of that plan."). Thus, the statutory period to bring this action began when the alleged misconduct occurred in 2011 and expired well before the Murrays filed this lawsuit in 2019. Their claims are therefore barred by the applicable statutes of limitations.

On summary judgment, the Murrays attempted to minimize Robert's status as an officer of Miracorp, claiming he was either unaware of his status or did not genuinely act in that official capacity. But the Murrays cannot rely on a contract to assert Robert's rights as a shareholder while ignoring his duties as an officer arising from the same legal instrument. Cf. *Weigand*, 227 Kan. at 754 (knowledge an individual is charged with in their capacity as corporate officer is likewise charged to the individual personally as a shareholder).

True, the district court and Court of Appeals did not resolve summary judgment on this basis. Nor have the parties argued that we should resolve this dispute based on Robert's position as a corporate officer. Indeed, the Murrays cited the 1989 agreement only to establish that there is a jury question regarding Robert's status as a shareholder.

But appellate courts regularly affirm lower court orders granting summary judgment as right for the wrong reasons. See, e.g., *Frick v. City of Salina*, 290 Kan. 869, 904-05, 235 P.3d 1211 (2010) ("Summary judgment was appropriate, therefore, although on different grounds than entered by the district court.").

And Supreme Court Rule 141(e) expressly authorizes courts to resolve summary judgment based on parts of the record that the parties have not cited. Supreme Court Rule 141(e) (2023 Kan. S. Ct. R. at 224) (When ruling on summary judgment, "[t]he court need consider only the parts of the record that have been cited in the parties' briefs, but it may consider other materials in the record."); see *Acord v. Porter*, 58 Kan. App. 2d 747, 757, 475 P.3d 665 (2020). In fact, Rule 141(e) is identical to and was patterned after Federal Rules of Civil Procedure 56(c)(3), which was adopted to make clear that a "court may decide a motion for summary judgment" based on materials found during "an independent search of the record." Fed. R. Civ. Proc. 56(c)(3) advisory committee's note to 2010 amendment; see Report of the Supreme Court Rules Advisory Committee on Restyling of District Court Rules, comments on Rule 141. Thus, Rule 141 gave the parties sufficient notice that their claims could be resolved on *any* facts included in the summary judgment record, even if they chose not to cite those facts. I would exercise the discretion afforded to us under Rule 141(e).

In Kansas, corporate officers owe "a very strict fiduciary duty" to their stockholders. *Becker v. Knoll*, 291 Kan. 204, Syl. ¶ 3, 208, 239 P.3d 830 (2010). To fulfill that duty, officers must remain involved in the affairs of the company. For those—like Robert Murray—who do not, the law charges them with knowledge of the corporation's affairs. As a result, the Murrays should have known of their injuries when the alleged misconduct occurred in 2011. And the statutes of limitations bar the Murrays' suit filed in 2019. I would therefore affirm the panel majority's opinion as right for the wrong reason.

STEGALL, J., joins the foregoing concurring opinion.

No. 123,631

STATE OF KANSAS, *Appellee*, v. KYLIE JO ELIZABETH WALDSCHMIDT, *Appellant.*

(546 P.3d 716)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Aggravated Assault and Aggravated Battery Can Both Be Predicate Felonies for Felony Murder.* Under K.S.A. 2022 Supp. 21-5402(c)(2)(D) and (F), aggravated assault, as defined in K.S.A. 2022 Supp. 21-5412(b), and amendments thereto, and aggravated battery, as defined in K.S.A. 2022 Supp. 21-5413(b)(1), and amendments thereto, can both serve as predicate felonies for felony murder if they are so distinct from the killing as to not be an ingredient of the killing.

2. SAME—*Merger Doctrine—Factors to Assess Whether the Inherently Dangerous Felony Is Part of the Killing.* The merger doctrine examines whether an inherently dangerous felony is part of the killing, or if it stands as an independent predicate felony supporting a felony murder charge. This assessment hinges on factors such as the temporal and spatial proximity between the predicate felony and the killing, as well as the causal relationship between them.

3. SAME—*Felony Murder—Definition.* Felony murder holds a defendant strictly liable for homicides occurring in the commission of, attempt to commit, or flight from any inherently dangerous felony. Consequently, self-defense can never be a legal justification for the killing itself; it may be asserted only in felony-murder cases to the extent it may negate an element of the underlying inherently dangerous felony.

4. EVIDENCE—*Preserving Evidentiary Claims for Appellate Review.* Under K.S.A. 60-404, evidentiary claims, including those concerning questions and responses during witness examination, must be preserved for appellate review by a contemporaneous and specific objection at trial.

5. TRIAL—*Prosecutorial Error to State Opinions to Jury.* Prosecutors commit error by stating their opinions to the jury.

6. CONSTITUTIONAL LAW—*Right of Criminal Defendant to Present Their Theory of Defense—Exclusion of Evidence Violates Right to Fair Trial.* Under both the United States and Kansas Constitutions, a criminal defendant has the right to present their defense theory, and excluding evidence integral to that theory violates their fundamental right to a fair trial. To constitute error, the excluded evidence supporting the defense theory must be relevant, admissible, and noncumulative.

7. EVIDENCE—*All Relevant Evidence Is Admissible by Statute—Exceptions.* Under K.S.A. 60-407(f), all relevant evidence is admissible unless barred

by statute, constitutional provisions, or caselaw. When a defendant's intent is in question, a trial court must allow the defendant to testify about the defendant's motive and actual intent, or state of mind, provided that such testimony aligns with our legal principle.

8. TRIAL—*Jury Instructions—Claim of Error in Giving or Failing to Give Instruction.* K.S.A. 2022 Supp. 22-3414(3) provides that no party may claim as error the giving or failing to give an instruction unless that party timely objects by stating a specific ground for objection or unless the instruction or failure to give an instruction is clearly erroneous.

9. TRIAL—*Cumulative Error Analysis—Unpreserved Instructional Issues Not Clearly Erroneous Not Aggregated in Analysis.* Unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 2022 Supp. 22-3414(3) limits a party's ability to claim them as error. Our caselaw suggesting otherwise is disapproved.

Appeal from Ellis District Court; GLENN R. BRAUN, judge. Oral argument held December 13, 2022. Opinion filed April 12, 2024. Affirmed.

Corrine E. Gunning, of Kansas Appellate Defender Office, argued the cause, and *Bryan W. Cox*, of the same office, was with her on the briefs for appellant.

Aaron J. Cunningham, assistant county attorney, argued the cause, and *Derek Schmidt*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Kylie Waldschmidt directly appeals her convictions for aiding and abetting felony murder and interference with a law enforcement officer arising from the killing of Diego Gallaway by Ryan Thompson. We affirm.

We hold: (1) the district court did not err by rejecting Waldschmidt's merger claim; (2) the court's omission of a self-defense instruction was not clearly erroneous; (3) prosecutorial error occurred, although none of the errors require reversal either individually or collectively; (4) the district court did not violate Waldschmidt's right to present her defense theory by sustaining an objection to a question about her intent; and (5) cumulative error does not require reversal. In so ruling, we determine that unpreserved instructional issues that are not clearly erroneous may not be aggregated in a cumulative error analysis because K.S.A. 2022

Supp. 22-3414(3) limits a party's ability to claim them as error. Our caselaw suggesting otherwise is disapproved.

FACTUAL AND PROCEDURAL BACKGROUND

Gallaway and Waldschmidt began a romantic relationship in 2014. For several years, they were friends with Thompson. He sold them methamphetamine and all three regularly used the drug. About a week before his killing, Gallaway accused Thompson of having a sexual relationship with Waldschmidt. Thompson denied it because "at the time I wasn't." But a few days later Thompson and Waldschmidt began an intimate relationship, and she stopped living with Gallaway and stayed with Thompson.

Waldschmidt expected money from Gallaway because he claimed their children on his tax return, but he threatened not to give it to her. She and Thompson discussed ways to get her share if he reneged. Thompson even called Gallaway's bank, pretending to be him, and helped set up a PayPal account for a transfer. They never got the money before he died.

On February 27, 2019, the day of the homicide, Waldschmidt planned to return Gallaway's debit card she used with his consent during their relationship. She said she intended to drop it off at Gallaway's apartment because he was "angry" about it and her relationship with Thompson. She asked Thompson to go with her.

On their way to Gallaway's, Waldschmidt drove to Alysha Meade's residence, where Thompson sold Meade methamphetamine and got a gun. Waldschmidt waited in the car. Thompson testified he took the pistol out of his pocket when he re-entered the car and put "it down on the floorboard and jacked a few rounds through it, just to make sure it wouldn't jam, and then checked the safety."

When police interviewed Thompson after the killing, he said Waldschmidt was "relieved" he brought the gun and felt safer knowing he had it. He also said she "freaked out" about the gun when he was "function-checking" it. He put the gun between the passenger seat and console after chambering a bullet. At trial, he told a different story. He claimed Waldschmidt said nothing about the gun and may not have even seen it because "she was driving, it was dark, and I was down on the floorboard" hidden behind the

"big center console." He denied showing her the gun. She denied ever seeing it in the car.

When they arrived at Gallaway's apartment about 10 p.m., Thompson told Waldschmidt to back into a parking spot "so they could get away should things go south." She parked near a shed "right next to the back door of [the] apartment." Thompson got out and smoked a cigarette. He put Gallaway's debit card on the car hood and then swapped places with Waldschmidt, so she sat in the passenger's seat. He called Gallaway using Waldschmidt's phone to tell him they were there to return the debit card. When Gallaway came out, he ignored the card and went straight for the vehicle's passenger side.

Thompson and Waldschmidt gave similar accounts about what happened next. She said at trial:

"I just remember [Gallaway] coming out and coming to my window and yelling and screaming at me, trying to open the door, and [Thompson] came up to him. I do remember there was some words exchanged between the two of them. [Thompson] told him to get his card and go back in the house. And [Gallaway] said, 'What the fuck are you going to do about it, man?' And that's when a physical confrontation ensued.

"And I—I saw them struggle. I couldn't hear them though after a little bit, because they were not in earshot anymore, so I don't know if there were more words exchanged. I don't know. I heard a pop, and I seen somebody fall to the ground. And that's when I got out of the car and seen [Gallaway] laying there on the ground, and I immediately ran up to him. And [Thompson] told me, 'Don't look at him, go inside and call 9-1-1.' And so I did."

She saw Thompson throw the gun into the snow. She went into the apartment to call 911. She did not see Thompson leave. During the 911 call, Waldschmidt told the dispatcher her "ex-boyfriend just came at my boyfriend with a gun."

Police found a .22 caliber pistol near Gallaway's body. An officer attempted CPR, but Gallaway died moments later. An autopsy confirmed he died from a single gunshot to the back of the head. The wound had an irregular shape consistent with the gun barrel being pushed up against the skin. His index finger was lacerated, his face showed swelling, and his shoulder had abrasions. The coroner speculated Gallaway injured his hand by reaching back to grab the gun barrel before it fired, although he observed no soot in the wound.

The State charged Waldschmidt with one count of aiding and abetting felony murder during the commission of aggravated assault or aggravated battery and one count of interference with law enforcement by giving false information. Thompson pled guilty to second-degree murder in a separate case. The jury found Waldschmidt guilty as charged. The district court imposed a hard 25 life sentence for the murder and a six-month consecutive prison term for the interference. Waldschmidt directly appeals.

MERGER OF THE PREDICATE FELONIES

Felony murder is the killing of a human being "in the commission of, attempt to commit, or flight from any inherently dangerous felony." K.S.A. 2022 Supp. 21-5402(a)(2). If a death occurs in the context of an inherently dangerous felony, all participants are guilty of felony murder, irrespective of who actually killed the person. *State v. Pattillo*, 311 Kan. 995, 1000, 469 P.3d 1250 (2020).

Aggravated assault and aggravated battery can both serve as predicate felonies for felony murder if they are "so distinct from the homicide . . . as to not be an ingredient of the homicide." K.S.A. 2022 Supp. 21-5402(c)(2)(D), (c)(2)(F). This means both are subject to the merger doctrine, which examines whether the underlying felony is part of the killing as opposed to an independent predicate crime supporting felony murder. See *Pattillo*, 311 Kan. at 1000-01.

Before trial, Waldschmidt moved to dismiss the felony-murder charge on a theory of merger, arguing both predicate felonies were not so distinct from Gallaway's killing. The district court rejected this argument during pretrial proceedings and again at trial. She repeats it now on appeal. We hold the district court did not err.

Standard of review

We review the district court's ruling under the merger doctrine de novo. See *State v. Reed*, 302 Kan. 390, 397-98, 352 P.3d 1043 (2015). To the extent the governing statute, K.S.A. 2022 Supp. 21-5402(c)(2), requires a predicate felony be "so distinct from the

homicide," a district court, as a gatekeeper, makes a legal determination whether the evidence is strong enough to reach a jury. Cf. *State v. Pepper*, 317 Kan. 770, 776, 539 P.3d 203 (2023); *State v. Wade*, 284 Kan. 527, 540, 161 P.3d 704 (2007).

Additional factual and procedural background

After the preliminary hearing, Waldschmidt moved to dismiss the felony-murder count by focusing on how Thompson used the handgun:

> "A review of the Preliminary Hearing Transcript herein should show that *Ryan Thompson's producing a handgun, pointing the same at [Gallaway]*, and firing one (1) shot, killing [Gallaway] is all part of one 'single assaulting incident' that resulted in death and merges with the homicide." (Emphasis added.)

In response, the State more expansively summarized its factual allegations: Waldschmidt and Thompson drove to Meade's house to sell her methamphetamine. While there, Meade gave Thompson the gun. The pair then drove to Gallaway's apartment to return his debit card. They intended to have Thompson either scare him or "beat his ass." Thompson called Gallaway to say they arrived with his debit card. Gallaway came out and confronted Waldschmidt. Thompson retrieved the gun, walked around the car, came up behind Gallaway, and placed him in a headlock. The pair struggled away from the car "for several feet" until they backed into a shed where Thompson shot Gallaway in the head and killed him.

The State referenced the coroner's testimony about the headlock and described abrasions on Gallaway's arm and shoulder, as well as injury to his lower jaw and discoloration along the right side of his face consistent with someone placed in a headlock. The coroner observed marks "on the back of the head where a gunsight would've been pressed into the head." The State then articulated how these allegations satisfied the elements for both aggravated assault and aggravated battery.

At a pretrial hearing, defense counsel again described Thompson as getting out of the car, advancing toward the victim, and pointing the gun in Gallaway's direction. Counsel summarized the coroner's testimony as Thompson and Gallaway "struggling over the gun, Mr. Ryan Thompson prevailed, placing [Gallaway] in a

headlock and administering the fatal shot." Counsel noted there was "some question as to how long this struggle ensued" and argued: "[I]t was all very lineal. The gun is produced, pointed at decedent, contact is made with the decedent while decedent is being restrained. The shooter, Mr. Thompson, places gun to decedent's head and delivers one fatal shot."

The court overruled Waldschmidt's motion in a written decision. In its factual recitation, the court saw the case as the State did—Thompson began the struggle by retrieving the gun, walking around the front of the car, coming up behind the victim and placing him in a headlock with Thompson "ultimately" shooting the victim in the head, several feet away from the car. The court noted the coroner's testimony about the struggle explained Gallaway's abrasions on his left upper arm and left upper shoulder and damage to his lower jaw and discoloration. It concluded:

"[T]he elements of both Aggravated Assault and Aggravated Battery are distinct from the act of shooting the gun, which ultimately killed Gallaway. There were messages regarding beating up Gallaway before the incident and testimony that [Waldschmidt] stated the gun was present to scare Gallaway. Before the shot that killed Gallaway, there was a struggle after Gallaway was placed in a headlock. The gun was visible. According [to] the Coroner, there were injuries consistent with the headlock when Thompson had his arm around Gallaway's neck and throat. The struggle began at the car. Gallaway's body ended up several feet away from the car. Taking away the shot itself that killed Gallaway, the other testimony independently supports the underlying alternative felonies which are distinct from the homicide itself. As such, the Motion to Dismiss is denied."

After the State rested its case-in-chief, Waldschmidt moved for directed verdict, largely based on the pretrial merger motion, adding that Thompson testified the struggle lasted "15 to 30 seconds." The court summarized this as the "time sequence is of such brevity that it couldn't constitute the commission of either aggravated assault or aggravated battery." Defense counsel agreed, describing what happened as the "infamous single act." The State countered, "Whether it was 15 seconds or a minute . . . both an aggravated assault and an aggravated battery could occur in that timeframe."

After hearing the parties' arguments, the court found sufficient evidence "to let that issue reach the jury." It noted Thompson's testimony demonstrated "the events [were] anywhere from 15 to

30 seconds to a minute," and that the coroner's testimony stated "there was evidence of a battery that occurred in conjunction with or just prior to the shooting."

At the close of evidence, Waldschmidt renewed the merger motion summarily without refinements. The court again ruled sufficient evidence existed to submit the matter to the jury.

Discussion

Felony murder requires proving two causation elements: (1) the death must occur within the res gestae of the underlying felony; and (2) there must be a direct causal connection between the felony and the homicide. *State v. Phillips*, 295 Kan. 929, 940, 287 P.3d 245 (2012). Res gestae refers to acts before, during, or after the principal occurrence that are so closely connected with the principal occurrence to actually be a part of it. A direct causal connection exists unless an extraordinary intervening event supersedes the defendant's act to become the sole legal cause of death. Three factors—the time, distance, and causal relationship between the underlying felony and the killing—determines whether the underlying felony is part of the killing. 295 Kan. at 940-41.

In Waldschmidt's case, the jury returned its guilty verdict for the felony-murder count on both aggravated assault and aggravated battery. The jury instructions were modeled after PIK and recited aggravated assault's generic elements:

"a. Ryan Thompson knowingly placed or attempted to place, [Gallaway] in reasonable apprehension of bodily harm.

"b. Ryan Thompson did so with a deadly weapon.

"c. A 'deadly weapon' is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury."

Similarly, the jury instructions set out aggravated battery's generic elements:

"a. Ryan Thompson knowingly caused physical contact with [Gallaway] in a rude, insulting or angry manner with a deadly weapon.

"b. A 'deadly weapon' is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury."

In arguing against the verdict, Waldschmidt cannot overcome the questions of fact created by the disputed evidence that the jury resolved against her. For example, there was inconsistent evidence

about the time elapsed between Thompson rounding the front of the car with the gun and the fatal shot. Thompson at one point testified the "whole episode" took between 30 seconds and a minute from the time Gallaway came up to the car. In other testimony, he estimated the fight itself lasted less than 30 seconds and even said "[t]he total time from me going over to the other side of the car and him getting shot is less than 10, 15 seconds easy." Thus, while one comment suggests a timeframe of a minute, other evidence contradicts that. The jury was left to resolve it.

Likewise, the jury had to assess Thompson's credibility when he testified that he rounded the car with the gun pointed at the ground, not Gallaway, because the "assaultive conduct" (showing Gallaway the gun) is different from pointing the gun and firing it in one continuous movement. Particularly, Thompson claimed Gallaway grabbed the gun and inadvertently brought it toward his own body, and that Thompson only then hit the trigger. Viewed in this light, Thompson's act of displaying the gun precipitated the struggle that, ultimately, concluded in Gallaway's death.

But in another account, Thompson testified he exited the car with the gun, "cleared the passenger side and [Gallaway] saw the gun, [and] that's when [Gallaway] came with his right hand." Thompson said after that he pulled Gallaway back to "try to get him to let go of it. It turned his body, so I put him in a headlock." Thompson said he used his left arm to put Gallaway in a headlock that "[Gallaway] did not get out of" until "I threw him out of the headlock. I threw his whole body." Thompson agreed that this caused "a separation" of the two before he fired.

The evidence presents conflicting perspectives, but it provides sufficient grounds for the jury to conclude Thompson's act of displaying the gun was not "'a single instance of assaultive conduct'" resulting in Gallaway's death—even if it led to it. See *State v. Sanchez*, 282 Kan. 307, 319, 144 P.3d 718 (2006). The essence of the purported aggravated assault—as described by Thompson—was distinct enough from the act that killed Gallaway for the jury to consider when deciding whether Waldschmidt aided and abetted felony murder.

As for the aggravated battery, the district court noted the evidence created jury questions about the struggle just prior to the shooting. The State's medical evidence detailed discoloration on the right side of

Gallaway's face and some "indistinct areas of swelling from the lateral face up across the cheek near the eye." When asked for a potential cause, the coroner testified it "[c]ould be a direct blow; could be a broad surface like an arm, an elbow, a knee, or a hip could have struck the individual cross this area." The coroner also mentioned abrasions to the upper left arm and injuries to the body, "the size range of somebody having grabbed him there." He noted torn skin on the fingers and a "taller oval-shaped wound that couples immediately with a trapezoidal, a rectangular injury," "similar to the front sight of a gun that was present at the scene" on the head. And the coroner believed the victim's left hand reached back to try to grab the gun barrel or the gun during the struggle, causing an injury on the index finger. He also detailed other injuries, including contusions on the right side of the face and left upper arm and shoulder and lacerations to the fingers consistent with struggling to get control of a handgun.

On cross-examination, the coroner described breaking or injuring the hyoid bone in the neck with a headlock. He also said using arms would have spread the force across a wider diameter that "may not break the hyoid bone, but you can shut off blood flow and air flow." He did not see any petechiae, which would show restricted breathing by closing off the airway, but he noted it could result from an arm around someone's neck. This prompted redirect about not necessarily breaking the hyoid bone. The prosecutor inquired whether hypothetically if an individual approached Gallaway from behind, "put him in a choke hold, put the gun to the back of his head, you would have . . . that could happen and still have what you found." The coroner said, "Yes."

The coroner added this could explain reaching back for the gun with the left hand and a potential for injury on the right hand. Then, there was this exchange:

> "Q. So under the scenario I gave you or hypothetically I gave you, a person putting him in [a] choke hold, putting the gun to the bottom of his skull, that [is] consistent with your report.
>
> "A. It is."

Again, the evidence conflicts. But its strength warranted Waldschmidt's case proceeding to trial, affording the jury the opportunity to carefully weigh it and arrive at a factual conclusion about what happened. As the State's brief argues:

"Thompson's account explains that by placing [Gallaway] in a headlock, he was using his arms as a deadly weapon in which they were used, calculated, or likely to produce death or serious bodily injury. See *In re J.A.B.*, 77 P.3d 156, 31 Kan. App. 2d 1017 (2003) (whether an instrument is a deadly weapon, for purposes of aggravated battery is tied to the circumstances in which the instrument is used, this determination is generally a question reserved to the finder of fact). [Coroner] established [Gallaway] sustained injuries consistent with being placed in a headlock. Here, holding [Gallaway] in the headlock, prior to the struggle over to the shed, Thompson completes the crime of aggravated battery, prior to the causal act which led to [Gallaway's] death."

Finally, we mention Waldschmidt's newly raised assertion on appeal that the State abandoned the headlock as a basis for aggravated battery. Her opening brief made this short, cryptic, and undeveloped comment: "After it presented its evidence at trial, *the State no longer relied on the headlock*, but instead argued to the jury that the act was touching [Gallaway] with the gun." (Emphasis added.) She cited three pages from the trial record as support without further explanation or legal authority, and the cited pages do not compel us to conclude the State abandoned the headlock as a factual element.

As a matter of appellate practice, we fail to see how this brevity creates a substantive issue for the State or this court to follow up on. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) ("Issues not briefed are deemed waived or abandoned."). The only statement from the State's response brief that might relate argues:

"It has consistently been the State's theory that Thompson committed multiple felonies that day (two aggravated assaults—the second of which would merge, two aggravated batteries—the second of which would merge, and a murder). The State asserts Thompson commits an aggravated assault when Thompson initially clears the passenger side and [Gallaway] sees the gun. Thompson then commits an aggravated battery when he places [Gallaway] in a headlock. Following the headlock, Thompson throws [Gallaway] aside separating the two of them. Thus, completing the first aggravated assault and the first aggravated battery (which do not merge). After Thompson throws [Gallaway] aside, Thompson points the gun at [Gallaway] a second time, committing the second aggravated assault (which merges). Thompson then commits a second aggravated battery by 'jamming' the barrel of the gun to [Gallaway]'s head (which merges)."

As readily seen, the State conceded its self-described "second" aggravated assault (pointing the gun just before firing) and its so-called "second" aggravated battery (striking the gun barrel to Gallaway's head) merged with the murder, so those "second" felonies were not at issue. But the State also argues against merger

based on each alleged felony's time, distance, and causal relationships from the killing, distinguishing the "initial aggravated assault and aggravated battery from the terminal aggravating battery."

Undeterred, Waldschmidt's reply brief continued: "While the State relied solely on the headlock during pretrial arguments regarding merger, it had abandoned that theory by the time it argued its case to the jury." She contended the State's case presented a multiple acts problem "resolved" only by abandoning the headlock theory. And she characterized the State's opening and closing statements as the "functional equivalent of an election" to drop the headlock, relying on *State v. Moyer*, 306 Kan. 342, 361, 410 P.3d 71 (2017) ("We have previously considered a prosecutor's opening statement and closing argument as constituting the functional equivalent of an election by the State.").

At oral argument, we asked the State about this election claim. It noted the prosecutor's closing referenced both the headlock and the medical testimony about bruising and abrasions resulting from it, as well as cuts caused by the gun. On rebuttal, Waldschmidt repeated that the State "functionally elected" to proceed only on the gun as the instrument for the aggravated battery.

But the record does not establish Waldschmidt's newest contention if we can even call it that. In opening statements, the prosecutor began by telling the jury:

> "On February 27, 2019, Ryan Thompson goes around the front of the defendant's car, grabs Diego Gallaway, forces him into a headlock, places the barrel of a .22 Browning Buck Mark gun against [Gallaway]'s head and [Gallaway] struggles for his life. He begins to force Thompson back up against the shed, when pop, the gun goes off. [Gallaway] goes limp and falls dead on the icy pavement of the parking lot, as the defendant watches from the safety of inside her car, which she drove there. The defendant Kylie Waldschmidt watches the father of her children die along with all of her hopes of getting the $10,000 tax return she felt so entitled to."

The prosecutor also said:

> "The evidence will show that she did this by driving Thompson to [Meade's] house so he could pick up the murder weapon. Driving him to [Gallaway]'s apartment to confront [Gallaway], and going so as to distract [Gallaway] so Thompson could sneak up behind him, place him in a headlock and execute him. She sat silently as she watched Thompson sneak around [Gallaway] and [pull out]

the murder weapon. She watched as he put him in a headlock, wrestled with him, and eventually pulled the trigger ending his life."

During closing, the prosecutor said:

"It was foreseeable exactly what was going to happen; a fight. Only the fight turned deadly when Ryan Thompson took the gun. And remember the testimony of Thompson and Kylie Waldschmidt; had [Gallaway] in a headlock, gun gets jammed up into the head, and as [the coroner] testified to, we had a contact injury; that funny star-shaped injury where it doesn't look like a hole in the head, the little-starring pattern, because of the gas. Instead of coming out from the barrel, goes into the skin. This was a contact wound. The headlock, and the gun right up against the skull. The wound happened from behind."

If Waldschmidt intended to present a multiple acts issue or a functional election argument for the first time on appeal, her approach here is incorrect. See Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) ("If the issue was not raised below, there must be an explanation why the issue is properly before the court."); *State v. Harris*, 311 Kan. 371, Syl. ¶ 1, 461 P.3d 48 (2020) ("Generally, an appellate court does not address issues for the first time on appeal.").

Even so, the passing reference to *Moyer* seems out of place. In *Moyer*, the State itself argued it elected among multiple acts, and the court agreed, noting: "For the most part, the [trial] record confirms the State's contention." *Moyer*, 306 Kan. at 360. But we see nothing in the State's opening or closing statements expressly telling the jury to ignore the headlock or, more pointedly, to abandon the headlock as a predicate felony. And the State certainly does not argue it made such an election.

We hold the district court did not err by rejecting Waldschmidt's merger argument.

FAILURE TO GIVE USE-OF-FORCE INSTRUCTIONS

Waldschmidt claims the district court erred by failing to sua sponte instruct the jury on the use of force in defense of a person or in defense of an occupied vehicle. See K.S.A. 2022 Supp. 21-5222 (self-defense, defense of another); K.S.A. 2022 Supp. 21-5223 (defense of occupied vehicle); K.S.A. 2022 Supp. 21-5224 (use of force); PIK Crim. 4th 52.200 (2021 Supp.); PIK Crim. 4th

52.210 (2021 Supp.). She argues that if Thompson lawfully defended himself or her, he would not have committed any felonies, so she could not be convicted of aiding and abetting felony murder. We hold the omission of the unrequested use-of force instructions was not clearly erroneous as required by K.S.A. 2022 Supp. 22-3414(3) and, therefore, cannot be assigned as error on appeal.

Standard of review

Waldschmidt concedes she did not request instructions addressing the use of justifiable force, so she must establish clear error. See K.S.A. 2022 Supp. 22-3414(3). And to do that, she has the burden to firmly convince us the jury would have reached a different verdict had the unrequested instructions been given. See *State v. Martinez*, 317 Kan. 151, 162, 527 P.3d 531 (2023).

Discussion

We begin by considering whether the instructions at issue would have been legally appropriate. In *State v. Milo*, 315 Kan. 434, Syl. ¶ 1, 510 P.3d 1 (2022), we clarified:

> "Felony murder imposes strict liability for homicides caused by the attempt to commit, commission of, or flight from an inherently dangerous felony. Thus, self-defense is never a defense to felony murder. A self-defense instruction may only be given in felony-murder cases to the extent it may negate an element of the underlying inherently dangerous felony."

Given this, we "must first examine the elements of the underlying inherently dangerous felony alleged by the State to determine whether any of those elements can be negated by a claim of self-defense. If the answer is no, then the self-defense instruction will not be legally appropriate." 315 Kan. at 443. The State's theory of aggravated assault required proof Thompson placed Gallaway in reasonable apprehension of bodily harm by using a deadly weapon. Its aggravated battery theory was that Thompson "knowingly caused physical contact with [Gallaway] in a rude, insulting or angry manner with a deadly weapon[,]" which occurred by placing him in a headlock during their fight.

Both crimes contain elements of force. See K.S.A. 2022 Supp. 21-5221(a) (defining "use of force" and "use of deadly force"). But "some crimes contain an element—the use of force—which

may be negated by a proper claim of self-defense." *Milo*, 315 Kan. at 444. And unlike aggravated robbery, nothing in the crime of aggravated assault or aggravated battery is inherently inconsistent with use of lawful force. See *State v. Holley*, 315 Kan. 512, 519, 509 P.3d 542 (2022) (discussing self-defense in the aggravated robbery context). Both crimes here can fit this criterion. We hold the omitted instructions would have been legally appropriate.

Turning next to whether the instructions were factually supported, the State argues Thompson could not claim a use-of-force defense because he provoked the fight that ended with Gallaway's death. See K.S.A. 2022 Supp. 21-5226 (justifications described in K.S.A. 2022 Supp. 21-5222 and K.S.A. 2022 Supp. 21-5223 are unavailable to initial aggressors). But our standard of review requires we weigh the evidence in Waldschmidt's favor, not the State's, and there is contrary evidence supporting use-of-force instructions. See *State v. Kahler*, 307 Kan. 374, 396, 410 P.3d 105 (2018).

When evaluating the factual appropriateness of justifiable use-of-force instructions, courts apply a two-pronged test.

> "'The first [prong] is subjective and requires a showing that [the defendant] sincerely and honestly believed it was necessary to kill to defend herself or others. The second prong is an objective standard and requires a showing that a reasonable person in [the defendant's] circumstances would have perceived the use of deadly force in self-defense as necessary.'
>
> "In *State v. Haygood*, 308 Kan. 1387, 1405-06, 430 P.3d 11 (2018), this court cautioned against confusing the subjective and objective requirements. Even if the only evidence supporting the defendant's theory consists of the defendant's own testimony, which may be contradicted by all other witnesses and by physical evidence, the defendant may have met his or her burden of showing that a reasonable person in his or her circumstances would have perceived the use of deadly force as necessary self-defense. [Citations omitted.]" *State v. Qualls*, 309 Kan. 553, 557-58, 439 P.3d 301 (2019).

The pertinent statutes regarding a person's use of force in response to another's use of force are instructive. In the context of this case, K.S.A. 2022 Supp. 21-5222(a) permits Thompson to use "force against [Gallaway] when and to the extent it appears to [Thompson] and [Thompson] reasonably

believes that such use of force is necessary to defend [Thompson] or [Waldschmidt] against [Gallaway's] imminent use of unlawful force." K.S.A. 2022 Supp. 21-5222(b) permits the use of deadly force here "if [Thompson] reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to [Thompson] or [Waldschmidt]." And K.S.A. 2022 Supp. 21-5223 extends the justified use of force and deadly force to situations involving protection of occupied vehicles. Use of force includes "[w]ords or actions that reasonably convey the threat of force"; use of deadly force "means the application of any physical force . . . which is likely to cause death or great bodily harm." K.S.A. 2022 Supp. 21-5221(a)(1)-(2).

Both Thompson and Waldschmidt's testimony supports a possible finding Thompson sincerely and honestly believed he needed to display the gun to persuade Gallaway to stand down or to subdue him with a headlock. And when viewed in a light most favorable to Waldschmidt, sufficient evidence supports that a reasonable person in Thompson's situation would perceive the use of such force as necessary, given Gallaway's angry words and aggressive actions while arguing with Waldschmidt. The district court should have given the instructions sua sponte.

