REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

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— **Disbarment**. Attorney charged with multiple violations of KRPCs in a formal complaint filed by the Disciplinary Administrator, voluntarily surrendered his license to practice law in Kansas. This court admitted Brian William Costello to the practice of law in Kansas on October 9, 2001. In a letter signed March 27, 2023, Costello voluntarily surrendered his license to practice law under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). *In re Costello* ……..…..…… 149*

— **One-year Suspension**. Attorney entered into a summary submission agreement under Supreme Court Rule 223, stipulating that he violated KRPCs 1.1, 1.3, 1.15(a) and (b), 8.4(c) and (d), Rule 210(c), and Rule 221(b). Attorney is disciplined by a one-year suspension, to run concurrent with his suspension in the state of Maryland. The Supreme Court further orders as a condition of reinstatement of his Kansas license that attorney show that his Maryland and District of Columbia law licenses have been reinstated. *In re Marks* ……..…… 10

— —. Attorney is suspended for one year from the practice of law in the state of Kansas, in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. R. at 281), for violations of KRPC 1.15 (safekeeping property), 8.4(c) (professional misconduct), and Rule 210 (duty to cooperate). Respondent will be required to undergo a reinstatement hearing. *In re McVey* ……..…….…… 266*

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— **Published censure**. Attorney Mitchell Spencer committed a misdemeanor that involved dishonesty, fraud, deceit, or misrepresentation which adversely reflected on his fitness to practice law, but the Kansas Supreme Court held it did not seriously adversely reflect on his fitness to practice law. A minority of the court would impose the jointly agreed to recommended discipline of a 90-day suspension with the suspension being stayed while the respondent is placed on probation for one year. The court held published censure to be an appropriate sanction. *In re Spencer* …..……..... 70

— **Reinstatement**. Attorney suspended for 90 days in October 2022, files motion for reinstatement. Disciplinary Administrator moved for reinstatement hearing, but Kansas Supreme Court denied motion for hearing, and granted Malone's reinstatement, and ordered his license to be reinstated when CLE and attorney registration fees are in compliance. *In re Malone* ……..……..…….. 117

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Courts Exercise Judicial Review Only in Actual Case or Controversy—Requirement of Standing. While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is

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not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *State v. Strong* 197*

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Claims of Multiplicity—Two Components to Inquiry. When analyzing claims of multiplicity, the overarching inquiry is whether the convictions are for the same offense. There are two components to this inquiry, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? and (2) By statutory definition are there two offenses or only one? *State v. Eckert* 21

Compulsion Defense—Application—Instruction Not Warranted When Coercion Not Continuous. Under a compulsion defense, a person is not guilty of a crime other than murder or voluntary manslaughter because of conduct the person performs under the compulsion or threat of the imminent infliction of death or great bodily harm. The defense applies only if such person reasonably believes that death or great bodily harm will be inflicted upon such person or upon such person's spouse, parent, child, brother, or sister if such person does not perform such conduct. The coercion or duress must be present, imminent, and impending and cannot be invoked by someone who had a reasonable opportunity to avoid doing the thing, or to escape. Additionally, a compulsion defense instruction is not warranted when the coercion is not continuous. *State v. Lowry* 89

Defective Complaint Claim—Not Properly Raised in Motion to Correct Illegal Sentence. Defective complaint claims are not properly raised in a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504. *State v. Deck* 101

Defendant's Incriminating Statements to Law Enforcement – Conditions Considered in Determining Voluntariness of Statement. A defendant's incriminating statements to law enforcement are not involuntary simply because the defendant was tired or under the influence of drugs. Any

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such condition must have rendered the defendant confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent.
State v. Spencer 295*

— Determination of Voluntariness – Two-Step Standard of Review. An appellate court reviews a district court's determinations about the voluntariness of a defendant's incriminating statements to law enforcement by using a two-step standard of review. First, the appellate court decides whether substantial competent evidence supports the factual underpinnings of the district court's decision. Second, the reviewing court views the district court's ultimate legal conclusion drawn from those facts de novo. In this process, the appellate court must not reweigh evidence or reassess witness credibility. *State v. Spencer* 295*

— State's Burden of Proof. When challenged, the State must prove a defendant voluntarily made incriminating statements to law enforcement by a preponderance of the evidence based on the totality of the circumstances involved. *State v. Spencer* 295*

Determination of Appropriate Unit of Prosecution—Statutory Definition of the Crime—Nature of the Prohibited Conduct Is Key. The statutory definition of the crime determines what the Legislature intended as the allowable unit of prosecution. There can be only one conviction for each allowable unit of prosecution. The determination of the appropriate unit of prosecution is not necessarily dependent on whether there is a single physical action or a single victim. Rather, the key is the nature of the conduct proscribed. *State v. Eckert* 21

District Court's Denial of Motion to Withdraw Plea—Abuse of Discretion Appellate Review. We review a district court's decision to deny a motion to withdraw a guilty or no contest plea for an abuse of discretion. A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would take the view adopted by the district court; (2) it is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) it is based on an error of fact, i.e., substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based. *State v. Bilbrey* 57

Failure to Obtain Jury Trial Waiver before Stipulation—Appellate Review. A district court's failure to obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime is reviewed for constitutional harmless error. *State v. Bentley* 222*

First-degree Murder – Premeditation – Proof Established by Direct or Circumstantial Evidence. As an element of first-degree murder, premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. It need not be proved by direct evidence. It can also

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Guilt-based Defense Utilized by Defendant's Counsel—Court Considers if Defense Was Deficient Performance and Prejudicial. When there is no indication a defendant objected to a guilt-based defense, a court considers whether counsel's decision to utilize such a defense was deficient performance and prejudicial under the circumstances. There is no general requirement that counsel first obtain express approval from the defendant. *State v. Bentley* ……. 222*

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Multiplicity—Charging a Single Offense in Several Counts of Complaint—Prohibited by Double Jeopardy Clause and Section 10. Multiplicity is the charging of a single offense in several counts of a complaint or information. The principal danger of multiplicity is that it creates the potential for multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. *State v. Eckert* ……... 21

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Multiplicity Questions—Appellate Review. Questions involving multiplicity are questions of law subject to unlimited appellate review. *State v. Eckert* …..... 21

No Alternative Means of Committing Computer Crime in K.S.A. 2022 Supp. 21-5839(a)(2). K.S.A. 2022 Supp. 21-5839(a)(2) does not contain alternative means of committing a computer crime because both clauses in K.S.A. 2022 Supp. 21-5839(a)(2) —executing a scheme "with the intent to defraud" and obtaining money "by means of false or fraudulent pretense or representation"—require an individual to engage in fraudulent behavior to induce a condition to facilitate theft. *State v. Smith* ……130*

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Requirement of Sufficient Jury Trial Waiver before Stipulation to Element of Crime. A district court must obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime. *State v. Bentley* 222*

Sentencing—Appellate Review of Departure Sentence. An appellate court may affirm a departure sentence as long as one or more of the factors relied on by the sentencing court was substantial and compelling. *State v. Newman-Caddell* 251*

— **Application of Extreme Sexual Violence Departure Factor Not an Error**. A court does not err in applying the extreme sexual violence departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) when sentencing a defendant for an aggravated kidnapping involving a nonconsensual act of sexual intercourse or sodomy. *State v. Newman-Caddell* 251*

— Determining Appropriate Amount of Restitution. The appropriate amount of restitution is that which compensates the victim for the actual damage or loss caused by the defendant's crime. Substantial competent evidence must support every restitution award. *State v. Smith* 130*

— **Motion to Correct Illegal Sentence—Not Used for Constitutional Due Process Claim**. A motion to correct an illegal sentence may not be used to litigate a constitutional due process claim. *State v. Newman-Caddell* 251*

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Withdrawal of Plea—Competence of Counsel Considered under First Factor under *State v. Edgar*—Post-Sentencing Standard and Pre-Sentencing Legal Standard. The applicable legal standard when considering the competence of counsel for purposes of withdrawing a plea under the first factor under *State v. Edgar*, 281 Kan. 30, 36, 127 P.3d 986 (2006), is well established. When a defendant moves to withdraw a plea after sentencing, a trial court must use the Sixth Amendment constitutional ineffective assistance standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to consider

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whether the defendant was represented by competent counsel. But when the same motion is made before sentencing, a lower standard of lackluster advocacy may constitute good cause to support the presentence withdrawal of a plea.
State v. Bilbrey 57

— **Determination Whether Good Cause—Three Factors**. When determining whether a defendant has demonstrated good cause, district courts generally look to the following three factors: (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandingly made.
State v. Bilbrey 57

Withdrawal of Plea Before Sentencing for Good Cause. Before sentencing, a defendant may withdraw his or her plea for good cause shown.
State v. Bilbrey 57

EVIDENCE:

Inferences and Presumptions—Inference Is Conclusion Drawn from Facts—Presumption is Rule of Law. There is a legally significant difference between inferences and presumptions. An inference is a conclusion rationally drawn from a proven fact or set of facts. In contrast, a presumption is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence. *State v. Slusser* 174*

Presumptions. Because presumptions direct jurors to draw certain conclusions once the State has satisfied a certain evidentiary predicate, they have the potential to relieve the State of its burden to prove the defendant's guilt beyond a reasonable doubt and shift the burden onto the defendant to prove his or her innocence. *State v. Slusser* 174*

GARNISHMENT:

Appeal from Garnishment Award—Appellate Review. On appeal from a garnishment award, an appellate court conducts a mixed review of law and fact. Under that framework, an appellate court reviews the district court's legal conclusions independently, with no required deference to the district court. But review of the district court's factual findings is deferential. The appellate court must accept those findings if they are supported by substantial competent evidence. *Granados v. Wilson* 34

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Common-law Marriage—Burden of Proof. The party asserting a common-law or consensual marriage bears the burden of proving the existence of the marriage.
In re Common-Law Marriage of Heidkamp and Ritter 125*

Common-law Marriage—Elements. The essential elements of a common-law marriage in Kansas are: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public.
In re Common-Law Marriage of Heidkamp and Ritter 125*

Jurisdiction of Supreme Court—Determination of Common-law Marriage. The Kansas Supreme Court has jurisdiction to review a district court determination that a couple had a common-law marital relationship and to either approve or disapprove that determination.
In re Common-Law Marriage of Heidkamp and Ritter 125*

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Driving While License Suspended—Proof Notice Mailed to Last Known Address of Licensee—Proof of Receipt Not Required. In a prosecution under K.S.A. 8-262, for driving while one's license is suspended, the State must offer proof that a copy of the order of suspension, or written

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notice of that action, was mailed to the last known address of the licensee according to the division's records. The State does not have to prove the licensee actually received the notice, had actual knowledge of the revocation, or had specific intent to drive while the license was suspended.
State v. Bentley 222*