Even so, we are not firmly convinced this would have changed the outcome. Waldschmidt gave statements to police suggesting Thompson devised a plan—the details of which she was unaware—to rob Gallaway. At another point, Waldschmidt told police she thought Thompson "just wanted to scare and teach [Gallaway] a lesson, whatever, it got out of hand." And for his part, Thompson disclaimed the existence of any such plan, while cavalierly testifying he often lied to law enforcement. The jury also had messages between Waldschmidt and Thompson discussing what to do with Gallaway, the picking up of the handgun, checking its functionality on the way to the crime scene, Waldschmidt's driving to Gallaway's apartment, and her admission that she lied to police to cover up the crime. The jury also had the coroner's testimony that Gallaway's injuries reflected an execution-style

murder in that he was held from behind, in a choke hold, with the barrel placed at the base of his skull.

We hold the jury instructions omission was not clearly erroneous, so under K.S.A. 2022 Supp. 22-3414(3) this matter cannot be assigned as error on appeal.

PROSECUTORIAL ERROR

Waldschmidt advances multiple claims of prosecutorial error. She contends the prosecutor made improper comments on witness credibility, misstated facts, and misstated the law. We agree in a few instances but hold none require reversal—either individually or collectively.

Standard of review

Appellate courts analyze prosecutorial error claims in two steps: error and prejudice. First, we decide whether the challenged actions fall outside the wide latitude afforded a prosecutor in conducting the State's case in a manner that does not offend a defendant's constitutional right to a fair trial. In doing so, we evaluate each challenge in the context in which it occurred, rather than in isolation. Still, a prosecutor commits error when misstating the law or arguing facts or making factual inferences with no evidentiary foundation. And if we find error, we determine whether it prejudiced the defendant's due process rights to a fair trial by applying the constitutional harmlessness standard. *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021); *State v. Ballou*, 310 Kan. 591, 596, 448 P.3d 479 (2019).

Opening statements

Waldschmidt challenges the prosecutor's statements suggesting she "distract[ed] Gallaway so Thompson could sneak up behind him, place him in a headlock and execute him." She argues the evidence did not support this, so the prosecutor strayed from the evidence the State expected to prove during trial. We disagree.

Opening statements help a jury understand what each side expects the evidence will prove and frame the questions the

jury will need to decide. Prosecutorial error in that context occurs when a prosecutor strays outside the wide latitude recognized in *State v. De La Torre*, 300 Kan. 591, 609, 331 P.3d 815 (2014). Here, the prosecutor drew a fair inference that Waldschmidt's presence would distract Gallaway based on the expected evidence. This included a long, acrimonious relationship between Gallaway and Waldschmidt, his ire over her new relationship with Thompson, and the hostile communications shared that day, including various threats Gallaway ostensibly sent about Thompson. The same is true for the inference she was there to distract Gallaway so Thompson could shoot him as the "backup plan." No error occurred.

Cross-examination

Waldschmidt asserts prosecutorial error for the cross-examination about her brief move to Lawrence in 2018 and oldest child's parentage. She claims the prosecutor lacked good faith to ask these questions and intended to denigrate her as an unfaithful woman. We disagree. As we read the record, the question about her temporary move to Lawrence a few months before the killing was relevant to her turbulent relationship with Gallaway—a major theme of the State's case. And the question about her oldest child's parentage just clarified an ambiguity in her testimony about what she meant by stating Gallaway was "a father" to the child.

Even so, she miscasts this as prosecutorial error. In *State v. George*, 311 Kan. 693, 701-02, 466 P.3d 469 (2020), the court noted a distinction between prosecutorial error and a prosecutor's efforts involving admission or exclusion of evidence, such as witness questioning on particular topics. The *George* court explained: "'In accordance with the plain language of K.S.A. 60-404, evidentiary claims—including claims concerning questions posed by a prosecutor and responses to those questions during trial—must be preserved by way of a contemporaneous objection before those claims may be reviewed on appeal.'" 311 Kan. at 703. This means Wald-

schmidt's argument is more properly categorized as an unpreserved challenge to the admission of evidence because there was no contemporaneous objection.

Closing arguments—comments on credibility

Waldschmidt contends the prosecutor's comments in closing arguments improperly bolstered law enforcement witnesses' credibility and undermined hers. The prosecutor said:

"Before I get too caught up in responding to the arguments of [defense counsel], *I want to take just a moment to also compliment law enforcement on their efforts in this case to investigate this case*. What started out with a *lie* of 'my ex-boyfriend came at my current boyfriend with a gun, and they wrestled over it, and a bad thing happened,' due to the efforts of [law enforcement officers], we got to find out the real story; that that was a *lie* that she was telling to law enforcement . . . from the get-go." (Emphases added.)

Later, the prosecutor commented:

"[Waldschmidt] continued to *lie* all the way through the first half of the interview with [law enforcement] on March 8th. And it was only at the second half of the interview on March 8th when she started to give some of the *truthful* elements to law enforcement. *That shows her true intent in this matter, to continue to cover up the agg assault and the agg battery which resulted in the murder*. And she continued to cover that up all the way through March 8th, and *dare I say with her testimony here at trial, she continues to try to cover this up*." (Emphases added.)

Beginning with the compliment to law enforcement, we hold it introduced prosecutorial opinion to bolster law enforcement reliability as witnesses. This was error. Prosecutors step outside their recognized wide latitude when they state their own belief as to witness credibility. See *State v. Gulley*, 315 Kan. 86, 95, 505 P.3d 354 (2022). Prosecutors are not to personally comment on the evidence or declare law enforcement efforts led to finding the "real story." That said, this occurred just once and was not part of a grander theme, so its impact had to be minimal.

Similarly, the prosecutor erred by telling the jury, "[D]are I say with her testimony here at trial, she continues to try to cover this up." The prosecutor's "[D]are I say" aside again

amounts to giving a personal view. But we reject Waldschmidt's claim that the prosecutor impugned all her trial testimony. The reference to "this" plainly relates to specific statements attributed to her in a police interview report about the aggravated assault and aggravated battery.

We also hold no error occurred from the comment that Waldschmidt "lied" to investigators. After all, she admitted lying to police; and the State charged her with knowingly giving false information to law enforcement. So given the nature of the charge against her—with distinct elements of knowingly reporting false information to the police with intent to induce, impede, or obstruct a homicide investigation—it makes sense that both sides occasionally fell into describing things she said as "lying." For example, defense counsel in closing argument told the jury: "[W]hat I would suggest you might do is determine if *a lie or false statement* was made by Kylie on that date as opposed to some other dates." (Emphasis added.) Counsel further identified a State exhibit as "the essential evidence for the *obstruct/lie* to law enforcement charge." (Emphasis added.) Waldschmidt also acknowledged lying to police during her 911 call to report Gallaway's death.

Closing arguments—discussing facts

Waldschmidt objects to aspects of the prosecutor's arguments as misstatements of fact. First, she asserts the remark that the evidence did not support she "knew there was going to be a fight." But during his interview, Thompson told detectives Waldschmidt knew about the gun and was "relieved" that he brought it. Likewise, in at least one interview, Waldschmidt admitted she was aware of the potential for a fight. And the State presented evidence Gallaway threatened Thompson; that Waldschmidt called Gallaway "very abusive" in a message sent to her brother that she forwarded to Thompson; and that she thought of Thompson as a "thug," clarifying to police that thugs don't like "people who treat their children, or the mothers of their children in the manner that [Gallaway] treated me." The evidence supported the prosecutor's inference, even though both Waldschmidt and Thompson tried to debunk it at trial. We hold no error occurred.

Second, Waldschmidt disputes the prosecutor's characterizations of Facebook messages between her and Thompson. The relevant messages range from just over two days prior to the shooting to within seven hours before it. They are in three blocks of time: the first, between 6:46 and 6:52 p.m. on February 25; the second, between 10:31 and 10:37 p.m. on February 26; and the third, between 2:30 and 3:25 p.m. on February 27.

Waldschmidt's arguments require some fleshing out. She first focuses on the prosecutor's comment concerning the second block of time. The prosecutor said,

"[Waldschmidt] is sending [Thompson] the information about her brother going over and beating up [Gallaway] and no cops being called. They are talking about the robbery. They are talking about the backup plan. And at the end of it, at 4:36:28 [10:36 p.m.] [Waldschmidt] says, 'So? So are we going to go do this or what. So? Let's go do this.'"

She asserts the "So?" comment references "the robbery" and correctly notes the first—and only—mention of a "backup plan" came during the third block of messages, roughly 17 hours later, at 3 p.m. on February 27, about seven hours before Gallaway's killing. She labels this as a misrepresentation. But Waldschmidt admitted she was aware of a plan to rob Gallaway, though she claimed at trial this "plan" was not even "[h]alf-baked." She also told the jury: "I would just say those are comments from a thug who thinks that he's cool." So despite her attempts to downplay the degree of planning, the State's closing drew reasonable inferences given the Facebook discussion, the timing before Gallaway's death, her concession she knew Thompson may have planned to rob Gallaway, and Thompson's admission the pair talked in person about all of this. There was no error in the challenged remark.

Waldschmidt next questions four statements by the prosecutor:

"They stopped and got a gun. This is after they had already talked about the fact that [Gallaway] needed his ass whooped. This is after they talked about 'maybe I should just put a gun down his throat.'

. . . .

"But it went south, just as [Waldschmidt] had predicted it would. That prediction is called foreseeability. And she's not the only one who foresaw that, and she's not the only one that can foresee that. I think you as jurors using your own

common sense and experience can certainly see the foreseeability of what was going to happen when they plot to put him in line, when they decided and agreed to teach him a lesson, to whoop his ass, and to put a gun down his throat.

. . . .

"How did Kylie Waldschmidt aid in the agg assault? She talked about it with Ryan Thompson. Discussed all the problems she was having with Diego Gallaway with Ryan Thompson. Talked about scaring him. Talked about threatening him. Talked about whooping his ass. Talked about putting a gun barrel down his throat.

. . . .

"[Waldschmidt] is responsible. She doesn't have to get out and wrestle with [Gallaway]. She didn't have to get out and do anything at the scene. She had talked about it, whooping his ass, talked about threatening him, putting the gun down his throat, talked about getting the money, talked about robbing him."

She parses the Facebook messages to argue the prosecutor either misquoted them or drew unreasonable inferences from them, or both. Again, we disagree. The evidence allowed the prosecutor to draw these inferences.

Lieutenant Jeffrey Ridgway testified about the potential significance of the Facebook messages. And when asked about Thompson telling Waldschmidt, "[A]s soon as I got back we would take care of [Gallaway]," the lieutenant said this meant physical harm to Gallaway. He also referred to another statement by Thompson, "Or I can just go around putting pistols down people's throats and catch charges," when asked if anything explained how Thompson might "take care of [Gallaway]." Then, the prosecutor and lieutenant had this exchange:

"Q. Okay. Did the defendant in these messages at any point tell Thompson it wasn't necessary to use physical violence, or how she wanted to go about, quote, 'taking care of Diego,' end quote?

"A. Not that I recall, no.

"Q. In your review of these messages, did you find any sort of explanation as to why Thompson would be so committed to helping the defendant, quote, 'take care of Diego,' end quote?

"A. On a couple of messages above, at 0049 as marked, the author Ryan Thompson indicates, quote, 'it's about taking care of you the way you taking care of me,' end quote."

The lieutenant also described discussions between Thompson and Waldschmidt about getting the tax refund from Gallaway's bank account. Later, the prosecutor asked if he noted "any express

desires to commit physical violence" towards Gallaway in the Facebook messages. He said he did, describing a photograph Waldschmidt sent Thompson with a notation, "See . . . Exhibit A, [Gallaway] needs ass whooped."

The wide latitude afforded prosecutors in crafting closing arguments allows them to make reasonable inferences based on the evidence. But their arguments must remain consistent with the evidence; error occurs if prosecutors assert facts or inferences not supported by the evidence. *State v. Maestas*, 298 Kan. 765, 774, 316 P.3d 724 (2014); *State v. Pabst*, 268 Kan. 501, 507, 996 P.3d 321 (2000) ("Stating facts not in evidence is clearly improper."). Here, the lieutenant described his understandings from the Facebook messages and other evidence that provided the prosecutor with a basis to draw as reasonable inferences the points argued. We hold no prosecutorial error occurred.

Closing arguments—statements about the law

Waldschmidt complains the prosecutor committed error while discussing the law on "foreseeability" and "aiding and abetting." The prosecutor read the jury instructions and attempted to explain their meaning. He said:

"We have to prove that the defendant knowingly, i.e., her conduct and her actions were reasonably certain to cause the result complained about. Reasonably certain to cause the result which, again, I refer to when we talk about the foreseeability of the situation. The defendant knew what was going to happen when she took Ryan Thompson over there."

Waldschmidt asserts this misstated the law because, even if the statements between her and Thompson were acts of planning, they might be "at most" a potential conspiracy, and "[t]he *possibility* of a fight or aggravated battery or assault is not a reasonably foreseeable consequence of a conspiracy." But that assertion does not present any legal issue; what she argues on appeal is a factual question already resolved by the jury. And to the extent she portrays this as a legal issue, we hold no error occurred. The governing law on foreseeability provides:

"(a) A person is criminally responsible for a crime committed by another if such person, acting with the mental culpability required for the commission

thereof, advises, hires, counsels or procures the other to commit the crime or intentionally aids the other in committing the conduct constituting the crime.

"(b) A person liable under subsection (a) is *also liable for any other crime* committed in pursuance of the intended crime if *reasonably foreseeable by such person as a probable consequence of committing . . . the crime intended*." (Emphases added.) K.S.A. 2022 Supp. 21-5210.

The Kansas Criminal Code, K.S.A. 21-5101 et seq., does not define foreseeability, but the term is not hard to understand. See Black's Law Dictionary 792 (11th ed. 2019) (defining foreseeability as "[t]he quality of being reasonably anticipatable"); Merriam-Webster's New Collegiate Dictionary 490 (11th ed. 2020) (foreseeable means "being such as may be reasonably anticipated" or "lying within the range for which forecasts are possible"). Here, the prosecutorial remark—"The defendant knew what was going to happen when she took Ryan Thompson over there."—did not deviate from this common meaning.

Next, Waldschmidt argues the prosecutor misstated the law of "aiding and abetting" when telling the jury:

"How did Kylie Waldschmidt aid in this agg assault? She talked about it with Ryan Thompson. . . . Talked about scaring him. Talked about threatening him. Talked about whooping his ass. Talked about putting a gun barrel down his throat.

"Aided by driving. . . . [S]he drove him to Alysha Meade's to pick up the weapon. She drove him over to the site. She backed in [although she conceded it was weird.] Yeah, that was weird. And you know why that was weird? Because it wasn't about returning the card, it was about luring Diego Gallaway out to the car so she could frighten him with the gun they had just picked up."

She claims that "[m]erely discussing problems in her relationship or saying someone needs to have his 'ass whooped' does not demonstrate she was aiding or abetting Ryan to commit the alleged crimes," and the prosecutor's comment "does not reflect the law on aiding and abetting." But again, this reasoning concerns a factual determination, which was up to the jury.

As to aiding and abetting, the prosecutor properly reiterated the jury instruction by saying: "'A person is criminally responsible for the crime of another if the person either before or during the commission and with the mental culpability, knowingly, intentionally, aids the other person.'" This aligns with K.S.A. 2022 Supp. 21-5210. We hold no error occurred.

Collective effect of two prosecutorial errors

We conclude the prosecutor committed two errors: bolstering the witnesses' credibility and personally commenting on Waldschmidt's testimony. Considering the entire record, as previously discussed, we are comfortable their collective effect did not deprive Waldschmidt of a fair trial beyond a reasonable doubt. Both remarks were minor and not repeated.

QUESTIONING ABOUT INTENT

Waldschmidt claims the district court infringed on the right to present her defense theory by denying the opportunity to answer a question about her intent in going to Gallaway's apartment. We disagree. This complaint centers on the following exchange:

"[DEFENSE COUNSEL:] Okay. Now, on February 27, 2019, did you intend to place Diego Gallaway in fear or apprehension of bodily harm?

"[PROSECUTOR:] Objection. Leading.

"THE COURT: It calls for a legal conclusion. Sustained."

Standard of review

Under both the United States and Kansas Constitutions, a criminal defendant has the right to present their defense theory, and excluding evidence integral to that theory violates their fundamental right to a fair trial. To constitute error, the excluded evidence supporting the defense theory must be relevant, noncumulative, and admissible. We review this type of alleged error de novo. *State v. Robinson*, 306 Kan. 431, 435-36, 394 P.3d 868 (2017).

Unless barred by statute, constitutional provision, or caselaw, "all relevant evidence is admissible." K.S.A. 60-407(f); *State v. Gunby*, 282 Kan. 39, 47, 144 P.3d 647 (2006). For relevancy, there are two elements: materiality and probativity. We review the former de novo and the latter for abuse of discretion. *State v. Boleyn*, 297 Kan. 610, Syl. ¶ 1, 303 P.3d 680 (2013). A court abuses its discretion when no reasonable person could agree with its decision or if its exercise of discretion is based on a factual or legal error. *State v. Butler*, 315 Kan. 18, Syl. ¶ 1, 503 P.3d 239 (2022).

Discussion

Waldschmidt correctly notes the district court's stated reason for sustaining the State's objection—"calls for a legal conclusion"—was wrong. "Calling for a legal conclusion" during witness examination applies when counsel asks the witness to make a judgment or determination on a legal issue rather than a factual one. To do so is inappropriate because the court makes legal conclusions, and when examining witnesses, counsel must focus on the relevant factual issues. Cf. *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 445, 228 P.3d 1048 (2010) ("[I]t is generally recognized that testimony expressing a legal conclusion should ordinarily be excluded because such testimony is not the way in which a legal standard should be communicated to the jury."). Waldschmidt's intent on February 27, 2019, was not a legal determination; it was instead a factual statement relating to her mens rea at the time of the crime.

A defendant can testify about their own intent if relevant. See *United States v. Hayes*, 477 F.2d 868, 873 (10th Cir. 1973) ("Where a defendant's intent is in issue he should be permitted to testify as to his motive and actual intent or state of mind."); 23 C.J.S., Criminal Procedure and Rights of Accused § 1052 ("Generally, the defendant may testify directly as to the defendant's own uncommunicated intent or motive if it is material."). And whether Waldschmidt intended to put Gallaway "in fear or apprehension of bodily harm" was material and probative. See *Boleyn*, 297 Kan. 610, Syl. ¶ 1 ("Materiality addresses whether a fact has a legitimate and effective bearing on the decision of the case and is in dispute. Evidence is probative if it has any tendency in reason to prove a fact.").

Although the evidence was relevant to her intent and therefore admissible, we determine the solicited response was not essential to the defense's theory. Right after the court sustained the objection, this exchange occurred:

"[DEFENSE COUNSEL:] What was your intent in going to that parking lot?

"[WALDSCHMIDT:] To return his debit card.

. . . .

"[DEFENSE COUNSEL:] Had you any other intent that night other than to return the debit card?

"[WALDSCHMIDT:] No, I did not."

And during the State's cross-examination, the following exchange took place:

"[PROSECUTOR:] So in your direct exam you stated that you went over there to put—to give Diego Gallaway the debit card?

"[WALDSCHMIDT:] Yeah.

. . . .

"[PROSECUTOR:] Is that why you pulled into the back of that parking lot so that Ryan Thompson could whip [Gallaway]'s ass?

"[WALDSCHMIDT:] Absolutely not."

Waldschmidt forcefully made her point, so the excluded evidence solicited by the question was cumulative and redundant given what she testified to after the court sustained the objection. The jury just did not believe her. We hold the district court did not violate Waldschmidt's fair trial right to present her defense theory.

CUMULATIVE ERROR

To sum up, we have held the use-of-force instructions should have been given, although that omission did not amount to clear error, and that the prosecutor improperly bolstered the credibility of the State's witnesses and personally commented on Waldschmidt's testimony. But do all these circumstances get included in the cumulative error analysis Waldschmidt seeks? We hold they do not.

To explain, we begin with K.S.A. 2022 Supp. 22-3414(3):

> "No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, unless the party objects thereto before the jury retires to consider its verdict stating distinctly the matter to which the party objects and the grounds of the objection unless the instruction or the failure to give an instruction is clearly erroneous."

The statute presents an obvious question: How can an unpreserved instructional issue that is not clearly erroneous, like the one here on use-of-force instructions, become part of cumulative error when the statute's plain language declares no party may assign that matter as error? We can find no statutory support for doing so. See *State v. Moler*, 316 Kan. 565, 571, 519 P.3d 794 (2022) ("'[A] clear and unambiguous statute must be given effect as written.'").

And death penalty cases like *State v. Carr*, 314 Kan. 744, 777-78, 502 P.3d 511 (2022), *cert. denied* 143 S. Ct. 584 (2023), are instantly distinguishable because K.S.A. 2022 Supp. 21-6619(b) explicitly permits this court in capital cases to notice any "unassigned errors appearing of record if the ends of justice would be served thereby." Different still is the federal criminal code's plain error treatment. See Fed. R. Crim. Proc. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

To be sure, this court has at times—but without discussion—lumped unpreserved instructional issues into its cumulative error pot, even though very few resulted in conviction reversals. See, e.g., *State v. Smith-Parker*, 301 Kan. 132, 167-68, 340 P.3d 485 (2014); *State v. Castoreno*, 255 Kan. 401, 410-11, 874 P.2d 1173 (1994). Regardless, unreasoned judicial repetition does not create law when it directly conflicts with a statute.

The only hard look the court has taken at K.S.A. 2022 Supp. 22-3414(3) was more than 10 years ago in *State v. Williams*, 295 Kan. 506, 286 P.3d 195 (2012). There, the court broadly considered subsection (3)'s effect on appellate analysis when a party raises an instructional error for the first time on appeal. The *Williams* court characterized the statutory language as "a *preservation rule* for instruction claims on appeal." (Emphasis added.) 295 Kan. 506, Syl. ¶ 3. And with that understanding, it said:

> "[W]e need to clarify just what the court must decide when presented with a claim of error for giving or failing to give an instruction that was not requested. As we noted earlier, the first step in the appellate process is normally a reviewability inquiry. Obviously, K.S.A. 22-3414(3) directly impacts that determination. Although it purports to withhold appellate jurisdiction in the absence of a proper objection, *the statute's exception effectively conveys such jurisdiction and preserves for appellate review any claim that the instruction error was clearly erroneous*." (Emphasis added.) 295 Kan. at 515.

Williams did not specifically address cumulative error, but the takeaway seems obvious from its preservation perspective: the Legislature mandates that no party may claim as error the giving or failing to give an instruction unless (1) that party objects by stating a specific ground or (2) the instruction or failure to give an instruction is clearly erroneous. And recall that clear error is a demanding standard. See *Williams*, 295 Kan. at 516 (to be clearly

erroneous, reviewing court must be firmly convinced the jury would have reached a different verdict had the error not occurred). Said differently, the statute tells us unpreserved instructional issues are not error, unless they are determined to be clearly erroneous.

This is somewhat analogous to appeals about erroneously admitted evidence because we do not consider those unpreserved claims in a cumulative error analysis. K.S.A. 60-404 provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection."

Of course, K.S.A. 60-404's plain language prevents an unpreserved evidentiary matter from contributing to the judgment's reversal, which is why we do not consider such matters collectively with other errors. Compare K.S.A. 60-404, with K.S.A. 2022 Supp. 21-6820(c) (providing "the appellate court shall not review" any sentence within the presumptive sentence for the crime or any sentence resulting from the parties' agreement). Similarly, when no clear error occurs with an unpreserved instructional issue, there is no error to aggregate.

Since we have not discussed this question before, it is difficult to understand how we stumbled into including unpreserved instructional matters that were not clearly erroneous with a cumulative error analysis in the first instance. But *Williams* suggests a possibility when the court noted:

> "[T]o determine whether it was clearly erroneous to give or fail to give an instruction, *the reviewing court would necessarily have to first determine whether it was erroneous*. In other words, to determine whether the claim of error is properly reviewable, the court must first determine whether there is an error, *i.e.*, perform the merits review in the second step of the normal appellate process." (Emphasis added.) *Williams*, 295 Kan. at 515-16.

Williams explained the obvious—to decide whether an unpreserved instructional issue qualifies as clear judicial error under K.S.A. 2022 Supp. 22-3414(3), an appellate court must decide first whether there was even a mistake. Only then would a court take the next step to decide whether that mistake was serious

enough to meet the demanding clearly erroneous standard. So after *Williams*, when it came time to do a cumulative error analysis in later cases, the court recited its typical boilerplate language describing cumulative error and just scooped up "all identified errors." See, e.g., *State v. Taylor*, 314 Kan. 166, Syl. ¶ 1, 496 P.3d 526 (2021):

> "The test for cumulative error considers whether *all the identified errors* substantially prejudiced the defendant to the extent they affected the trial's outcome given the totality of the circumstances. To do this, an appellate court *examines all the errors in context*, considers how the district court dealt with them, reviews the nature and number of errors and whether they are connected, and then weighs the strength of the evidence." (Emphases added.)

In other words, we included unpreserved instructional issues that were not clearly erroneous when they merely passed the first step in the two-part test without considering K.S.A. 2022 Supp. 22-3414(3)'s limiting language. Worse yet, this practice increased the State's burden when these unpreserved instructional matters were included with other identified errors because cumulative error analysis places the burden on the State to show harmlessness. And if the cumulative error pot contained a constitutional error, the State's burden increased further because it would have to prove harmless error beyond a reasonable doubt. See *Taylor*, 314 Kan. at 173.

To recap, we find no authority for our prior practice given the statutory restriction. We hold an unpreserved instructional issue that is not clearly erroneous cannot escape K.S.A. 2022 Supp. 22-3414(3)'s confines to be considered in a cumulative error analysis. It is simply not "error" for appellate review, even if we must characterize an unpreserved instructional issue as a "mistake" or an "error" under *Williams*' first step. 295 Kan. at 515-16. Our caselaw suggesting otherwise is disapproved. Here, this means the omitted use-of-force instructions cannot be part of Waldschmidt's cumulative error analysis.

Accordingly, we have two prosecutorial errors for cumulative error purposes, and we have already considered their collective impact. They did not deny Waldschmidt a fair trial beyond a reasonable doubt. No other analysis is needed because no error was

found other than those prosecutorial issues. See *State v. Blevins*, 313 Kan. 413, 436-37, 485 P.3d 1175 (2021).

Affirmed.

* * *

WILSON, J., dissenting: Like the majority, I find many aspects of Kylie Waldschmidt's conviction troubling. Unlike the majority, I can neither excuse the prosecutor's errors as harmless nor repudiate longstanding assumptions about our cumulative error analysis without the parties' input. Indeed, because I would find that the prosecutor's errors alone merit reversal, I would not reach the thorny cumulative error question the court has posed sua sponte. Therefore, I respectfully dissent.

Merger

I agree that Waldschmidt's "first" underlying act of aggravated assault did not merge with Gallaway's killing. But, in my view, the majority missteps in affirming the felony murder conviction based on the "first" underlying aggravated battery. (Like the majority, I use quotation marks in discussing the "first" and "second" aggravated battery and aggravated assault theories. While I cannot speak to the majority's intent, I do so to highlight what is, in my view, the specious nature of the distinction the State made between the "first" and "second" aggravated batteries for the first time in its brief on appeal.)

To begin, I see no evidence in the record that Thompson's use of a "headlock" constituted a deadly weapon. The majority latches on to the coroner's testimony about injury the coroner did *not* find—as if the coroner *did* find it—to conclude that the evidence "conflicts." Slip op. at 13-14. But there was no conflict here. While I am willing to assume without deciding that a person's own body could constitute a deadly weapon in some circumstances (should there be sufficient—nay, *any*—evidence to support such a claim), the State's failure to present any evidence of injury associated with the "headlock" renders this analysis unnecessary. See *State v. Clark*, 214 Kan. 293, 295, 521 P.2d 298, *opinion modified on denial of reh'g*, 215 Kan. 1, 522 P.2d 411 (1974). Instead, the majority embraces *hypothetical* testimony about what a "choke

hold" *could* have inflicted—but, critically and clearly, *did not*—as sufficient. See slip op. at 21.

More importantly, nothing in the prosecutor's opening statements or closing arguments suggests that the jury would have been *aware* the State was relying on a "headlock" theory of aggravated battery as a predicate for its felony murder charge. Admittedly, as the majority notes, the State had espoused this theory at a pretrial hearing. Slip op. at 8. But so what? The jury, ostensibly the ultimate fact-finder here, heard none of those arguments. All the jury heard was evidence *at trial* that Thompson briefly put Gallaway in a headlock while they were physically fighting for control of the gun and that Thompson touched the gun to the back of Gallaway's head before firing it. In describing the aggravated battery charge, the prosecutor *repeatedly* focused the jury's attention on the touching with the gun—*and never mentioned the headlock*. For instance, in opening statements, the prosecutor said:

> "The evidence will show that the defendant aided and abetted Ryan Thompson in this inherently dangerous felony of aggravated assault with a deadly weapon, and/or the evidence will show that she aided and abetted him in committing an aggravated battery by putting that gun—by allowing Thompson to put that gun to [Gallaway's] head."

Later, in closing arguments, the prosecutor said:

> "The intended crime is the agg assault, scare him with a weapon, show him this big gun, and scare him; agg assault.
>
> "Or use the gun, hold the gun up against him. That's an agg battery; the gun against him. Showing him the gun, touching him with the gun, scare the hell out of him. That was the crime, the intended, that was the crime they were carrying out.
>
> . . . .
>
> "On the agg battery, it's the same thing, did Ryan Thompson kill Diego Gallaway? Yes. Was he attempting or committing agg battery? Yes. *Agg battery is physical contact with Diego Gallaway with a deadly weapon*. We know it was a contact wound. *We know the gun had contact with him*. He also had bruising on his face and other cuts on his hands. We know the gun cut his finger. Diego Gallaway had contact with that gun when Ryan Thompson had the gun. *That's the agg battery*."

The prosecutor could not have been more clear about what *he* thought the act of aggravated battery was. I am thus puzzled by the majority's observation that it sees "nothing in the State's opening or closing statements expressly telling the jury to ignore the

headlock or, more pointedly, to abandon the headlock as a predicate felony." Slip op. at 17. This is entirely beside the point. Of course the State never told the jury to "ignore" the headlock; it had never highlighted the headlock to the jury as the source of the predicate felony in the *first* place. Why would it make an "election" on a theory it had not spelled out? In billiards terms, the majority seems to be condoning what was effectively a slop shot by the prosecution. When the prosecution calls their pocket, as the prosecutor here *repeatedly* did by pointing to the act of touching Gallaway with the gun, they ought not to prevail on a mere fluke raised—for the first time since the pretrial hearings—in their appellate brief.

The majority also claims if "Waldschmidt intended to present a multiple acts issue or a functional election argument for the first time on appeal, her approach here is incorrect." Slip op. at 17. This criticism is misplaced. It was the State, in its responsive brief, who claimed there were two batteries. No matter what the State presented as theories in pretrial motions, Waldschmidt would have no reason to appeal a theory the State did not present to the jury. Did the State present evidence or argue that Thompson's arm was a deadly weapon? No. Did the State present evidence or argue that Thompson's headlock caused injury? No. The State did not just elect a theory in its opening statements or closing arguments. It presented no claim of aggravated battery based on the headlock; while the State certainly *mentioned* the headlock, as the majority points out, it only did so in describing the sequence of events—not in establishing the headlock *as* a deadly weapon. No deadly weapon, no injury, no cause of action. Thus, I would not fault Waldschmidt for crying foul "for the first time on appeal" when it was the *State* who put the headlock theory into play for the first time on appeal.

Thus, I would reverse Waldschmidt's conviction for felony murder based on the theory of Thompson's "first" aggravated battery—the headlock. This would still leave her with an alternative conviction for felony murder based on Thompson's "first" aggravated assault, but it might nevertheless affect the resulting analysis of other trial errors insofar as they only affect one or the other predicate felony theories.

Prosecutorial Error

While I agree with much of the majority's analysis of the prosecutor's errors, I depart from them in several critical ways—including the ultimate collective harmlessness of these errors.

First, I cannot agree that the impact of the prosecutor's bolstering comment "had to be minimal." Slip op. at 24. While the majority quotes a portion of the prosecutor's praise of law enforcement and correctly notes that it "occurred just once," that "just once" covered an entire page of transcript, while the prosecutor applauded each law enforcement officer *by name*. Slip op. at 24. This was a song, not a minor note in the prosecution's closing symphony.

Nor do I agree that this bolstering "was not part of a grander theme." Slip op. at 24. Indeed, the very next error the majority identifies, slip op. at 24, highlights the prosecutor's purpose in "'compliment[ing] law enforcement on their efforts'": the angle that Waldschmidt was a liar trying to "cover up" the crime and only the stalwart efforts of the police prevented her from getting away with it. The prosecutor may have only offered extended praise to law enforcement once, but it fit seamlessly into the overall theory of his case.