KDR Granted Subject Matter Jurisdiction from K.S.A. 8-1002(f)—Suspension of Driving Privileges. The plain language of K.S.A. 8-1002(f) grants the Kansas Department of Revenue subject matter jurisdiction to review an officer's certification and notice of suspension upon receipt and, if it satisfies the requirements of K.S.A. 8-1002(a), to suspend an individual's driving privileges. If the certification and notice does not satisfy the requirements of K.S.A. 8-1002(a), the Kansas Department of Revenue must dismiss the administrative proceeding.
Fisher v. Kansas Dept. of Revenue 119*

Subject Matter Jurisdiction of KDR Not Impaired by Officer's Error in Filling Out Information. An officer's error in filling out information required by K.S.A. 8-1002(d) on a certification and notice of suspension does not impair the Kansas Department of Revenue's subject matter jurisdiction.
Fisher v. Kansas Dept. of Revenue 119*

Suspension of Driving License— Statutory Compliance if Defendant has Actual Knowledge. When a defendant has actual knowledge that his or her license has been suspended, the State is not required to present direct evidence that there has been compliance with K.S.A. 8-255(d).
State v. Bentley 222*

OPEN RECORDS ACT:

Statute Requires Public Agency to Provide Record in Format in Which It Maintains the Record. The plain language of K.S.A. 45-219(a) requires a public agency, upon request, to provide a copy of a public record in the format in which it maintains that record.
Roe v. Phillips County Hospital 1

STATUTES:

Challenge to Constitutionality of Statute—Judicial Review by Courts—Standing Is Requirement for Case-or-Controversy and Component of Court's Subject Matter Jurisdiction. While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a

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case-or-controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *State v. Martinez* 151*

Challenge to Constitutionality of Statute—Requirement of Standing. To have an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. A party has standing to challenge the constitutionality of a statute only when it directly affects the party's rights. *State v. Martinez* 151*

Constitutional Challenge to Statute—Party Must Have Standing. To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. Generally, if there is no constitutional defect in the application of the statute to a litigant, the litigant does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *State v. Strong* 197*

Construction by Courts—Avoid Unreasonable Results. Courts must construe a statute to avoid unreasonable or absurd results. *State v. Eckert* 21

Interpretation of Statute—Plain and Unambiguous Language Requires Court Consider Intent of Legislature. In interpreting a statute, courts begin with its plain language. When a statute is plain and unambiguous, the court must give effect to the intention of the Legislature as expressed, rather than determine what the law should or should not be. The court need not apply its canons of statutory construction or consult legislative history if a statute is plain and unambiguous. *Roe v. Phillips County Hospital* 1

Language of Statute Is Clear—Courts Consider Provisions of Act *In Pari Materia* to Reconcile. Even when the language of a statute is clear, courts still consider various provisions of an act *in pari materia* to reconcile and bring those provisions into workable harmony, if possible.
Roe v. Phillips County Hospital 1

Rule of Lenity—Application When Criminal Statute Is Ambiguous. The rule of lenity is a canon of statutory construction applied when a criminal statute is ambiguous to construe the uncertain language in the accused's favor. *State v. Eckert* 21

Statutory Construction—Intent of Legislature Governs. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. In ascertaining this intent, a court begins with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, a court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, a court may consult canons of construction to resolve the ambiguity. *State v. Eckert*...21

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SUMMARY JUDGMENT:

Appellate Review of District Court's Grant of Summary Judgment Is De Novo. When the parties agree that the facts are undisputed, an appellate court reviews a district court's decision to grant summary judgment de novo. *Roe v. Phillips County Hospital* ……. 1

TRIAL:

Admission of Gruesome Photographs—Error to Admit if Only to Inflame Jury—Determination Whether Risk of Undue Prejudice Outweighs Its Probative Value—Appellate Review. A trial judge errs by admitting gruesome photographs that only inflame the jury. But gruesome photographs are not automatically inadmissible. Indeed, gruesome crimes result in gruesome photographs. Faced with an objection, rather than automatically admit or deny admission of a gruesome photograph, a trial judge must weigh whether the photograph presents a risk of undue prejudice that substantially outweighs its probative value. On appeal, appellate court's review a trial judge's assessment for an abuse of discretion, often asking whether the judge adopted a ruling no reasonable person would make. *State v. Lowry* ……..……89

Cumulative Error Rule—Application. Cumulative trial errors may require reversal when, under the totality of the circumstances, the combined errors substantially prejudice a defendant and deny a fair trial. The cumulative error rule does not apply if there are no errors or only a single error. *State v. Lowry* ……..……..……89

Effect of Trial Errors May Require Reversal of Conviction—Totality of Circumstances Must Establish Prejudice—Appellate Review of Cumulative Effect of Errors. The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establishes that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of the errors, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. If any of the errors being aggregated are constitutional, their effect must be harmless beyond a reasonable doubt. *State v. Martinez* ……..……. 151*

Invited-Error Doctrine—Application—Appellate Review. The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. In determining whether the invited-error doctrine applies, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error. *State v. Martinez* …...…... 151*

— *State v. Slusser* ……. 174*

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Jury Instruction—Legally Appropriate Jury Instruction. To be legally appropriate, a jury instruction must fairly and accurately reflect the applicable law. *State v. Strong* 197*

— When Legally Inappropriate. A jury instruction is legally inappropriate if it fails to accurately state the applicable law. *State v. Martinez* 151*

Jury Instructions—Determination Whether Voluntary Manslaughter Instruction Is Factually Appropriate. A voluntary manslaughter instruction is factually appropriate only if some evidence, viewed in a light most favorable to the defendant, shows an adequate provocation that deprives a reasonable person of self-control and causes that person to act out of passion, rather than reason. A sudden quarrel, or any unforeseen angry altercation, can fall into the definition of heat of passion and thus be sufficient provocation. But ongoing and protracted interactions do not usually provide factual support for a voluntary manslaughter instruction. *State v. Lowry* 89

— Failure to Object to Instruction Does Not Trigger Invited-Error Doctrine. In the context of jury instructions, the mere failure to object to an instruction does not trigger the invited-error doctrine. And the doctrine does not automatically apply every time a party requests an instruction at trial but then, on appeal, claims the district court erred by giving it. But application of the doctrine is appropriate when the party proposing an instruction before trial could have ascertained the instructional error at that time. *State v. Slusser* 174*

— Unpreserved Instructional Error—Appellate Review. An appellate court reviews an unpreserved instructional error for clear error. Under that standard, the party asserting error has the burden to firmly convince the appellate court that the jury would have reached a different verdict if the instructional error had not occurred. *State v. Martinez* 151*

Lesser Included Offense Instruction—Appellate Review. A lesser included offense instruction is factually appropriate if an appellate court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. *State v. Martinez* 151*

— Lesser Included Offense Instruction Must Be Legally and Factually Appropriate. Even if a lesser included offense instruction is legally appropriate, it must also be factually appropriate. A trial judge's failure to give a lesser included offense instruction is not error if the instruction falls short on either or both the factual and legal appropriateness requirements. *State v. Lowry* 89

— **Mandatory Rebuttable Presumption under Statute**. An instruction permitting the jury to infer a defendant intended to distribute drugs based on a certain amount of drugs in the defendant's possession is not legally

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appropriate because it does not reflect the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e). *State v. Bentley* ……..... 222*

Prosecutor's Latitude 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 prosecutors step outside the bounds of proper argument if they lower the State's burden to prove the defendant's guilt beyond a reasonable doubt or shift the burden onto the defendant.
State v. Slusser ……..…… 174*

Review of Jury Question Submitted during Deliberations—Appellate Review. An appellate court reviews a district court's response to a question submitted by the jury during deliberations for abuse of discretion. A district court's response constitutes an abuse of discretion when it is objectively unreasonable or when the response includes an error of law or fact. *State v. Martinez* …….. 151*

Sufficiency of Evidence Review—Appellate Review. When reviewing the sufficiency of the evidence supporting a conviction, an appellate court reviews all the evidence in a light most favorable to the prosecution and decides whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. The court does not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Martinez* ……...……. 151*

No. 124,169

ALEX FISHER, *Appellant*, v. KANSAS DEPARTMENT OF REVENUE, *Appellee*.

(526 P.3d 665)

SYLLABUS BY THE COURT

1. ADMINISTRATIVE LAW—*Administrative Agency -- Subject Matter Jurisdiction Derived from Statutes*. An administrative agency derives subject matter jurisdiction over a matter from statutes.

2. MOTOR VEHICLES—*KDR Granted Subject Matter Jurisdiction from K.S.A. 8-1002(f)—Suspension of Driving Privileges.* The plain language of K.S.A. 8-1002(f) grants the Kansas Department of Revenue subject matter jurisdiction to review an officer's certification and notice of suspension upon receipt and, if it satisfies the requirements of K.S.A. 8-1002(a), to suspend an individual's driving privileges. If the certification and notice does not satisfy the requirements of K.S.A. 8-1002(a), the Kansas Department of Revenue must dismiss the administrative proceeding.

3. SAME—*Subject Matter Jurisdiction of KDR Not Impaired by Officer's Error in Filling Out Information.* An officer's error in filling out information required by K.S.A. 8-1002(d) on a certification and notice of suspension does not impair the Kansas Department of Revenue's subject matter jurisdiction.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 22, 2022. Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed March 31, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Tricia A. Bath, of Bath & Edmonds P.A., of Leawood, argued the cause, and *Thomas J. Bath Jr. and Mark E. Hartman*, of the same firm, were on the brief for appellant.

Nhu Nguyen, of Legal Services Bureau, Kansas Department of Revenue, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

WILSON, J.: Alex Fisher claims that the Kansas Department of Revenue (KDOR) lacked subject matter jurisdiction to suspend his driving privileges because a law enforcement officer made a mistake in entering the date on his officer's certification and notice of suspension form, commonly called a DC-27. While acknowledging the mistake, we disagree that there was no subject matter

jurisdiction for KDOR to act. We consequently affirm the judgments of the Court of Appeals and district court affirming KDOR's suspension of Fisher's driving privileges.

FACTS AND PROCEDURAL BACKGROUND

On August 25, 2019, Johnson County Sheriff's Deputy Mark Burns pulled Fisher's vehicle over for a traffic violation. Fisher agreed to take a breath test, which he failed. Burns then filled out a DC-27 informing Fisher that his driving privileges were suspended and that he had the right to petition KDOR for review. Although the record contains a DC-27 with the correct date, Burns first filled out another version of the form documenting the date as April 25, 2019, instead of August 25; the parties agree that Burns gave Fisher the form with the incorrect date. On the DC-27 given to Fisher, the relevant paragraphs read:

> "1. On *April 25*, 2019, reasonable grounds/probable cause existed to believe the above-named person, within the State of Kansas, in JO County, had been operating a vehicle while under the influence of alcohol and/or drugs in violation of state statute, city ordinance, or county resolution.
>
> . . . .
>
> "8. A copy of this document which contains a Notice of Driver's License Suspension is being served on the above-named person on *April 25*, 2019 by . . . personal service." (Emphases added.)