Likewise, I believe the majority cuts matters too finely in construing the prosecutor's erroneous comment that "[Waldschmidt] continues to try to cover *this* up." (Emphasis added.) The majority claims that "'this' plainly relates to specific statements attributed to her in a police interview report about the aggravated assault and aggravated battery." Slip op. at 24-25. But the prosecutor was not arguing that Waldschmidt was covering up some stray statements: he characterized "her true intent in this matter" as "to continue to cover up *the agg assault and the agg battery which resulted in the murder*" and framed her trial testimony as a continuation of that effort. (Emphasis added.) Slip op. at 24. Without Thompson's predicate crimes, Waldschmidt would not be facing a trial for felony murder. Thus, I struggle to see how the prosecutor's improper insinuation did not impugn "all" of Waldschmidt's trial testimony.

I further depart from the majority's treatment of the prosecutor's references to Thompson's "pistol" comment from the Face-

book messages. The majority suggests that the prosecutor's closing arguments—which, among other things, insinuated that *Waldschmidt*, not Thompson, "had talked about . . . putting the gun down his throat"—can be excused as fair inferences based on Lieutenant Ridgway's testimony interpreting the Facebook comments. Slip op. at 27-28.

While I admit to some concern at the absence of a defense objection to the prosecutor's questions of a detective asking for his speculative interpretation of *someone else's* Facebook messages, I believe the majority goes too far to justify the prosecutor's remarks. Lieutenant Ridgway testified that his "understanding" of the immediate context of Thompson's "pistol" remark "would be the intention of causing harm to Mr. Gallaway." But Lieutenant Ridgway's "understanding" of the testimony was not based on anything other than what the jury already had before it: the plain text of the Facebook messages. Whatever else can be said about the eloquence of Thompson's writing, those messages were composed in plain English. Lieutenant Ridgway offered no specialized knowledge of Thompson's vernacular and did not testify about messages not presented to the jury. The jury needed no translation of Thompson's meaning, and Lieutenant Ridgway gave them nothing beyond what they already had—except his uninformed and speculative opinion.

Even so, nothing Lieutenant Ridgway said justified the "inferences" the majority claims the prosecutor justifiably drew from Thompson's "pistol" comment. Even if *Thompson* was obliquely stating an intent to commit aggravated battery on Gallaway, the Facebook messages do not show that *Waldschmidt* did so. In each of the four at-issue comments, the prosecutor insinuated that *Waldschmidt*—either alone or as a component of "they"—made the "pistol" comment. But this was not an inference the prosecutor could make, either with or without Lieutenant Ridgway's testimony. It was a misstatement, and the prosecutor repeated it four separate times in increasingly distorted ways. In my view, this was error.

Unlike the majority, I would hold that the collective effect of the prosecutor's errors prejudiced Waldschmidt and required re-

versal of her conviction for felony murder. The prosecutor's bolstering of law enforcement put his own thumb on the scale to give their testimony extra weight to which they were not entitled. Building on the effect of the bolstering, the prosecutor again tilted the playing field when he opined that Waldschmidt could not be trusted to tell the truth even when she was under oath during trial, since she was simply furthering a "cover up." From there, the prosecutor's repeated mischaracterization of Thompson's stray "pistol" comment in the Facebook messages—which eventually all but put the comment in *Waldschmidt's* mouth—compounded the effect of the prosecutor's multiple errors.

Collectively, these errors effectively pigeonholed the jury into concluding, as the prosecutor argued, that the only possible motive Waldschmidt and Thompson could have for going to Gallaway's apartment was to threaten Gallaway with a gun, whether simply by displaying the gun or by physically attacking him. But the evidence supporting this theory was far from overwhelming, particularly given the uncertainty about whether Waldschmidt even knew Thompson *had* a gun. In my view, there is a reasonable possibility that, but for these errors, the outcome of trial might have been different as to the felony murder charges. *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020). I would reverse Waldschmidt's conviction for felony murder.

The District Court's Handling of an Objection to Waldschmidt's Testimony

I next disagree with the majority's handling of Waldschmidt's claim that the district court denied her a right to a fair trial by refusing to permit her to testify about her intent. Defense counsel asked Waldschmidt, "Now, on February 27, 2019, did you intend to place Diego Gallaway in fear or apprehension of bodily harm?" The prosecutor objected on grounds of leading, which the district court sustained on the basis that the question called for a legal conclusion. Although the majority correctly holds that the question did *not* call for a legal conclusion and that "the evidence was relevant to [Waldschmidt's] intent and therefore admissible," it sanctions the district court's decision because "the solicited response was not essential to the defense's theory." Slip op. at 34.

Instead, because the majority believes the evidence was "cumulative and redundant" in light of what Waldschmidt testified to *after* the district court's ruling, it affirms the district court as right for the wrong reasons. Slip op. at 34-35.

I find this approach troubling. In my view, the majority has transposed its analysis of *whether* the district court erred with its consideration of whether that error was harmless, i.e., whether the error *mattered*. I agree that the district court's error was harmless for the reason the majority sets forth: Waldschmidt was ultimately able to testify about her intent before the jury. But I cannot agree that the district court's ruling was not error. The district court was not clairvoyant, and at the time it made the ruling the evidence was *not* cumulative; instead, defense counsel's question was proper and Waldschmidt should have been able to answer it. And while I agree that the error was harmless, it is yet one more error to consider in assessing cumulative error—my final disagreement with the majority.

Cumulative Error

The majority concludes that the district court should have sua sponte given the jury instructions on the use of force to defend another. Slip op. at 20. I agree. And I agree with the majority that this failure was not clearly erroneous. Slip op. at 21. Further, like me, the majority has found various other errors in Waldschmidt's trial, although we differ on their number and individual magnitude. Unlike the majority, however, I believe the cumulative effect of the prosecutor's errors warrants reversal of Waldschmidt's felony murder conviction even without considering the impact of other errors, such as the court's failure to sua sponte give use-of-force jury instructions.

But without seeking input from the parties, the majority takes it upon itself to address "an obvious question" in our cumulative error analysis: "How can an unpreserved instructional issue that is not clearly erroneous, like the one here on use-of-force instructions, become part of cumulative error when the statute's plain language declares no party may assign that matter as error?" Slip op. at 35. The majority then devotes several pages to answering its own question before ultimately concluding that "an unpreserved

instructional issue that is not clearly erroneous cannot escape K.S.A. 2022 Supp. 22-3414(3)'s confines to be considered in a cumulative error analysis" and, indeed, "is simply not 'error' for appellate review." Slip op. at 39.

However sound the majority's analysis may be, it courts disaster by proceeding heedlessly into the land of statutory construction when it has not been asked to do so. Further, "when 'an appellate court raises a new issue sua sponte, counsel for all parties should be afforded a fair opportunity to brief the new issue and present their positions to the appellate court before the issue is finally determined.'" *Lumry v. State*, 305 Kan. 545, 566, 385 P.3d 479 (2016) (quoting *State v. Puckett*, 230 Kan. 596, 601, 640 P.2d 1198 [1982]). In repudiating decades of cumulative error analysis—however well-reasoned that repudiation and however deserving of repudiation that ostensible "unreasoned judicial repetition" may be—the majority does disservice to both the parties and future litigants by deciding the matter without offering anyone the chance to throw in their two cents first. Slip op. at 36. I would be curious to know what the parties would say about ignoring something not "clearly erroneous"—but also clearly not correct—when considering whether an accused has been afforded a fair trial, which is our standard of review when considering the impact of cumulative error. Thus, I would not so blithely disregard the constitutional implications with simple statutory construction.

Because I believe the prosecutor's errors denied Waldschmidt a fair trial and because I believe the majority dangerously oversteps itself in sua sponte reshaping our understanding of cumulative error, I respectfully dissent.

No. 124,920

SHANA L. JARMER, *Appellant*, v. KANSAS DEPARTMENT OF REVENUE, *Appellee.*

(546 P.3d 743)

SYLLABUS BY THE COURT

1. MOTOR VEHICLES—*Statutory Definition of Operation of Vehicle Distinguished from Attempted Operation.* K.S.A. 8-1002(a) distinguishes operation of a vehicle from attempted operation of a vehicle. The word "operate," as used in K.S.A. 8-1002(a), is synonymous with the word "drive," which requires that the vehicle must move. A would-be driver's physical control over the vehicle does not establish "operation" of the vehicle.

2. SAME—*Suspension of Person's Driving Privileges for Operating Vehicle— Not for Attempting to Operate Vehicle.* When an individual fails a breath alcohol test, K.S.A. 8-1002(a)(2) authorizes the Kansas Department of Revenue to suspend that person's driving privileges if they were operating a vehicle, but not if they were attempting to operate a vehicle.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 37, 524 P.3d 68 (2023). Appeal from Sumner District Court; GATEN WOOD, judge. Oral argument held September 13, 2023. Opinion filed April 19, 2024. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed, and the case is remanded to the Kansas Department of Revenue.

C. Ryan Gering, of Hulnick, Stang, Gering & Leavitt, P.A., of Wichita, argued the cause and was on the brief for appellant.

Charles P. Bradley, of Legal Services Bureau, Kansas Department of Revenue, argued the cause and was on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Shana L. Jarmer challenges the suspension of her driver's license following a failed breath alcohol test. Jarmer claims that, because her car was stuck in the mud and could not move, her efforts to drive it only constituted attempted operation—not *actual* operation, as required by K.S.A. 2020 Supp. 8-1002(a)(2)(A). The district court and a panel of the Kansas Court of Appeals rejected this argument. *Jarmer v. Kansas Dept. of Revenue*, 63 Kan. App. 2d 37, 524 P.3d 68 (2023). But these rulings conflict with our precedent in *State v. Darrow*, 304 Kan. 710, 714, 374 P.3d 673 (2016), and *State v. Kendall*, 274 Kan. 1003, 1009,

58 P.3d 660 (2002), wherein we held that "operation" of a vehicle requires actual movement. Because we see no reason to depart from that precedent, we reverse the suspension of Jarmer's license.

FACTS AND PROCEDURAL BACKGROUND

Given the straightforward nature of this case's underlying facts, we repeat the panel's summary of the matter:

> "On January 24, 2021, law enforcement was called to the scene of a vehicle accident. Jarmer's husband had apparently driven their vehicle into a house before landing in a muddy ditch. Law enforcement arrived to find the couple trying to maneuver the vehicle out of the ditch. Jarmer was in the driver's seat, pressing the gas pedal with her hands on the steering wheel. The vehicle's tires were spinning, and her husband was pushing it from the rear. The vehicle itself was not moving, however, because of the muddy conditions.
>
> "Jarmer submitted to a breath alcohol test and the result was 0.156. The legal limit in Kansas is 0.08. See K.S.A. 2021 Supp. 8-1567(a). She was arrested for driving under the influence (DUI), and she was notified her driving privileges would be suspended by the Kansas Department of Revenue (KDR) under K.S.A. 2020 Supp. 8-1014.
>
> "Jarmer requested an administrative hearing to challenge the suspension of her driving privileges. The KDR upheld the suspension, finding Jarmer 'operated [the] vehicle while [her] husband pushed [the] car.' Jarmer then sought judicial review of this decision in Sumner County District Court. She argued that because the vehicle was not moving from one point to another, she was not 'operating' or 'driving' the vehicle. Instead, she claimed she was merely attempting to operate the vehicle, so the administrative suspension of her driver's license was improper. The relevant statute, K.S.A. 2020 Supp. 8-1002(a)(2)(A), requires the operation of a vehicle, rather than attempted operation, if the driver fails a breath alcohol test. In contrast, K.S.A. 2020 Supp. 8-1002(a)(1)(A) requires either operation or attempted operation if the driver refuses a breath alcohol test.
>
> "The district court denied Jarmer's petition after finding Jarmer was operating the vehicle since the engine was running, she was behind the wheel, and the tires were spinning. It emphasized that, but for the muddy conditions, the vehicle would have been in motion." *Jarmer*, 63 Kan. App. 2d at 37-38.

On appeal, the panel agreed with the district court, affirming Jarmer's license suspension. After distinguishing various Kansas cases cited by Jarmer because "none of the vehicles involved in those cases were even in gear, and none of the drivers were awake when discovered by law enforcement," the panel instead looked to *Hines v. Director of Revenue*, 916 S.W.2d 884 (Mo. Ct. App. 1996), and *Commonwealth of Pennsylvania v. Kallus*, 212 Pa. Super. 504, 507, 243 A.2d 483 (1968), for guidance. 63 Kan. App.

2d at 39-41. The panel reasoned that Jarmer "was in actual physical control of the movements of the machinery of the vehicle and . . . had she succeeded in her efforts, she could have seriously jeopardized the public safety that K.S.A. 2020 Supp. 8-1002(a)(2) was intended to protect" and—relying on this court's recent interpretation of "operate" in a Kansas Offender Registration Act case—concluded that "Jarmer operated the vehicle because she caused it to function or work when she engaged the transmission and pressed the gas pedal." 63 Kan. App. 2d at 41-42 (citing *State v. Moler*, 316 Kan. 565, 519 P.3d 794 [2022]).

Jarmer petitioned this court for review, which we granted.

ANALYSIS

Jarmer claims the panel erred in its interpretation of K.S.A. 2020 Supp. 8-1002(a)(2)(A) and asks that we reverse the suspension of her driver's license. Her argument requires us to interpret Kansas statutes and our own precedent. For such questions of law, we review the matter de novo. E.g., *Fisher v. Kansas Dept. of Revenue*, 317 Kan. 119, 121, 526 P.3d 665 (2023); *Scott v. Hughes*, 294 Kan. 403, 412, 275 P.3d 890 (2012).

> "'All Kansas courts use the same starting point when interpreting statutes: The Legislature's intent controls. To divine that intent, courts examine the language of the provision and apply plain and unambiguous language as written. If the Legislature's intent is not clear from the language, a court may look to legislative history, background considerations, and canons of construction to help determine legislative intent.'" *Fisher*, 317 Kan. at 121 (quoting *Jarvis v. Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 [2020]).

But the panel's analysis also implicates the doctrine of stare decisis. "Although we are not inextricably bound by our own precedent, '[w]e do not overrule precedent lightly and must give full consideration to the doctrine of stare decisis.'" *State v. Uk*, 311 Kan. 393, 399, 461 P.3d 32 (2020) (quoting *State v. Sherman*, 305 Kan. 88, 107, 378 P.3d 1060 [2016]). Indeed, "'this court endeavors to adhere to the principle unless clearly convinced a rule of law established in its earlier cases "'was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'" [Citations omitted.]'" *State v. Clark*, 313 Kan. 556, 565, 486 P.3d 591

(2021) (quoting *State v. Hambright*, 310 Kan. 408, 416, 447 P.3d 972 [2019]).

We begin with the plain language of K.S.A. 8-1002(a)(1)-(2), which provides, in relevant part:

> "(a) Whenever a test is requested pursuant to this act and results in either a test failure or test refusal, a law enforcement officer's certification shall be prepared. . . . The certification required by this section shall be signed by one or more officers to certify:
>
> (1) With regard to a *test refusal*, that: (A) There existed reasonable grounds to believe *the person was operating or attempting to operate a vehicle* while under the influence of alcohol or drugs, or both . . . .
>
> (2) With regard to a *test failure*, that: (A) There existed reasonable grounds to believe *the person was operating a vehicle* while under the influence of alcohol or drugs, or both . . . ." (Emphases added.)

After a driver either refuses or fails a test, the officer "shall serve upon the person notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and amendments thereto." K.S.A. 8-1002(c).

Here, Jarmer failed a breath alcohol test. Accordingly, K.S.A. 2020 Supp. 8-1002(a)(2)(A) authorized the KDR to suspend her driver's license if the certifying officer had reasonable grounds to believe she was *operating* a vehicle—not merely *attempting* to operate a vehicle, as would be the case had she outright refused a test under K.S.A. 2020 Supp. 8-1002(a)(1)(A).

We have previously considered the distinction between "operating" and "attempting to operate" a vehicle in the context of prosecutions for driving under the influence. In *State v. Fish*, 228 Kan. 204, 205, 612 P.2d 180 (1980), the defendant was found asleep in the driver's seat of a car that was parked—albeit with the motor running—at a local "community trash receptacle." The State conceded that if "the words 'operating' and 'driving' are synonymous and that some movement of the vehicle while under the defendant's control is needed to prove driving," the evidence was insufficient to sustain a conviction under K.S.A. 8-1567(a). *Fish*, 228 Kan. at 205. After examining the statutes and both prior Kansas cases and the law in other jurisdictions, the court held that the Legislature "intended the words 'operate' and 'drive' to be considered as synonymous terms" for purposes of the Uniform Act Regulating Traffic on Highways. *Fish*, 228 Kan. at 207. In other words, a

conviction for driving under the influence based on "operating" a vehicle requires "some evidence, either direct or circumstantial, that the defendant drove the automobile while intoxicated." 228 Kan. at 210.

We echoed that distinction in *State v. Kendall*, 274 Kan. 1003, 1009, 58 P.3d 660 (2002), where we rejected the State's invitation to overrule *Fish*. The State argued that "the definition of 'operate' is much broader than the definition of 'drive' and encompasses other activities involving a vehicle, including sitting inside it with the engine running or fastening a seat belt." *Kendall*, 274 Kan. at 1009. Instead, we noted that the Legislature had amended K.S.A. 8-1567 since *Fish*—but only to add "attempted" operation of a vehicle to the definition of driving under the influence. *Kendall*, 274 Kan. at 1009-10. Thus, as amended:

> "[T]he current version of the DUI statute at issue here encompasses both those accused of actually driving while under the influence and those who merely tried but failed, with no election required. Movement of the vehicle is not required in order to convict a defendant of DUI under the theory that defendant attempted to operate the vehicle." *Kendall*, 274 Kan. at 1009-10.

We reaffirmed this construction in *Darrow*. There, the parties framed the core inquiry as, "'Is fumbling with [the] gear shift while [the] vehicle is running, operating or attempting to operate a motor vehicle?'" *Darrow*, 304 Kan. at 712. Yet again, we held that:

> "[T]o 'operate' means to 'drive'; 'driving' requires movement of the vehicle; therefore, 'operating' requires movement of the vehicle, and an 'attempt to operate' means to attempt to move the vehicle. Taking actual physical control of the vehicle is insufficient to attempt to operate that vehicle without an attempt to make it move." *Darrow*, 304 Kan. at 714.

We further held that circumstantial evidence, when viewed in a light most favorable to the State, could support the conclusion that Darrow was attempting to make the car move by "fumbling" with the gear shift. *Darrow*, 304 Kan. at 718-20. Specifically, we observed that:

> "[T]he vehicle's engine was running, i.e., *the vehicle was ready to move upon the engagement of the transmission*; Darrow had previously moved into the driver's seat, i.e., she had intentionally placed herself in a position to manipulate the controls necessary to move the vehicle and may have been the one to start the engine; and, upon being awakened, Darrow reached down and fumbled with the gear shift lever, i.e., she made an overt act toward engaging the transmission,

which was arguably the last act needed to legally 'drive' the vehicle." (Emphases added.) *Darrow*, 304 Kan. at 718-19.

We most recently reaffirmed this point of law in *State v. Zeiner*, 316 Kan. 346, 352-53, 515 P.3d 736 (2022), albeit briefly. Critically, we observed that any actions taken by a defendant *after* he parked his car—such as turning on the lights and radio—could not be considered "operating" the car, since these actions had no bearing on making the car move. *Zeiner*, 316 Kan. at 353.

Here, the panel correctly observed that, in all four of the aforementioned cases, "none of the vehicles involved . . . were even in gear, and none of the drivers were awake when discovered by law enforcement." *Jarmer*, 63 Kan. App. 2d at 39. It then cited a pair of out-of-state cases which, it claimed, fit the situation better: *Hines*, 916 S.W.2d at 886, and *Kallus*, 212 Pa. Super. at 507. Then it embraced an out-of-context "common meaning" definition of "operate" set forth by this court in *Moler*, 316 Kan. at 572: "'bring about, effect'; 'to cause to function, work'; 'to put or keep in operation'; or 'to perform an operation on.'" *Jarmer*, 63 Kan. App. 2d at 40-42. The panel then "agree[d] with the district court's finding that Jarmer operated the vehicle because she caused it to function or work when she engaged the transmission and pressed the gas pedal." 63 Kan. App. 2d at 42.

Admittedly, both *Hines* and *Kallus* more closely resemble the situation here. But both cases conflict with our precedent requiring *movement* as a component of vehicular operation. *Hines* relied on *Chinnery v. Director of Revenue*, 885 S.W.2d 50 (Mo. Ct. App. 1994), which held that "driving or operating a vehicle occurs 'even when the vehicle is motionless as long as the person is keeping the vehicle in restraint or is in a position to regulate its movements.'" *Hines*, 916 S.W.2d at 886 (quoting *Chinnery*, 885 S.W.2d at 52). Indeed, in the portion of *Hines* quoted by the panel, the Missouri Court of Appeals even wrote that "'in *attempting* to move the vehicle from the ditch, Mrs. Hines was the person in a position to regulate its movement'"—which may constitute "driving" or "operating" a vehicle in Missouri, but not under *Darrow*, *Kendall*, and *Fish*. *Jarmer*, 63 Kan. App. 2d at 40-41 (quoting *Hines*, 916 S.W.2d at 886). The same is true of the language the panel cited from *Kallus*:

"'We agree with the reasoning of the court below that it is not necessary that the vehicle itself must be in motion but that it is sufficient if the operator is in actual physical control of the movements of either the machinery of the motor vehicle or of the management of the movement of the vehicle itself.'" *Jarmer*, 63 Kan. App. 2d at 41 (quoting *Kallus*, 212 Pa. Super. at 507-08).

Nor are we persuaded by the panel's out-of-context citation to *Moler*. There, the court's attention was not on the distinction between driving and *trying* to drive a vehicle; instead, the court considered, for purposes of the Kansas Offender Registration Act, whether "operation" means regular or repeated use of a vehicle or one-time use. *Moler*, 316 Kan. at 571 ("Moler does not dispute that driving a vehicle constitutes its operation and concedes the term 'operated' can encompass either 'regular, ongoing use' or a 'one-time use' in a different context."). *Moler* has no applicability here, and the panel's attempt to import its broader definition is unavailing.

We are thus far from clearly convinced to depart from our precedent. E.g., *Clark*, 313 Kan. at 565 (Though "'stare decisis is not an inexorable command,'" we follow this stabilizing legal principle unless we are clearly convinced the rule of law already established by caselaw was originally wrong or changing conditions show the rule can no longer stand, and more good than harm would result by departing from precedent.). We reiterate that to "operate" a vehicle means to "drive" it—which further requires *motion* on the part of the vehicle. While we recognize the intuitive appeal of the panel's efforts to expand this definition in light of Jarmer's more overt efforts towards driving her vehicle than in *Darrow*, *Kendall*, and *Fish*, we continue to emphasize that vehicular movement—not physical control—distinguishes "operation" of a vehicle from *attempts* to operate a vehicle.

We now turn that lens upon the facts here. While those facts are slim, they reveal that Jarmer unquestionably *attempted* to operate the vehicle. The facts further show that Jarmer's vehicle *would* have moved, but for the mud—which would, just as unquestionably, have constituted "driving" and thus "operation" under our precedent. But Jarmer's car did not move, despite her best efforts; the rotation of its wheels apparently proved totally ineffectual. In other words, it was *factually* impossible for Jarmer to "move"—and, under our precedent, "operate"—the vehicle. "'Factual impossibility denotes conduct where

the objective is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing it about.'" *State v. Logan*, 232 Kan. 646, 647, 656 P.2d 777 (1983) (quoting *United States v. Conway*, 507 F.2d 1047, 1050 [5th Cir. 1975]) (noting the "classic example" of factual impossibility is "the thief who picks an empty pocket").

The dissent suggests that we should leave the question of what constitutes "operation" up to the jury as a matter of "common sense." Slip op. at 12. It further poses several hypotheticals that, it suggests, show that the question before us cannot be answered by legal analysis. And, indeed, if the question before us was merely, "Did Jarmer operate the vehicle or didn't she?" we might agree that the issue ought to be reviewed solely as an issue of fact. But the Legislature has not made our task so simple. Instead of a simple binary choice, the Legislature has *also* included the term "attempted" operation of a vehicle for our consideration. While "operation" may be plain language on its own, the "attempted" modifier requires additional consideration that cannot be answered by a broad appeal to "common sense"—as the dissent's own summary of the case suggests: "Jarmer was engaging the drive train of the vehicle, spinning the tires, and *attempting* to get the car out of the ditch." (Emphasis added.) Slip op. at 12. And until the Legislature removes this distinction, legal analysis is needed to guide a fact-finder's common sense.

The Legislature continues to draw a distinction between operation and *attempted* operation of a vehicle. This distinction would not matter had Jarmer refused a breath test, since K.S.A. 8-1002(a)(1)(A) permits the suspension of a license for either act. But "almost"—while it may count in horseshoes and hand grenades—does not warrant suspension of a driver's license under K.S.A. 8-1002(a)(2)(A). When Jarmer's car remained stuck in the mud, her attempt to drive it failed.

CONCLUSION

Under *Darrow*, Jarmer's unsuccessful effort to drive her car out of a muddy ditch fails to satisfy K.S.A. 8-1002(a)(2)(A)'s requirement that she was "operating a vehicle while under the influence of alcohol or drugs, or both." Because the evidence presented establishes only that she attempted to operate her vehicle, the KDR could not suspend her driver's license under K.S.A. 8-1002(a)(2)(A) following her failed

breath test. We thus reverse the suspension of Jarmer's driver's license and remand the matter to the KDR for further proceedings.

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

* * *

STEGALL, J., dissenting: I take no issue with the majority's characterization of either the underlying facts or precedent in this case. I disagree, however, with the way today's majority extends and applies that caselaw. Rather than continuing to pinpoint—as a matter of law—when, precisely, a person is operating or driving a vehicle, I would resolve today's case and future similar cases by recognizing that after a broad legal definition is pronounced, the case-by-case application of that definition is a question of fact to be answered by the fact-finder.

The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. *State v. LaPointe*, 309 Kan. 299, 314, 434 P.3d 850 (2019). "Reliance on the plain and unambiguous language of a statute is 'the best and only safe rule for determining the intent of the creators of a written law. . . . The plain language selected by the legislature, when it does not conflict with constitutional mandates, *trumps both judicial decisions and the policies advocated by parties*.'" *State v. Spencer Gifts, LLC*, 304 Kan. 755, 761, 374 P.3d 680 (2016); see also *Taylor v. Kobach*, 300 Kan. 731, 735, 334 P.3d 306 (2014) ("We have often expressed that the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language they have used.").

K.S.A. 8-1002(a)(2) requires an officer to have reasonable grounds to believe that the person was *operating* a vehicle while under the influence. Our cases have interpreted "operate" to mean "drive"—and "driving" to require "actual movement." See *State v. Darrow*, 304 Kan. 710, 714, 374 P.3d 673 (2016). But the law cannot definitionally answer every imaginable scenario with a clear yes or no. When an appellate court forgets this, we will inevitably go beyond giving "definitional" guidance and become fact-finders ourselves. Today's decision defines "actual movement" in a way

that no reasonable person would recognize as definitionally related to the act of operating a motor vehicle. I fail to understand how causing the actual movement of the mechanical mechanisms of the drivetrain of the car, done with an intent to steer the vehicle out of a ditch, does not satisfy the Legislature's intent behind the word "operate" as used in K.S.A. 8-1002(a)(2). Today's outcome falls far outside the plain meaning of the statute and produces what I believe to be an absurd result. *State v. Eckert*, 317 Kan. 21, 31, 522 P.3d 796 (2023) ("A court 'must construe a statute to avoid unreasonable or absurd results.'").

Jarmer was engaging the drive train of the vehicle, spinning the tires, and attempting to get the car out of the ditch. Was she driving? This is a common-sense factual question easily understood by a fact-finder and we should not step into every case and take the question away from a jury or other fact-finder by increasingly narrow and obscure layers of legal definition. Is a drag racer doing a stationary burnout not "driving" their car? On the other hand, what about a mechanic operating a vehicle's drive train while the vehicle is on a lift? Or a motorcycle being revved up to show off a new motor, but the transmission is disconnected? See *Cullison v. Kansas Dept. of Revenue*, 52 Kan. App. 2d 745, 372 P.3d 442 (2016). These circumstances—and the infinite variety of facts that may arise—are not amenable to definitive legal conclusions. They present, instead, fact questions which ought to be submitted to the real-world judgment of fact-finders.

If we were to review the question presented as one of fact, we would be able to determine whether substantial competent evidence supported the factual findings when considered in light of all the evidence. *Hanson v. Kansas Corp. Comm'n*, 313 Kan. 752, 763, 490 P.3d 1216 (2021). Here, I would hold there was substantial competent evidence to support the hearing officer's conclusion to establish reasonable grounds to believe Jarmer was operating the vehicle.

STANDRIDGE, J., joins the foregoing dissenting opinion.

No. 125,685

STATE OF KANSAS, *Appellee*, v. JOSE GARCIA-MARTINEZ, *Appellant*.

(546 P.3d 750)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Statutory Phrase "Taking or Confining" Does Not Present Alternative Means of Committing Kidnapping and Aggravated Kidnapping.* The phrase "taking or confining" in K.S.A. 21-5408(a) does not present alternative means of committing kidnapping and aggravated kidnapping; rather, it presents options within a means merely describing the factual circumstances that may prove the material element—the actus reus—of holding the victim to accomplish one of the four alternative means of committing kidnapping set forth in the statute. To the extent language in *State v. Haberlein*, 296 Kan. 195, 290 P.3d 640 (2012), may suggest "taking" and "confining" are distinct actus rei intended by the Legislature to create alternative means, we disapprove it.

Appeal from Sedgwick District Court; KEVIN J. O'CONNOR, judge. Oral argument held December 14, 2023. Opinion filed April 26, 2024. Affirmed.

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

Lance J. Gillett, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: This is Jose Garcia-Martinez' direct appeal following his convictions for first-degree felony murder, aggravated kidnapping, aggravated battery, and battery. Garcia-Martinez raises two issues on appeal. He argues the State presented alternative means of committing aggravated kidnapping and claims the evidence was insufficient to support a finding of guilt on each of the alternative means on which the jury was instructed. He also argues the district court erred in refusing to give a unanimity instruction because the jury heard evidence of multiple acts that could have supported his aggravated kidnapping conviction.

Garcia-Martinez is not entitled to relief on either issue. First, the phrase "taking or confining" does not present alter-

native means for committing kidnapping or aggravated kidnapping; rather it presents options within a means merely describing the factual circumstances that may prove the material element of holding the victim to accomplish one of the four alternative means of committing kidnapping set forth in the statute. Second, a unanimity instruction was not required here because the evidence established a single continuous incident of aggravated kidnapping, not multiple acts.

FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2020, Candi Morris arrived at the Wichita Police Department to report a potential murder that had occurred the day before at her residence located on South San Pablo Lane, where she lived with Matthew Small and Ariana Cook. Morris said that the day before, July 1st, she left home to run errands. As she was leaving, Morris saw Garcia-Martinez get out of a tan car and go inside her house. Garcia-Martinez was with a Black man that Morris did not know. The man was later identified as Roy Hayden. After about an hour, Morris arrived back home but was at first unable to get inside because the door was locked.

After someone finally opened the door, Morris went inside and tripped over Hayden, who was on the ground near the front door. Morris said Hayden's eye was swollen, his face "looked like hamburger meat," and he was not moving. According to Morris, several individuals were inside the residence, including Cook, Lawrence Bailey, Carlos Delgado, and Garcia-Martinez. Bailey stood by the front door with a gun and told the men to "shut [Hayden] up." Morris saw Garcia-Martinez stomp on Hayden's chest and head and said he and Delgado punched Hayden before dragging him into the bathroom. Morris was forced into a bedroom but heard sounds coming from the bathroom that sounded like the men were hitting Hayden with a hammer and Hayden was begging for his life. After about 20 minutes, Morris saw Garcia-Martinez and Delgado carry Hayden out of the house and drive away in the tan car. Hayden was wrapped in a blue curtain or sheet and had white trash bags over his head. Morris said she was then forced to clean the bathroom, where she used soap and bleach to clean up blood and pieces of flesh. Eventually, Morris managed to escape from

the house, and she reported the incident to the police. Morris was unsure of Hayden's condition and was very concerned that he might be dead or dying.

Based on Morris' statements, law enforcement obtained a search warrant for the South San Pablo residence and conducted a search. It appeared the residence had been recently cleaned. Law enforcement seized five trash bags from the kitchen which contained several items of potential evidentiary value, including empty bottles of bleach, hydrogen peroxide, cleaning supplies, bloody rags, clothing, and shoes. They discovered bloodstains on the floor in the living room and the bathroom, as well as in the hallway leading to the bathroom. Law enforcement also located multiple hammers, several loaded firearms, and a wallet containing identification and credit cards belonging to Hayden.

The next day, law enforcement located and interviewed Delgado. Delgado admitted that he was at the South San Pablo residence on July 1, 2020, with Small, Cook, and Bailey. Delgado said that Garcia-Martinez arrived with Hayden, who the group did not know. Delgado claimed the group was high on methamphetamine, causing them to become increasingly paranoid that Hayden was a law enforcement officer. He said they grew suspicious when Hayden turned down Cook's sexual advances and refused to let her pull his pants down to see if he was wearing a wire. Hayden also declined to give his wallet to Small. When Hayden stood up from the couch and tried to leave, Bailey pointed a gun at him and told him to sit back down. Hayden stood up again, and Bailey hit him on the head with a crowbar. Hayden started bleeding and fell back onto the couch, where Bailey hit him again with the crowbar.

According to Delgado, Bailey told him and Garcia-Martinez to "'take care of this situation.'" Delgado said that Garcia-Martinez kicked Hayden in the head several times. Once Hayden lost consciousness, Bailey told the men to clean up the blood and get rid of the body. When Hayden started to move, Bailey shot his gun in Hayden's direction. Delgado did not know whether Hayden was hit by the shot because there was already so much blood. Delgado said that he and Garcia-Martinez were left to "finish what happened" and described the situation as "[k]ill or get killed." Complying with Bailey's orders, they carried Hayden to the bathroom

and put him in the bathtub. At some point, Hayden regained consciousness and tried to get up, so they held Hayden down and tied his hands and feet with wire and a dog leash. Garcia-Martinez then hit Hayden in the head with a hammer. As Hayden continued to struggle, Delgado held him down while Garcia-Martinez put three trash bags over Hayden's head. When Hayden finally stopped moving, they wrapped him in a blue blanket and put Hayden in the trunk of his car. After driving to various locations to seek help, Delgado claimed Garcia-Martinez eventually dropped him off at a Sonic restaurant. Delgado denied knowing where Garcia-Martinez took Hayden.

Days later, on July 6, 2020, law enforcement responded to a report of an abandoned gold Volvo in a Wichita parking lot. Video footage from a nearby business showed the Volvo had been left in the parking lot on the morning of July 1st. Upon arrival, law enforcement noted a strong odor of decomposition coming from the car. Inside the trunk, they discovered Hayden's decomposed body, along with a blue blanket, a duffle bag, and a pair of shoes. Hayden's hands and legs were bound together. Four garbage bags and a pillowcase were secured around his head. Hayden had hemorrhage marks and bruises around his neck, and there was evidence of blunt force trauma to his head and face. His legs were bruised, and he had a gunshot wound on his right leg. The coroner determined that Hayden's cause of death was asphyxia, with contributing conditions that included blunt force head trauma, the gunshot wound to his leg, and methamphetamine use. The coroner found Hayden's blunt force head trauma significant but could not say whether it was fatal due to the body's decomposition. The coroner also could not say whether Hayden was dead before he was put in the trunk of the car.

The State charged Garcia-Martinez with first-degree felony murder, aggravated kidnapping, and two counts of aggravated battery. To support the felony-murder charge, the State alleged Garcia-Martinez killed Hayden while committing the inherently dangerous felony of aggravated kidnapping.

The case proceeded to a jury trial, where the State presented the evidence outlined above. Garcia-Martinez testified in his defense, alleging compulsion. Garcia-Martinez admitted to bringing

Hayden to the South San Pablo residence. When asked what happened there, he said, "I was in fear for my life, and in fear for the safety of my family throughout the course of this incident." On cross-examination, Garcia-Martinez admitted that although Hayden had no weapons and never threatened or hurt anyone, he was beaten with a crowbar, punched, and kicked. Garcia-Martinez admitted that he carried Hayden from the living room to the bathroom and hit him on the head with a hammer, but he denied kicking Hayden in the head or putting bags over his head. Garcia-Martinez claimed he did not know Delgado and denied driving Hayden's car. But he did admit that he helped another man carry Hayden to the car and put Hayden in the trunk. Garcia-Martinez maintained that he acted out of fear for his life.

The jury found Garcia-Martinez guilty of felony murder, aggravated kidnapping, one count of aggravated battery, and one count of the lesser included offense of battery. The district court imposed a controlling hard 25 life sentence consecutive to a 13-month term of imprisonment.

Garcia-Martinez directly appealed his convictions to our court. Jurisdiction is proper. K.S.A. 22-3601(b)(3)-(4) (life sentence and off-grid crimes appeal directly to the Supreme Court).

ANALYSIS

Garcia-Martinez raises two issues on appeal. First, he argues the State presented alternative means of committing aggravated kidnapping—"taking or confining"—but failed to produce sufficient evidence to support each alternative means. Second, he contends the district court erred in refusing to issue a unanimity instruction because the jury heard evidence of multiple acts that could have supported his aggravated kidnapping conviction. We address each argument in turn.

1. *Alternative means*

Garcia-Martinez argues the State presented alternative means of committing aggravated kidnapping, but the evidence was insufficient to support a finding of guilt on each of the alternative means on which the jury was instructed. Because the aggravated kidnapping charge also served as the inherently dangerous felony

supporting Garcia-Martinez' felony-murder charge, he seeks reversal of both convictions. See K.S.A. 21-5402(a)(2), (c)(1)(B).

Framing the issue primarily as a claim of instructional error, the State suggests Garcia-Martinez invited any error by requesting a jury instruction containing both alleged alternative means. But Garcia-Martinez does not challenge the district court's jury instructions. Rather, he argues the evidence is insufficient to support the alternative means of aggravated kidnapping as charged by the State and set forth in the jury instructions. See *State v. Smith*, 317 Kan. 130, 132, 526 P.3d 1047 (2023) (alternative-means issue "implicates whether there is sufficient evidence supporting the conviction").

Standard of review and relevant legal framework

An alternative-means crime is one that can be committed in more than one way. *State v. Rucker*, 309 Kan. 1090, 1094, 441 P.3d 1053 (2019). The Legislature creates an alternative-means crime by enacting criminal statutes which list distinct alternatives for a material element of the crime. See *State v. Brown*, 295 Kan. 181, 199-200, 284 P.3d 977 (2012). A district court presents the jury with an alternative-means crime when it issues jury instructions that incorporate more than one of the distinct statutory alternatives for a material element of the crime. *State v. Sasser*, 305 Kan. 1231, 1239, 391 P.3d 698 (2017). So if a statute contains alternative means and both means are submitted to the jury, "'sufficient evidence must support each of the alternative means charged to ensure that the verdict is unanimous as to guilt.'" *State v. Cottrell*, 310 Kan. 150, 157, 445 P.3d 1132 (2019).

In contrast, when criminal statutes "merely describe a material element or a factual circumstance that would prove the crime," the Legislature has created "options within a means." *Brown*, 295 Kan. at 194, 196-97. Options within a means describe secondary matters that "do not state additional and distinct ways of committing the crime" and thus do not implicate statutory jury-unanimity protections. 295 Kan. at 196-97.

Analysis of an alternative-means claim must first consider whether the district court presented an alternative-means crime to the jury. This determination involves consideration of the relevant statute's language

and structure to decide whether the Legislature meant to list distinct alternatives for an element of the crime. "Issues of statutory interpretation and construction, including issues of whether a statute creates alternative means, raise questions of law" over which this court has unlimited review. *Brown*, 295 Kan. at 193-94. If alternative means were not presented, the error inquiry ends. 295 Kan. at 200.

Statutory analysis

To determine whether a statute presents alternative means of committing a crime, "a court must analyze whether the legislature listed two or more alternative distinct, material elements of a crime—that is, separate or distinct *mens rea*, *actus reus*, and, in some statutes, causation elements." *Brown*, 295 Kan. at 199-200. The *Brown* court recognized that the structure of a statute may be a clue to legislative intent, such as by separating intended alternatives into distinct subsections. 295 Kan. at 200. But a statute's structure is not dispositive. See *State v. Foster*, 298 Kan. 348, 354-55, 312 P.3d 364 (2013) ("Regardless of the statutory structure, the legislature may list multiple descriptors within a single means of committing a crime that *Brown* labeled 'options within a means.'"). As we noted in *Brown*, a court considering alternative means should determine the purpose of the disjunctive "or":

"Is it to list alternative distinct, material elements of a crime—that is, the necessary *mens rea*, *actus reus*, and, in some statutes, a causation element? Or is it to merely describe a material element or a factual circumstance that would prove the crime? The listing of alternative distinct, material elements, when incorporated into an elements instruction, creates an alternative means issue . . . . But merely describing a material element or a factual circumstance that would prove the crime does not create alternative means, even if the description is included in a jury instruction." 295 Kan. at 194.

Turning to the statute at issue, K.S.A. 21-5408 defines kidnapping as follows:

"(a) Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person:

(1) For ransom, or as a shield or hostage;

(2) to facilitate flight or the commission of any crime;

(3) to inflict bodily injury or to terrorize the victim or another; or

(4) to interfere with the performance of any governmental or political function."

Aggravated kidnapping requires an additional element that bodily harm be inflicted on the victim. K.S.A. 21-5408(b).

The State charged Garcia-Martinez with aggravated kidnapping under K.S.A. 2020 Supp. 21-5408(a)(3). At trial, the district court issued a jury instruction that accurately set forth the statutory elements the State was required to prove:

"1. The defendant took or confined Roy L. Hayden by force or threat.
"2. The defendant did so with the intent to hold Roy L. Hayden to inflict bodily injury on or to terrorize Roy L. Hayden, or another.
"3. Bodily harm was inflicted upon Roy L. Hayden.
"4. This act occurred on or about the 1st day of July, 2020, in Sedgwick County, Kansas."

Relying on *State v. Haberlein*, 296 Kan. 195, 207-08, 290 P.3d 640 (2012), Garcia-Martinez argues the phrase "took or confined" in the first element presents alternative means of committing the crime of aggravated kidnapping. In *Haberlein*, this court analyzed various provisions of K.S.A. 21-3420, the previous version of the kidnapping statute, to determine whether they contained alternative means. The current statute, enacted on July 1, 2011, made an organizational change by combining kidnapping and aggravated kidnapping into a single statute, but is otherwise nearly identical to the version of the statute considered in *Haberlein*. Compare K.S.A. 21-3420 with K.S.A. 21-5408; *Haberlein*, 296 Kan. at 202.

The defendant in *Haberlein* alleged that two provisions of the kidnapping statute presented alternative means: (1) force, threat, and deception and (2) facilitation of flight and facilitation of the commission of any crime. 296 Kan. at 207. Although the defendant's alternative means arguments did not include the "taking or confining" provision of the statute, this court's analysis did:

"Haberlein does not challenge the phrase 'taking or confining' in this appeal. Those two terms set out two alternative means of carrying out the crime of kidnapping and thus aggravated kidnapping. 'Taking' and 'confining' each denotes a distinct *actus reus* and they are, therefore, alternative means. But the phrase 'force, threat, or deception' addresses secondary matter, merely describing ways in which the *actus reus* can be accomplished. . . . Force, threat, and deception are not alternative means of committing a kidnapping or aggravated kidnapping, and we need not reach the question of whether sufficient proof of each was presented to Haberlein's jury." 296 Kan. at 208.

This court also held that the different subsections of the kidnapping statute create alternative means:

"When we examine the language of the entire statute, it appears the legislature did signal through structure an intent to define alternative means of proving the *mens rea* for kidnapping and aggravated kidnapping. It did not stop with 'intent to hold' but listed several motivations for that intent to hold. Each of the subsections that follows states an additional and distinct way of committing the crime, and proof of one of these additional and distinct material elements must be shown in order to support a conviction. Thus, the different subsections create alternative means of committing a kidnapping.

"But the language on which Haberlein relies is *within* subsection (b). Facilitation of flight and facilitation of the commission of a crime are mere options within a means. The members of the legislature grouped certain potentially distinct and potentially overlapping items, which must mean they did not want jurors to have to split hairs over whether a kidnapping or aggravated kidnapping was committed to facilitate flight or the commission of any crime. Again, we need not reach the question of whether the evidence was sufficient on each." 296 Kan. at 209.

Since *Haberlein* was decided, Kansas appellate decisions have generally relied on it for the proposition that "taking or confining" present alternative means of committing kidnapping or aggravated kidnapping. See, e.g., *State v. Couch*, 317 Kan. 566, 583, 533 P.3d 630 (2023) ("By including only 'confining' and not 'taking,' the instruction eliminated one of the alternative means of committing kidnapping or aggravated kidnapping."); *State v. Ross*, No. 118,199, 2019 WL 847672, at *22 (Kan. App. 2019) (unpublished opinion) ("'[T]aking or confining' denotes two alternative means of committing kidnapping."); *State v. Lloyd*, No. 113,486, 2016 WL 6568746, at *2 (Kan. App. 2016) (unpublished opinion) ("Our Supreme Court has defined taking and confining as alternative means of committing the crime of kidnapping because each is a distinct *actus reus*."); *State v. McCoy*, No. 110,827, 2015 WL 3632037, at *16 (Kan. App. 2015) (unpublished opinion) ("'Taking' and 'confining' are alternative means of kidnapping.").

But as the State points out, there is at least some suggestion that *Haberlein*'s alternative means commentary on "taking or confining" is mere dicta and therefore not binding. See *Law v. Law Co. Building Assocs.*, 295 Kan. 551, Syl. ¶ 1, 289 P.3d 1066 (2012) ("Dicta in a court opinion is not binding, even on the court itself, because the court should consider the issue in light of the

briefs and arguments of counsel when the question is squarely presented for decision."); *Lloyd*, 2016 WL 6568746, at *7-9 (Malone, C.J., concurring) ("Although the issue of whether the phrase 'taking or confining' constituted alternative means of committing kidnapping was not before the court in *Haberlein*, the court nevertheless expressed in dicta its opinion that these separate terms in the kidnapping statute constitute alternative means of committing the crime."); *Ross*, 2019 WL 847672, at *22 (recognizing Judge Malone's concurring opinion in *Lloyd*); *State v. Gustin*, No. 123,274, 2022 WL 816268, at *6 (Kan. App. 2022) (unpublished opinion) (discussing dicta issue identified in *Lloyd* and *Ross*).

Citing then-Chief Judge Malone's concurring opinion in *Lloyd*, the State urges us to disregard *Haberlein*'s dicta and instead find that "taking or confining" do not present alternative means of committing kidnapping and aggravated kidnapping. In *Lloyd*, Judge Malone explained his reasoning as follows:

> "Under the statute, the legislature has expressed four distinct alternative means of committing kidnapping based on the defendant's 'intent to hold' the victim: (1) for ransom or as a shield or hostage; (2) to facilitate flight or the commission of any crime; (3) to inflict bodily injury or to terrorize the victim or another; or (4) to interfere with the performance of any governmental or political function. The options within each subsection of the statute do not state additional and distinct ways of committing the crime, but rather constitute options within a means of committing kidnapping. *Haberlein*, 296 Kan. at 207. Likewise, the phrase 'accomplished by force, threat or deception' does not constitute alternative means of committing kidnapping. 296 Kan. at 208. As stated by the court in *Haberlein*, each term 'merely sets out factual circumstances that may prove the distinct, material element of taking or confining.' 296 Kan. at 208.
>
> "Applying the same analysis to the phrase 'taking or confining of any person,' these separate terms do not constitute alternative means of committing kidnapping. Each term merely sets out factual circumstances that may prove the distinct, material element of taking or confining, i.e., holding the victim to accomplish one of the alternative means of committing kidnapping set forth in the statute. The Kansas Legislature does not intend for the terms 'taking' and 'confining' to be separate alternative means of committing kidnapping, as evidenced by the statutory structure our lawmakers chose to employ. Our Supreme Court's dicta to the contrary in *Haberlein* is wrong. See 296 Kan. at 208." *Lloyd*, 2016 WL 6568746, at *8-9 (Malone, C.J., concurring).

As discussed, this court said in *Haberlein* that "taking or confining" provide alternative means for committing kidnapping and

aggravated kidnapping because "'[t]aking' and 'confining' each denotes a distinct *actus reus* . . . ." 296 Kan. at 208. But the acts of "taking" and "confining" are not so distinct when we look closely at the meaning of these terms, the structure of the kidnapping statute, and the difficulty in separately applying "taking" and "confining" to the present facts.

To determine whether the Legislature intended for "taking or confining" to set out alternative means for committing the crime of kidnapping or aggravated kidnapping under K.S.A. 21-5408(a), we look to the statutory language enacted, giving common words their ordinary meanings. See *State v. Keys*, 315 Kan. 690, 698, 510 P.3d 706 (2022). The Kansas Criminal Code does not define the terms "take" and "confine," so we may consult their dictionary definitions. See *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017) ("Dictionary definitions are good sources for the 'ordinary, contemporary, common' meanings of words."). Relevant here, Black's Law Dictionary defines "take" as "[t]o obtain possession or control, whether legally or illegally" and "[t]o seize with authority; to confiscate or apprehend." Black's Law Dictionary 1754 (11th ed. 2019). And Black's Law Dictionary defines "confinement" as "[t]he act of imprisoning or restraining someone; the quality, state, or condition of being imprisoned or restrained." Black's Law Dictionary 373 (11th ed. 2019). Read in isolation outside the context of the kidnapping statute, each term could be construed to have a distinct actus reus—taking involves the act of obtaining possession or seizing, while confining involves the act of imprisoning or restraining.

But in the context of our kidnapping statute, the terms are not so dissimilar. On its face, the crime of kidnapping is commonly understood to include both taking and confining. Indeed, kidnapping is defined as "[t]he crime of seizing and taking away a person by force or fraud, [usually] to hold the person prisoner in order to demand something from his or her family, employer, or government." Black's Law Dictionary 1040 (11th ed. 2019). Generally, kidnappers take victims to confine them. And a victim who is confined has also necessarily been taken. The essence of the crime of kidnapping is the unlawful restriction of a person's freedom. Based

on this interpretation, "taking or confining" would be considered options within a means because each term merely describes the factual circumstances that may prove the material element of "holding the victim to accomplish one of the alternative means of committing kidnapping set forth in the statute." *Lloyd*, 2016 WL 6568746, at *9 (Malone, C.J., concurring); see *Smith*, 317 Kan. at 134 (Words present "only options within a means if . . . their role is merely to describe a material element or to describe factual circumstances in which a material element may be proven.").

And reading the phrase "taking or confining" as presenting options within a means aligns with this court's interpretation of the kidnapping statute as a whole. As we explained in *Haberlein*, the Legislature "signal[ed] through structure an intent to define alternative means of proving the *mens rea* for kidnapping and aggravated kidnapping" by separating distinct ways of committing the crime into multiple subsections. 296 Kan. at 209; see K.S.A. 21-5408(a)(1)-(4). The Legislature did not convey a similar intent to define "taking or confining" as alternative means of proving the actus reus for kidnapping and aggravated kidnapping by placing them in different subsections of the statute. See K.S.A. 21-5408(a).

Finally, the facts in Garcia-Martinez' case illustrate why "taking or confining" do not set forth separate and distinct actus rei. The evidence at trial established that although Hayden voluntarily entered the residence, he did not remain there willingly. When Hayden tried to leave, he was hit over the head with a crowbar. To prevent Hayden from leaving, Garcia-Martinez participated in beating Hayden and transported him from the living room to the bathroom. In the bathroom, Garcia-Martinez physically restrained Hayden by beating him, tying restraints on his arms and legs, and suffocating him. Finally, Garcia-Martinez transported Hayden to the trunk of his car and later abandoned the car in a parking lot. This evidence established that Garcia-Martinez seized or obtained control over Hayden. Thus, a rational fact-finder could conclude that a taking occurred. And these same facts also could be viewed as evidence of confinement because they establish the act of imprisoning or restraining. Garcia-Martinez' conduct was the same regardless of whether he was taking or confining Hayden. Either

way, the evidence was sufficient to support Garcia-Martinez' aggravated kidnapping conviction.

In sum, we hold the phrase "taking or confining" in K.S.A. 21-5408(a) does not present alternative means of committing kidnapping and aggravated kidnapping; rather, it presents options within a means merely describing the factual circumstances that may prove the material element—the actus reus—of holding the victim to accomplish one of the four alternative means—each with distinct mens rea—of committing kidnapping. See K.S.A. 21-5408(a) (requiring State to prove the defendant intended to hold the victim "[1] [f]or ransom, or as a shield or hostage; [2] to facilitate flight or the commission of any crime; [3] to inflict bodily injury or to terrorize the victim or another; or [4] to interfere with the performance of any governmental or political function"). In so holding, we expressly disapprove of any language in *Haberlein* that may suggest "taking" and "confining" are distinct actus rei intended by the Legislature to create alternative means.

2. *Propriety of multiple acts jury instruction*

Next, Garcia-Martinez contends the district court erred by declining his request to instruct the jury on multiple acts. When a case involves multiple acts, the jury must unanimously agree on which specific act constitutes the crime. K.S.A. 22-3421; *State v. King*, 297 Kan. 955, 977, 305 P.3d 641 (2013). To ensure a unanimous verdict in such cases, the district court must give the jury a unanimity instruction or the State must elect the particular act it relies on for the conviction. 297 Kan. at 978.

Garcia-Martinez claims the State presented evidence of four separate and distinct acts that the jury could have found amounted to aggravated kidnapping, so the jurors might have disagreed about which specific act constituted that crime. The State counters that a multiple acts instruction was unwarranted here because the evidence established that a single continuous incident, which could not be separated, formed the basis for the aggravated kidnapping charge.

This court generally reviews jury instruction errors by asking whether the party preserved the issue, whether the jury instruction is legally and factually appropriate, and whether any error requires reversal. See *State v. Holley*, 313 Kan. 249, 253, 485 P.3d 614 (2021). But

we use a more particularized test when, as here, a defendant challenges a district court's failure to give a unanimity instruction in a case potentially involving multiple acts. See *State v. Harris*, 310 Kan. 1026, 1039, 453 P.3d 1172 (2019). First, we determine whether the case involves multiple acts. Second, if the case does involve multiple acts, we consider whether an error occurred because the district court failed to give a unanimity instruction and the State failed to elect which act it was relying on. Third, if there was an error, we decide whether it requires reversal. 310 Kan. at 1039.

Under the first step, we decide "'whether the defendant's actions could have given rise to multiple counts of the charged crime or whether the alleged conduct was unitary.'" *Harris*, 310 Kan. at 1039. In Kansas, "'acts are multiple acts if they are factually separate and distinct.'" *State v. Moyer*, 306 Kan. 342, 360, 410 P.3d 71 (2017). Incidents are factually separate when either independent criminal acts have occurred at different times or when a fresh impulse motivated a later criminal act. 306 Kan. at 360. Four factors guide our inquiry to determine whether conduct was unitary: (1) whether the acts occurred at or near the same time; (2) whether they occurred at the same location; (3) whether an intervening event occurred between the acts; and (4) whether a fresh impulse motivated any portion of the acts. *Harris*, 310 Kan. at 1039. When the conduct is unitary, no unanimity instruction is necessary and the analysis ends. *State v. Voyles*, 284 Kan. 239, 244, 160 P.3d 794 (2007).

At the instructions conference, the district court denied Garcia-Martinez' request for a unanimity instruction. Citing *State v. Staggs*, 27 Kan. App. 2d 865, 9 P.3d 601 (2000), the district court found the evidence established "a continuous incident that can't be factually separated from one another" and said that a unanimity instruction would be confusing for the jury.

Garcia-Martinez argues the district court's reliance on *Staggs* was misplaced because it is factually distinguishable. He claims a unanimity instruction was warranted because the jury heard evidence of four separate acts that it could have relied on to find an aggravated kidnapping occurred:

- Garcia-Martinez aided and abetted Bailey in confining Hayden when Bailey struck Hayden with a crowbar for attempting to leave the residence;

- Garcia-Martinez confined Hayden by kicking and beating him after he attempted to leave;
- Garcia-Martinez confined Hayden in the bathroom by beating him with a hammer and placing bags over his head; and
- Garcia-Martinez took and/or confined Hayden by placing him in the trunk of the car.

Contrary to Garcia-Martinez' assertion, the district court did not reference *Staggs* as a factually analogous case. Rather, the court mentioned *Staggs* because it was cited by the PIK Committee in the Notes on Use section of the applicable PIK instruction as authority for the multiple acts test. After explaining this test, the court discussed the evidence and determined Garcia-Martinez' actions did not involve multiple acts and instead constituted a continuous incident.

Applying the four-factor multiple acts test to the facts here fully supports the district court's finding of unitary conduct. Starting with the first factor, the timing of the events, the evidence establishes all the acts forming the basis for the aggravated kidnapping charge occurred around the same time. Contrary to Garcia-Martinez' assertion that the events occurred over the course of an entire night, the record reflects they took place during a short window of time on the morning of July 1, 2020. Morris testified that she saw Garcia-Martinez and Hayden arrive at the South San Pablo residence that morning as she left to run errands. When she arrived home about an hour later, Hayden was already on the ground. Morris saw Garcia-Martinez beat and kick Hayden and then transport him to the bathroom, where the violence continued. Morris estimated the men were in the bathroom for about 20 minutes before she saw Garcia-Martinez carry Hayden outside and drive away. Video surveillance from the parking lot where Hayden's tan Volvo was found showed the car driving in the area on July 1st at 7:39 a.m. and in the parking lot at 8:30 a.m. Although it is unclear exactly when the attack on Hayden began on the morning of July 1st, the entire incident was over before 8:00 a.m.

As for the second factor, proximity of location, the acts forming the basis of Garcia-Martinez' aggravated kidnapping charge occurred inside or outside of the South San Pablo residence. The attack on Hayden began in the living room and continued after he was moved to the bathroom. Hayden's car was driven up to the residence, and Garcia-Martinez put him inside the trunk. Although Garcia-Martinez later

drove Hayden to a different location, a taking and/or a confining occurred while the car was still parked outside the residence when Garcia-Martinez moved Hayden to the trunk of the car and confined him there.

As to the third and fourth factors, the record does not show any intervening event separating one act from another or a fresh impulse motivating any of Garcia-Martinez' conduct. Instead, the evidence demonstrated a causal relationship between all his actions, which stemmed from the group's suspicion that Hayden was a law enforcement officer. Each action was made in furtherance of the group's plan to silence and dispose of Hayden.

Garcia-Martinez' actions which formed the basis for the aggravated kidnapping charge involved a single course of conduct, not separated by distinct time periods, locations, or causal relationships. See *Harris*, 310 Kan. at 1040 (finding no multiple acts for kidnapping charge when defendant confined victim to her apartment for two hours and repeatedly forced her from room to room while demanding money); *State v. Kesselring*, 279 Kan. 671, 683, 112 P.3d 175 (2005) (finding no multiple acts where kidnapping was a continuous incident that could not be factually separated even though it happened over several hours, the victim was moved from one location to another, and the victim was momentarily free and tried to escape); cf. *King*, 297 Kan. at 982 (finding multiple acts when defendant intentionally rammed into parked vehicles, left, then returned 5 to 10 minutes later and possibly damaged some vehicles again).

Because Garcia-Martinez did not commit multiple acts, the unanimity instruction he claims should have been given was not necessary. As a result, the district court did not err in failing to give a unanimity instruction.

Affirmed.

No. 126,062

In the Matter of the Wrongful Conviction of WILLIAM P. SPANGLER.

(547 P.3d 516)

SYLLABUS BY THE COURT

1 CIVIL PROCEDURE—*Civil Action for Persons Wrongfully Convicted and Imprisoned—Compensation Prohibited When Conduct Causes Conviction.* K.S.A. 2023 Supp. 60-5004(c)(1)(D), part of a statutory provision allowing persons wrongfully convicted and imprisoned to bring a civil action, prohibits compensation when the claimant's own conduct causes or brings about the conviction.

2. SAME—*Civil Action for Compensation for Wrongful Conviction—Conviction for Lesser Included Offense in Second Trial Precludes Recovery under Statute.* A defendant convicted of a lesser included offense after a second trial based on the same criminal conduct underlying the alleged wrongful conviction has engaged in illegal conduct that precludes the claimant's recovery under K.S.A. 2023 Supp. 60-5004.

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Submitted without oral argument. Opinion filed April 26, 2024. Affirmed.

Larry G. Michel, of Kennedy Berkley, of Salina, was on the brief for appellant.

Kurtis K. Wiard, assistant solicitor general, and *Kris W. Kobach*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: William P. Spangler brought a civil proceeding for wrongful conviction and imprisonment after he was convicted of a lesser charge on a retrial for his role in the shooting death of Faustino Martinez. He was sentenced to time served, having already served about four and a half years longer in prison than the term of his new sentence for involuntary manslaughter. Spangler seeks compensation for those four plus years of imprisonment.

The district court held that Spangler's own conduct caused or brought about his conviction and thus any recovery was precluded by K.S.A. 2023 Supp. 60-5004(c)(1), which requires that "[t]he claimant shall establish the following by a preponderance of evidence: . . . (D) the claimant did not commit or suborn perjury,

fabricate evidence, or by the claimant's own conduct cause or bring about the conviction." We affirm.

FACTS AND PROCEDURAL BACKGROUND

A jury convicted Spangler of second-degree murder for his actions in causing Martinez' death, and the district court sentenced him to a term of 186 months and remanded him to prison. The Court of Appeals affirmed his conviction and sentence on direct appeal. See *State v. Spangler*, No. 112,270, 2015 WL 3632523, at *1-2 (Kan. App. 2015) (unpublished opinion).

Later, Spangler filed a motion for relief under K.S.A. 2023 Supp. 60-1507, arguing he received constitutionally deficient assistance of counsel. The district court agreed, finding that Spangler's trial counsel failed to investigate Spangler's mental health status and its effect on his state of mind when he shot Martinez. The district court concluded that failure prejudiced Spangler, and it ordered a new trial. The Court of Appeals affirmed. See *Spangler v. State*, No. 120,137, 2020 WL 1222954 (Kan. App. 2020) (unpublished opinion).

The State retried Spangler in 2022. The jury on retrial convicted Spangler again, but this time of involuntary manslaughter rather than second-degree murder. At sentencing, he was released based on time served. Spangler had served about four-and-a-half years beyond the sentence imposed for his involuntary manslaughter conviction.

Spangler later filed a civil action under K.S.A. 2023 Supp. 60-5004, seeking compensation for the time he spent in prison beyond his involuntary manslaughter sentence. The State moved to dismiss Spangler's case, arguing Spangler could not meet the conditions for recovery under the statute. It cited the condition in K.S.A. 2023 Supp. 60-5004(c)(1)(D), requiring a claimant to prove the claimant's conduct did not cause or bring about the conviction. The State argued Spangler undisputedly shot Martinez, meaning he engaged in the underlying conduct that led to his second-degree murder conviction. To support its statements about the basic facts of the incident, the State attached to its motion to dismiss various documents filed in Spangler's criminal case and his K.S.A. 60-1507 action. In response, Spangler wrote: "For purposes of the

Motion to Dismiss, William [Spangler] does not dispute the Statement of Facts contained in the State's brief."

The district court conducted a hearing on the motion during which the court asked the parties whether the State's use of the various court filings to support its argument converted the State's motion to dismiss to one for summary judgment. The State filed a supplemental brief to address the question and argued that "[w]hen matters outside the pleadings are proper objects for judicial notice, a motion to dismiss need not be treated as a summary judgment motion. *Rodina v. Castaneda*, 60 Kan. App. 2d 384, 386 (2021), *review denied* (Dec. 6, 2021)." It added that the *Rodina* decision had recognized that "[a] trial court may take judicial notice of specific facts 'capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy.' Id. (quoting K.S.A. 60-409(b))."

The district court issued a memorandum decision, citing the standard set out in K.S.A. 60-212(b)(6) for a motion to dismiss for failure to state a claim. In the Statement of Facts section of the decision the court wrote:

> "Because this matter is before the Court on a motion to dismiss, the Court considers the facts as stated in Spangler's petition along with some additional facts which, for purposes of the instant motion, are acknowledged as true by both parties.
>
> "Spangler had a verbal confrontation with Faustino Martinez outside Spangler's apartment building. Spangler went to his apartment and got his loaded AR-15 rifle. Spangler came out of his apartment and encountered Martinez. Spangler tried to scare Martinez with his rifle. When that didn't work, Spangler 'fired a warning shot.' When that didn't work, Spangler fired off another shot, stating that he was 'aiming for [Martinez'] leg.' Spangler missed Martinez's leg and hit Martinez in the abdomen. Spangler fled the scene. Martinez died from the shooting."

The court then discussed the meaning of K.S.A. 2023 Supp. 60-5004(c)(1)(D)'s requirement that Spangler prove by a preponderance of the evidence that he did not cause or bring about the conviction. It concluded that "Spangler's behavior in retrieving a loaded semi-automatic rifle from inside his apartment, leaving the apartment, encountering Martinez, brandishing the weapon, firing a 'warning shot,' and then purposely shooting Martinez, clearly constitutes Spangler's own conduct that caused or brought about the conviction for second-degree murder." This meant that "[o]n

the agreed facts here, Spangler cannot prove by a preponderance of the evidence that he did not, by his own conduct, cause or bring about the conviction."

Spangler timely appealed directly to this court as permitted by K.S.A. 2023 Supp. 60-5004(l): "The decision of the district court may be appealed directly to the supreme court pursuant to the code of civil procedure."

ANALYSIS

A claimant seeking damages under K.S.A. 2023 Supp. 60-5004(c)(1)(D) must establish by a preponderance of evidence that the claimant's own conduct did not "cause or bring about the conviction." Spangler argues the district court improperly divorced the phrase "cause or bring about his conviction" from its statutory context of subparagraph (D) ("[T]he claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction."). Spangler reads the phrase "cause or bring about the conviction" as pertaining to conduct similar in character to that immediately preceding it in the statute, namely committing or suborning perjury or fabricating evidence.