KDOR held an administrative hearing. At the hearing, Fisher argued that the incorrect date on the DC-27 deprived KDOR of jurisdiction. The hearing officer affirmed the suspension.

Fisher petitioned the district court for review. The district court denied Fisher's petition noting that the "complete findings of fact and conclusions of law are as stated in a Memorandum Decision" dated March 23, 2021. Although Fisher attached a copy of this memorandum decision to his petition for review, it is missing from the record on appeal.

Fisher then appealed to the Court of Appeals, arguing that the incorrect date on the DC-27 form—which impacted the information required in K.S.A. 8-1002(d)—deprived KDOR of jurisdiction. A panel of the Court of Appeals disagreed. *Fisher v. Kansas Dept. of Revenue*, No. 124,169, 2022 WL 2904053, at *1 (Kan. App. 2022) (unpublished opinion). While the panel acknowledged some cases that treated certain errors on DC-27

forms as jurisdictional infirmities, the panel sided with other cases that "refused to treat strict compliance with K.S.A. 8-1002 as jurisdictional." 2022 WL 2904053, at *3. Instead, the panel rejected the notion that "jurisdiction [is] such a transient concept." 2022 WL 2904053, at *4.

Fisher petitioned this court for review, which it granted.

ANALYSIS

Fisher's sole argument recapitulates his claim below: the officer's failure to correctly fill out paragraphs one and eight on the DC-27 deprived the KDOR of subject matter jurisdiction to suspend his driving privileges. We note that Fisher makes no claim of prejudice resulting from the officer's error; instead, his sole claim for relief centers on KDOR's jurisdiction.

Standard of review

Appellate courts review questions of subject matter jurisdiction de novo. *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009). A jurisdictional deficiency in an agency's exercise of authority also infects any appeal from that exercise of authority, preventing a district or appellate court from obtaining jurisdiction over it. *Sandlin v. Roche Laboratories, Inc.*, 268 Kan. 79, 85, 991 P.2d 883 (1999).

Appellate courts also review de novo issues involving interpretation of statutes, which present a question of law. *Kingsley*, 288 Kan. at 395.

> "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." *Jarvis v. Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020).

Discussion

As an agency of the executive branch, KDOR derives authority to initiate an agency proceeding—what we call subject matter jurisdiction—from statutes. *Rodewald v. Kansas Dept. of Reve-*

nue, 296 Kan. 1022, 1038, 297 P.3d 281 (2013); *Stutsman v. Kansas Dept. of Revenue*, No. 119,528, 2019 WL 1303063, at *3 (Kan. App. 2019) (unpublished opinion). Cf. *Kingsley*, 288 Kan. at 395. We begin by examining those statutes.

K.S.A. 8-1002(a) authorizes law enforcement officers to issue a certification and notice of suspension of an individual's driving privileges "[w]henever a test is requested pursuant to this act and results in either a test failure or test refusal." The DC-27 form sets forth this certification and notice. *Meats v. Kansas Dept. of Revenue*, 310 Kan. 447, 451, 447 P.3d 980 (2019); *State v. Baker*, 269 Kan. 383, 387, 2 P.3d 786 (2000). K.S.A. 8-1002(a) further sets forth the information which an officer must certify and thus which a DC-27 must include:

"(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, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the person refused to submit to and complete a test as requested by a law enforcement officer.

"(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, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, or is under 21 years of age while having alcohol or other drugs in such person's system; (B) the person had been placed under arrest, was in custody or had been involved in a vehicle accident or collision; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; and (D) the result of the test showed that the person had an alcohol concentration of .08 or greater in such person's blood or breath.

"(3) With regard to failure of a breath test, in addition to those matters required to be certified under subsection (a)(2), that: (A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment." K.S.A. 8-1002(a).

K.S.A. 8-1002(d) enumerates additional information required on a DC-27:

"(d) In addition to the information required by subsection (a), the law enforcement officer's certification and notice of suspension shall contain the following information: (1) The person's name, driver's license number and current address; (2) the reason and statutory grounds for the suspension; (3) the date notice is being served and a statement that the effective date of the suspension shall be the 30th day after the date of service; (4) the right of the person to request an administrative hearing; and (5) the procedure the person must follow to request an administrative hearing. The law enforcement officer's certification and notice of suspension shall also inform the person that: (1) Constitutional issues cannot be decided at the administrative hearing, but may be preserved and raised in a petition for review of the hearing as provided in K.S.A. 8-1020(o) and (p), and amendments thereto; and (2) all correspondence will be mailed to the person at the address contained in the law enforcement officer's certification and notice of suspension unless the person notifies the division in writing of a different address or change of address. The address provided will be considered a change of address for purposes of K.S.A. 8-248, and amendments thereto, if the address furnished is different from that on file with the division."

K.S.A. 8-1002(f) addresses the Legislature's grant of authority for KDOR to act. It states: "Upon receipt of the law enforcement officer's certification, the division shall review . . ." By considering these two clauses only, the Legislature has made clear that at a certain moment in time—"upon [KDOR's] receipt of the certification"—KDOR is authorized to do something: "review." That review is an action that requires, at a minimum, a KDOR staff member to look at something and consider what it says. In other words, when a certification is received, KDOR has subject matter jurisdiction to proceed further. Under the plain language of K.S.A. 8-1002(f), then, Fisher's claim fails.

To be sure, once the "review" has occurred, K.S.A. 8-1002(f) then presents KDOR with two potential courses of action. KDOR must "suspend the person's driving privileges in accordance with the notice of suspension previously served" *if* the certification "meets the requirements of subsection (a)"; otherwise, "the division shall dismiss the administrative proceeding and return any license surrendered by the person." Thus the plain language of K.S.A. 8-1002(f) grants KDOR subject matter jurisdiction to review a DC-27 and—if the DC-27 satisfies the requirements of K.S.A. 8-1002(a)—to suspend the driver's driving privileges. If the DC-27 does not satisfy the requirements of K.S.A. 8-1002(a), the agency continues to have the authority to take action, but that action is limited to dismissing the case and returning the license

to the driver; K.S.A. 8-1002(f) precludes it from doing anything else.

We pause to note Fisher's assertion that he lacks any mechanism to challenge an incorrect date on a DC-27 form. We concede only that Fisher lacks any mechanism on appeal to challenge the date on the form because of the way he framed the sole issue before us. We also offer no opinion on whether other challenges can be made.

CONCLUSION

We affirm the judgments of the Court of Appeals panel and the district court affirming KDOR's administrative suspension of Fisher's license.

STANDRIDGE, J., not participating.

No. 125,617

In the Matter of the Common-Law Marriage of MARGARET M. HEIDKAMP and EDWARD RITTER.

(526 P.3d 669)

SYLLABUS BY THE COURT

1. MARRIAGE—*Jurisdiction of Supreme Court—Determination of Common-law Marriage.* The Kansas Supreme Court has jurisdiction to review a district court determination that a couple had a common-law marital relationship and to either approve or disapprove that determination.

2. SAME—*Common-law Marriage—Elements.* The essential elements of a common-law marriage in Kansas are: (1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public.

3. SAME—*Common-law Marriage—Burden of Proof.* The party asserting a common-law or consensual marriage bears the burden of proving the existence of the marriage.

Appeal from Johnson District Court; RHONDA K. MASON, judge. Opinion filed March 31, 2023. Affirmed.

Kelsey E. Johnson, of Overland Park, was on the brief for appellant Margaret Heidkamp.

No other parties appear.

The opinion of the court was delivered by

ROSEN, J.: This is an uncontested action and uncontested appeal in which Margaret M. Heidkamp seeks judicial confirmation that she lived in a common-law marital relationship with Edward Ritter, who is deceased.

Margaret (Peggy) Heidkamp met Edward (Ed) Ritter in 1993, and the two started dating. While the two were visiting Dublin in November of 1996, Ed proposed to Peggy and gave her an engagement ring. The two had the understanding, albeit a legally incorrect one, that they were in a common-law marital relationship after being together for seven years. They believed they did not have to do anything further to formalize their marital status.

On September 8, 2003, the two mutually agreed they were a married couple, and Peggy moved into the same residence as Ed.

Their discussion at that time led them to conclude their relationship was permanent and they should consider themselves husband and wife. At no time after 2003 did the two ever live apart from each other or have any romantic relationships with other people. The couple had no children together.

The couple jointly paid for all utilities at their primary residence. Utility bills listed Peggy's last name as "Ritter." Insurance declarations were issued to the couple jointly. They jointly agreed on where to make charitable contributions and made joint charitable contributions up to the time of Ed's death. Beginning in September 2003, Peggy and Ed started paying a monthly stipend of $300 from a joint banking account to Peggy's parents. That amount increased over time, and the couple provided additional financial and other support to her parents.

The couple jointly owned multiple real estate interests over the course of their relationship and continuing into 2022, including their primary residence. They also jointly held several bank accounts and credit cards. While each of them held individual banking accounts, they both had access to the other's accounts and could transfer funds to and from each other's personal accounts. They shared passwords with each other on all banking accounts. Both Ed and Peggy had IRA accounts, and they listed each other as spouses and primary beneficiaries on their accounts.

Ed and Peggy traveled extensively together and attended each other's family gatherings at holidays, where they presented themselves as a married couple. Their families considered them both to be part of their families. Peggy's nieces and nephews considered Ed to be their uncle. Ed's mother, Diana Ritter, considers Peggy to be her daughter-in-law and named Peggy her power of attorney, the executor of her will, the trustee of her trust, and the sole beneficiary of her estate. Peggy's father considered Ed to be his son-in-law. Acquaintances of both Ed and Peggy considered them to be a married couple. Medical professionals at appointments they attended together referred to Peggy as Ed's wife and Ed as Peggy's husband.

Ed died on February 10, 2022, at the age of 67. Ed's mother, Diana Ritter, survived him. The death certificate listed Ed's marital status as "married," and his residence at the time of his death

was the house he shared with Peggy. The death certificate named Peggy as his surviving spouse.

On June 10, 2022, Peggy filed in district court a petition to declare relationship as common-law spouse. The district court conducted an evidentiary hearing, and no witnesses or parties appeared to oppose Peggy's petition. Diana Ritter entered a voluntary appearance but waived both notice and appearance at the evidentiary hearing, and, in fact, testified on Peggy's behalf.

After hearing the testimony of Peggy, family members, and family acquaintances, the court concluded that Peggy and Ed were married at common law. The court specifically found that "they were of legal age and had the capacity to be married and held themselves out to the community as a married couple." The court concluded that Peggy and Ed "were in a valid common-law marriage under the statute and common law of Kansas as of September 8, 2003," and the relationship continued until his death.

Peggy thereupon filed notices of appeal to the Court of Appeals. The notices stated:

"This appeal, to the Kansas Court of Appeals, is for certification purposes only based on the grounds that '. . . the IRS and federal courts are not bound by lower state court decisions but must instead merely give those decisions proper regard. On matters of state law, deference is given to decision rendered by the state's highest court.' *In re Estate of Keller,* 273 Kan. 981, 985 (Kan. 2002), citing *Commissioner v. Estate of Bosch,* 387 U.S. 456, 465 (1967)."