We disagree. We read the phrase to reflect the Legislature's intent to impose a common-sense limitation: Only someone innocent of the criminal conduct supporting the underlying conviction may pursue a claim for damages under K.S.A. 2023 Supp. 60-5004(c)(1)(D). Based on this interpretation, a claimant like Spangler who stands convicted of a lesser included offense based on the same charge as a previous conviction is not eligible to seek relief under K.S.A. 2023 Supp. 60-5004.

Standard of Review

We consider this issue after the district court granted the State's motion to dismiss for failure to state a claim. We note that the procedural question asked by the district court about whether the State's motion should be treated as a summary judgment motion has not been presented to us on appeal. Both parties recite the motion to dismiss standard as the standard we should apply, and they do not disagree with the district court's reliance on undisputed

facts gleaned through judicial notice. We thus proceed using that procedural posture to frame our standard of review without addressing the procedural question the district court posed to the parties.

The appellate standard of review builds on the district court's standard for considering a motion to dismiss, so we begin there. A district court deciding a motion to dismiss considers the well-pleaded factual allegations, resolving factual disputes in the plaintiff's favor, to determine "whether the petition states any valid claim for relief." *Williams v. C-U-Out Bail Bonds,* 310 Kan. 775, 784, 450 P.3d 330 (2019). Appellate courts reviewing the district court's decision also assume well-pleaded facts to be true and draw reasonable inferences in the plaintiff's favor. 310 Kan. at 784. Whether the district court erred in granting a motion to dismiss for failure to state a claim is a question of law subject to unlimited review. *In re M.M.*, 312 Kan. 872, 873, 482 P.3d 583 (2021).

Another consideration frames our review. The district court's ruling rested on its interpretation of K.S.A. 2023 Supp. 60-5004. This also presents an issue of statutory interpretation subject to unlimited review. See *In re M.M.*, 312 Kan. at 873-84.

Discussion

We apply a well-established rubric to our de novo statutory interpretation of K.S.A. 2023 Supp. 60-5004. The touchstone of statutory interpretation is that the Legislature's intent controls. A court "'must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.' [Citation omitted.]" *In re Wrongful Conviction of Sims*, 318 Kan. 153, 158, 542 P.3d 1 (2024).

Under K.S.A. 2023 Supp. 60-5004(a), the claimant bears the burden of proving by a preponderance of evidence certain conditions. Our focus here is on one of the conditions found in subsection (c)(1)(D), but we set out the full text of subsection (c), including the other conditions, for context:

> "(c)(1) The claimant shall establish the following by a preponderance of evidence:
> (A) The claimant was convicted of a felony crime and subsequently imprisoned;

(B) the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty;
(C) the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial; and
(D) the claimant did not commit or suborn perjury, fabricate evidence, *or by the claimant's own conduct cause or bring about the conviction.* Neither a confession nor admission later found to be false or a guilty plea shall constitute committing or suborning perjury, fabricating evidence or causing or bringing about the conviction under this subsection." (Emphasis added.) K.S.A. 2023 Supp. 60-5004.

The State moved to dismiss based on its interpretation of the words "the claimant did not . . . by the claimant's own conduct cause or bring about the conviction" in subsection (c)(1)(D). It interpreted this phrase to mean any conduct by the claimant that caused or brought about the conviction, including the behavior leading to the filing of charges and ultimate conviction. The district court agreed with the State's proffered interpretation.

We begin our independent interpretation of the statute by considering the commonly understood meaning of words in the statute or, where a word has a technical legal meaning, the legal definition. If the Legislature includes no definitions, we look to dictionaries for the ordinary, contemporary, and common meaning of words, although we might also look to other legal authorities when examining the meaning of words with a technical, legal meaning. See *State v. Arnett*, 307 Kan. 648, 654, 413 P.3d 787 (2018) (considering caselaw about causation when interpreting phrase "caused by the defendant's crime" in restitution statute); *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 851, 397 P.3d 1205 (2017) (stating general proposition that courts assume Legislature intends the word to be used in its "ordinary, contemporary, common meaning" when not otherwise defined by statute).

We first consider the meaning of "claimant," the only word in the phrase "the claimant did not . . . by the claimant's own conduct cause or bring about the conviction" that the Legislature chose to define. In doing so, it defined "claimant" as "a person convicted

and subsequently imprisoned for one or more crimes that such person did not commit." K.S.A. 2023 Supp. 60-5004(a). The phrase "such person did not commit" is arguably similar in meaning to K.S.A. 2023 Supp. 60-5004(c)(1)(D)'s phrase about causing or bringing about the conviction. As we examine the other words in that phrase, the similarity stands out. See *State v. Newman-Caddell*, 317 Kan. 251, 259, 527 P.3d 911 (2023) (courts may read statutory provisions together—that is, *in pari materia*—when determining whether the statutory language is plain and unambiguous).

The next word we examine is "conduct." The word "conduct" can be used as a verb or a noun. Here, the statute uses the term as a noun, and in that context "conduct" means "[p]ersonal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds." Black's Law Dictionary 369 (11th ed. 2019). We have found this definition useful when interpreting the word "conduct" in another context. *State v. Dinkel*, 311 Kan. 553, 559-60, 465 P.3d 166 (2020). Lay dictionaries provide similar definitions: "[t]he way one acts: behavior," Webster's New World College Dictionary 310 (5th ed. 2014), or "[t]he way a person acts, especially from the standpoint of morality and ethics," American Heritage Dictionary 384 (5th ed. 2011).

Considered in the context of the shooting of Martinez, Spangler's actions and behaviors—that is, his conduct—of retrieving the gun, confronting Martinez with a gun, and firing shots at Martinez are behaviors that contributed to charges being filed against him and that led to Spangler's first and second convictions. This brings us to the phrase's causation requirement. See K.S.A. 2023 Supp. 60-5004(c)(1)(D) ("[T]he claimant did . . . by the claimant's own conduct *cause or bring about* the conviction."[Emphasis added.]).

While "cause" is commonly understood, it has a technical meaning in the law that involves the principles of proximate cause. We consider that technical meaning here because, when our Legislature adopts legislation against an established legal landscape, judicial discussions of the established legal principle inform a court's analysis of the word's meaning. *Arnett*, 307 Kan. at 654

(examining whether defendant's criminal actions cause damages subject to restitution award). *Arnett* discusses the legal concepts of causation.

The *Arnett* court observed, "In both the criminal and civil context, we routinely require a showing of causation to demonstrate that one thing was the proximate cause of another." 307 Kan. at 654. Proximate cause consists of two components: cause-in-fact and legal causation. "Together, these elements limit a defendant's liability to '"those consequences that are *probable* according to ordinary and usual experience."'" 307 Kan. at 654 (quoting *Puckett v. Mt. Carmel Regional Med. Center*, 290 Kan. 406, 420, 228 P.3d 1048 [2010]).

We sometimes refer to cause-in-fact as but-for causation. In other words, but for a person's conduct, would the result have occurred? Legal cause, on the other hand, limits liability to when the result complained of is a foreseeable risk created by the defendant's conduct. When other events follow the precipitating occurrence, there may be an intervening cause that absolves a person of liability. The key to whether an intervening cause cuts the causal chain is again foreseeability. See *Arnett*, 307 Kan. at 654-55.

Here, it was foreseeable that shooting someone could lead to a conviction for some degree of murder or manslaughter.

This brings us to the final word in the statutory phrase, "conviction." Black's Law Dictionary 422 (11th ed. 2019) defines "conviction" as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime." Other dictionaries similarly define a conviction by referring to the judicial process. "Conviction," Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/conviction ("the act or process of finding a person guilty of a crime especially in a court of law"); see also "Conviction," American Heritage Dictionary Online, https://ahdictionary.com/word/search.html?q=conviction ("[T]he judgment of a jury or judge that a person is guilty of a crime as charged" or "the state of being found or proved guilty.").

Putting these definitions together provides a plain meaning of the phrase consistent with the district court's ruling. That plain meaning is reinforced when other subsections of the statute are

considered. See *Newman-Caddell*, 317 Kan. at 259 (courts may read unambiguous statutes *in pari materia*).

The Legislature restricted recovery under K.S.A. 2023 Supp. 60-5004 to a claimant who did not commit the crime and whose conduct did not cause the conviction. Spangler who stands convicted of a lesser included offense on retrial after a conviction on a greater offense arising from the same conduct cannot as a matter of law establish his conduct did not create a foreseeable risk of being convicted of either the charged offense or a lesser included offense. Kansas law provides that "[u]pon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both." K.S.A. 21-5109(b). Consideration of the two counts of conviction from each of Spangler's trials shows the same conduct supported each verdict.

At his first trial, Spangler was convicted of murder in the second degree. Second-degree murder "is the killing of a human being committed . . . intentionally or . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 21-5403(a). At his second trial, Spangler was acquitted on the second-degree murder count and convicted of involuntary manslaughter, which "is the killing of a human being committed . . . [r]ecklessly." K.S.A. 21-5405(a)(1). K.S.A. 21-5202(j) describes when a person acts recklessly or is reckless as "when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." Both offenses as charged here involve recklessly killing a human being. In such cases, what distinguishes the offenses is the degree of recklessness. *State v. Gentry*, 310 Kan. 715, 725, 449 P.3d 429 (2019). In other words, the underlying behavior or conduct is the same for second-degree murder and involuntary manslaughter. Only the mental state differs.

Spangler's personal behavior the night he killed Martinez was the cause-in-fact of the charges being filed against him. It is entirely foreseeable that shooting someone could lead to a conviction for some degree of murder or manslaughter. Spangler thus is

not entitled to compensation under K.S.A. 2023 Supp. 60-5004 as a matter of law.

This reading of K.S.A. 2023 Supp 60-5004(c)(1)(D) is consistent with our recent holding in *In re Sims*, 318 Kan. 153. There, while a conviction was on direct appeal, the parties agreed the evidence was insufficient to uphold the conviction and that the defendant should be resentenced for a lesser crime. Like Spangler, on resentencing the defendant was sentenced to time served, having already spent more time in prison for the greater offense than the sentence on the lesser offense. The defendant sought compensation under K.S.A. 2023 Supp. 60-5004, and the State filed for summary judgment. The State contended that the defendant could not prove he met the condition in K.S.A. 2023 Supp. 60-5004(c)(1)(B). Under (c)(1)(B) a claimant must show (a) a court reversed or vacated a felony conviction; and (b) either the dismissal of charges or a finding of not guilty following a new trial. The State argued the charges had neither been dismissed nor had the defendant been found not guilty because he committed the lesser offense. The district court granted summary judgment, and we affirmed. We held that (c)(1)(B) clearly and unambiguously requires "both terminating the criminal accusation presented in court and relieving the defendant of that accusation's criminal liability." 318 Kan. at 160.

Likewise, K.S.A. 2023 Supp. 60-5004(c)(1)(D) reflects that the claimant must show factual innocence from the charges giving rise to criminal liability before receiving compensation. Other provisions in the statute convey this same intent. For example, the procedure set out in K.S.A. 2023 Supp. 60-5004 ultimately results in the claimant receiving a certificate of innocence. That certificate includes a "finding that the claimant was innocent of all crimes for which the claimant was mistakenly convicted." K.S.A. 2023 Supp. 60-5004(g). After that certificate is entered, the court orders "the associated convictions and arrest records expunged and purged from all applicable state and federal systems." K.S.A. 2023 Supp. 60-5004(h). Once the certificate of innocence and order of expungement are entered, the claimant is to be treated as if never arrested or convicted of the crime. K.S.A. 2023 Supp. 60-5004(h)(4). The reference to "all crimes" conveys a requirement

of factual innocence on the originally charged crimes and their lesser included offenses. See K.S.A. 21-5109(b) ("Upon prosecution for a crime, the defendant may be convicted of either the crime charged or a lesser included crime, but not both.").

Spangler argues for a different reading of the statute. He encourages us to read K.S.A. 2023 Supp. 60-5004(c)(1)(D) to refer to conduct engaged in during the criminal proceedings, beginning with the investigation and up through the conviction and to read K.S.A. 2023 Supp. 60-5004(c)(1)(C) to concern the criminal conduct underlying the conviction. Again, under (c)(1)(C) the claimant must prove that "the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial." We disagree.

Under (c)(1)(C), while the first portion focuses on conduct, the final portion focuses on the procedures leading to relief from the first crime of conviction. In contrast, (c)(1)(D) looks solely at conduct, that is the defendant's behavior. Some of the behavior is connected to the criminal proceedings, such as suborning perjury or fabricating evidence. But K.S.A. 2023 Supp. 60-5004(c)(1)(D)'s words "the claimant did . . . by the claimant's own conduct cause or bring about the conviction" convey behavior that is broader. It provides no qualification on when that conduct occurs. We do not agree with Spangler's position that we should limit that phrase to only conduct like perjury or fabricating evidence when its plain words do not support such a limitation.

The State correctly points out the doctrines Spangler argues support such a construction are doctrines we reach only when we cannot discern the Legislature's intent from the plain language of the statute. See *Woessner v. Labor Max Staffing*, 312 Kan. 36, 56-57, 471 P.3d 1 (2020) (Luckert, C.J., concurring) (defining as rules of statutory construction the maxims *noscitur a sociis* [a word is known by the company it keeps] and *ejusdem generis* [where enumeration of specific things is followed by a more general word or phrase, such general word or phrase is held to refer to things of the same kind]). But the words "by the claimant's own conduct cause or bring about the conviction" are clear. We see no

reason to confine the phrase "the claimant's own conduct" to the same type of behavior conveyed in the two statutory phrases that precede it. Again, nothing in the language suggests such a limitation. Each condition—no perjury, no fabricating evidence, no conduct leading to the conviction—finds roots in equitable principles that the claimant's actions cannot cause the first conviction. See *Goben v. Barry*, 234 Kan. 721, 727, 676 P.2d 90 (1984) ("Equity will not permit a litigant to rely on his own wrongful conduct to recover."). Likewise, no other provision in K.S.A. 2023 Supp. 60-5004 supports Spangler's reading. Instead, our construction of (c)(1)(D) is consistent with our construction of (c)(1)(C). The various provisions thus can be read harmoniously.

Spangler shot and killed Martinez. This shooting caused or brought about his convictions, first for second-degree murder and, on retrial, for the lesser included offense of involuntary manslaughter. Spangler is not entitled to recover under K.S.A. 2023 Supp. 60-5004(c)(1)(D).

Affirmed.

Bar Docket No. 12759

In the Matter of TERRA DAWN MOREHEAD, *Respondent.*

(546 P.3d 1227)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Voluntary Surrender of License—Disbarment.*

Attorney voluntarily surrendered her license to practice law before facing a formal disciplinary hearing for violations of the Kansas Rules of Professional Conduct. The Supreme Court accepted the voluntary surrender and ordered disbarment.

The court admitted Terra Dawn Morehead to the practice of law in Kansas on September 30, 1986.

Morehead has requested to voluntarily surrender her Kansas law license under Supreme Court Rule 230(a) (2024 Kan. S. Ct. R. at 287). Morehead faces a hearing before a hearing panel appointed by the Kansas Board for Discipline of Attorneys. See Supreme Court Rule 204(c) (2024 Kan. S. Ct. R. at 252) (hearing panel appointment); Supreme Court Rule 222 (2024 Kan. S. Ct. R. at 274) (hearing process).

The court accepts Morehead's request to surrender her Kansas law license, disbars Morehead under Rule 230(b), and revokes Morehead's license and privilege to practice law in Kansas.

The court further orders the Office of Judicial Administration to strike the name of Terra Dawn Morehead from the roll of attorneys licensed to practice law in Kansas effective the date of this order.

The court notes that under Rule 230(b)(1)(C), the pending board proceeding and any other pending disciplinary proceeding against Morehead terminate effective the date of this order. The Disciplinary Administrator may direct an investigator to complete any pending investigation to preserve evidence.

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein be assessed to Morehead under Supreme Court Rule 229 (2024 Kan. S. Ct. R. at 286), and that Morehead comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

Dated this 26th day of April 2024.

Bar Docket No. 20911

In the Matter of DAVID LEE MCCOLLUM, *Respondent.*

(546 P.3d 1227)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Voluntary Surrender of License—Disbarment.*

This court admitted David Lee McCollum to the practice of law in Kansas on September 27, 2002. The court administratively suspended McCollum's Kansas law license on October 10, 2023, due to his noncompliance with registration and continuing legal education requirements. The court notes that as of the date of this order, McCollum had not paid any of the annual registration and continuing legal education fees related to the administrative suspension of his Kansas law license.

McCollum was also licensed to practice law in Missouri. On March 15, 2023, the Missouri Supreme Court disbarred McCollum after accepting his application to voluntarily surrender his Missouri law license.

McCollum now faces a related Kansas disciplinary complaint and requests to voluntarily surrender his Kansas law license under Supreme Court Rule 230(a) (2024 Kan. S. Ct. R. at 287).

This court accepts McCollum's request to voluntarily surrender his Kansas law license, disbars McCollum under Rule 230(b), and revokes McCollum's license and privilege to practice law in Kansas.

This court further orders the Office of Judicial Administration to strike the name of David Lee McCollum from the roll of attorneys licensed to practice law in Kansas effective the date of this order.

The court notes that under Rule 230(b)(1)(C), any Kansas disciplinary case pending against McCollum terminates effective the date of this order. The Disciplinary Administrator may direct an investigator to complete any pending investigation to preserve evidence.

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein be assessed to McCollum under Supreme Court Rule 229 (2024 Kan. S. Ct. R. at 286), and that McCollum comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

Dated this 26th day of April 2024.

No. 123,495

DAVE JENNINGS and EMILY MCLEOD, *Appellants*, v. ELIZABETH SHAUCK, *Appellee*.

(547 P.3d 524)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Legal Error to Expand Scope of Hearing Beyond Adequate Notice to All Parties Before Hearing.* It is legal error, and thus an abuse of discretion, for a district court to expand the scope of a hearing beyond the extent specified by adequate, clear, and unambiguous notice given to all parties before the hearing begins.

2. SAME—*Reversible Error if Prejudice Results from Improper Expansion of Scope of Hearing.* When the improper expansion of the scope of a hearing results in prejudice to an affected party, the error is reversible.

Review of the judgment of the Court of Appeals in an unpublished opinion filed January 20, 2023. Appeal from Wyandotte District Court; WILLIAM P. MAHONEY, judge. Submitted without oral argument November 3, 2023. Opinion filed May 3, 2024. Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is reversed, and the case is remanded.

Joseph W. Booth, of Lenexa, was on the briefs for appellants.

Julie J. Gibson and *Matthew J. Brooker*, of Matteuzzi & Brooker, P.C., of Overland Park, were on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: At the heart of this case lies a dispute over the ownership of Oscar, a purebred Cane Corso show dog. On one side of the dispute stands Oscar's breeder, Elizabeth "Betsy" Shauck; on the other, Dave Jennings and Emily McLeod, who have raised Oscar since puppyhood.

But the procedural history of the case precludes us from reaching the heart of the matter, and we conclude that both the Kansas Court of Appeals panel and the district court acted prematurely in doing so. Consequently, we affirm in part and reverse in part the decision of the panel, reverse the decision of the district court, and remand to the district court for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Because the issues before us primarily concern the procedural aspects of the case, we refer to the panel's recitation of the underlying facts. Briefly, Oscar is an award-winning show dog. Betsy claims she owns Oscar. Dave and Emily claim they do. Dave and Emily petitioned to quiet title to Oscar against Betsy. Betsy counterclaimed for breach of contract, replevin, conversion, for a restraining order and preliminary injunction, and to quiet title. Her preliminary injunction counterclaim asked the district court to enjoin Dave and Emily "from harboring Oscar, ordering his immediate return to [Betsy], and restraining [Dave and Emily] from neutering him."

On March 11, 2020, Betsy filed and served a notice of hearing, which stated: "Please take notice that Defendant will call up for hearing her Request for Preliminary Injunction on the 9th day of April, 2020, at 9:30 a.m. . . . ." But on April 9, 2020, no hearing was held. The COVID-19 pandemic delayed the hearing for months.

Betsy filed a brief on October 14, 2020, which she submitted "for the Court's consideration in relation to the evidentiary hearing on [Betsy's] preliminary injunction seeking the return of her purebred Cane Corso named Oscar. The hearing is to be held via Zoom on Wednesday, October 14, 2020 beginning at 9:30 a.m." The brief addresses the issues *Betsy* had the burden to prove in order to prevail in her counterclaim for preliminary injunction. The brief discussed the underlying merits of the lawsuit within the context of the likelihood that Betsy would eventually succeed on the merits, which Betsy was required to prove, among other things, to get a preliminary injunction.

On October 23, 2020, Dave and Emily filed a brief, entitled "Plaintiffs' Trial Brief on Injunction Issues." It states in part: "This matter is before the Court at this time on Defendant's Counterclaim for a preliminary injunction (Count V of Counterclaim.) Part of the testimony was heard on October 14, 2020, with additional witnesses to be heard on October 28, 2020." And on October 27, 2020, Betsy filed a response to Dave and Emily's brief. In all respects, the parties confined the arguments in their briefs to the preliminary injunction burden of proof.

The district court held a three-day hearing on October 14, October 28, and November 19, 2020, via zoom. When the hearing began, neither the district court nor the parties mentioned the hearing's purpose or scope. The court admitted various exhibits by stipulation and the parties presented testimony from eleven witnesses—six for Dave and Emily (including themselves), and five for Betsy (including herself). The attorneys did not offer any legal argument, instead apparently relying on their trial briefs.

The district court filed a Memorandum Decision on November 25, 2020. But instead of ruling only on the motion for preliminary injunction, the Memorandum Decision made findings of fact and conclusions of law on the merits of *all* issues pending in the underlying lawsuit, including Oscar's ownership, contract disputes, and damages. The court clarified no further evidence or hearings would occur. The case was over.

Dave and Emily appealed and Betsy cross-appealed.

Dave and Emily first argued that the district court denied their due process rights by deciding the case on the merits when it had only set the hearing on Betsy's preliminary injunction. In response, Betsy's attorneys executed affidavits, which they attached to her brief. These affidavits purported to explain what happened when the district court addressed counsel after the hearing ended. But the panel refused to consider the affidavits because they were not a part of the record. *Jennings v. Shauck,* No. 123,495, 2023 WL 334765, at *7 (Kan. App. 2023) (unpublished opinion). The panel then held that the district court violated Dave and Emily's due process rights by expanding the scope of the hearing without notice. 2023 WL 334765, at *9. Rather than remand the case, though, the panel analyzed the parties' ownership interests in Oscar and, ultimately, held that Dave and Betsy co-owned Oscar. 2023 WL 334765, at *12. Betsy then petitioned this court for review, which we granted.

ANALYSIS

The panel correctly concluded that the district court erred by expanding the scope of the hearing on Betsy's request for a preliminary injunction.

Betsy first challenges the panel's holding that the district court violated Dave and Emily's due process rights by expanding the scope of

the hearing without notice. Betsy argues that the parties litigated the matter "by consent" and claims the record supports the district court's discretionary decision to expand the scope of the hearing.

Standard of review

The parties agree that an appellate court reviews a district court's decision to expand the scope of a hearing for abuse of discretion. "A district court judge commits an abuse of discretion by (1) adopting a ruling no reasonable person would make, (2) making a legal error or reaching a legal conclusion not supported by factual findings, or (3) reaching a factual finding not supported by substantial competent evidence." *State v. Alfaro-Valleda*, 314 Kan. 526, 533-34, 502 P.3d 66 (2022).

The panel applied this standard. *Jennings*, 2023 WL 334765, at *7. Because we conclude the district court erred in any event, we assume without deciding that a district court may, in certain circumstances, consolidate a hearing on a preliminary injunction with a trial on the merits, even though Kansas statutes do not specifically allow it. See *Omni Outdoor Advertising of Missouri, Inc. v. City of Topeka*, 241 Kan. 132, 138, 734 P.2d 1133 (1987). But Dave and Emily also framed their claim as a violation of due process, and "[w]hether the trial court violated an individual's due process rights is a question of law, to which this court exercises unlimited review." *State v. Holt*, 285 Kan. 760, 774, 175 P.3d 239 (2008).

Discussion

The panel held that the record did not show the district court gave notice to the parties that it intended to rule on anything beyond Betsy's request for a preliminary injunction. *Jennings*, 2023 WL 334765, at *7. We agree. And the record shows notice given to the court and opposing parties of a hearing only on the request for preliminary injunction. The record is bereft of any notice to the court and parties of a hearing on anything more than the preliminary injunction. Betsy does not renew her claim that the court can consider her attorneys' affidavits about what transpired off-the-record at the end of the hearing, and we thus leave undisturbed

the panel's rejection of these affidavits as outside the scope of the record on appeal. *Jennings*, 2023 WL 334765, at *7.

Instead, Betsy cites two entries in the district court's register of actions and an excerpt from the district court's Memorandum Decision as proof that the "merits had been tried by consent" and, thus, the district court did not err by expanding the scope of the hearing. We disagree. First, we find *Douglas Landscape & Design v. Miles*, 51 Kan. App. 2d 779, 355 P.3d 700 (2015)—the case Betsy cites for her "tried by consent" argument—inapposite. In *Douglas Landscape*, a panel of the Court of Appeals considered whether it was possible to litigate a defense during trial "'by the parties' express or implied consent'" under K.S.A. 2014 Supp. 60-215(b)(2), when that defense had been "initially waived" before trial. 51 Kan. App. 2d at 784. The *Douglas Landscape* panel acknowledged it was possible to litigate the newly raised defense, given such mutual party consent.

But K.S.A. 2023 Supp. 60-215 addresses amending and supplementing *pleadings*. Pleadings are statutorily restricted to specific court filings. K.S.A. 2023 Supp. 60-207(a). K.S.A. 2023 Supp. 60-215 (b) applies to new issues in the pleadings that are presented *at trial*; it does not permit a district court unilaterally to accelerate the procedural phase of a case from a preliminary hearing to a final trial on the merits. K.S.A. 2023 Supp. 60-215 does not apply here. We thus find no legal support for Betsy's "tried by consent" argument.

Rather than address Betsy's "trial by consent" argument, the panel considered whether the district court could, under *any* circumstance, consolidate "a preliminary injunction hearing with a trial on the merits." *Jennings*, 2023 WL 334765, at *7 (citing *Omni*, 241 Kan. at 138). In *Omni*, a majority of the Kansas Supreme Court held there was no reason the preliminary injunction hearing and trial could not be consolidated, provided no prejudice results to the parties. 241 Kan. at 138. The court reached this conclusion even though the Kansas statute does not specifically allow such consolidation and the statute's federal counterpart specifically does allow it. See K.S.A. 60-905; Fed. R. Civ. Proc. 65(a)(2). As the court further explained:

"Factors to be considered include but are not limited to the parties' preparedness for trial, including the completion of or the need for additional discovery, the availability at the hearing of evidence which either party proposes to introduce upon trial, the issues involved, and the adequacy of time which the parties have to prepare for the hearing. If the parties agree to consolidation, then with the court's consent consolidation may be ordered. If the parties do not agree, then the trial court must determine whether or not there is to be a consolidation. If the court determines to consolidate, all parties must be given adequate, clear, and unambiguous notice of the consolidation." *Omni*, 241 Kan. at 138.

The majority then reversed the district court's decision because the district court failed to notify Omni—the losing party below—of its intent to consolidate the hearing on the preliminary injunction with a trial on the merits, and because Omni sustained "actual prejudice" from the lack of notice. *Omni*, 241 Kan. at 138.

Although the *Omni* court was not unanimous in its approach, it has remained unchallenged for nearly 40 years. *Omni*, 241 Kan. at 139 (Lockett, J., concurring in part and dissenting in part) (accusing the majority of "rewrit[ing]" K.S.A. 60-905 to conform with Fed. R. Civ. Proc. 65, since nothing in the plain language provided for such consolidation). In any event, the parties do ask us to revisit *Omni*. We thus assume without deciding that the panel correctly considered the district court's decision under the *Omni* framework.

Within that framework, the panel correctly held the district court erred. To begin, we find Betsy's citations to the record—two entries in the district court's register of actions and a line from the district court's Memorandum Decision—fail to show "adequate, clear, and unambiguous notice of the consolidation." *Omni*, 241 Kan. at 138.

The first entry referenced by Betsy is the court's own note, which says: "ROA Date: 11/19/2020 . . . Parties excused and court talked briefly with counsel off the record and giving them until Tuesday 11/24/2020 to work out and [*sic*] agreement. Recess to allow for court to issue a memorandum decision . . . . "

The second entry Betsy references is also the court's own note, which says: "ROA Date: 11/25/2020 . . . Hearing result for Jury Trial held on 11/25/2020 09:00AM: Jury trial continued: Court issues memorandum decision via e-file system. Case settled with judicial hearing and issuance of written opinion. . . ."

Neither excerpt helps Betsy. The district court's comment in the register of actions that it "talked briefly with counsel off the record and giving them until Tuesday 11/24/2020 to work out and [*sic*] agreement" does not show that the district court told the parties that it planned to decide the case's ultimate merits—only that it would issue a decision on *something* if they failed to reach an agreement by November 24, 2020. The second entry simply refers to a "jury trial," which is clearly incorrect. It mentions neither agreement nor notice.

Further, the Memorandum Decision excerpt Betsy cites does not show the *parties* ever agreed there would be no additional evidence—only that the district court *believed* no more was needed: "There is no need for any further evidentiary hearings in this case. By deciding that Betsy is the owner, there are no further issues to decide about the preliminary injunction or otherwise *and no new evidence will be forthcoming*." (Emphasis added.) Contrary to Betsy's assertions, the record does not show adequate notice of intent to consolidate the hearing on Betsy's motion for preliminary injunction with a trial on the case's ultimate merits. That lack of notice was a denial of due process and an error of law.

We likewise agree with the panel's conclusion that the district court's failure prejudiced Dave and Emily. Although the panel did not consider the *Omni* "'[f]actors'" to ascertain prejudice, its discussion captures the prejudice inherent in the district court's decision to consolidate the hearings without prior notice. *Jennings*, 2023 WL 334765, at *8-9 (explaining the differing legal standards between a motion for preliminary injunction and a final decision quieting title). Ultimately, the problem with the district court's decision lay not just in the parties' presentation of evidence, but also in their ability to appropriately *frame* that evidence for the district court under the correct legal standard. As the district court's lengthy Memorandum Decision suggests, the parties' scattershot approach to the evidence provided a confusing picture of their understanding of the purported oral agreement—a picture that could have been resolved through more focused presentation of evidence and argument. Further, as Betsy's trial brief suggested, Dave and Emily's statute of frauds argument constituted an affirmative defense for which *they* bore the burden of proof—a burden they

may have been unprepared to carry at a hearing on *Betsy*'s request for a preliminary injunction.

In a nutshell, without informing the parties, the district court's decision retroactively changed practically everything: the elements to be proved, the burden of proof on each element, and the party obligated to carry the burden on each element. Dave and Emily were denied due process from the lack of clear notice that they, not Betsy, had to prove each element of each cause of action they made in the lawsuit, and not just to defend Betsy's burden to prove her counterclaim for preliminary injunction. Dave and Emily have thus shown they were prejudiced by the court's actions.

So the panel correctly held that the district court made a legal error in consolidating the hearing on Betsy's request for a preliminary injunction with a trial on the case's merits. The district court abused its discretion by going beyond making the findings of fact and conclusions of law needed to determine whether Betsy should prevail on her counterclaim for a preliminary injunction.

The panel erred by addressing the case's merits after correctly concluding that the district court erred.

Betsy next complains that the panel erred by sua sponte reversing the district court's ownership determination based on the "legal pathway" the district court took. *Jennings*, 2023 WL 334765, at *10. In effect, Betsy claims the panel improperly reweighed the evidence and failed to give deference to the district court's credibility determinations under the guise of reviewing its ultimate legal conclusions. We agree.

As we have explained, the problem with the district court's decision to consolidate lay in the parties' inability to appropriately frame their legal arguments and evidence within the appropriate legal framework. But the panel compounded that problem by adopting a set of "common law rules" drawn largely from *Willcox v. Stroup*, 467 F.3d 409 (4th Cir. 2006)—cited by neither party—to try and resolve the case's merits on purely legal grounds. *Jennings*, 2023 WL 334765, at *9-12. And while the panel claimed that its role was "not to substitute our judgment for that of the district court," it seems to have done just that. 2023 WL 334765, at

*9, 11-12. Instead, the panel should have done what it said would "[o]ften" happen upon a finding that the district court violated a party's due process rights: "remand the case to the district court to afford both parties the opportunity to present the evidence and obtain the corresponding analysis they were denied as a result of the district court's failure to provide the required notice." 2023 WL 334765, at *9.

CONCLUSION

We need not belabor the point. The panel, like the district court, got ahead of itself in trying to resolve the case's merits before the appropriate procedural time. We hold that, after the panel correctly concluded the district court erred by improperly accelerating the procedural phase of the case without adequate notice, it should have remanded the matter for further proceedings—beginning with the district court's ruling on Betsy's request for a preliminary injunction.

Judgment of the Court of Appeals reversing the district court is affirmed in part and reversed in part. Judgment of the district court is reversed, and the case is remanded.

No. 125,430

STATE OF KANSAS, *Appellee*, v. J.L.J., *Appellant.*

(547 P.3d 501)

SYLLABUS BY THE COURT

1. TRIAL—*Wide Latitude of Prosecutors in Closing Arguments*. Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect the evidence presented at trial and accurately state the controlling law. But a prosecutor errs by arguing that it is the jury's job to convict a criminal defendant when the State proves its case beyond a reasonable doubt.

2. SAME—*No Objection Needed at Trial to Preserve Prosecutorial Error Claim*. Generally, a defendant need not object at trial to preserve a claim of prosecutorial error for appellate review. But a defendant may not bypass the contemporaneous-objection rule in K.S.A. 60-404 by reframing an evidentiary challenge as prosecutorial error.

3. CRIMINAL LAW—*Unconstitutional-Conditions Doctrine—Application.* The unconstitutional-conditions doctrine states that the government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. The doctrine has been applied in situations in which the State either forced a criminal defendant to forfeit one constitutional right to exercise another or impaired the exercise of a constitutional right by needlessly penalizing the defendant for asserting that right.

4. SAME—*Unconstitutional-Conditions Doctrine—Considerations of Inquiry.* In determining whether a government-imposed choice violates the unconstitutional-conditions doctrine, the threshold inquiry is whether the State's action impairs to an appreciable extent any of the policies behind the rights involved. In conducting this inquiry, it is appropriate to consider both the nature of the impairment and the legitimacy of the State's practice.

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Oral argument held February 2, 2024. Opinion filed May 3, 2024. Affirmed.

Korey A. Kaul, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Ethan C. Zipf-Sigler, assistant solicitor general, argued the cause, and *Kris W. Kobach*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: J.L.J. opened fire on a car after one of its passengers ripped off J.L.J.'s cousin in a gun sale. A 12-year-old boy

riding in the car was killed. The State charged J.L.J. with first-degree felony murder and several other offenses. J.L.J., who was a juvenile at the time of the shooting, was certified for adult prosecution. At trial, J.L.J. testified he was acting in self-defense. The jury rejected J.L.J.'s self-defense claim and convicted him on all charges.

On direct appeal to our court, J.L.J. raises several claims of error. First, he argues that numerous prosecutorial errors warrant reversal of his convictions. He claims the prosecutor erred during voir dire by asking potential jurors if they would do their "job" and convict J.L.J. if the State proved his guilt beyond a reasonable doubt. We agree this was error but conclude it was harmless, which means the error did not contribute to or affect the jury's verdict.

J.L.J. also argues the prosecutor misstated the law on self-defense during closing argument. We disagree. The prosecutor was simply explaining that the evidence better aligned with the State's theory that J.L.J. recklessly discharged his firearm into an occupied vehicle than with J.L.J.'s theory of self-defense.

J.L.J. then argues the prosecutor inflamed the prejudices of the jury during closing argument by stating that J.L.J. had not been thinking about his daughter during the shooting. But the prosecutor's argument simply recited a series of questions from J.L.J.'s cross-examination. And J.L.J. failed to lodge a timely and specific objection to these questions to preserve them for appellate review, as required under K.S.A. 60-404. J.L.J. cannot circumvent the contemporaneous-objection rule by repackaging his evidentiary challenge in prosecutorial-error dressing.

Second, J.L.J. argues that the State unconstitutionally pitted his right to prepare for his defense against his right to testify at trial by asking J.L.J. on cross-examination whether he had viewed the State's discovery before taking the witness stand. He claims the State's impeachment violated the unconstitutional-conditions doctrine, which prevents the State from (1) forcing a defendant to surrender one constitutional right to exercise another and (2) needlessly penalizing a defendant for exercising a constitutional right. But, here, J.L.J. exercised both his right to participate in his defense and the right to testify. And the State's impeachment served

the legitimate purpose of enhancing the reliability and truth-seeking function of the criminal process. Thus, the State's impeachment did not violate the unconstitutional-conditions doctrine.

Third, J.L.J. argues the combined effect of these alleged trial errors deprived him of a fair trial. And he urges us to reverse his convictions under the cumulative-error doctrine. But we conclude that only one trial error occurred. Thus, the cumulative-error doctrine does not apply.

Finally, J.L.J. argues that the judicial fact-findings made to certify him for adult prosecution increased his potential maximum punishment in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). But J.L.J. failed to preserve this issue for review by first raising it before the district court. And we decline to invoke an exception to our general preservation rule because we have consistently rejected this *Apprendi* challenge and J.L.J. has not argued why we should depart from the doctrine of stare decisis in this case.

Thus, we affirm J.L.J.'s convictions and sentence.

FACTS AND PROCEDURAL BACKGROUND

On a sunny evening in April 2021, J.L.J. went to Kare Pharmacy in Leavenworth with his cousin, D.N., and friend, Darvon Thomas. They had arranged to purchase a Glock handgun through social media and planned to meet the seller, Brooke Johnson, in the pharmacy's parking lot. Unbeknownst to them, Brooke was attempting to pass a BB gun off as a genuine firearm.

The subsequent events were captured by Kare Pharmacy's surveillance camera. The surveillance footage shows the pharmacy's parking lot has two opposing rows of about 10 parking spots each. J.L.J., D.N., and Thomas arrived in Thomas' Dodge Charger. Thomas backed the Charger into a parking spot in the row farthest from the pharmacy and to the left of the camera. A Volkswagen Jetta then pulled into the lot and backed into a parking spot in the row closest to the pharmacy and to the left of the camera. The parking lot's sole exit was to the right of the camera, and the Jetta was one or two spots closer to the exit than the Charger.

The video shows D.N. approaching the Jetta and exchanging some cash for a gun through the front passenger window. After

the exchange, D.N. turned to walk back toward the Charger. He then stopped while briefly inspecting the gun in his hand. He turned back to the front passenger window of the Jetta, which had already been rolled up. D.N. later told police that he realized at that moment he had been given a BB gun rather than the promised Glock, and he had turned to say something to the people in the Jetta.

D.N. then continued to walk toward the Charger, crossing in front of the Jetta. The Jetta began to slowly pull out of its parking spot, immediately turning right toward the exit and away from D.N. and the Charger. As the Jetta made its way toward the exit, J.L.J. stepped out of the front passenger seat of the Charger. He pulled out a gun and pointed it at the Jetta, as it moved toward the parking lot exit. J.L.J. fired 12 rounds at the rear of the Jetta. Eleven of those rounds hit the Jetta, and a twelfth round hit a car driving down a nearby street. B.H., a 12-year-old boy who was sitting in the backseat on the passenger side of the Jetta, sustained three gunshot wounds and later died from his injuries.

Several hours after the shooting, police arrested J.L.J. and D.N. at Thomas' house. Thomas' Charger was parked in the backyard. The Charger had no bullet holes or other damage.

During his police interview, J.L.J. initially said someone in the Jetta had shot out one of the Charger's windows, and Thomas instructed J.L.J. to return fire. J.L.J. also told police that Thomas had gotten the Charger's window fixed in the few hours between the shooting and J.L.J.'s arrest. After the interviewing detective told J.L.J. that a child had died, J.L.J. changed his story. He said he was not at the scene, but Thomas had told J.L.J. to take the rap for the real shooter. J.L.J. then said he had a daughter and felt remorseful and asked the detective what he wanted to know. In his third version of the incident, J.L.J. said Thomas handed him a gun before the sale and he gave it back to Thomas after the shooting. J.L.J. said Thomas told him to shoot at the people in the Jetta after they gave D.N. a BB gun.

D.N.'s statement to the police corroborated J.L.J.'s third version of the incident. D.N. said he yelled out to Thomas and J.L.J. that the front passenger of the Jetta had given him a BB gun. He

then heard Thomas say something like, "Shoot, they got my money."

While searching the Jetta, police found a silver BB gun on the floorboard of the driver's seat and a black BB gun on the floorboard of the seat where B.H. had been sitting. Photos of the Jetta showed most of the bullets hit the rear windshield, trunk, and back bumper. Investigators concluded most of the shots were fired at the rear of the Jetta.

The State charged J.L.J. with one count of first-degree felony murder, two counts of criminal discharge of a firearm at an occupied vehicle, and one count of criminal possession of a firearm by a convicted felon. J.L.J., who was 17 years old at the time of the shooting, was later certified for adult prosecution.

At trial, the driver of the Jetta, S.L., testified Brooke orchestrated the plan to pass the BB gun off as a genuine Glock firearm and sell it to an unsuspecting buyer. S.L. drove Brooke, B.H., and another passenger to Leavenworth in his Jetta to complete the sale. He said the Jetta's windows were tinted and none of the windows were down when they attempted to leave after the sale. He also said no one in the Jetta pointed a gun.

D.N. testified that he was scared during the sale because he did not know the people in the Jetta. He thought they probably had other guns given the nature of the transaction, but he never actually saw anyone in the Jetta point a gun. He said the windows of the Jetta were up when it was leaving the parking lot, and he could not see inside because the windows were dark.

J.L.J. testified in his own defense. He said that after the sale, D.N. started walking back toward the Charger and then stopped with a shocked look on his face. J.L.J. said he saw the Jetta begin to roll slowly towards D.N, and he thought the Jetta was going to hit D.N. J.L.J. thought he had to shoot because he believed the Jetta's driver had a gun and was pointing it out the window.

J.L.J. admitted he had given three different versions of the incident during his police interview and was now presenting a fourth version at trial. He said he lied about the identity of the shooter during his police interview because he was "freaked out" and did not know what to do. He also said he had consumed cocaine at Thomas' house before being picked up by police and was sleepy

by the time he was interviewed around 2 a.m. J.L.J. said that before the interview started, the detective told him a 12-year-old girl was killed and that made J.L.J. think of his daughter.

The jury convicted J.L.J. as charged. The district court sentenced J.L.J. to a controlling term of life imprisonment without the possibility of parole for 25 years.

J.L.J. appeals directly to our court. We heard oral argument on February 2, 2024. Jurisdiction is proper. K.S.A. 22-3601(b)(3)-(4) (life sentence and off-grid crimes appeal directly to Supreme Court).

ANALYSIS

I. *The Prosecutor Committed One Error During J.L.J.'s Trial, but the Error Was Harmless*

For his first issue on appeal, J.L.J. asserts the prosecutor committed three errors during his trial. First, he claims the prosecutor erred during voir dire by asking potential jurors if they would do their "job" and convict J.L.J. if the State proved his guilt beyond a reasonable doubt. Second, he claims the prosecutor misstated the law on self-defense during closing argument. Finally, J.L.J. claims the prosecutor inflamed the prejudices of the jury during closing argument by arguing that J.L.J. had not been thinking about his daughter during the shooting. After reviewing our standard of review and relevant legal framework, we address each claim of error in turn.

A. *Standard of Review and Relevant Legal Framework*

The two-step process for reviewing claims of prosecutorial error is well-established:

> "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." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

"Prosecutors generally have wide latitude in crafting their closing arguments, so long as those arguments accurately reflect

the evidence presented at trial and accurately state the controlling law." *State v. Slusser*, 317 Kan. 174, 185, 527 P.3d 565 (2023). "'In determining whether a particular statement falls outside of the wide latitude given to prosecutors, the court considers the context in which the statement was made, rather than analyzing the statement in isolation.'" *State v. Bodine*, 313 Kan. 378, 406-07, 486 P.3d 551 (2021). And we have applied this same standard when reviewing allegedly erroneous comments made during voir dire. See *State v. Crawford*, 300 Kan. 740, 748, 334 P.3d 311 (2014).

J.L.J. did not object to any of the prosecutor's comments. But we will generally review claims of prosecutorial error based on comments made during voir dire, opening statements, and closing arguments even without a contemporaneous objection. *Bodine*, 313 Kan. at 406.

B. *The Prosecutor Committed Harmless Error by Asking Potential Jurors if They Would Do Their "Job" and Convict J.L.J. if the State Proved His Guilt Beyond a Reasonable Doubt*

J.L.J. first argues the prosecutor erred by asking the potential jurors during voir dire whether they would do their "job." The prosecutor began by asking a potential juror "will you *do your job* and find the defendant guilty if the State proves to you beyond a reasonable doubt that he committed these crimes?" (Emphasis added.) That potential juror responded affirmatively. The prosecutor then posed the same question to several more potential jurors without repeating the question in full:

> "[PROSECUTOR]: Juror 18, same question.
> "VENIREMAN 18: Yes.
> "[PROSECUTOR]: Juror 17?
> "VENIREMAN 17: Yes, sir.
> "[PROSECUTOR]: Juror 29, same question."

After discussing Juror 29's experience with gun violence, the prosecutor then asked the entire panel "[i]f picked as a juror, will you *do your job* and find the defendant guilty if the State proves to you beyond a reasonable doubt that he is guilty? . . . If you agree to do this, raise your sign." (Emphasis added.) The prosecutor then

had a discussion with the only potential juror not to raise their sign. That juror eventually agreed they would be able to find J.L.J. guilty if the State proved he committed the crime beyond a reasonable doubt.

Later, during closing argument, another prosecutor reminded the jurors that "[w]hen [the other prosecutor] was going through voir dire with you, jury selection, he asked if all the elements were met, could you find guilty [*sic*]. And the response was yes. Let's take a look at those [elements.]" The prosecutor then discussed the elements of the various charged crimes and the evidence supporting those elements. The prosecutor did not repeat the "do your job" language at any point during closing argument.

In *United States v. Young*, 470 U.S. 1, 17-18, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985), the United States Supreme Court held a prosecutor erred by urging the jury to "'do its job,'" explaining "that kind of pressure . . . has no place in the administration of criminal justice." See also *United States v. Mandelbaum*, 803 F.2d 42, 44 (1st Cir. 1986) (finding prosecutor errs by urging jury to do its job or duty). And we agree that a prosecutor errs by arguing that it is the jury's "job" to convict a criminal defendant when the State proves its case beyond a reasonable doubt. See *State v. Scott*, 286 Kan. 54, 79-80, 183 P.3d 801 (2008) (disapproving of prosecutors telling the jury to honor its oath and return a guilty verdict, finding such comments akin to those found erroneous in *Young*), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). Based on *Young*, the State concedes error. We thus move to the prejudice analysis.

In determining whether prosecutorial error was harmless, we apply the traditional constitutional harmlessness standard under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *Sherman*, 305 Kan. at 109. Under that standard, "prosecutorial error is harmless if the State can demonstrate 'beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict.'" 305 Kan. at 109 (quoting *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 [2011]).

The State has met its burden to show that the error was harmless. As the State argues, the prosecutor's improper comments here were limited to voir dire. While the prosecutor referred to voir dire in closing argument, he did not repeat the erroneous "do your job" language. Instead, the prosecutor reminded jurors that they had agreed they "could" find J.L.J. guilty if the State proved all the elements of the charged crimes beyond a reasonable doubt. And voir dire was separated from closing arguments by 2 days of trial at which 9 witnesses testified and 114 exhibits were admitted. Finally, the prosecutor made no other comments during closing argument suggesting the jury was obligated to return a guilty verdict.

J.L.J. argues the prosecutor's error was prejudicial under *State v. Holmes*, No. 125,187, 2023 WL 3140004 (Kan. App. 2023) (unpublished opinion). There, the Court of Appeals held that the prosecutor committed a reversible error by telling the jurors that it was their "job" to convict the defendant if the State proved its case. 2023 WL 3140004, at *2-4. But *Holmes* is distinguishable. The prosecutor in *Holmes* instructed the jury to do its "job" both in voir dire and in closing argument at the one-day trial. And that prosecutor made other comments suggesting the jury was obligated to convict the defendant, which compounded the prejudicial effect of the error. 2023 WL 3140004, at *3.

Our conclusion that the prosecutor's error did not prejudice J.L.J.'s right to a fair trial is further bolstered by the compelling evidence of his guilt. See *Sherman*, 305 Kan. at 111 (strength of evidence may secondarily impact harmlessness analysis). As J.L.J. acknowledges, the outcome of this case largely turned on whether the jury believed his testimony that he acted in self-defense. But J.L.J. was already fighting an uphill battle on the credibility front because he gave four different versions of his involvement in the shooting. He gave three versions to investigators during his police interview. And J.L.J.'s story changed yet again at trial when he first claimed that he was acting in self-defense or in defense of D.N.

J.L.J.'s self-defense claim was not only inconsistent with his prior statements to police but also belied by the other evidence. J.L.J. claimed he feared for D.N.'s safety and thought the driver of

the Jetta tried to hit D.N. with that vehicle. But D.N. does not appear to be afraid in the video footage. Instead, he casually walks back to the Charger after receiving the BB gun. As D.N. crosses in front of the Jetta on his way back to the Charger, the Jetta begins to slowly pull out of the parking spot. But D.N. and the Jetta are separated by several feet, and D.N. does not need to move out of the way for the Jetta to make a sharp right turn away from the Charger and toward the parking lot's exit.

J.L.J. also testified he saw the driver of the Jetta with a gun. But D.N. testified he never saw the driver of the Jetta with a gun. And the video shows D.N. had a better vantage point, because he was only several feet away from the Jetta while J.L.J. was much farther away. Several witnesses also testified the Jetta had tinted windows. S.L. and D.N. both testified all the Jetta's windows were rolled up when the car left, and D.N. said he could not see inside the Jetta because the windows were dark. Kare Pharmacy's manager, who witnessed the shooting from inside the pharmacy's front windows, also testified she could not see inside the Jetta's tinted windows even though she was only a few feet away. She also said the Jetta's driver's window stayed up during the entire transaction.

Furthermore, both the surveillance video and ballistics analysis show J.L.J. fired 12 rounds at the rear of the Jetta as it was fleeing the parking lot. Firing a dozen rounds at the rear of a fleeing vehicle is more consistent with the State's theory of criminal discharge of a firearm than with J.L.J.'s theory of self-defense. Thus, while the prosecutor erred by asking potential jurors during voir dire if they would do their "job" and convict J.L.J., the State has met its burden to show there is no reasonable possibility that the error contributed to the verdict.

C. *The Prosecutor Did Not Misstate the Law on Self-Defense*

Next, J.L.J. argues the prosecutor misstated the law on self-defense during closing argument. At J.L.J.'s trial, the district court gave the jury a self-defense instruction based on PIK Crim. 4th 52.200 (2021 Supp.), which told the jury:

"Defendant is permitted to use against another person physical force that is likely to cause death or great bodily harm only when and to the extent that it appears to him and he reasonably believes such force is necessary to prevent

death or great bodily harm to himself or someone else from the other person's imminent use of unlawful force. *Reasonable belief requires both a belief by defendant and the existence of facts that would persuade a reasonable person to that belief*." (Emphasis added.)

During closing argument, defense counsel recited part of this instruction: "'Reasonable belief requires both a belief by the defendant . . . and the existence of facts which would persuade a reasonable person to belie[ve] that [the use of deadly force was necessary].'" And during rebuttal, the prosecutor repeated the same portion of the instruction and argued the evidence did not support J.L.J.'s claim that he justifiably acted in self-defense:

"It's not [B.H.'s] fault he was shot in the back and killed. [J.L.J.] pulled the trigger, killing [B.H.], not caring who else may have been hit. It was reckless. Shouldn't have had the gun in the first place.

"Defense says that reasonable belief requires both a belief by the defendant and the existence of facts that would persuade a reasonable person to that belief. That's for self defense. *This is no self defense. It's not self defense*. That's shooting in the back of a car driving away. Window's up. No evidence anybody was waving guns around. *Surely no evidence* [*B.H.*] *on the back passenger side was doing anything*." (Emphasis added.)

J.L.J. challenges the portion of the prosecutor's comments emphasized above. First, he argues the State incorrectly suggested the definition of self-defense provided by the jury instructions and defense counsel was incorrect. Second, he argues the State improperly suggested J.L.J. could not claim self-defense because B.H. was an innocent bystander.

A prosecutor may not misstate law applicable to the evidence. *State v. Hilt*, 307 Kan. 112, 124, 406 P.3d 905 (2017). K.S.A. 21-5222 sets forth a two-part test for determining whether an individual justifiably used deadly force in self-defense or in defense of another. The first part is subjective and requires a showing that the defendant "'sincerely and honestly believed it was necessary to kill to defend'" themselves or others. *State v. Qualls*, 309 Kan. 553, 557, 439 P.3d 301 (2019). The second part is objective and "'requires a showing that a reasonable person in [the defendant's] circumstances would have perceived the use of deadly force in self-defense as necessary. [Citation omitted.]'" 309 Kan. at 557.

J.L.J. first argues that by stating, "This is no self defense. It's not self defense," the prosecutor implied that defense counsel's

definition of self-defense was incorrect, even though it was accurately recited from the jury instruction. But context makes clear the prosecutor was not arguing that defense counsel had incorrectly defined self-defense. See *Bodine*, 313 Kan. at 406-07 (courts consider challenged comment in context rather than in isolation). Instead, the prosecutor was arguing the facts did not support J.L.J.'s theory that he had acted in self-defense. This falls within the bounds of proper argument.

Next, J.L.J. argues the prosecutor erred when he stated that there was "no evidence [B.H.] on the back passenger side was doing anything." J.L.J. admits this statement accurately reflects the evidence presented at trial. Nevertheless, he claims that by highlighting this fact, the State effectively told the jury that J.L.J.'s claim of self-defense would not or should not apply because B.H. was an innocent bystander. J.L.J. acknowledges that in *State v. Betts*, 316 Kan. 191, 207, 514 P.3d 341 (2022), we held that statutory self-defense immunity does not apply to "reckless conduct injuring an innocent bystander who was not reasonably perceived as an attacker." And J.L.J.'s felony-murder charge was based on the inherently dangerous felony of criminal discharge of a firearm at an occupied vehicle, which is a reckless crime. See K.S.A. 2020 Supp. 21-6308(a)(1)(B). But J.L.J. argues *Betts* should not apply here because B.H. was a "nearby cohort[] of the aggressor," not an "innocent bystander."

We note that *Betts* did not involve a criminal defendant's claim of self-defense at trial for a reckless crime. Rather, *Betts* addressed whether a defendant could claim immunity from prosecution under our self-defense immunity statute, K.S.A. 21-5231, for reckless conduct injuring an innocent bystander. We have not addressed whether *Betts* applies outside of that specific context. But we need not decide that issue today because J.L.J.'s argument is based on a misinterpretation of the State's comment.

Here, the State was not arguing that, as a matter of law, J.L.J.'s self-defense claim failed because B.H. was an innocent bystander. Instead, the State was arguing that the evidence better supported its theory of prosecution—that J.L.J. killed B.H. while committing criminal discharge of a firearm, a reckless crime—than J.L.J.'s

theory of self-defense. The prosecutor's argument that J.L.J.'s behavior appeared reckless rather than intentional was based on the evidence at trial and reasonable inferences drawn from that evidence, and the prosecutor did not misstate the law in making that argument. See *Bodine*, 313 Kan. at 406 (prosecutors have wide latitude in crafting arguments and drawing reasonable inferences from evidence but must not misstate law or evidence). Thus, the prosecutor did not misstate the law on self-defense.

D. *J.L.J.'s Claim that the Prosecutor Improperly Intended to Inflame the Passions and Prejudices of the Jury Is Actually an Unpreserved Evidentiary Challenge*

In his final prosecutorial-error claim, J.L.J. argues the prosecutor tried to inflame the passions and prejudices of the jury during closing argument by asking whether J.L.J. was thinking about his daughter during the shooting. Ultimately, we conclude that J.L.J.'s argument is more properly characterized as an unpreserved claim of evidentiary error for which K.S.A. 60-404 precludes review.

During his direct examination, J.L.J. testified that before his police interview began, the detective told him a 12-year-old girl had died. J.L.J. said this made him think about his daughter. During cross-examination, the prosecutor pursued a line of questioning to impeach this testimony. The prosecutor asked if J.L.J. was thinking about his daughter during and after the shooting, and J.L.J. admitted he was not:

"Q. Now, you said that when you were talking to Detective St. John, you were thinking about your daughter?

"A. Yes, sir.

"Q. You weren't thinking about your daughter when you were putting round after round into that car; were you?

"A. No, sir.

"Q. You weren't thinking about your daughter when you were using drugs; were you?

"A. No, sir.

"Q. You weren't thinking about your daughter when you were at the [K]are Pharmacy to buy a gun; were you?

"A. No, sir."

J.L.J. did not object to any of the prosecutor's questions during this portion of cross-examination.

Later, during the rebuttal portion of closing argument, the prosecutor reminded the jury that J.L.J. had testified he was thinking about his daughter while he was being questioned by police. The prosecutor then restated a series of questions that were substantively similar to those posed to J.L.J. during cross-examination:

> "At one point [J.L.J.] testified that when he was being questioned by . . . Detective St. John, he thought about—at the time St. John told him it was a girl that was killed, and he thought about his daughter. Was he thinking about his daughter when he was holding a Glock 45 to watch over a gun deal in the parking lot in Leavenworth County[?] Was he thinking about his daughter when he shot 12 rounds in the back of a fleeing car[?] Was he thinking about his daughter when he went back to Darvon's house where he did some cocaine? Was he thinking about his daughter when he told multiple versions of what happened[?] Was he thinking about his daughter when he killed [B.H.]?"

J.L.J. now argues the prosecutor's comments during closing argument were intended to inflame the passions and prejudices of the jury. He claims the thrust of the State's argument was to persuade the jury that J.L.J. was a bad father because he was involved in the gun sale and shooting rather than being with his daughter. And he claims the comments were not relevant to the issue of his guilt and served only to prejudice the jury against him.

Prosecutors may not make statements that inflame the passions or prejudices of the jury or divert the jury from its duty to decide the case based on the evidence and applicable law. *Bodine*, 313 Kan. at 406. And normally, J.L.J. would not need to object to comments made in closing argument to preserve a claim of prosecutorial error for our review. *State v. George*, 311 Kan. 639, 703, 466 P.3d 469 (2020). But we have recognized a distinction between claims arising from a prosecutor's comments made during closing argument and others arising from a prosecutor's cross-examination of a witness. 311 Kan. at 702-03. Claims falling within the second category are, in essence, evidentiary challenges. As such, a defendant must comply with K.S.A. 60-404 by lodging a timely and specific objection to preserve the claim of error for appellate review. A defendant cannot evade K.S.A. 60-404's contemporaneous-objection rule by reframing an unpreserved evidentiary objection as prosecutorial error. 311 Kan. at 703-04.

Here, J.L.J. challenges the portion of closing argument where the prosecutor mainly repeated a series of questions from J.L.J.'s cross-examination. In essence, he contends that these questions were irrelevant and unduly prejudicial. But J.L.J. failed to lodge a contemporaneous objection to these questions and the testimony elicited from them at trial. And the prosecutor simply restated the substance of these cross-examination questions during closing argument. In these circumstances, J.L.J. cannot evade K.S.A. 60-404's mandate by reframing the issue as prosecutorial error.

If the prosecutor had relied on these questions to develop a new or broader argument in closing, then K.S.A. 60-404 may not have precluded review of J.L.J.'s claim. See *State v. Holt*, 300 Kan. 985, 992, 336 P.3d 312 (2014) (prosecutor erred by going beyond reciting the evidence and emphasizing a fact not relevant to proving the charged crimes and significant only as an appeal to sympathy). But that did not happen—the prosecutor merely restated the substance of his cross-examination questions and drew reasonable inferences from them. See *State v. Timley*, 311 Kan. 944, 950, 469 P.3d 54 (2020) (in crafting closing argument, prosecutors may discuss evidence and draw reasonable inferences from that evidence). As such, K.S.A. 60-404 forecloses our review.

II. *The State's Impeachment of J.L.J. Did Not Violate the Unconstitutional-Conditions Doctrine*

Next, J.L.J. argues the district court erred by allowing the prosecutor to impeach him with questions about whether J.L.J. saw the evidence in the case before he testified. He claims that he was exercising his right to participate in his defense when he viewed discovery and, thus, the prosecutor effectively penalized him for exercising that right. He contends the State's impeachment thus violated the unconstitutional-conditions doctrine because it forced him to choose between exercising his right to participate in his defense and exercising his right to testify.

A. *Standard of Review and Relevant Legal Framework*

Generally, a district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *George*, 311 Kan. at 706. When a

party claims the district court abused its discretion by basing its decision on an error of law, this court exercises unlimited review. *State v. Ernesti*, 291 Kan. 54, 65, 239 P.3d 40 (2010). Both parties agree that whether the district court permitted the State to pursue a line of questioning that violated J.L.J.'s constitutional rights is a question of law subject to unlimited review. See *State v. Stafford*, 312 Kan. 577, 588, 477 P.3d 1027 (2020) (reviewing de novo claim that evidence was admitted in violation of Sixth Amendment to the United States Constitution).

The unconstitutional-conditions doctrine states that "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.'" *State v. Nguyen*, 285 Kan. 418, 427, 172 P.3d 1165 (2007); see also *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (unconstitutional-conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up"). The doctrine has been applied in situations in which the State either (1) forced a criminal defendant to forfeit one constitutional right to exercise another, see *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), or (2) impaired the exercise of a constitutional right by "needlessly penaliz[ing]" the defendant for asserting that right, see *United States v. Jackson*, 390 U.S. 570, 583, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968).

Nevertheless, defendants must often make difficult choices while navigating the criminal justice system. See *McKune v. Lile*, 536 U.S. 24, 41, 122 S. Ct. 1017, 153 L. Ed. 2d 47 (2002) ("The 'criminal process, like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow.'"). And "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins v. Anderson*, 447 U.S. 231, 236, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). Instead, the threshold inquiry is whether the State's action """impairs to an appreciable extent any of the policies behind the rights involved."'" 447 U.S. at 236. In conducting this

inquiry, it is appropriate to consider both the nature of the impairment and the legitimacy of the State's practice. See 447 U.S. at 236-38.

B. *The State's Impeachment Did Not Violate the Unconstitutional-Conditions Doctrine Because Any Burden on the Exercise of J.L.J.'s Constitutional Rights Was Slight and the Impeachment Served a Legitimate Purpose*

During his cross-examination of J.L.J., the prosecutor pursued a line of questioning to establish that J.L.J. had been made aware of the evidence against him before taking the stand. The prosecutor established J.L.J. had seen the surveillance video and all photos admitted into evidence before testifying. The prosecutor then asked, "Before you testified here today, you had an opportunity to read all of the police reports; didn't you?" Defense counsel objected, arguing "[t]he defendant has a right to see all that stuff, Your Honor, so he can't be impeached by his own right." The district court overruled the objection, finding the line of questioning was fair impeachment. The prosecutor then asked questions establishing that J.L.J. had seen the police reports and statements from other witnesses and that he had a good idea what evidence the State would present at trial. J.L.J. contends this impeachment unconstitutionally pitted his right to participate in his defense against his right to testify at trial, violating the unconstitutional-conditions doctrine.

To make his argument, J.L.J. relies on *Simmons*. There, the defendant testified at a hearing on his motion to suppress to establish his standing to assert a Fourth Amendment violation under the United States Constitution. The Government later used this testimony against the defendant at trial. The United States Supreme Court held the defendant's testimony at the suppression hearing should not have been admitted at trial on the issue of defendant's guilt. *Simmons*, 390 U.S. at 394. In those circumstances, the defendant was forced to either give up a potentially valid Fourth Amendment claim or waive his Fifth Amendment privilege against self-incrimination. 390 U.S. at 394. The Court "[found] it intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394.

J.L.J. claims that like the defendant in *Simmons*, he was forced to choose between his constitutional rights. He claims the State's impeachment "forced [him] to choose between his right to participate in the preparation of his defense and not exercising his right to testify lest he be impeached by the evidence he reviewed." He argues he "should not have to sacrifice one right to exercise another" and that "forcing him to make that choice [between those rights] greatly impairs the policy behind both rights." We disagree.

To begin with, we question whether the State's cross-examination, inquiring about J.L.J.'s review of the discovery before testifying, implicated his exercise of a constitutional right. Certainly, defendants have a state and federal constitutional right to present a defense. *State v. Evans*, 275 Kan. 95, 102, 62 P.3d 220 (2003). And defendants have a constitutional right to testify. *Drach v. Bruce*, 281 Kan. 1058, 1066, 136 P.3d 390 (2006). But there is no general constitutional right to discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). And J.L.J. cites no authority that a defendant represented by counsel has a right to review discovery. Indeed, some authority suggests otherwise. See *State v. Marks*, 297 Kan. 131, 149, 298 P.3d 1102 (2013) (defendant has no right to personal copies of discovery, and court has previously declined to find constitutional violation when defendant claims discovery violation); see also *People v. Krueger*, 296 P.3d 294, 300 (Colo. App. 2012) (criminal defendant who is represented by counsel does not have unqualified right to personally review discovery; counsel's decision whether to provide client with discovery constitutes matter of trial strategy and lies within counsel's discretion).

But assuming, without deciding, that J.L.J. was exercising a constitutional right when he viewed discovery, any purported burden on the exercise of J.L.J.'s constitutional rights was slight. Unlike *Simmons*, the State's impeachment did not force J.L.J. to sacrifice one constitutional right to exercise another. Indeed, J.L.J. exercised both rights by reviewing discovery and testifying at trial.

Furthermore, the State did not "needlessly penalize" J.L.J. for asserting his alleged right to review discovery. See *Jackson*, 390

U.S. at 583. The State has a legitimate interest in conducting impeachment. See *Jenkins*, 447 U.S. at 238 ("In determining whether a constitutional right has been burdened impermissibly, it also is appropriate to consider the legitimacy of the challenged governmental practice."). Impeachment "advances the truth-finding function of the criminal trial" and "may enhance the reliability of the criminal process." 447 U.S. at 238.