After the appeal was docketed in the Court of Appeals, this court transferred the case from the Court of Appeals under K.S.A. 20-3018(c).

The validity of the Heidkamp-Ritter marriage.

The district court found, based on uncontroverted evidence, that Ed and Peggy lived in a common-law marital relationship. Although she prevailed in district court, she has appealed to this court to affirm the ruling.

Such an appeal is necessary based on the United States Supreme Court's holding in *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). *Bosch* held that the Internal Revenue Service and federal courts are not bound by lower state court decisions. On matters of state law, deference is

given to decisions rendered by the state's highest court. 387 U.S. at 465.

This court has jurisdiction to consider this uncontested appeal because of the *Bosch* requirement that the highest state court in Kansas must affirm a ruling in this kind of case in order to have legal effect on federal courts and agencies. "States have responded to *Bosch* by considering appeals where no adverse parties were involved and where the appellants asked the court to affirm the lower court." *In re Estate of Keller*, 273 Kan. 981, 985-86, 46 P.3d 1135 (2002). This court has followed the lead of those other states and may consider an appeal in an uncontested action determining the rights upon the death of a party. 273 Kan. at 986. The court may approve or disapprove the district court's determination that a common-law marriage existed. See *In re Cohen*, No. 101,187, 2009 WL 862463 (Kan. 2009) (unpublished opinion).

Common-law marriage establishes a legally cognizable status that does not depend on religious or civil ceremony for its validity but is created by the consent of the parties. See Feighny, *Common Law Marriage: Civil Contract or "Carnal Commerce*", 70 J.K.B.A. 20, 21 (April 2001). The institution has a long history in Kansas. See, e.g., *State v. Walker*, 36 Kan. 297, Syl. ¶ 1, 13 P. 279 (1887) (mutual present assent to immediate marriage by persons capable of assuming that relationship is sufficient to constitute a valid marriage at common law in Kansas).

The district court applied a test set out in *Driscoll v. Driscoll*, 220 Kan. 225, 227, 552 P.2d 629 (1976). Under this test, the essential elements of a common-law marriage are:

(1) capacity of the parties to marry;

(2) a present marriage agreement between the parties; and

(3) a holding out of each other as husband and wife to the public.

The party asserting a common-law or consensual marriage bears the burden of proving the existence of the marriage. *Driscoll*, 220 Kan. at 227.

If the district court's findings are supported by substantial competent evidence and the court properly applied the rules, this

court will affirm the district court. See *In re Estate of Antonopoulos*, 268 Kan. 178, 192-93, 993 P.2d 637 (1999); *In re Estate of Mazlo*, 211 Kan. 217, 218, 505 P.2d 762 (1973).

Here, the district court had a large body of uncontested evidence before it and made detailed findings based on that evidence. The evidence supports concluding that the components necessary to establish a common-law marriage existed in the relationship between Peggy and Ed.

In 2003, they mutually agreed they were married. At that time, they were both over the age of 18, they were not married to anyone else, and their conduct demonstrated the mental capacity to enter into a marital relationship. They presented themselves to the public at large as a married couple, and the public considered them to be a married couple. They conducted their financial and personal affairs in a manner consistent with a marital relationship.

We agree with the findings and conclusions of the district court, affirm the judgment of the district court, and confirm the existence of a common-law marriage between Margaret M. Heidkamp and Edward Ritter.

Affirmed.

State v. Smith

No. 123,783

STATE OF KANSAS, *Appellee,* v. MARNEZ L. SMITH, *Appellant.*

(526 P.3d 1047)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*No Alternative Means of Committing Computer Crime in K.S.A. 2022 Supp. 21-5839(a)(2).* K.S.A. 2022 Supp. 21-5839(a)(2) does not contain alternative means of committing a computer crime because both clauses in K.S.A. 2022 Supp. 21-5839(a)(2) —executing a scheme "with the intent to defraud" and obtaining money "by means of false or fraudulent pretense or representation"—require an individual to engage in fraudulent behavior to induce a condition to facilitate theft.

2. APPEAL AND ERROR—*Invited Error Doctrine—Application.* The invited error doctrine does not bar an appellant from raising an issue on appeal when he or she merely acceded to—but did not affirmatively request—the error. The doctrine applies only when a defendant actively pursues and induces the court to make the error.

3. CRIMINAL LAW—*Sentencing—Determining Appropriate Amount of Restitution.* The appropriate amount of restitution is that which compensates the victim for the actual damage or loss caused by the defendant's crime. Substantial competent evidence must support every restitution award.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 1, 2022. Appeal from Sedgwick District Court; ERIC WILLIAMS, judge. Opinion filed April 7, 2023. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part, and the case is remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

Julie A. Koon, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: A jury convicted Marnez L. Smith of felony theft and unlawful acts concerning a computer. The district court ordered him to serve 18 months' probation and pay $4,100 in restitution. The Court of Appeals affirmed Smith's convictions and restitution, and we granted Smith's petition for review. Today we affirm Smith's convictions and remand for a restitution hearing

because the amount of restitution awarded was not supported by substantial competent evidence.

FACTS

Because the parties do not dispute the accuracy of the statement of facts contained in the Court of Appeals' opinion, we will quote from that section of the opinion:

> "In July 2018, Smith was hired to work as teller for EquiShare Credit Union in Wichita. After a two-week training period, Smith went to work in EquiShare's main office. Smith's employment at EquiShare did not go well and did not last long. He was ultimately fired on August 31, 2018, after he approached another employee and asked to borrow money, which was a violation of EquiShare's employment policies. There had also been several instances during his employment in which there were inconsistencies in Smith's drawer balance.
>
> "In August 2018, an EquiShare customer, John Nash, received his monthly statement and noticed a $200 withdraw from his account, which neither he nor his wife had authorized. Nash reported the transaction to EquiShare, and EquiShare's senior vice president, Freda Reynolds, investigated the matter. Reynolds discovered Smith had been the teller for Nash's disputed transaction, and Nash had not signed for the withdraw. Reynolds reviewed all of Smith's register receipts for any withdraws that did not have a customer's signature and found three additional transactions. Reynolds looked at security footage from the time of the transactions and found neither Nash nor the other affected customers were present at the time of the withdraws. In total, Reynolds determined Smith withdrew $3,200 from the four affected accounts without the account holders' authorization.
>
> "The State charged Smith with one count of felony theft and one count of unlawful acts concerning computers. A jury convicted him as charged. At sentencing, the district [court] imposed a 14-month prison sentence but placed Smith on probation from that sentence for 12 months. The district court also ordered Smith to pay $4,100 in restitution, to which Smith did not object." *State v. Smith*, No. 123,783, 2022 WL 983619, at *1 (Kan. App. 2022) (unpublished opinion).

Notably, the evidence at trial showed that Smith stole $3,200. But at sentencing the State requested $4,100 in restitution without providing a reason for the increase. Smith's counsel did not object and the court awarded $4,100 in restitution.

Before the Court of Appeals, Smith argued that (1) K.S.A. 2022 Supp. 21-5839(a)(2) contains alternative means and there was insufficient evidence to support his conviction under both means; (2) the district court erred in failing to give the jury a unanimity instruction on the felony theft charge; and (3) the district

court erred in ordering restitution in excess of the actual harm caused by his crimes.

The panel affirmed Smith's convictions. It determined that (1) K.S.A. 2022 Supp. 21-5839(a)(2) contained only options within a means, and that sufficient evidence existed to convict Smith of one of those options; (2) any error in failing to give a unanimity instruction was harmless beyond a reasonable doubt; and (3) Smith invited the restitution error by failing to object to the amount of restitution requested by the State. 2022 WL 983619, at *2-7. We granted Smith's petition for review.

DISCUSSION

K.S.A. 2022 Supp. 21-5839(a)(2) does not contain alternative means for committing a computer crime.

Smith was convicted of a computer crime under K.S.A. 2022 Supp. 21-5839(a)(2) which criminalizes the use of "a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation." Smith argues this subsection contains alternative means.

An alternative means crime is one that can be committed via more than one set of elements. *State v. Rucker*, 309 Kan. 1090, 1094, 441 P.3d 1053 (2019). Whether a statute contains alternative means is a question of statutory interpretation subject to unlimited review. *State v. Cottrell*, 310 Kan. 150, 157, 445 P.3d 1132 (2019). An alternative means issue raised for the first time on appeal does not require us to engage in a preservation inquiry because it implicates whether there is sufficient evidence supporting the conviction. *State v. Foster*, 298 Kan. 348, 352, 312 P.3d 364 (2013).

"'Alternative means issues arise when the statute and any instructions that incorporate it list distinct alternatives for a material element of the crime.'" *Cottrell*, 310 Kan. at 158. To qualify for an alternative means analysis and application of the so-called "super-sufficiency" requirement, "a statute—and any instruction that

incorporates it—must list distinct alternatives for a material element of the crime, not merely describe a material element or a factual circumstance that would prove the crime." *State v. Brown*, 295 Kan. 181, 184, 284 P.3d 977 (2012). 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.'" *Rucker*, 309 Kan. at 1094.

We have previously laid out the following analytical path for determining whether a statute contains alternative means:

"Identifying an alternative means statute is more complicated than spotting the word 'or.'

"To determine if an 'or' separates an option that is not an alternative means or separates alternative means, there are several considerations.

"First, as with any situation in which the courts are called upon to interpret or construe statutory language, the touchstone is legislative intent. . . .

"To divine legislative intent, courts begin by examining and interpreting the language the legislature used. Only if that language is ambiguous do we rely on any revealing legislative history or background considerations that speak to legislative purpose, as well as the effects of application of canons of statutory construction. . . .

"In examining legislative intent, a court must determine for each statute what the legislature's use of a disjunctive 'or' is intended to accomplish. 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 demanding super-sufficiency of the evidence. 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.

. . . .

"'[A]s a general rule, [alternative means] crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed.' Typically . . . a legislature will signal its intent to state alternative means through structure, separating alternatives into distinct subsections of the same statute. Such structure is an important clue to legislative intent.

"Regardless of such subsection design, however, a legislature may list additional alternatives or options within one alternative means of committing the crime. But these options within an alternative do not constitute further alternative means themselves if they do not state additional and distinct ways of committing the crime, that is, if they do not require proof of at least one additional and dis-

tinct material element. Rather they are only options within a means if, as discussed above, their role is merely to describe a material element or to describe the factual circumstances in which a material element may be proven. In Washington at least, a '"means within a means" scenario does not trigger jury unanimity protections.'

"In Kansas, we accept this general concept, which we would describe as the legislature's creation of an option within a means. An option within a means scenario is another important clue to legislative intent because such options signal secondary status rather than an intent to create a material, distinct element of the crime. Options within a means—that is, the existence of options that do not state a material, distinct element—do not demand application of the super-sufficiency requirement.

. . . .

"[I]n determining if the legislature intended to state 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. Or, did the legislature list options within a means, that is, options that merely describe a material element or describe a factual circumstance that would prove the element? The listing of alternative distinct, material elements, when incorporated into an elements instruction, creates an alternative means issue demanding super-sufficiency of the evidence. Often this intent can be discerned from the structure of the statute. On the other hand, the legislature generally does not intend to create alternative means when it merely describes a material element or a factual circumstance that would prove the crime. Such descriptions are secondary matters—options within a means—that do not, even if included in a jury instruction raise a sufficiency issue that requires a court to examine whether the option is supported by evidence. [Citations omitted.]" *Brown*, 295 Kan. at 193-200.

Smith was convicted under K.S.A. 2018 Supp. 21-5839(a)(2). Subsection (a) provides in full:

"(a) It is unlawful for any person to:

(1) Knowingly and without authorization access and damage, modify, alter, destroy, copy, disclose or take possession of a computer, computer system, computer network or any other property;

(2) use a computer, computer system, computer network or any other property for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services or any other thing of value by means of false or fraudulent pretense or representation;

(3) knowingly exceed the limits of authorization and damage, modify, alter, destroy, copy, disclose or take possession of a computer, computer system, computer network or any other property;

(4) knowingly and without authorization, disclose a number, code, password or other means of access to a computer, computer network, social networking website or personal electronic content; or

(5) knowingly and without authorization, access or attempt to access any computer, computer system, social networking website, computer network or computer software, program, documentation, data or property contained in any computer, computer system or computer network." K.S.A. 2022 Supp. 21-5839(a).

The structure of this statute strongly suggests that subsection (a)(2) does not contain alternative means; rather, it gives us an important clue that the Legislature intended for each subparagraph in (a)(1)-(5) to constitute five alternative means of committing a computer crime. And while we recognize that the subsection design is not dispositive to the inquiry, we agree with the Court of Appeals that "there is no meaningful distinction . . . between 'intent *to defraud*' and 'intent to . . . obtain . . . [something] of value *by means of false or fraudulent* pretense or representation.'" *Smith*, 2022 WL 983619, at *3.

The panel focused on the fact that all prohibited activity under (a)(2) requires dishonest conduct. While we agree, we can state the distinction even more precisely.

K.S.A. 2022 Supp. 21-5839(a)(2) criminalizes the use of a computer for the purpose of executing a scheme "with the intent to defraud or to obtain money . . . by means of false or fraudulent pretense or representation." An "intent to defraud," as it is used in the first half of (a)(2), means an intention to deceive and to induce another to action. K.S.A. 2022 Supp. 21-5111(o). We disagree with Smith's argument that the second phrase in (a)(2) does not require inducement. Both pieces of (a)(2) contemplate an individual engaging in false or fraudulent behavior to commit the crime. The gravamen of false behavior is to induce a condition to facilitate theft. The latter phrase—obtaining money "by means of false or fraudulent pretense or representation"—requires inducement, just as does an intent to defraud. K.S.A. 2022 Supp. 21-5839(a)(2) does not present two alternative means of committing a computer crime.

To the extent that Smith argues the evidence is insufficient to show he induced any person to action (because he only induced an act by the bank itself), the statute plainly forecloses this argument. Under the statutorily defined terms, a "person" includes both individuals and "public or private corporation[s]." K.S.A. 2022 Supp. 21-5111(t). The evidence presented at trial showed

that Smith, while logged in to the bank's computer, attributed his illegal withdrawals to bank customers that were not present at the time of the transactions. Stated another way, Smith engaged in fraudulent behavior to induce the bank—a "person" under K.S.A. 2022 Supp. 21-5111(t)—to release the money to him. This was amply supported by the electronically created withdrawal receipts attributed to individual customer accounts while Smith was logged in to the computer, the absence of the required signatures on those receipts, and the security camera footage which showed that none of the four affected accountholders were present at the time of the withdrawals.

The district court's failure to give a multiple acts instruction for the felony theft charge does not amount to reversible error.

We review unanimity instruction errors under a three-part framework. First, we conduct unlimited review in determining whether a multiple acts case is presented by asking whether jurors heard evidence of multiple acts, each of which could have supported conviction on a charged crime. If so, we then consider whether error was committed. An error was committed if the State or district court failed to inform the jury which act to rely upon or direct the jury that it must agree on the specific act for each charge. Finally, we determine whether the error was reversible or harmless. When the defendant failed to request a unanimity instruction, we apply the clearly erroneous standard found in K.S.A. 2022 Supp. 22-3414(3). *State v. De La Torre*, 300 Kan. 591, 596, 331 P.3d 815 (2014).

The State alleged Smith had committed four individual thefts and charged him under K.S.A. 2017 Supp. 21-5801(b)(5), which required the State to prove Smith had stolen "property of the value of less than $1,500 . . . in two or more acts or transactions . . . constituting parts of a common scheme or course of conduct." Smith contends the panel should have found the district court's failure to give a sua sponte unanimity instruction warranted reversal. A unanimity instruction would have informed the jury it had to unanimously agree that Smith committed, at minimum, the same two thefts to convict him.

The panel assumed without deciding that a unanimity instruction was legally and factually appropriate but found that the error did not warrant reversal even under the high bar of the constitutional harmless error standard. See *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 (2011) (no reasonable possibility the error affected the verdict). Because the State did not file a cross-petition for review, we only evaluate whether the assumed error was harmless. See Supreme Court Rule 8.03(c)(3)(A) (2023 Kan. S. Ct. R. at 57) (If the Court of Appeals assumes an outcome on an issue without deciding it, the State must file a cross-petition for review to preserve that issue for review.).

The panel carefully described how, in response to a jury question about the multiple acts charged, the district court allowed the parties to reopen closing arguments. At that time both parties clearly and explicitly explained to the jury that it must unanimously agree on two specific thefts to convict.

First, the State explained to the jury:

"Then you move on to [paragraph] two, that the defendant exerted unauthorized control over the property. Whichever the property you unanimously identified, we have to prove the defendant exerted unauthorized control over that.

"[Paragraph] three, that is—and that is an act of the defendant that we have to prove, so that's one.

"And then there is another act with respect to [paragraph] 3; 3a, 3b, and 3c and 3d. Those are four choices. You must unanimously find two—at least two. You can find all four. You can find three, but you must at least find two. If you don't find two, then you don't have a verdict or at least you don't have a verdict of guilty.

"With respect to [paragraph] 4, that's just referring you back to two or more at question three. Okay. But you still must find that.

"Let's say for example, you find 3a, that the defendant intended to deprive JSN permanently of the use or benefit of the property. If you find that unanimously, you must still have found that JSN owned that property. Does that make sense? It must correspond.

"In other words, if you find unanimously 3a you must have found unanimously 1a, and 2, that the defendant exerted control over it.

"You must also find unanimously that the facts were—I'm on [paragraph] five now—that the acts constituted a common scheme, course of conduct."

Smith's counsel also explained to the jury:

"[Paragraph] 4 explains that Mr. Smith—you must find—if you determine beyond reasonable doubt—you must find that Mr. Smith committed two or more of the acts described above.

"So you would need to describe two or more or find as to two or more of those. These have to be unanimous. That means all of you have to decide. Let's take for instance, or example, JSN, as to A. All of you would have to find as to A, and all of you would have to find as to one of the other examples. It couldn't be a split finding of two. And then that the acts were connected together or constituted a common scheme or course of conduct. That refers you back to the two if you were able to find two. And then, of course, the value which has already been explained and each of those would have to be a unanimous finding as well.

"So in each step, it has to be a unanimous finding. And the burden should be applied to each element of each step within the instruction."

The panel concluded that these supplemental closing arguments properly explained to the jury its verdict had to be unanimous on which two acts of theft it believed occurred. It determined that Smith failed to explain how the supplemental explanations were insufficient to resolve any questions the jury had about the instruction. *Smith*, 2022 WL 983619, at *4-6.

We agree that a unanimity instruction would not have done anything beyond those lengthy supplemental explanations made in closing arguments. Consequently, we hold that there is no reasonable possibility the error affected the verdict.

The Court of Appeals erred by invoking the invited error doctrine to affirm the $4,100 restitution order when the State's evidence only proved $3,200.

The State sought $4,100 in restitution at sentencing. Yet the evidence presented at trial proved that Smith had stolen only $3,200. Defense counsel did not catch the discrepancy at the time the State made its request. She simply said: "I don't have an objection to that restitution amount given that we had the trial and the evidence [has] already been heard." The district court then ordered restitution in the amount of $4,100.

When Smith raised this issue on appeal, the panel held that the invited error doctrine precluded Smith from challenging the restitution order.

We exercise unlimited review when determining whether the doctrine of invited error applies. *State v. Stoll*, 312 Kan. 726, 735, 480 P.3d 158 (2021).

The invited error doctrine provides that a party "may not invite an error and then complain of the error on appeal." 312 Kan.

at 735. The panel concluded that the doctrine applied here because Smith "acquiesced" by "not objecting to the State's restitution amount and by failing to ask for an evidentiary hearing," and therefore "cannot complain now about such amount on appeal." *Smith*, 2022 WL 983619, at *7. Yet this ignores our ample precedent that clearly distinguishes between failing to object and affirmatively asking for the error.

A "defendant's actions in causing the alleged error and the context in which those actions occurred must be carefully reviewed in deciding whether to trigger this doctrine. There is no bright-line rule for its application." *State v. Sasser*, 305 Kan. 1231, 1235, 391 P.3d 698 (2017). "The ultimate question is whether the record reflects the defense's action *in fact induced* the court to make the claimed error." *State v. Douglas*, 313 Kan. 704, 708, 490 P.3d 34 (2021). "[W]hen a defendant *actively pursues* what is later argued to be an error, then the doctrine most certainly applies." (Emphasis added.) *Sasser*, 305 Kan. at 1236.

A defendant "must do more than just fail to object." 305 Kan. at 1235. We have repeatedly declined to apply the invited error doctrine "when counsel merely acceded to—but did not affirmatively request—a factually inappropriate instruction." 305 Kan. at 1236; see also *Douglas*, 313 Kan. at 708-09 (defense simply stating "I am not requesting any lesser included offenses" did not amount to defense counsel "inducing" the court to action).

Here, Smith clearly only consented to—but did not affirmatively request—the $4,100 restitution amount. The defense's actions did not induce the district court to make the error; the record does not reflect that defense did anything but acquiesce to the State's request. As a result, appellate review of Smith's challenge is appropriate, and the panel incorrectly sidestepped the issue by invoking the invited error doctrine.

The appropriate amount of restitution is that which compensates the victim for the actual damage or loss caused by the defendant's crime. The most accurate measure of this loss depends on the evidence before the district court. *State v. Hall*, 297 Kan. 709, 713-14, 304 P.3d 677 (2013). Substantial competent evidence must support every restitution award. See *State v. Arnett*,

307 Kan. 648, 653, 413 P.3d 787 (2018). Based on the record before us, we find that the restitution award was not supported by substantial competent evidence.