The State's impeachment of J.L.J. was tied to this legitimate purpose. During cross-examination, the State established that J.L.J. had given four different versions of the shooting. And it impeached J.L.J. by confirming he had reviewed the State's discovery and knew what evidence the State would likely present at trial. This evidence included the video, which showed D.N. briefly stopping on his way back to the Charger and then crossing in front of the Jetta as the Jetta began exiting its parking spot. This evidence also included the photos from the search of the Jetta, which showed two other BB guns had been in the car. From this evidence and J.L.J.'s prior inconsistent statements, a juror could infer that J.L.J. crafted his trial testimony around the State's evidence. This inference would explain why J.L.J. changed his version of the incident for a fourth time at trial. And the State's impeachment suggested that J.L.J.'s fourth version of the shooting was unreliable.

Other persuasive authorities have recognized that *Simmons* does not prevent the State from using a defendant's inconsistent statements at a suppression hearing to impeach the defendant at a subsequent trial. See, e.g., *United States v. Jaswal*, 47 F.3d 539, 543 (2d Cir. 1995); *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1290-91 (9th Cir. 1994); *United States v. Quesada-Rosadal*, 685 F.2d 1281, 1283 (11th Cir. 1982); *Commonwealth v. Rivera*, 425 Mass. 633, 637-38, 682 N.E.2d 636 (1997). And in dicta, the United States Supreme Court has said, "'[T]he protective shield of *Simmons* is not to be converted into a license for false representations.'" *United States v. Salvucci*, 448 U.S. 83, 94 n.9, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980) (quoting *United States v. Kahan*, 415 U.S. 239, 243, 94 S. Ct. 1179, 39 L. Ed. 2d 297 [1974]). This further supports our conclusion that the State's impeachment was not unconstitutional under *Simmons*.

In sum, the State's impeachment created no significant impairment of J.L.J.'s constitutional rights because he both viewed discovery in preparation for his trial and he testified in his own defense. And the impeachment served the legitimate purpose of enhancing the reliability of the criminal process and its truth-seeking function. Thus, the State did not "needlessly" penalize J.L.J. for exercising his constitutional rights. See *Jackson*, 390 U.S. at 583; see also *State v. Williams*, 213 Vt. 334, 344, 246 A.3d 960 (2020) ("'Practices that enhance the reliability of the criminal process and its truth-seeking function may be permitted, even if a constitutional right is burdened.'"). And J.L.J. has failed to show that the State violated the unconstitutional-conditions doctrine.

III. *The Cumulative-Error Doctrine Does Not Apply*

Next, J.L.J. argues that the cumulative effect of the alleged trial errors deprived him of a fair trial. Under the cumulative-error doctrine, "[t]he effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial." *State v. Martinez*, 317 Kan. 151, 172, 527 P.3d 531 (2023). But we have identified only one error—the prosecutor asking the potential jurors during voir dire if they would do their "job." And the cumulative error doctrine does not apply to a single trial error. *George*, 311 Kan. at 709-10.

IV. *We Decline to Invoke a Preservation Exception to Reach J.L.J.'s Constitutional Challenge to the Adult Certification Process*

Finally, J.L.J. challenges the constitutionality of the adult certification process. J.L.J. was 17 years old at the time of the shooting, but the district court later certified him for adult prosecution. In the certification order, the district court made several fact-findings supporting its decision to authorize adult prosecution. See K.S.A. 38-2347.

J.L.J. now argues these judicial fact-findings raised his potential punishment in violation of his Sixth Amendment rights under *Apprendi*. 530 U.S. at 490 (other than fact of prior conviction, any fact which increases penalty for crime beyond prescribed statutory

maximum must be proved to a jury beyond a reasonable doubt). J.L.J. contends that if he had been adjudicated for felony murder as a juvenile, his punishment could not have extended past his 23rd birthday. See K.S.A. 38-2369(a)(1). But because he was prosecuted as an adult, he was subject to a life sentence. See K.S.A. 21-6806; K.S.A. 21-6620(b)(1). Thus, J.L.J. claims the judicial fact-findings supporting his certification for adult prosecution increased his maximum punishment contrary to *Apprendi*.

J.L.J. admits he did not preserve this argument for review by raising it before the district court. And parties generally may not raise constitutional issues for the first time on appeal. *State v. Frantz*, 316 Kan. 708, 746, 521 P.3d 1113 (2022). But J.L.J. argues his claim meets two recognized exceptions to this general rule because the claim involves only a question of law and consideration of the claim is necessary to prevent the denial of fundamental rights. See *Pierce v. Board of County Commissioners*, 200 Kan. 74, 80-81, 434 P.2d 858 (1967) (identifying exceptions to preservation rule). J.L.J. also notes that we have previously invoked these exceptions to address *Apprendi* challenges first raised on appeal. See, e.g., *State v. Graham*, 273 Kan. 844, 853-54, 46 P.3d 1177 (2002); *State v. Gould*, 271 Kan. 394, 404-05, 23 P.3d 801 (2001).

But here, we see no need to invoke either exception. We have consistently rejected the claim that judicial fact-findings made in support of an adult-certification order violate *Apprendi*. See *State v. Potts*, 304 Kan. 687, 704-07, 374 P.3d 639 (2016); *State v. Tyler*, 286 Kan. 1087, 1095-96, 191 P.3d 306 (2008); *State v. Mays*, 277 Kan. 359, 367-68, 85 P.3d 1208 (2004); *State v. Kunellis*, 276 Kan. 461, 465, 78 P.3d 776 (2003); *State v. Jones*, 273 Kan. 756, 770-78, 47 P.3d 783 (2002). And J.L.J. has not argued why we should depart from the doctrine of stare decisis in this case. See *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004) (Under doctrine of stare decisis, "'once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised.'"). Thus, we decline to invoke an exception to our general preservation rule. See

State v. Vonachen, 312 Kan. 451, 469, 476 P.3d 774 (2020) (declining to invoke preservation exception to address argument that adult certification process violates *Apprendi* for first time on appeal).

The judgment of the district court is affirmed.

No. 126,270

In the Matter of KEVIN T. CURE, *Respondent*.

(547 P.3d 489)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Indefinite Suspension.*

Original proceeding in discipline. Oral argument held January 31, 2024. Opinion filed May 3, 2024. Indefinite suspension.

Kathleen J. Selzler Lippert, Deputy Disciplinary Administrator, argued the cause and was on the formal complaint for the petitioner.

Kevin T. Cure, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in attorney discipline filed by the Office of the Disciplinary Administrator (ODA) against the respondent, Kevin T. Cure, an attorney admitted to the practice of law in Kansas in 1991. The following summarizes the history of this case before the court.

After the ODA filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC), Cure timely responded, admitting nearly all the factual allegations in the formal complaint. In due course, respondent filed a proposed probation plan. An appointed panel held a formal hearing on the complaint, during which respondent personally appeared, pro se. The hearing panel determined the respondent violated KRPC 1.2(a) (scope of representation) (2024 Kan. S. Ct. R. at 326); KRPC 1.3 (diligence) (2024 Kan. S. Ct. R. at 328); KRPC 1.4(a) (communication) (2024 Kan. S. Ct. R. at 329); KRPC 1.16 (a)(2), (3) (declining or terminating representation) (2024 Kan. S. Ct. R. at 374); and KRPC 8.4(d) (professional misconduct) (2024 Kan. S. Ct. R. at 430).

More specifically, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"*Findings of Fact*

"11. The hearing panel finds the following facts, by clear and convincing evidence:

"12. On or about April 10, 2021, T.W. contacted the respondent about representing T.W. in two Cherokee County District Court criminal matters. The respondent told T.W. that he would charge a flat fee of $3,000.00 to represent T.W. in the two criminal cases.

"13. On May 27, 2021, T.W. was charged in a third matter, case number 21-CR-000151, in Cherokee County District Cout with criminal threat, interference with law enforcement, battery on a law enforcement officer, domestic battery, and assault. The respondent told T.W. he would represent T.W. in this third case for an additional flat fee of $1,000.00, for a total flat fee for the three cases of $4,000.00. The respondent considered the flat fee earned upon receipt.

"14. Later, the respondent and T.W. verbally modified the fee agreement for T.W. to pay the respondent $1,000.00 and for T.W.'s brother, D.W., to provide IT services for the respondent's business. On one or more occasions, D.W. asked the respondent for information necessary to complete the IT project; however, the respondent did not provide D.W. the requested information.

"15. On May 28, 2021, the respondent filed an entry of appearance in T.W.'s Cherokee County District Court case 21-CR-000151. The respondent soon thereafter began plea negotiations with the prosecutor.

"16. On June 8, 2021, the respondent sent T.W. a text message that stated:

'[T.W.], I don't mean to compound your problems but I didn't sign up to do this for free. I need $1,000 paid soon or I'll have to withdraw. I am now in a third case. I want to help you but you must understand that I am in business. I want to know when the thousand dollars will be paid and I will make arrangements to receive it. Please let me know your response by the end of tomorrow. Thank you.'

"17. On June 14, 2021, the day before T.W.'s first appearance, the respondent sent T.W. an email that stated:

'[T.W.], we shall seek a continuance tomorrow. I need for you to execute a release to disclose information and provide proof you are in a treatment program.

'It is not finalized, but I believe the prosecutor will be willing to lower the felonies to a level 7 or below to provide you a chance of probation.

'I will need $1,000.00 in cash to continue representing you by the July date to be set. If not received, I will withdraw. That is the beginning point. To date, $0 has been paid.

'Attached are the Zoom codes.'

"18. On June 15, 2021, the respondent sent T.W. a text to confirm that T.W. had the Zoom codes for the hearing, which T.W. confirmed. The respondent appeared for T.W. at his first appearance and a scheduling conference was set for July 27, 2021.

"19. On June 22, 2021, T.W.'s brother, D.W., paid the respondent $1,000.00 on T.W.'s behalf via Venmo. The respondent confirmed with T.W. that he received the payment.

"20. On July 22, 2021, the prosecutor emailed the respondent with plea offers on several cases, including T.W.'s case.

"21. The respondent's file for T.W. includes a note that says:

'[T.W.] 7/24/21—he accepted the offer of Kurt with the other two cases dismissed. One of the cases to be dismissed, ending in 59, will assist him greatly in his custody case, according to the client. .3 hrs.'

"22. On July 29, 2021, staff from the prosecutor's office emailed the respondent a 'Journal Entry of Waiver of Preliminary Hearing and Bindover' and 'Plea Agreement' setting forth the prosecutor's offer in the 21-CR-000151 case.

"23. The last note in the respondent's file is dated August 1, 2021; the respondent did not create or maintain any file notes after that date.

"24. On August 11, 2021, T.W. sent the respondent a text message asking about signing the plea deal before he went to treatment. The respondent did not reply to T.W.'s request. T.W. wanted to sign the plea offer extended by the prosecutor in his case, but the respondent failed to provide T.W. a copy of the waiver or plea offer and failed to attempt to set any appointments with T.W. to review or sign the plea offer during the course of his representation.

"25. On August 21, 2021, the respondent told court staff that T.W. agreed to enter a guilty plea.

"26. On September 7, 2021, T.W. texted the respondent and stated, 'Treatment is completed.' The respondent replied, 'Yes!' T.W. also told the respondent about his discharge paperwork, outpatient treatment, and a release authorizing the respondent to get information about T.W.'s treatment.

"27. On or about October 11, 2021, the respondent called T.W. and left a voice mail message, stating:

'[T.W.] it's Kevin. I've withheld payment for services 'cause I haven't had time to get back to your brother with an organized approach. I'd like for you to come up with, ah, $400 [slurred] [P.C.] and [B.L.] for signs. You purchase them and deliver them so they don't use the money for other reasons and then they get passed around and put into the ground . . . anyhow [T.W.] that is the deal. Take care.'

"28. T.W. observed that the respondent sounded intoxicated on the October 11, 2021, voicemail message.

"29. The respondent admitted that he had been drinking when he made this call to T.W.

"30. On October 14, 2021, T.W. contacted the county sheriff to complain about the respondent's representation and stated that he understood the respondent's October 11, 2021, voicemail as preventing T.W. from signing and finalizing the plea agreement like T.W. wanted until T.W. purchased campaign yard signs for two local candidates running for mayor of Galena and Galena City Council.

"31. That same day, T.W. also contacted the prosecutor's office expressing frustration that the respondent refused to respond several times since August and was not willing to meet with T.W. to sign the plea agreement. T.W. said he was content with the plea offer.

"32. The respondent acknowledged during the formal hearing that he withheld the plea agreement as leverage for having his attorney fee paid.

"33. The respondent testified that during this time he experienced stress related to his law practice, particularly with the felony appointments, that made it difficult to keep up with his cases. Further, the respondent experienced stress related to handling his practice's administrative functions such as billing and other personal pressures.

"34. On October 18, 2021, the disciplinary administrator's office received a written complaint from the sheriff who received T.W.'s complaint about the respondent. The disciplinary administrator notified the respondent in a letter dated October 20, 2021, that a complaint had been docketed for investigation and the respondent was asked to provide a written response.

"35. The respondent left T.W. two voicemails after receiving notice of the disciplinary complaint. In one voicemail, the respondent stated:

'Hey [T.W.] I saw the complaint, ah, I always thought I had your backside and I know something weird happened that night, I apologize. I wish you'd call me. Thank you [T.W.].'

"36. In the second voicemail, the respondent's tone and tempo was different from the first, and similar to that of his October 11, 2021, voicemail, which the respondent admitted he left while drinking alcohol. During an interview on September 26, 2022, the respondent acknowledged the tone of his voice was similar to the October 11, 2021, voicemail he left after drinking and he 'can't rule out' that he had been drinking when he made this call. In this voicemail, the respondent stated:

'Hello [T.W.] I'm going to assume you want another counsel and, ah, and can you, this great deal that I worked out . . . but, you let me know. Period. I'm going to file a motion to withdraw, given your bar complaint, and, honestly I have to tell 'ya I don't give a shit what happens in your life the rest the way because I did a great job. Thank you, thank you.'

"37. On November 18, 2021, T.W. sent a text message to the respondent that said, among other things, that he did not want to have any more contact with the respondent.

"38. Later that same day, the respondent sent T.W. a text message that he 'had to send [T.W.] one final text just now to know where to send the information' in the respondent's file for T.W. T.W. replied that he planned to proceed pro se and stated 'I'm going to respectfully ask you to withdraw.'

"39. The respondent replied in a text message later that day:

'You seem to have yourself together today. You kept telling me that Chris was extorting fees from you and that was a reason you can't pay my attorney fees. I attempted to make every other arrangement to get those paid and save your life. Here, you are as pthe [*sic*] most unappreciative and deceitful person I've ever seen. Your entire bar complaint was about you avoiding paying me. After numerous attempts to be reasonably paid you resorted to your current tactic. I know I look forward to going to all of your cases.

'Once more I'm gonna send you your paperwork assuming you have no counsel. I suppose you forgot who begged you to stay in the treatment in Oklahoma but ypjalways [*sic*] felt you're too smart for the system and always want to escape any obligations.'

"40. T.W. responded to this text message referencing the agreement with respondent that his brother D.W. would do IT work for the respondent in lieu of payment of a portion of the fee but that the respondent did not get necessary information to D.W. to complete the work.

"41. The respondent sent other unprofessional text messages to T.W. that same day, even after T.W. asked that the respondent stop contacting him, including:

'I hit the last tax [*sic*] before I drafted it do you have fat fingers but after that when you receive no more. I have recorded you as well.

'I promise you there will need to be no further contact as you took the money and that you're going to pay me and paid it to Meek.

'As always whether it's beating your women or otherwise it's always somebody else's fault.

[. . . .]

'Now then, if you want to burn fucking ridiculous tax roll then stay quiet now. I would suggest going back to hitting a woman but that seems something you're really good at.

'That is my last text unless you want to call me and have a decent conversation.'

"42. The respondent indicated in the November 18, 2021, text string that he would send T.W. his client file but never did so.

"43. On December 8, 2021, the respondent tested positive for COVID-19 and an isolation order was issued the next day directing the respondent to isolate at his home in Joplin, Missouri.

"44. On December 20, 2021, the respondent provided a written response to the complaint in this matter to the disciplinary administrator. The respondent stated that a judge in Cherokee County retired on July 31, 2021, and it was unclear who would hear the felony pleas. Further, the respondent stated that his voicemail message to T.W. on October 11, 2021, was a 'negotiation attempt to have him pay some of his fees.'

"45. The disciplinary investigator asked the respondent several times if he believed that he could refuse to let his client have a copy of the plea deal because

of non-payment. The respondent did not answer the question, but did say that he was not pulling the plea deal, he just wanted to get paid.

"46. On January 8 and 23, 2022, the respondent filed motions to withdraw from T.W.'s criminal case.

"47. The respondent failed to send T.W. a copy of the July 29, 2021, plea offer or return the client file to T.W. any time before or after his motion to withdraw.

"48. The respondent was previously disciplined on May 10, 2019, at which time the Supreme Court suspended the respondent's license to practice law for a period of 18 months and ordered that the respondent be required to undergo a reinstatement hearing. In the prior matter, the respondent's misconduct was based on his four criminal convictions of driving while intoxicated, the effects of his incarceration and intoxication on his ability to perform his duties as a lawyer, and his failure to report a felony conviction to the disciplinary administrator's office.

"49. On March 8, 2021, the respondent was reinstated to the practice of law. In its order granting the respondent's reinstatement, the Supreme Court ruled that his reinstatement was subject to his entering into a one-year monitoring agreement with KALAP.

"50. The 2021 and 2022 KALAP monitoring agreements the respondent entered [by] law into with KALAP required, among other things, indefinite abstinence from the use of alcoholic beverages.

"51. The respondent agreed that he had not substantially complied with the 2021 or 2022 KALAP monitoring agreements. The respondent acknowledged that he had been consuming alcohol since his reinstatement and had last consumed alcohol four to five days prior to the formal hearing.

"52. The respondent also testified that he was on probation for his Missouri law license during the same time, and that he violated that probation plan by consuming alcohol.

"53. The respondent's Missouri probation plan and his KALAP monitoring agreements also required the respondent to attend a certain number of Alcoholics Anonymous meetings, which the respondent did not complete.

"*Conclusions of Law*

"54. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.2(a) (scope), 1.3 (diligence), 1.4(a) (communication), 1.16(a) (declining or terminating representation), and 8.4(d) (misconduct prejudicial to the administration of justice), as detailed below.

"KRPC 1.2(a)

"55. Lawyers must 'abide by a client's decisions concerning the lawful objectives of representation . . . and shall consult with the client as to the means which the lawyer shall choose to pursue.' KRPC 1.2(a). 'In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.' Id.

"56. The respondent failed to send a copy of the plea agreement to T.W. and also failed to abide by T.W.'s decision to execute a plea agreement in his 21-CR-000151 Cherokee County District Court criminal matter.

"57. Further, the respondent violated KRPC 1.2(a) when he failed to promptly comply with T.W.'s request that the respondent withdraw from the 21-CR-000151 Cherokee County District Court criminal case.

"58. The respondent stipulated that he violated KRPC 1.2(a).

"59. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.2(a).

"KRPC 1.3

"60. Attorneys must act with reasonable diligence and promptness in representing their clients. See KRPC 1.3.

"61. The respondent failed to diligently and promptly represent T.W. in his criminal case by failing to take any steps during his representation of T.W. to get a copy of the plea agreement to T.W. for T.W. to sign and return to the prosecutor or the court.

"62. Further, in a text message dated November 18, 2021, the respondent stated he would send T.W.'s paperwork to T.W. but never did so.

"63. The respondent stipulated that he violated KRPC 1.3.

"64. Because the respondent failed to act with reasonable diligence and promptness in representing T.W., the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4(a)

"65. KRPC 1.4(a) provides that '[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.'

"66. The respondent did not adequately communicate with T.W. when the respondent did not provide T.W. a copy of the plea agreement after T.W. requested a copy.

"67. The respondent stipulated that he violated KRPC 1.4(a).

"68. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(a).

"KRPC 1.16(a)(2)

"69. Lawyers must withdraw from representing a client under certain circumstances. KRPC 1.16(a)(2) specifically provides that:

'(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

[. . . .]

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.'

"70. The respondent experienced stress related to his law practice, particularly with the felony appointments, that made it difficult to keep up with his cases. Further, the respondent experienced stress related to handling his practice's administrative functions such as billing and other personal pressures.

"71. These stressors culminated in the respondent's consumption of alcohol and current conduct related to T.W.'s matter.

"72. Further, the respondent testified that drinking alcohol is still an issue for him. The respondent admitted that some of the unprofessional statements he made to T.W. are not things that he would have said to a client when sober.

"73. The respondent stipulated that he violated KRPC 1.16(a)(2).

"74. The hearing panel concludes that the respondent's use of alcohol and the stress he underwent while representing T.W. materially impaired the respondent's ability to represent T.W. Accordingly, the hearing panel concludes the respondent violated KRPC 1.16(a)(2).

"KRPC 1.16(a)(3)

"75. Lawyers must withdraw from representing a client when, 'the lawyer is discharged.' KRPC 1.16(a)(3).

"76. T.W. asked the respondent to withdraw from representing T.W. in the Cherokee County District Court criminal matter via text message on November 18, 2021.

"77. The respondent did not file motions to withdraw until January 8 and 23, 2022.

"78. The respondent stipulated that he violated KRPC 1.16(a)(3).

"79. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.16(a)(3).

"KRPC 8.4(d)

"80. 'It is professional misconduct for a lawyer to . . . engage [in] conduct that is prejudicial to the administration of justice.' KRPC 8.4(d).

"81. The respondent withheld the plea agreement from T.W. as leverage to receive payment for his legal fees. Further, the respondent failed to promptly withdraw as counsel for T.W. in the Cherokee County District Court criminal matter when T.W. requested he do so. This conduct was prejudicial to the administration of justice.

"82. The respondent stipulated that he violated KRPC 8.4(d).

"83. Therefore, the hearing panel concludes that the respondent violated KRPC 8.4(d).

"*American Bar Association Standards for Imposing Lawyer Sanctions*

"84. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"85. Duty Violated. The respondent violated his duty to his client and the legal profession.

"86. Mental State. The respondent knowingly violated his duty.

"87. Injury. As a result of the respondent's misconduct, the respondent caused injury to T.W. by causing unnecessary frustration and diminishing T.W.'s confidence in the respondent's representation and unnecessary delay in resolution of T.W.'s criminal matters.

"*Aggravating and Mitigating Factors*

"88. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, considered the following aggravating factors:

"89. Prior Disciplinary Offenses. The respondent was previously disciplined on May 19, 2019. The Supreme Court suspended the respondent's license to practice law for a period of 18 months, beginning on the date of his temporary suspension, July 13, 2018, and ordered that the respondent be required to undergo a reinstatement hearing. The respondent's license was reinstated by order of the Supreme Court on March 18, 2021. The respondent's recent prior discipline is an aggravating factor.

"90. Dishonest or Selfish Motive. The hearing panel concludes that the respondent's misconduct was motivated by selfishness. While T.W. ultimately was able to secure the benefit of the negotiated plea agreement, the respondent withheld the plea agreement from T.W. for several months to compel payment from T.W. The respondent's selfish motive is an aggravating factor.

"91. A Pattern of Misconduct. The disciplinary administrator's office argued that the respondent's prior 2019 disciplinary case and the misconduct here represent a pattern of misconduct. With the exception of the KRPC 8.4(d) violation, the rules violated in the 2019 case are different from those violated in this matter. In the 2019 case, the respondent's misconduct was based on his four criminal convictions of driving while intoxicated, the effects of his resulting incarceration and intoxication on his legal duties, and his failure to report a felony conviction to the disciplinary administrator's office. The misconduct here involves the respondent's failure to comply with his duties to T.W. regarding the negotiated plea agreement and withdrawal from the case. While the respondent's use of alcohol was clearly a common factor between these two disciplinary matters, the misconduct involved in this case is different from that in the prior case. The hearing panel concludes that this aggravating factor does not apply here.

"92. Multiple Offenses. The respondent violated KRPC 1.2(a) (scope), 1.3 (diligence), 1.4(a) (communication), 1.16(a) (declining or terminating representation), and 8.4(d) (misconduct prejudicial to the administration of justice), in the way he handled T.W.'s case. The respondent committed multiple offenses, which is an aggravating factor.

"93. Substantial Experience in the Practice of Law. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas on April 26, 1991. At the time of the misconduct, the respondent had been practicing law for approximately 30 years. However, from July 13, 2018, until March 8, 2021, the respondent was suspended. He had only been reinstated to the practice of law for a few months when the misconduct occurred. Further, the respondent testified that he had been off the felony appointment list and rarely handled any felony cases from 2006 until his reinstatement in 2021. Therefore, the hearing panel concludes that the respondent was significantly out of practice in this area of the law and cannot be considered to have substantial experience in the area of law involved in this matter. The respondent was overwhelmed with his felony appointments, which clearly contributed to his misconduct. The hearing panel does not consider this an aggravating factor.

"94. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, considered the following mitigating factors:

"95. Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct. The respondent testified that he experienced significant stress related to his law practice and case

overload associated with the felony appointment list that made it difficult to keep up with his cases. The respondent also experienced stress related to handling his practice's administrative functions such as billing and other personal pressures. Further, the respondent testified that drinking alcohol is still an issue for him. These stressors culminated in the respondent's consumption of alcohol and current conduct related to T.W.'s matter. In addition, the respondent has had to deal with several health conditions that contributed to his overall stress and difficulty maintaining professional conduct. The hearing panel concludes that the respondent's personal or emotional problems contributed to his violation of the Kansas Rules of Professional Conduct, which is a mitigating factor.

"96. The Present and Past Attitude of the Attorney as Shown by His Cooperation During the Hearing and His Full and Free Acknowledgment of the Transgressions. The respondent fully cooperated with the disciplinary process. The respondent entered into a joint stipulation with the disciplinary administrator's office that admitted the facts and KRPC violations alleged in the formal complaint. Ms. Lippert agreed that the respondent was cooperative during the disciplinary process and that this mitigating factor applies. The hearing panel concludes the respondent's present and past attitude as shown by his cooperation and acknowledgment of the transgressions is a mitigating factor.

"97. Mental Disability or Chemical Dependency Including Alcoholism or Drug Abuse. The evidence presented clearly establishes that the respondent suffers from a dependency on alcohol. This is a mitigating factor when the following four factors are all met: '(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.' ABA Standards for Imposing Lawyer Sanctions 9.32(i)(1)-(4). The hearing panel concludes that the evidence establishes that the first two factors are met. However, the evidence showed that factors 3 and 4 have not been met, as the respondent has not recovered from his alcohol dependency as demonstrated by a meaningful and sustained period of successful rehabilitation and the evidence did not establish that the misconduct was arrested and that recurrence of the misconduct is unlikely. The hearing panel concludes that this mitigating factor does not apply here.

"98. Remorse. The respondent stipulated that his conduct violated the rules of professional conduct and showed genuine remorse for having committed the misconduct. The respondent's remorse is a mitigating factor.

"99. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect [and] causes injury or potential injury to a client.'

'6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.'

'7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.'

'8.1 Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.'

'8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.'

'8.3 Reprimand is generally appropriate when a lawyer:

(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.'

'8.4 An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.'

"*Recommendation of the Parties*

"100. The disciplinary administrator recommended that the respondent be suspended for a period of two years with the requirement that the respondent undergo a reinstatement hearing pursuant to Supreme Court Rule 232.

"101. The respondent recommended that he be placed on probation according to the terms of his proposed probation plan.

"*Discussion*

"102. When a respondent requests probation, the hearing panel is required to consider Rule 227, which provides:

'(d) Restrictions on Recommendation of Probation. A hearing panel may not recommend that the respondent be placed on probation unless the following requirements are met:

(1) the respondent complies with subsections (a) and (c) and the proposed probation plan satisfies the requirements in subsection (b);

(2) the misconduct can be corrected by probation; and

(3) placing the respondent on probation is in the best interests of the legal profession and the public.'

"103. Rule 227(c) requires that the respondent 'establish that the respondent has been complying with each condition in the probation plan for at least 14 days prior to the hearing.'

"104. During the November 30, 2022, prehearing conference, the hearing panel inquired whether the respondent had reviewed Rule 227. The respondent stated that he was familiar with Rule 227. The panel noted that Rule 227 requires a respondent to file a proposed probation plan at least 14 days prior to the formal hearing, comply with the plan, and provide evidence that the plan is in place during the formal hearing.

"105. Here, an important part of the respondent's proposed probation plan is supervision of his law practice by attorney Gene Barrett. The respondent's plan proposed bi-weekly meetings between Mr. Barrett and the respondent to review the respondent's cases, files, calendar, and trust account records during which the respondent would discuss any problems, deadlines, court appearances, and his planned course of action in his cases.

"106. The respondent testified that he first spoke with his proposed practice supervisor, Gene Barrett, about supervising the respondent the day before the formal hearing, though, he thought he mentioned needing Mr. Barrett's help in this case 3 to 4 weeks prior to the hearing. Mr. Barrett testified that the respondent sent Mr. Barrett a copy of the proposed probation plan either the night before or the morning of the formal hearing. Mr. Barrett first saw the probation plan in his email inbox the morning of the formal hearing. Mr. Barrett had not met with the respondent regarding the plan and testified that the respondent had not provided Mr. Barrett with an inventory of his cases and clients as required by the plan. Mr. Barrett was unaware that the current disciplinary matter involved the respondent's representation of a client, and instead believed it stemmed from the respondent receiving a DUI. Mr. Barrett had no knowledge of whether the respondent presently maintained sobriety.

"107. Further, the Probation Plan requires the respondent to comply with the KALAP monitoring agreement. The most recent 2022 KALAP monitoring agreement requires, among other things, that the respondent abstain indefinitely from the use of alcoholic beverages and attend Alcoholics Anonymous meetings at least daily. The respondent testified that he has not substantially complied with the 2021 or 2022 KALAP monitoring agreements.

"108. The respondent acknowledged that he had been consuming alcohol since his reinstatement and had last consumed alcohol four to five days prior to the formal hearing. Further, the respondent has not attended Alcoholics Anonymous meetings as required by the KALAP agreement.

"109. The hearing panel concludes that the respondent failed to establish that he 'has been complying with each condition in the probation plan for at least 14 days prior to the hearing' as required by Rule 227(c).

"110. Further, the hearing panel concludes that the respondent's proposed probation plan does not satisfy the requirements of Rule 227(b) because it does not describe a sufficient plan for the respondent to address his dependency on alcohol or for suitable supervision of his law practice. Because of this, the plan is not 'substantial' or 'detailed,' nor does it 'contain adequate safeguards that address the professional misconduct committed, protect the public, and ensure the respondent's compliance with the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, and the attorney's oath of office.' Rule 227(b)(1) and (2).

"111. For these reasons, pursuant to Rule 227(d), the hearing panel concludes that it may not recommend that the respondent be placed on probation.

"112. However, while the misconduct involved in this case is serious, the hearing panel concludes that the respondent's conduct in his 2019 disciplinary matter was much more serious, warranting the resulting 18-month suspension. In the prior matter, the respondent was convicted of driving under the influence of alcohol on four occasions, the last conviction being a felony. The respondent's crimes had resulting effects on his ability to perform his duties as a lawyer, as he was too intoxicated to appear in court at all as municipal prosecutor on one occasion and missed court due to his incarceration on another occasion.

"113. The respondent's misconduct here, while serious, did not rise to the same level of the criminal conduct and misconduct involved in the 2019 matter. Therefore, keeping in mind that this is not the respondent's first disciplinary matter, the hearing panel recommends discipline that is tailored to the specific misconduct at issue here. The hearing panel believes that the discipline recommended below, in connection with a reinstatement hearing requiring proof of specific requirements aimed at ensuring the respondent's dependence on alcohol is properly addressed before he is reinstated, is appropriate.

"114. The hearing panel notes that it considered ABA Standard 8 in determining the appropriate discipline to recommend because the Supreme Court's reinstatement order required the respondent to enter 'a one-year monitoring agreement with KALAP.' The evidence established that the respondent failed to comply with the KALAP monitoring agreement, which violated the Court's reinstatement order.

"*Recommendation of the Hearing Panel*

"115. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel recommends that the respondent be suspended for a period of one year. The hearing panel further recommends that the respondent be required to undergo a reinstatement hearing pursuant to Rule 232.

"116. The hearing panel recommends that prior to reinstatement, the respondent be required to show that he has followed the recommendations of Kendall Heiman, LSCSW, LCAC as listed in pages 26-28 of Ms. Heiman's Amended Evaluation Summary, which was based on Ms. Heiman's evaluation of the respondent on December 28, 2022.

"117. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In an attorney disciplinary proceeding, the court considers the evidence, the panel's findings, and the parties' arguments and determines whether KRPC violations exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2024 Kan. S. Ct. R. at 279). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

A finding is considered admitted if exception is not taken. When exception is taken, the finding is typically not deemed admitted so the court must determine whether it is supported by clear and convincing evidence. *In re Hodge*, 307 Kan. 170, 209-10, 407 P.3d 613 (2017). If so, the finding will not be disturbed. The court does not reweigh conflicting evidence, assess witness credibility, or redetermine questions of fact when undertaking its factual analysis. *In re Hawver*, 300 Kan. 1023, 1038, 339 P.3d 573 (2014).

The respondent was given adequate notice of the formal complaint and timely responded. The respondent was also given adequate notice of the hearing before the panel and the hearing before this court. He did not file exceptions to the hearing panel's final hearing report.