Typically, the State gets only one bite at the apple to prove up the amount of restitution. *State v. Dailey*, 314 Kan. 276, 278-79, 497 P.3d 1153 (2021) (remanding but directing the district court to base the new award only on the existing evidentiary record). Here, however, the State never got its "one bite" because the defense acquiesced to the requested amount, forestalling any restitution hearing. See K.S.A. 2022 Supp. 22-3424(d)(1) (directing district court to "hold a hearing to establish restitution" but that the "defendant may waive the right to the hearing and accept the amount of restitution").

The State should be afforded the opportunity to present evidence to support its requested restitution. Accordingly, we vacate the restitution order imposed by the district court and remand for a restitution hearing.

Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and vacated in part, and the case is remanded with directions.

Nos. 124,625
124,898

CHRISTOPHER SHELTON-JENKINS, *Appellant*, v. STATE OF KANSAS, *Appellee*.

(526 P.3d 1056)

SYLLABUS BY THE COURT

1. APPEAL AND ERROR—*New Claims Cannot Be Raised on Appeal.* A defendant cannot raise new claims for the first time on appeal unless an exception applies.

2. ATTORNEY AND CLIENT—*Claim of Ineffective Assistance of Counsel—Proof of Deprivation of Right to Counsel.* A defendant claiming ineffective assistance of counsel to warrant setting aside a plea under K.S.A. 2022 Supp. 22-3210(d)(2) must demonstrate counsel's performance deprived the defendant of his or her Sixth Amendment right to counsel.

Appeal from Johnson District Court; J. CHARLES DROEGE, judge. Opinion filed April 7, 2023. Affirmed.

Richard P. Klein, of Lenexa, argued the cause and was on the brief for appellant.

Kendall S. Kaut, assistant district attorney, argued the cause, and *Shawn E. Minihan*, assistant district attorney, *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Christopher Shelton-Jenkins received a hard 25 life sentence in 2014 after pleading guilty to first-degree premeditated murder. Several years later, Shelton-Jenkins filed a motion to withdraw his plea under K.S.A. 2017 Supp. 22-3210 and a subsequent K.S.A. 60-1507 motion alleging ineffective assistance of counsel and involuntariness when he entered the plea. After an evidentiary hearing where both trial counsel and Shelton-Jenkins testified, the district court denied both motions. Today we affirm the decision of the district court.

FACTS

Shelton-Jenkins pled guilty to the premeditated first-degree murder of Brandon Holmes in 2014. In return, the State agreed to not seek a hard 50. At the plea hearing, Shelton-Jenkins agreed

with the following facts presented by the State in support of the plea:

"[O]n September 20th, 2013, law enforcement received a 911 call from Audreonna Shelton who reported she had returned to her residence . . . to find that her roommate, Brandon Holmes, was lying on the floor and unresponsive. Officers and Med-Act responded to the scene and Mr. Holmes was pronounced deceased.

"An autopsy was performed the following day by Dr. Charles Glenn who opined that the manner of death was homicide by gunshot wound. Several projectiles were recovered from Mr. Holmes' body.

"Investigators subsequently interviewed Renee Reeves, which is Audrey's mother. She advised that she saw Mr. Holmes around 10:30 that morning at a Dunkin Donuts where she worked located on Metcalf. Mr. Holmes wasn't feeling well and left indicating he was going to go home. Investigat[ors] believed that Ms. Reeves was most likely the last person to see Mr. Holmes alive prior to the homicide.

"Subsequent investigation identified the defendant, Christopher Shelton-Jenkins, as a suspect in the homicide. The defendant is married to Audreonna, the victim's roommate, and investigators developed the potential motive that the defendant believed their relationship was inappropriate.

"The defendant was interviewed by the detectives on September 23rd. During that interview, the defendant admitted that he wanted to kill Mr. Holmes and had planned to kill Mr. Holmes for several weeks. However, he explained that this time, someone else beat him to it.

"He also told officers that there would be incriminating text messages found on his cellphone that would make it appear he was responsible for Mr. Holmes' death. Officers obtained a search warrant and recovered those messages.

"On the 25th, detectives also interviewed the defendant's younger brother, Willie. During that interview, Willie told the officers that he knew his brother was planning to kill the victim. He said that they spoke on September 20th, and during that conversation, the defendant said that the murder was complete and the gun was available for sell.

"The brother indicated that he later found the gun inside the family residence after the defendant was arrested and hid it in the bed of a pickup truck located in a wooded area near the house. Officers obtained search warrants—a search warrant and were able to retrieve the gun.

"Ballistic testing on the gun established that it was the murder weapon and that it matched the bullets that were used to kill Mr. Holmes.

"On September 26th, detectives interviewed the defendant a second time. During this interview, the defendant admitted he set up the murder of Mr. Holmes, but at this point claimed not to have been the person who actually shot the victim.

"However, on March 14th, deputies with the sheriffs['] office searched the defendant's cell at the jail. During that search, they found a large amount of documents, including a journal entry written by the defendant essentially confessing to the homicide and to shooting and killing Mr. Holmes. The statement describes how the defendant entered the victim's home, waited for him to come home, and then shot him multiple times and disposed of the weapon."

The sentencing judge followed the parties' plea agreement and sentenced Shelton-Jenkins to a hard 25. Shelton-Jenkins appealed, and we summarily affirmed his sentence.

Three years after he was sentenced according to the plea agreement, Shelton-Jenkins filed a motion to withdraw his plea under K.S.A. 2017 Supp. 22-3210. He asserted that his trial counsel was ineffective because his counsel did not inform him of the applicable lesser included offenses; that his guilty plea was not knowingly and voluntarily made; and that his guilty plea was improperly accepted without a sufficient finding of factual basis.

Then Shelton-Jenkins filed for relief under K.S.A. 2017 Supp. 60-1507. Shelton-Jenkins made the same claims in this motion as in his motion to withdraw plea. He claimed he did not receive adequate notice of the true nature of the charge, he was not informed that his crime fit a lesser charge, and his plea did not "represent an intelligent decision among the alternative choices."

At an evidentiary hearing held before the district court on both motions, Shelton-Jenkins testified that he did not "remember any statutes for lesser includeds at all," while his trial counsel testified that he did go over all potentially applicable lesser included subsections with Shelton-Jenkins, as well as the hard 40 and 50 sentencing statutes. After considering the evidence presented at the hearing, the district court denied both motions.

DISCUSSION

Shelton-Jenkins has not preserved any issue on appeal as it relates to his 60-1507 motion. First, he has abandoned the arguments he made below by raising them only incidentally in his brief. He has not explained which lesser included offenses would have been relevant to his case or how they may have changed his decision to plead guilty. Likewise, at oral arguments, counsel did not explain to the court which—if any—lesser included offenses were applicable to Shelton-Jenkins' case. We therefore find that

he has abandoned the arguments made below. See *State v. Swint*, 302 Kan. 326, 346, 352 P.3d 1014 (2015) ("To preserve an issue for appellate review, it must be more than incidentally raised in an appellate brief; it must be accompanied by argument and supported by pertinent authority or an explanation why the argument is sound despite the lack of authority or existence of contrary authority."); see also *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (same).

Shelton-Jenkins' does make new arguments, but they are raised for the first time on appeal. Finding no exceptions apply, these too are unpreserved. Shelton-Jenkins' slew of brand-new assertions include arguments that his counsel did not thoroughly investigate his case, inaccurately explained the hard 50 sentencing procedure, did not review discovery with him, did not explain the concept of jury nullification, and did not discuss mitigation with him. Shelton-Jenkins did not raise any of these claims in his original motions.

Moreover, Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36) makes clear that an appellant must include in his or her brief a pinpoint citation showing where each argument was raised and ruled on in the record on appeal. If the issue was not raised below, the appellant must explain why the issue is properly before us. In other words, unless an exception applies, Shelton-Jenkins cannot raise these new claims for the first time on appeal of his 60-1507 motion. See *Robertson v. State*, 288 Kan. 217, 227, 201 P.3d 691 (2009). And Shelton-Jenkins has failed to argue—either in his brief or at oral arguments—that any exception applies.

Turning now to Shelton-Jenkins' motion to withdraw his plea under K.S.A. 2017 Supp. 22-3210(d)(2), we review a district court's decision to deny a postsentence motion to withdraw a plea for abuse of discretion. The defendant bears the burden of establishing any such abuse of discretion. *State v. Cott*, 311 Kan. 498, Syl. ¶ 2, 464 P.3d 323 (2020).

In contending the district court erred in denying his motion to withdraw his guilty plea, Shelton-Jenkins essentially incorporates and restates his contentions from his 60-1507 claim of ineffective assistance of counsel. In order to demonstrate manifest injustice to warrant setting aside a plea based on ineffective assistance of

counsel, a defendant must show counsel's performance deprived the defendant of his or her Sixth Amendment right to counsel. Courts consider whether a reversible denial of the right occurred by applying the two-prong test stated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which also applies to challenges to guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985); *State v. Johnson*, 307 Kan. 436, Syl. ¶ 2, 410 P.3d 913 (2018). In such a case, the defendant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

But just as Shelton-Jenkins has failed to meet the constitutional test for establishing ineffective assistance of counsel under K.S.A. 2021 Supp. 60-1507, so too

his argument for statutory manifest injustice must fail. See *State v. Adams*, 297 Kan. 665, 673-74, 304 P.3d 311 (2013). The district court did not abuse its discretion in denying Shelton-Jenkins' motion to withdraw plea.

Affirmed.

STANDRIDGE, J., not participating.

No. 124,790

STATE OF KANSAS, *Appellee,* v. ANDREW CHARLES REDICK, *Appellant.*

(526 P.3d 672)

SYLLABUS BY THE COURT

APPEAL AND ERROR—*Clerical Mistakes May Be Corrected by Court at Any Time*. Clerical mistakes in judgments, orders, or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Appeal from Shawnee District Court; CHERYL A. RIOS, judge. Opinion filed April 7, 2023. Affirmed and remanded with directions.

Gerald E. Wells, of Jerry Wells Attorney-at-Law, of Lawrence, was on the brief for appellant.

Steven J. Obermeier, assistant solicitor general, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In 2014, Andrew Charles Redick was convicted of first-degree murder and arson. On appeal in 2018, this court affirmed Redick's convictions but vacated his sentence and remanded the case to the district court with directions for resentencing. *State v. Redick*, 307 Kan. 797, 798, 414 P.3d 1207 (2018).

On July 5, 2018, the district court held a resentencing hearing and sentenced Redick to 27 months in prison with 12 months of postrelease supervision for arson and a "hard 25" life sentence for first-degree murder—with a release term that is the subject of this appeal. From the bench, the district court judge announced a term of lifetime parole; however, the judge marked the box for "Lifetime Postrelease" supervision on the journal entry of judgment. The following day, Redick appealed the district court's resentencing orders, ultimately arguing the imposition of lifetime postrelease supervision is contrary to K.S.A. 2020 Supp. 22-3717, and therefore his sentence is illegal under K.S.A. 22-3504.

Jurisdiction is proper under K.S.A. 2022 Supp. 22-3601(b)(3)-(4), and courts may correct an illegal sentence at any time while the sen-

tence is being served. K.S.A. 2022 Supp. 22-3504(a). "Whether a sentence is illegal is a question of law subject to de novo review." *State v. Mitchell*, 315 Kan. 156, 158, 505 P.3d 739 (2022).

Redick, the State, and this court agree that the journal entry indicating that Redick would be sentenced to lifetime postrelease supervision is contrary to K.S.A. 2022 Supp. 22-3717(u). And if Redick's sentence actually included a term of lifetime postrelease supervision, that portion of the sentence would need to be vacated. See *State v. Claiborne*, 315 Kan. 399, 400, 508 P.3d 1286 (2022) (""In Kansas, off-grid crimes are not associated with periods of postrelease supervision but instead are followed by *life parole*."""); *State v. Becker*, 311 Kan. 176, 191, 459 P.3d 173 (2020) ("A sentencing court has no authority to order a term of postrelease supervision in conjunction with an off-grid, indeterminate life sentence."); *State v. Gibson*, 311 Kan. 732, 745-46, 466 P.3d 919 (2020) (when lifetime postrelease supervision is improperly ordered, that portion of this sentence should be vacated).

But a journal entry is not the controlling pronouncement of a sentence. Instead, "[a] criminal sentence is effective upon pronouncement from the bench." *Abasolo v. State*, 284 Kan. 299, Syl. ¶ 3, 160 P.3d 471 (2007). Importantly, at Redick's 2018 resentencing hearing, the district court pronounced a legal sentence imposing the required term of lifetime parole: "You would be required to serve a period of *parole for your lifetime*." (Emphasis added.) Therefore, even though "[t]he sentence reflected in the journal entry is erroneous . . . there is no similar problem with the sentence pronounced from the bench." *State v. Mason*, 294 Kan. 675, 677, 279 P.3d 707 (2012). Redick's sentence as pronounced from the bench was legal.

The discrepancy in the journal entry is a simple clerical error which can be addressed by a nunc pro tunc order correcting the portion of the journal entry to require lifetime parole as required by K.S.A. 2022 Supp. 22-3717(u). See *Mason*, 294 Kan. at 677; K.S.A. 2022 Supp. 22-3504(b) ("Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.").

Redick's sentence is affirmed. Because the journal entry erroneously included lifetime postrelease supervision, we remand this case with directions to the district court to issue a nunc pro tunc order to correct that portion of the sentence in the journal entry.

Affirmed and remanded with directions.

Bar Docket No. 20256

In the Matter of BRIAN WILLIAM COSTELLO, *Respondent.*

(526 P.3d 1059)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Disbarment.*

This court admitted Brian William Costello to the practice of law in Kansas on October 9, 2001. In a letter signed March 27, 2023, Costello voluntarily surrendered his license to practice law under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290).

At the time Costello surrendered his license, he faced a hearing before the Kansas Board for Discipline of Attorneys on a formal complaint filed by the Disciplinary Administrator. That complaint alleged Costello had violated Kansas Rules of Professional Conduct 1.3 (2023 Kan. S. Ct. R. at 331) (diligence), 1.4 (2023 Kan. S. Ct. R. at 332) (communication), 1.15 (2023 Kan. S. Ct. R. at 372) (safekeeping property), 1.16 (2023 Kan. S. Ct. R. at 377) (declining or terminating representation), 3.2 (2023 Kan. S. Ct. R. at 390) (expediting litigation), 3.3 (2023 Kan. S. Ct. R. at 390) (candor to the tribunal), 3.4 (2023 Kan. S. Ct. R. at 394) (fairness to opposing party and counsel), 8.1 (2023 Kan. S. Ct. R. at 431) (bar admission and disciplinary matters), 8.2 (2023 Kan. S. Ct. R. at 431) (judicial and legal officials), and 8.4 (2023 Kan. S. Ct. R. at 433) (misconduct). The complaint also alleged Costello had violated Supreme Court Rule 206 (2023 Kan. S. Ct. R. at 255) (attorney registration), and Supreme Court Rule 210 (2023 Kan. S. Ct. R. at 263) (duty to assist; duty to respond; duty to report).

This court accepts the surrender of Costello's license, orders Costello disbarred from the practice of law pursuant to Supreme Court Rule 230(b), and revokes Costello's license and privilege to practice law in Kansas.

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

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

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein shall be assessed to Costello, and that Costello comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292).

Dated this 10th day of April 2023.

No. 121,204

STATE OF KANSAS, *Appellee*, v. MICHAEL STEVEN MARTINEZ, *Appellant.*

(527 P.3d 531)

SYLLABUS BY THE COURT

1. STATUTES—*Challenge to Constitutionality of Statute—Judicial Review by Courts—Standing Is Requirement for Case-or-Controversy and Component of Court's Subject Matter Jurisdiction.* While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a case-or-controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction.

2. SAME—*Challenge to Constitutionality of Statute—Requirement of Standing*. To have an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. A party has standing to challenge the constitutionality of a statute only when it directly affects the party's rights.

3. TRIAL—*Jury Instruction—When Legally Inappropriate.* A jury instruction is legally inappropriate if it fails to accurately state the applicable law.

4. TRIAL—*Jury Instructions—Unpreserved Instructional Error—Appellate Review.* An appellate court reviews an unpreserved instructional error for clear error. Under that standard, the party asserting error has the burden to firmly convince the appellate court that the jury would have reached a different verdict if the instructional error had not occurred.

5. SAME—*Sufficiency of Evidence Review—Appellate Review*. When reviewing the sufficiency of the evidence supporting a conviction, an appellate court reviews all the evidence in a light most favorable to the prosecution and decides whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. The court does not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility.

6. TRIAL—*Invited-Error Doctrine—Application—Appellate Review.* The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. In determining whether the invited-error

doctrine applies, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error.

7. SAME—*Review of Jury Question Submitted during Deliberations—Appellate Review.* An appellate court reviews a district court's response to a question submitted by the jury during deliberations for abuse of discretion. A district court's response constitutes an abuse of discretion when it is objectively unreasonable or when the response includes an error of law or fact.

8. SAME—*Lesser Included Offense Instruction—Appellate Review.* A lesser included offense instruction is factually appropriate if an appellate court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence.

9. TRIAL—*Effect of Trial Errors May Require Reversal of Conviction—Totality of Circumstances Must Establish Prejudice—Appellate Review of Cumulative Effect of Errors.* The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establishes that the defendant was substantially prejudiced by the errors and denied a fair trial. In assessing the cumulative effect of the errors, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. If any of the errors being aggregated are constitutional, their effect must be harmless beyond a reasonable doubt.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 24, 2021. Appeal from Finney District Court; ROBERT J. FREDERICK, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, was on the briefs for appellant.

Brian R. Sherwood, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Like three other cases decided this day, this appeal raises a constitutional challenge to the face of K.S.A. 2022 Supp. 21-5705(e)(2). See *State v. Bentley*, 317 Kan. 223, 526 P.3d 1060 (2023); *State v. Slusser*, 317 Kan. 174, 527 P.3d 565 (2023); *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023). That statute creates a mandatory (albeit rebuttable) presumption regarding a

defendant's intent to distribute a controlled substance. Specifically, under the statute, a jury must presume that a defendant who possessed at least 3.5 grams of methamphetamine did so with the intent to distribute it, unless the defendant can rebut the presumption with affirmative evidence to the contrary. See *State v. Holder*, 314 Kan. 799, 805, 502 P.3d 1039 (2022).

In *Slusser* and *Strong*, defendants argued the statute violated their federal due-process rights. They claimed that the mandatory rebuttable presumption in the statute shifts the burden of proof on the element of intent to the defendant because it requires the jury to presume the defendants' intent to distribute once the State has proved possession of at least 3.5 grams of methamphetamine.

Michael Martinez, who was convicted of possession of methamphetamine with the intent to distribute, raises a similar argument, but he takes a slightly different approach. Martinez argues the statutory presumption violates his federal due-process rights under *Leary v. United States*, 395 U.S. 6, 35-36, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), because there is no "rational connection" between possession of 3.5 grams of methamphetamine and an intent to distribute it.

For reasons explained in this opinion, we lack jurisdiction to address Martinez' constitutional challenge to the face of the statute. Granted, courts generally have authority to determine whether a statute is unconstitutional. But the power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise review only when the issues are presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. A party has standing to challenge the constitutionality of a statute only when it adversely impacts the party's rights. Thus, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction.

At Martinez' trial, rather than instructing the jury on K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory rebuttable presumption, the district court provided a "permissive inference" instruction founded on PIK Crim. 4th 57.022 (2013 Supp.). This permissive-inference instruction informed the jury that it could (but was not

required to) infer that Martinez intended to distribute methamphetamine if the evidence showed he possessed at least 3.5 grams. Because the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2) was not applied to Martinez, the statute could not have adversely impacted his rights. Thus, he lacks standing to challenge its constitutionality, depriving our court of subject matter jurisdiction over the issue.

But Martinez raises several other justiciable issues. He claims his conviction for possession of methamphetamine with intent to distribute is supported by insufficient evidence. He contends the district court erred in formulating its response to a question from the jury. Martinez also argues there were several errors in the district court's jury instructions that contributed to his conviction for possession of methamphetamine with intent to distribute. And he claims the cumulative effect of these trial errors warrants reversal of this conviction.

For reasons explained in this opinion, we hold that Martinez' conviction for possession of methamphetamine with intent to distribute is supported by sufficient evidence and the district court did not abuse its discretion in its answer to the jury's question. But there were multiple errors in the jury instructions given at Martinez' trial. Even so, upon review of the record evidence, we are not firmly convinced that the jury would have reached a different verdict without the jury-instruction errors. In other words, the errors do not warrant reversal of Martinez' convictions. And even when these errors are considered in the aggregate, we are convinced beyond reasonable doubt that they are harmless. Thus, we affirm the decision of the Court of Appeals panel upholding Martinez' convictions.

FACTS AND PROCEDURAL BACKGROUND

This case arose from events that occurred in a residential area east of Garden City in November 2017. Two Finney County Sheriff's deputies out on patrol began following an SUV that had recently left a suspected drug house. The SUV made several quick turns and pulled into the driveway of a house. Martinez and another man, Monyai Lampkin, went to the front door and asked for directions from the resident, who would later provide officers

with a video of the encounter recorded on his home-surveillance system. In the video, Martinez is wearing a stocking cap and a jacket with a distinctive shoulder patch.