With no exceptions before us, the panel's factual findings and conclusions of law are deemed admitted by the respondent and ODA. Supreme Court Rule 228(g)(1), (2) (2024 Kan. S. Ct. R. at 285). We agree with the panel in holding that respondent violated KRPC 1.2(a) (scope of representation); KRPC 1.3 (diligence); KRPC 1.4(a) (communication); KRPC 1.16 (a)(2), (3) (declining or terminating representation); and KRPC 8.4(d) (professional misconduct).

The only remaining issue is to decide the appropriate discipline for these violations. The hearing panel recommended the respondent be suspended for one year and required to undergo a reinstatement hearing pursuant to Supreme Court Rule 232 (2024 Kan. S. Ct. R. at 290). The hearing panel also recommended certain conditions before reinstatement. Before this court, both the ODA and respondent recommend respondent be suspended for one year and required to undergo a reinstatement hearing.

This court is not bound by any recommendations. *In re Long*, 315 Kan. 842, 853, 511 P.3d 952 (2022). The court is cognizant that "'[o]ur primary concern must remain protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar.' [Citation omitted.]" *In re Jones*, 252 Kan. 236, 241, 843 P.2d 709 (1992).

After considering the evidence presented, all recommendations, and aggravating and mitigating circumstances, we conclude appropriate discipline is respondent's indefinite suspension from the practice of law. A minority of the court would impose a lesser penalty.

Should respondent wish to have his license to practice law reinstated at some point, he must apply for reinstatement pursuant to Rule 232. Though we acknowledge the hearing panel urged us to set conditions before reinstatement would be considered, we decline to do so.

Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Kevin T. Cure is indefinitely suspended from the practice of law in the state of Kansas, effective

the date of this opinion, in accordance with Supreme Court Rule 225(a)(2) (2024 Kan. S. Ct. R. at 278) for violations of KRPC 1.2(a), 1.3, 1.4(a), 1.16(a)(2), (3), and 8.4(d).

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2024 Kan. S. Ct. R. at 289).

IT IS FURTHER ORDERED that if respondent applies for reinstatement, he shall comply with Rule 232 and be required to undergo a reinstatement hearing.

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

State v. Cantu

No. 124,303

STATE OF KANSAS, *Appellee*, v. JOHN R. CANTU, *Appellant*.

(547 P.3d 477)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Right to Testify in One's Criminal Trial Is Fundamental Right.* The right to testify on one's own behalf at a criminal trial is a fundamental right grounded in multiple provisions of the United States Constitution.

2. TRIAL—*Deprivation of Defendant's Right to Testify—Forfeiture and Striking Defendant's Testimony.* While a finding of forfeiture is the most overt way in which a defendant may be deprived of the right to testify, a court may also infringe on the right to testify by striking the defendant's testimony.

3. SAME—*Constitutional Errors Reviewed for Harmlessness—Reversal Not Required if Determined to Be Harmless.* Most constitutional errors can be reviewed for harmlessness. A constitutional error is harmless only if the party benefitting from the error establishes beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record. Constitutional errors determined to be harmless do not require reversal.

4. SAME—*Structural Errors Affect Fundamental Fairness—Require Automatic Reversal.* Structural errors are defects affecting the fundamental fairness of the trial's mechanism, preventing the trial court from serving its basic function of determining guilt or innocence and depriving defendants of basic due process protections required in criminal proceedings. Structural errors are not amenable to a harmless error outcome-based analysis and thus require automatic reversal.

5. SAME—*Denial of Defendant's Right to Testify by Striking Testimony—Structural Error.* The complete and wrongful denial of a defendant's constitutional right to testify by improperly removing a defendant from the stand and striking the defendant's entire testimony is structural error because it renders the criminal trial fundamentally unfair, regardless of whether the outcome of the trial would have been different had the defendant been permitted to testify and his or her testimony been left intact.

Review of the judgment of the Court of Appeals in 63 Kan. App. 2d 276, 528 P.3d 265 (2023). Appeal from Reno District Court; TRISH ROSE, judge. Oral argument held December 13, 2023. Opinion filed May 10, 2024. Judgment of the Court of Appeals affirming the district court on the issue subject to review is reversed. Judgment of the district court is reversed on the issue subject to review.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Kimberly A. Rodebaugh, senior assistant district attorney, argued the cause, and *Thomas R. Stanton*, district attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: This case requires us to decide whether the complete and improper denial of a criminal defendant's constitutional right to testify is structural error or can be analyzed for harmlessness. The Court of Appeals held this type of error can be analyzed using the harmless error standard and concluded it was harmless here. We disagree. Given the constitutional underpinnings of the right and the indeterminate or irrelevant effects of a total denial on the outcome of a criminal trial, we hold that the complete and improper deprivation of the right to testify is structural error. Accordingly, we reverse John R. Cantu's convictions and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

John R. Cantu was charged in Reno County District Court with two counts of felony stalking, two counts of violation of protection from stalking orders, criminal damage to property, criminal trespass, and felony criminal threat. *State v. Cantu*, 63 Kan. App. 2d 276, 276, 528 P.3d 265 (2023). He was tried before a jury, and he testified on his own behalf as the sole defense witness. On direct examination, Cantu denied all of the allegations against him and gave an uncorroborated alibi for his whereabouts on the night in question. The substance of Cantu's direct testimony and his demeanor on the stand appear to have been overall appropriate. He responded to all of his counsel's questions directly with one interruption and one irrelevant comment. There was no admonishment from the judge or objection from the State during his direct examination. Yet a very different situation unfolded on cross-examination.

The State's cross-examination of Cantu was cut short when the judge removed him from the stand on grounds that he was being uncooperative. Early in the State's questioning of Cantu, he interrupted the prosecutor by attempting to explain a previous answer, after which he ignored multiple admonishments from the

judge to wait for a question. During a back-and-forth exchange with the judge, Cantu repeatedly asked if he was limited to answering only "yes" or "no," but the judge ignored his question. Instead, after several warnings, the judge removed Cantu from the stand and, at the prosecutor's request, struck his entire testimony from the record. The following transcript excerpt depicts the relevant exchange:

"[STATE]:	You would agree that there was a protection from stalking that was filed against you, correct?
"[DEFENDANT]:	No.
"[STATE]:	You also agree?
"[DEFENDANT]:	For the record, for the record—
"COURT:	You need to wait for a question.
"[DEFENDANT]:	I didn't finish.
"COURT:	You need to wait for a question.
"[DEFENDANT]:	I didn't finish answering the first one.
"COURT:	I said it two times now. You need to wait for a question.
"[DEFENDANT]:	She asked if I agreed.
"COURT:	Sit back and wait for a question.
"[DEFENDANT]:	May I be allowed to explain? Do I have to say yes or no?
"[STATE]:	Mr. Cantu?
"COURT:	Mr. Cantu, if you don't cooperate I'm going to ask you to go back to the table.
"[DEFENDANT]:	May I ask a question?
"COURT:	You need to listen to the questions.
"[DEFENDANT]:	Am I supposed to respond yes or no?
"COURT:	Go sit at the table right now. Absolutely right now.
"[DEFENDANT]:	I don't understand. Can I object to this?
"COURT:	Sit at your table.
"[DEFENDANT]:	I mean, she asked me a question.
"COURT:	Officers, would you remove Mr. Cantu from the courtroom?
"[DEFENDANT]:	Is this going to be on the record? Dawn Hicks—my water. You—
"DEPUTY:	Grab your water.
"[COUNSEL]:	Is that sufficient, Your Honor?
"COURT:	If Mr. Cantu will remain compliant it is. Otherwise I will require his removal. He's indicating by his posture and returning to his seat that he will remain compliant. Do you have any other evidence."

The transcript record shows the judge warned Cantu four times to wait for or listen to the prosecutor's question before ordering him removed. The record also shows the judge repeatedly ignored Cantu's questions about how he was allowed to respond to the prosecutor's questions. Upon the prosecutor's motion and in front of the jury, the judge ordered Cantu's entire testimony stricken from the record, justifying this decision on grounds that "Mr. Cantu would not cooperate when I told him to only answer questions on cross-exam. I believe the State's request is valid. His testimony is stricken." The court made no further record of Cantu's conduct while he was on the stand, such as his body language, demeanor, or tone of voice.

Aside from granting the State's motion to strike Cantu's testimony in the presence of the jury, the judge did not specifically explain how the jury should treat Cantu's stricken testimony. But at the close of evidence and before jury deliberations, the court issued written instructions to the jury which explicitly advised: "In your fact finding you should consider and weigh everything admitted into evidence. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence."

The jury acquitted Cantu of criminal trespass but convicted him of two counts of felony stalking, two counts of violation of protection from stalking orders, criminal damage to property, and felony criminal threat. See *Cantu*, 63 Kan. App. 2d at 281. The district court imposed a controlling 24-month prison sentence and ordered restitution. Cantu appealed, arguing (1) there was insufficient evidence to support his convictions for stalking and violating the protection orders and (2) the district court's decision to strike his entire testimony from the record deprived him of his constitutional right to testify, which was structural error requiring automatic reversal. 63 Kan. App. 2d at 277. The Court of Appeals agreed with Cantu in part.

On the sufficiency claims, the panel reversed the two stalking convictions and the two convictions for violating a protection from stalking order, but affirmed the convictions for criminal

damage to property and criminal threat. *Cantu*, 63 Kan. App. 2d at 293.

On the claimed violation of the right to testify, the panel concluded that the district court erred in ordering Cantu's testimony stricken from the record and that this error denied Cantu the constitutional right to testify. *Cantu*, 63 Kan. App. 2d at 289. But the panel held the error was not a structural one requiring automatic reversal. Instead, it found the error could be properly analyzed under the constitutional harmless-error standard. In conducting that analysis, the panel found Cantu's testimony amounted to a general denial of all charges, which was synonymous with his plea of not guilty. Next, the panel reasoned Cantu's counsel managed to relay his theory of the case during closing arguments. 63 Kan. App. 2d at 290-92. Finally, the panel noted the judge never specifically instructed the jury to disregard Cantu's testimony, and so the panel could not conclude that the jury did not consider the stricken testimony in arriving at its verdict. 63 Kan. App. 2d at 292. For these reasons, the panel was convinced beyond a reasonable doubt that the erroneous denial of Cantu's right to testify by improperly striking his testimony did not affect the outcome of the trial and concluded the error was harmless. 63 Kan. App. 2d at 292-93.

Cantu petitioned for review, challenging the panel's holding that the complete and improper denial of the constitutional right to testify is not structural error but an error that can be analyzed for harmlessness. Alternatively, Cantu challenges the panel's conclusion that the court's error in denying his right to testify was harmless beyond a reasonable doubt.

The State did not file a cross-petition challenging any of the panel's rulings. Thus, the panel's conclusion that the district court erred in ordering Cantu's testimony stricken from the record and that this error denied Cantu the constitutional right to testify is an established point and not subject to review. See Supreme Court Rule 8.03(c)(3) (2023 Kan. S. Ct. R. at 57); *State v. Gonzalez*, 307 Kan. 575, 590, 412 P.3d 968 (2018) (when failing to file a cross-petition for review, Court of Appeals' holdings against respondent are settled). The only issue before us then is whether the district court's error in denying Cantu his constitutional right to testify is structural or can be properly analyzed for harmlessness.

ANALYSIS

Cantu claims the "complete and improper denial of the constitutional right to testify" is structural error. In support, he argues the right to testify is so integral to due process at trial that "[a] person who is wrongfully denied the right to testify in their own behalf can in no way be said to have had their 'day in court.'"

To resolve Cantu's claim, we first describe the fundamental and personal nature of the right to testify and then set forth the circumstances under which the right can be lost. Accepting as conclusive the panel's determination that the district court erroneously denied Cantu's constitutional right to testify, we next consider whether the error can be reviewed for harmlessness. We ultimately conclude that the complete and improper denial of the constitutional right to testify is not amenable to harmless-error review and is therefore structural error.

1. *Right to testify*

The right to testify on one's own behalf at a criminal trial is a fundamental right grounded in multiple provisions of the United States Constitution. *Rock v. Arkansas*, 483 U.S. 44, 49-55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987); *Ferguson v. Georgia*, 365 U.S. 570, 582, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961). In *Rock v. Arkansas*, the United States Supreme Court found this right is guaranteed by the Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment, and necessarily implied by the Fifth Amendment privilege against self-incrimination. 483 U.S. at 51-53. These constitutional provisions apply to state proceedings through the Fourteenth Amendment. See *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (incorporating the Sixth Amendment Compulsory Process Clause); *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) (incorporating the Fifth Amendment's protection against compelled self-incrimination).

At its most basic level, the right to testify allows a defendant to respond directly to the State's charges by "present[ing] his own version of events in his own words." *Rock*, 483 U.S. at 52. Thus, the Court has identified the right to testify as one in a bundle of

minimum due process rights guaranteed by the Fourteenth Amendment that are essential to a fair trial. *Rock*, 483 U.S. at 51 (listing a criminal defendant's basic due process rights at trial as including, at a minimum, the right to confront witnesses, to offer testimony, and to be represented by counsel) (quoting *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 682 [1948]).

The Court has also found the right to testify derives from the Sixth Amendment's Compulsory Process Clause, which grants a defendant the right to call favorable, material witnesses. *Rock*, 483 U.S. at 52 (noting "the most important witness for the defense in many criminal cases is the defendant himself"). In this way, the Court recognized the right to testify is part of the broader *personal* right to present a defense, designating it as even more fundamental than the right of self-representation. 483 U.S. at 52 (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 [1975]).

Finally, the Court has interpreted the Fifth Amendment's privilege against self-incrimination as implying an affirmative right to testify. *Rock*, 483 U.S. at 52-53 ("'Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.'") (quoting *Harris v. New York*, 401 U.S. 222, 230, 91 S. Ct. 643, 28 L. Ed. 2d 1 [1971]).

Though fundamental, the right to testify is not absolute and "'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock*, 483 U.S. at 55 (quoting *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 [1973]). For example, a defendant's right to testify is necessarily limited by procedural and evidentiary rules. It also comes with offsetting obligations to tell the truth and submit to cross-examination. See *Nix v. Whiteside*, 475 U.S. 157, 173, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (stating a defendant's right to testify does not include the right to commit perjury); *Brown v. United States*, 356 U.S. 148, 155, 78 S. Ct. 622, 2 L. Ed. 2d 589 (1958). Such rules facilitate the goals of "fairness and reliability in the ascertainment of guilt and innocence"—the central purpose of trial and ultimate duty of the trial court. *Chambers*, 410 U.S. at 302. Therefore, a defendant's right to testify should be understood as extending only to truthful, relevant testimony that is subject to

proper cross-examination. Even so, "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock*, 483 U.S. at 55-56. Thus, in limiting the right to testify, a court must evaluate whether the interests served justify the limitation imposed. See *Rock*, 483 U.S. at 56 (referring to limitations on witness testimony imposed by state rules of evidence).

Having recognized the personal and fundamental nature of the right to testify and its contours, we next consider how the right can be lost.

2. *Circumstances under which right to testify can be waived or forfeited*

Under Kansas law, the right to testify is not self-executing—the defendant must invoke the right or else it is waived. *State v. McKinney*, 221 Kan. 691, 694, 561 P.2d 432 (1977) (citing federal cases). A defendant voluntarily waives the right by choosing not to testify. Some courts have also determined a defendant may forfeit the right to testify by serious misconduct during trial, just as the United States Supreme Court has held of the right to be present at trial in *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970).

In *Allen*, the Court held that a defendant lost his constitutional right to be present at trial by engaging in conduct that is "so disorderly, disruptive, and disrespectful of the court that [the] trial cannot be carried on with [the defendant] in the courtroom." 397 U.S. at 343. The defendant's conduct in *Allen* consisted of several irrelevant tangents and abusive, threatening outbursts that together displayed a defiant unwillingness to comply with normal order and decorum. At one point, the defendant threatened the judge would be made a "corpse" and promised to obstruct the proceedings: "'There's not going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial.'" 397 U.S. at 340-41.

Although cautioning that courts must indulge every reasonable presumption against the loss of constitutional rights, the Court made clear that "flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated."

Allen, 397 U.S. at 343. The Court explained that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." 397 U.S. at 343. Acknowledging the need to weigh the competing interests of the constitutional right to be present at trial on the one hand and the orderly progress and effective administration of justice on the other, the Court held under the facts presented that the trial court's decision to remove Allen from the courtroom was constitutionally permissible:

> "[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." 397 U.S. at 343.

Some courts have extended the holding in *Allen* to conclude that, along with the right to be present at trial, the right to testify can also be waived or forfeited by the defendant's disorderly, disruptive, or disrespectful conduct. *United States v. Nunez*, 877 F.2d 1475, 1478 (10th Cir. 1989) (stating right to testify may be waived by "'contumacious conduct'"); *United States v. Ives*, 504 F.2d 935, 941 (9th Cir. 1974) ("[J]ust as the right of presence in the courtroom can be waived by the defendant's contumacious conduct, the privilege to testify can also be waived by the defendant's conduct."), *vacated on other grounds by* 421 U.S. 944, 95 S. Ct. 1671, 44 L. Ed. 2d 97 (1975), *opinion reinstated in relevant part by* 547 F.2d 1100 (9th Cir. 1976); *State v. Anthony*, 361 Wis. 2d 116, 144-56, 860 N.W.2d 10 (2015) (affirming denial of the right to testify when defendant's proffered testimony was irrelevant and defendant's conduct was stubborn and defiant to the point of threatening the fairness and reliability of the trial process); *Douglas v. State*, 214 P.3d 312, 322, 328 (Alaska 2009) (applying the *Allen* standard to find a defendant forfeited the right to testify by often interrupting the proceedings with irrelevant arguments and repeatedly insulting the prosecutor, attorneys, and judge). In so holding, all of

these courts brought forth *Allen*'s precautionary language requiring that the trial judge first specifically warn the defendant of the impending loss of the right.

While a finding of forfeiture is the most overt way in which a defendant may be deprived of the right to testify, a court may also infringe on the right to testify by striking the defendant's testimony. Striking the testimony of any witness is a drastic remedy not to be lightly invoked. *United States v. McKneely*, 69 F.3d 1067, 1076 (10th Cir. 1995). But when the witness is the defendant, courts must proceed with extra caution when deciding whether to strike testimony due to the constitutional right at stake. See *Allen*, 397 U.S. at 342-43 (reiterating a trial court's responsibility to "indulge every reasonable presumption against the loss of constitutional rights"). This obligation is not lessened when the defendant's behavior causes frustration. See *Ortega v. O'Leary*, 843 F.2d 258, 261 (7th Cir. 1988) ("A contentious defendant has no fewer rights than a sympathetic one."). Yet striking any witness' testimony is an appropriate remedy when the witness frustrates the fact-finding process, such as by testifying to irrelevant matters or refusing to answer the cross-examiner's questions. See, e.g., *United States v. Evans*, 908 F.3d 346, 355 (8th Cir. 2018); *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988).

We accept as conclusive the panel's determination that the district court erroneously denied Cantu's constitutional right to testify by striking his direct testimony. See Supreme Court Rule 8.03(c)(3) (2023 Kan. S. Ct. R. at 57); *State v. Corey*, 304 Kan. 721, 741-42, 374 P.3d 654 (2016) (Supreme Court did not question panel's determination about defendant's absence during a critical stage of trial, noting State did not cross-petition for review on that question). Thus, we turn now to whether the district court's error is structural or can be analyzed for harmlessness.

3. *Error analysis*

The question of what type of error analysis applies to a constitutional failure in a criminal trial is a question of law over which this court has unlimited review. *State v. Johnson*, 310 Kan. 909, 913, 453 P.3d 281 (2019).

Most errors that occur during a criminal trial, even those affecting a defendant's constitutional rights, can be reviewed to determine whether they are harmless. *State v. Herbel*, 296 Kan. 1101, 1110, 299 P.3d 292 (2013). A constitutional error is harmless only if the party benefitting from the error establishes beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record. 296 Kan. at 1110. Constitutional errors determined to be harmless do not require reversal. *State v. Ward*, 292 Kan. 541, 556, 256 P.3d 801 (2011) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 [1967] [stating a federal constitutional error is harmless only when there is no reasonable possibility the error contributed to the conviction]).

But the United States Supreme Court has recognized a limited category of errors which violate constitutional rights "so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23-24, n.8 (citing *Payne v. State of Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 [1958] [coerced confession]; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 [1963] [total deprivation of counsel]; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 [1927] [having an impartial judge]). See also *United States v. Gonzalez-Lopez*, 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (denial of right to counsel of choice); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (defective reasonable-doubt instruction); *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of grand jury); *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (denial of public trial); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (denial of self-representation at trial). Errors of this kind are considered "structural" and require a new trial regardless of whether prejudice has been shown because they constitute a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Structural errors prevent the trial court from serving its basic function of determining guilt or innocence and deprive defendants of

the basic protections of a criminal trial. *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 [1986]). In short, errors of this kind compromise the fundamental fairness expected in a criminal trial. See *McCoy v. Louisiana*, 584 U.S. 414, 427, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018).

In addition to impairing the framework of the trial itself, the consequences of structural errors are generally difficult to assess and therefore unamenable to the "outcome-based" analysis of harmless-error review. When the prejudicial effects of a constitutional violation are unquantifiable and indeterminate, any assessment of the effect on the outcome of trial becomes a purely speculative endeavor. See *Gonzalez-Lopez*, 548 U.S. at 149, n.4 (denial of right to counsel of choice considered structural error based on the "difficulty of assessing the effect of the error"); *Vasquez*, 474 U.S. at 263 ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained"); *Waller,* 467 U.S. at 49, n.9 (violation of the public-trial guarantee is not subject to harmlessness review because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). When the effects of a constitutional error cannot be adequately measured for harmlessness, automatic reversal is necessary.

As well as the difficulty in assessing structural error, the United States Supreme Court has also relied on the irrelevance of a harmlessness analysis when the constitutional right violated protects an interest other than an erroneous conviction. *Gonzalez-Lopez*, 548 U.S. at 149, n.4. An example is the right to self-representation which, when exercised, "usually increases the likelihood of a trial outcome unfavorable to the defendant." *McKaskle*, 465 U.S. at 177, n.8. The right to self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver v. Massachusetts*, 582 U.S. 286, 295, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017) (citing *Faretta*, 422 U.S. at 834). "Because harm is irrelevant to the basis underlying the right, the

Court has deemed a violation of that right structural error." *Weaver*, 582 U.S. at 295 (citing *Gonzalez-Lopez*, 548 U.S. at 149, n.4).

Like the United States Supreme Court, this court has found structural errors in a limited class of cases. See, e.g., *State v. Bunyard*, 307 Kan. 463, 471, 410 P.3d 902 (2018) (right to self-representation) ("'Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis.'"); *Miller v. State*, 298 Kan. 921, 935, 318 P.3d 155 (2014) (right to a reasonable doubt instruction) ("A jury instruction that a jury is reasonably likely to have applied in a way that could produce a guilty verdict despite reasonable doubt is per se prejudicial."); *State v. Cox*, 297 Kan. 648, 656, 304 P.3d 327 (2013) (right to a public trial) ("The district judge's wholesale closure of the courtroom during the presentation of [sensitive] evidence, in the absence of the State or the judge expressing any 'overriding interest' combined with the lack of meaningful consideration of alternatives, violated [defendant's] . . . right to a public trial."); *State v. Calderon*, 270 Kan. 241, 253-54, 13 P.3d 871 (2000) (right to be present at trial) (structural error when district court denied a non-English speaking defendant a "meaningful presence" at a critical stage of trial—an error that implicates the basic consideration of fairness—by failing to provide an interpreter during closing arguments, thus the error's effect on the outcome of trial is irrelevant); see also *State v. Harris*, 311 Kan. 371, 377, 461 P.3d 48 (2020) (right to a jury trial) (automatic reversible error when district court failed to properly apprise defendant of his right to a jury trial and obtain a sufficient waiver of the right).

This court's general approach for determining structural error has been based on the rationale that the error at issue compromised the fundamental fairness of the trial mechanism, both from the perspective of the court's function and the defendant's right to due process. See generally *Johnson*, 310 Kan. at 913-14 (explaining structural errors "prevent the trial court from serving its basic function of determining guilt or innocence and deprive defendants the 'basic protections' of a criminal trial"). In appropriate cases, we have also considered whether the error's effect on the trial's

outcome is difficult to measure or simply irrelevant. See, e.g., *Bunyard*, 307 Kan. at 471 (explaining that denial of the right to self-representation is not amenable to harmless error analysis because exercise of the right usually *increases* the likelihood of an unfavorable trial outcome for defendant); *Calderon*, 270 Kan. at 253 (noting a defendant's presence in the courtroom "can have a powerful influence on the outcome of the trial" because a "defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact"). Thus, our bases for identifying structural errors aligns with the United States Supreme Court's historical precedent. See generally *McCoy*, 584 U.S. at 427 (summing up the different rationales the Court has used to classify structural errors).

Additionally, the extent of the particular deprivation can be a factor in our finding of structural error. Wrongful, wholesale deprivations of fundamental constitutional rights are more likely to be structural. In such cases, the circumstances in which the deprivation took place matter greatly. Compare *Calderon*, 270 Kan. at 253-54 (denial of right to be present at trial during closing arguments by failure to provide necessary interpreter is structural error), with *State v. Mann*, 274 Kan. 670, 683, 56 P.3d 212 (2002) (denial of right to be present at trial during ex parte communications between judge and jurors subject to harmless-error review).

Finally, because a constitutional right may be properly denied, in full or in part, only when a legitimate, overriding interest is present, we look carefully at whether the district court properly weighed both the interest and the right at stake and deprived the right only to the extent necessary to protect that interest. See, e.g., *Cox*, 297 Kan. at 656-57 (holding the district judge's "wholesale closure" of the courtroom during the presentation of material evidence without expressing any "overriding interest" or meaningfully considering alternatives was structural error).

Thus, depending on the nature of the right at stake, both the extent of the deprivation and the circumstances of its deprivation can be highly relevant factors to the type of error analysis that applies. We now consider these factors in the context of the record before us.

We need not repeat the back-and-forth discussion that took place between the judge and Cantu during his cross-examination. We have already noted Cantu interrupted the prosecutor, attempted to give more than a yes or no answer to a previous question, and did not abide by the judge's repeated instructions to do just that. We also observed the judge did not respond to Cantu's repeated and simple question about how he could answer but instead removed him from the stand. Having done so, the judge was then faced with the State's immediate motion to strike Cantu's testimony on grounds that the State was denied the right to cross-examine him.

Had the judge only removed Cantu from the stand without striking his direct testimony, his right to testify would have been partially denied by foreclosure of further testimony on cross-examination and redirect. But the judge then struck Cantu's testimony up to that point. The effect of the court's order was to remove Cantu's entire testimony from the jury's consideration as if he had never testified. This action runs counter to the court's fact-finding function by depriving the jury of the opportunity to weigh this evidence and consider Cantu's credibility against the State's evidence and witnesses. The combination of removing Cantu from the stand and then striking his entire testimony constituted a complete denial of his right to testify. And based on the panel's finding that the court abused its discretion in doing so, this wholesale denial was wrongful.

Given the importance of the right at stake and the extent of the deprivation here, the district court's denial of Cantu's right to testify constitutes a defect affecting the entire trial framework and is therefore structural error. Cantu had no chance to be heard, to personally defend against the charges, or to call the most important material witness—himself. As a result, the jury could not consider his body language, expressions, tone of voice, and, of course, the substance of his testimony. Assessing the effect of an error of this magnitude on the outcome of trial would be improper speculation. And ultimately, an analysis of whether the outcome of the trial would have been different if Cantu had been allowed to testify is irrelevant because he is prejudiced by this lack of essential due process which rendered his criminal trial fundamentally unfair.

This is not to say that the denial of a defendant's right to testify will always be structural error and can never be analyzed for harmlessness. The extent and circumstances of the deprivation drive the reversibility framework. There may be instances where the deprivation is so slight, error is amenable to harmless error analysis. But where the impairment is closer to absolute, it "'implicates the basic consideration of fairness'" expected in a criminal trial. *State v. McDaniel*, 306 Kan. 595, 604, 395 P.3d 429 (2017) (quoting *Calderon*, 270 Kan. at 253). As an example, we look to *State v. Carr*, 300 Kan. 1, 209-11, 331 P.3d 544 (2014), *rev'd and remanded on other grounds* 577 U.S. 108, 136 S. Ct. 633, 193 L. Ed. 2d 535 (2016), where this court held the violation of a defendant's right to present a defense by erroneous evidentiary rulings, even when implicating the right to testify, is subject to harmless-error review.

Carr sought to introduce testimony that an unknown, uncharged third person committed the crimes with his codefendant instead of him. The State argued this evidence should be excluded as improper third-party evidence and could not be admitted under a hearsay exception. The trial court agreed with the State and found Carr's proffered testimony inadmissible. In the wake of the judge's rulings and after consulting with his counsel, Carr chose not to testify at trial.

On direct appeal, Carr argued the district court misapplied the applicable rules of evidence and consequently prevented him from testifying to "anything useful" in his defense. 300 Kan. at 210. He urged this court to treat the district court's erroneous evidentiary rulings as structural errors. This court agreed with Carr that the district court abused its discretion in excluding the proffered evidence, thereby violating his right to present a complete defense. 300 Kan. at 210. The court also entertained Carr's argument that these rulings infringed on his right to testify. 300 Kan. at 210-11. But guided by the United States Supreme Court's decision in *Crane v. Kentucky*, 476 U.S. 683, 691, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), on denial of the right to present a defense and persuasive authority on denial of the right to testify, the court applied the constitutional harmlessness standard to evaluate the effect of these errors. See *Carr*, 300 Kan. at 211 (noting the majority rule

"appears" to be the harmless-error standard for a wrongful denial of the right to testify) (citing *Palmer v. Hendricks*, 592 F.3d 386 [3d Cir. 2010]; *Ortega v. O'Leary*, 843 F.2d 258 [7th Cir. 1988]; *Wright v. Estelle*, 572 F.2d 1071 [5th Cir. 1978]; *Quarels v. Com.*, 142 S.W.3d 73 [Ky. 2004]). Given the strength of the State's overwhelming evidence supporting Carr's guilt, this court ultimately found the district court's wrongful violation of Carr's rights to present a defense and to testify was harmless. 300 Kan. at 212.

We find *Carr* distinguishable from the present case because both the extent and circumstances of the deprivation there were materially different. While *Carr* did not explicitly address the extent and circumstances of the deprivation, it is implicit in its holding. First, the extent of the deprivation in *Carr* was materially different from Cantu's. The alleged deprivation in *Carr* arose from an evidentiary ruling. And evidentiary rulings can generally be analyzed under the constitutional harmlessness standard. While such a violation may amount to a partial infringement on a defendant's right to testify, these errors can usually be analyzed in the context of other evidence. See, e.g., *Crane*, 476 U.S. at 691 (holding the erroneous exclusion of defendant's testimony about the circumstances in which his confession was obtained could be analyzed for harmless error); *State v. Green*, 254 Kan. 669, 680-81, 867 P.2d 366 (1994) (holding the erroneous exclusion of admissible hearsay evidence by failure to compel a witness to testify could be analyzed for harmless error). Importantly, a deprivation of this kind is less likely to impair the overall integrity of the trial. As to the circumstances surrounding the deprivation, Carr personally chose not to testify, though he appears to have done so based on the district court's evidentiary rulings. See *Carr*, 300 Kan. at 210. As such, he voluntarily waived his right to testify as a strategic decision for his defense. That circumstance is markedly different from the situation here in which the district court judge unilaterally and completely removed Cantu's personal right to testify.

We therefore do not read *Carr* to prescribe—without exception—application of the constitutional harmless error test to evaluate whether any improper infringement of a defendant's right to present a defense or to testify requires reversal. To do so would

require us to apply the constitutional harmless error test to a scenario in which the court completely and improperly prohibits defendant's counsel from presenting a defense and submits the matter to the jury for decision when the State rests based on a congested docket. Or to apply the constitutional harmlessness test to the situation here, in which the court completely and improperly prohibits the defendant from testifying at his own trial. In these cases, it is inappropriate to assess the effect such an error had on the outcome of the trial because the error impairs the integrity of the trial, no matter the outcome.

The district court's error in striking all of Cantu's testimony resulted in an absolute and unqualified deprivation of his right to testify. He was completely stripped of an opportunity to be heard in his own voice or to personally defend against the State's charges. This defect in the framework of Cantu's trial infected the entire judicial process by rendering his trial fundamentally unfair, regardless of whether the error affected the outcome of the trial. Thus, the complete and improper denial of Cantu's constitutional right to testify is structural error requiring reversal of his convictions and a new trial.

Our decision today should not be viewed as hindering a district court's discretion to preserve dignity, order, and decorum within the courtroom or its fact-finding mission. In appropriate circumstances, a district court can and should prevent a defendant from testifying or strike a defendant's testimony as an ultimate sanction. Rather, we echo and underscore the United States Supreme Court's guidance in *Allen* that courts are to "indulge every reasonable presumption against the loss of [a defendant's] constitutional rights." 397 U.S. at 342-43. Therefore, courts should proceed with appropriate caution and heightened sensitivity when considering restrictions on a defendant's right to testify, particularly when the restriction results in a complete and unqualified denial of the right as occurred here.

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

BILES, J., concurring in the result.