Martinez and Lampkin returned to the car and drove off. The deputies lost sight of the SUV but later encountered Martinez and Lampkin exiting a yard. The men fled on foot when they spotted the deputies. They were eventually apprehended. In a nearby yard, responding officers recovered the jacket that Martinez had been wearing. In one of the pockets, officers discovered a plastic bag containing 111 grams of what turned out to be large shards of methamphetamine. One of the deputies also found a small container of marijuana in the SUV.

The State charged Martinez with possession of more than 100 grams of metham-phetamine with the intent to distribute, tampering with evidence, criminal trespass, and possession of marijuana. At a three-day trial in January 2019, a former DEA agent working as an investigator for the Finney County Sheriff's Office testified that the weight, street value, and composition of the methamphetamine found in Martinez' coat suggested that it was meant for distribution rather than personal use. Martinez testified in his own defense. He acknowledged that the marijuana was his, but he denied any connection to the methamphetamine. Martinez suggested that Lampkin had put the methamphetamine in the jacket without his knowledge.

The jury convicted Martinez on the four charges. The district court imposed a controlling sentence of more than 16 years in prison. Martinez raised six issues on appeal to the Court of Appeals, but a panel of that court rejected each of his arguments and affirmed his convictions. *State v. Martinez*, No. 121,204, 2021 WL 4352387, at *7 (Kan. App. 2021) (unpublished opinion).

Martinez asked our court to review five of the six issues he had raised before the panel—he did not contest the panel's holding on his prosecutorial-error challenge. See Supreme Court Rule 8.03(b)(6)(C)(i) (2022 Kan. S. Ct. R. at 56) (issues not presented in the petition for review are not properly before the Kansas Supreme Court). We granted Martinez' petition, placed the case on the summary calendar, and ordered supplemental briefing on two issues. First, we directed the parties to address our recent holdings in *Holder* and *State v. Valdez*, 316 Kan. 1, 512 P.3d 1125 (2022). Although we decided

those cases while Martinez' petition for review was pending, neither Martinez nor the State cited them in a Rule 6.09 letter. See Supreme Court Rule 6.09(a)(3) (2022 Kan. S. Ct. R. at 41) ("After a petition for review is filed but before the petition has been ruled on, a party may advise the court, by letter, of citation to persuasive or controlling authority that was published or filed after the petition for review was filed."). Second, we directed the parties to address whether Martinez has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) on its face.

Because neither party requested oral argument, we decide this summary-calendar case based on the petition for review and the briefs. See Supreme Court Rule 7.01(c)(4) (2022 Kan. S. Ct. R. at 42) ("When a case is placed on the summary calendar, it is deemed submitted to the court without oral argument unless a party's motion for oral argument is granted.").

ANALYSIS

Martinez has raised five issues before our court. First, he challenges the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) and argues the jury instruction derived from that statute was erroneously given to the jury. Second, he claims insufficient evidence supports his conviction for possession with the intent to distribute. Third, he argues the district court's response to a question the jury submitted during deliberations was legally inappropriate. Fourth, he contends the district court should have instructed the jury on simple possession of methamphetamine, a less serious drug charge. And fifth, Martinez argues the cumulative impact of these errors requires us to reverse his convictions, even if those errors are harmless when viewed in isolation.

We address these issues below and conclude that none warrant reversal of Martinez' convictions.

I. *Martinez' Constitutional Challenge to K.S.A. 2022 Supp. 21-5705(e)(2) and His Challenge to the Jury Instruction Derived from that Statute Do Not Warrant Relief*

According to the panel, Martinez raised only a constitutional challenge to K.S.A. 2020 Supp. 21-5705(e)(2)'s rebuttable presumption, not an instructional challenge to the permissive-inference instruction

given during his trial: "More to the point, however, Martinez does not attack the instruction. He challenges the propriety of the statutory presumption in K.S.A. 2020 Supp. 21-5705(e)(2)." *Martinez*, 2021 WL 4352387, at *4. The State agrees with the panel. Martinez does not.

Thus, we must first address the scope of Martinez' challenge on appeal. For reasons discussed below, we conclude that Martinez raised both a constitutional challenge to the mandatory rebuttable presumption in the statute and an instructional challenge to the permissive-inference jury instruction.

A. *Martinez Preserved Both a Constitutional Challenge to the Statutory Presumption in K.S.A. 2022 Supp. 21-5705(e)(2) and an Instructional Challenge to the Permissive-Inference Instruction Given at Trial*

To determine whether Martinez challenged both the mandatory rebuttable presumption in the statute and the permissive-inference instruction on constitutional grounds, it helps to understand the distinction between the statute and the instruction given at trial. Under K.S.A. 2022 Supp. 21-5705(e)(2), "there shall be a rebuttable presumption of an intent to distribute if any person possesses . . . 3.5 grams or more of heroin or methamphetamine." As we explained in *Holder*, a rebuttable presumption "'requires the jury to find the presumed element unless the accused persuades the jury otherwise.'" 314 Kan. at 805 (quoting *State v. Harkness*, 252 Kan. 510, Syl. ¶ 13, 847 P.2d 1191 [1993]). In other words, K.S.A. 2022 Supp. 21-5705(e)(2) requires the jury to presume an intent to distribute if a defendant possessed at least 3.5 grams of methamphet-amine, unless the defendant rebuts that presumption with affirmative evidence to the contrary (for example, by presenting evidence that the defendant possessed the substance for personal use).

But the district court did not instruct the jury on the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e)(2). Instead, the district court provided a "permissive inference" instruction based on PIK Crim. 4th 57.022. Whereas a mandatory presumption *requires* a jury to presume a fact, a permissive inference does not. It instead "suggest[s] to the jury 'a possible

conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.'" *Holder*, 314 Kan. at 805 (quoting *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L. Ed. 2d 344 [1985]). The permissive-inference instruction here informed the jury that it could (but was not required to) infer Martinez intended to distribute methamphetamine, if the evidence showed he possessed at least 3.5 grams of the substance:

> "Under Kansas law, if you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that the defendant possessed with intent to distribute. You may consider this inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant."

Apart from the introductory phrase, the instruction matched PIK Crim. 4th 57.022. That pattern instruction cites K.S.A. 2022 Supp. 21-5705(e) as its legal authority.

A review of Martinez' appellate brief confirms that he challenges not only the constitutionality of the statutory mandatory presumption but also the permissive-inference instruction given at trial. First, the brief acknowledges Martinez did not object to the instruction below, but he argues that appellate courts may always consider a claim of instructional error for the first time on appeal under K.S.A. 2022 Supp. 22-3414. Then, the brief identifies the applicable standard of review as clear error, the standard of review applied to unpreserved jury-instruction challenges. See K.S.A. 2022 Supp. 22-3414(3). On the merits, Martinez' brief argues the permissive-inference instruction deviated from the statute and was not rationally connected to the State's evidence at trial.

Based on these arguments, Martinez adequately briefed a challenge to the permissive-inference instruction. And such a challenge may be raised for the first time on appeal. *State v. Hilyard*, 316 Kan. 326, 333, 515 P.3d 267 (2022). Moreover, the arguments Martinez raised on appeal mirrored the arguments defendant raised in *Valdez*. And there, we held that the Court of Appeals erred by failing to construe the defendant's

argument as both an instructional and constitutional challenge. See *Valdez*, 316 Kan. at 6-8. Having confirmed that Martinez raised both challenges, we now address each challenge in turn.

B. *Martinez Lacks Standing to Challenge the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) on Its Face*

In his appellate brief, Martinez argued that K.S.A. 2022 Supp. 21-5705(e)(2) is facially unconstitutional because it fails the "rational connection" standard as set out by the United States Supreme Court in *Leary*. Under that standard, a presumption in a criminal case violates a defendant's federal due-process rights "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36; see also *Tot v. United States*, 319 U.S. 463, 467-68, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943) ("[A] statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.").

According to Martinez, it cannot be said that K.S.A. 2022 Supp. 21-5705(e)(2)'s presumed fact—that the defendant has an intent to distribute—is more likely than not to flow from the proved fact—that the defendant possessed at least 3.5 grams of metham-phetamine. The panel did not address that argument, reasoning that "whatever legal shortcomings there might be with K.S.A. 2020 Supp. 21-5705(e)(2) as a presumption of intent, they amount to debatable academic points . . . because the jury was never instructed on—and, therefore, could not have considered—the statutory presumption." *Martinez*, 2021 WL 4352387, at *3. In essence, the panel held that Martinez lacked standing to raise his constitutional challenge (although the panel did not use that language). Thus, before addressing the merits of Martinez' constitutional challenge, we must first consider the threshold issue of whether he has standing to raise this legal claim.

While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the

Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the "'right to make a legal claim.'" 298 Kan. at 1121. To have such a right, a party generally must show an "'injury in fact'"; absent that injury, courts lack authority to entertain the party's claim. See 298 Kan. 1122-23 (Standing is "a component of subject matter jurisdiction."); see also *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019) ("Kansas courts have authority—in other words, the judicial power—to hear only those matters over which they have jurisdiction."). In this respect, standing is both a requirement for a case-or-controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *Gannon*, 298 Kan. at 1122-23.

To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. *State v. Coman*, 294 Kan. 84, Syl. ¶ 3, 273 P.3d 701 (2012); see *Ulster County Court v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights."). A party cannot establish standing by arguing that a statute would be unconstitutional if applied to third parties in a hypothetical situation. *Coman*, 294 Kan. 84, Syl. ¶ 3.

In our order granting Martinez' petition for review, we instructed the parties to provide supplemental briefing on whether Martinez has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2). And we directed the parties to *Ulster*.

In *Ulster*, the Court was tasked with determining whether defendants had standing to bring a facial challenge to the constitutionality of a statutory presumption (as opposed to standing to challenge the statutory presumption as applied). The *Ulster* Court explained that inferences and presumptions may broadly be divided into two categories—permissive and mandatory—and this categorization generally determines how a court will review any constitutional challenge. See 442 U.S. at 156-60. A permissive

presumption or inference leaves the fact-finder free to accept or reject the inference and does not shift the burden of proof, so such an evidentiary device violates due process "only if, *under the facts of the case*, there is no rational way the [fact-finder] could make the connection permitted by the inference." (Emphasis added.) 442 U.S. at 157. Consequently, this evidentiary device is traditionally reviewed on an as-applied basis. 442 U.S. at 157, 162-63 ("Our cases considering the validity of permissive statutory presumptions such as the one involved here have rested on an evaluation of the presumption as applied to the record before the Court. None suggests that a court should pass on the constitutionality of this kind of statute 'on its face.'").

Mandatory presumptions, however, compel the fact-finder to reach a presumed conclusion based on a predicate fact (at least until the defendant produces evidence to rebut the presumption). 442 U.S. at 157. Because the fact-finder "may not reject [a mandatory presumption] based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts." 442 U.S. at 159. Thus, mandatory presumptions are generally reviewed on their face. 442 U.S. at 157-58.

The *Ulster* Court also explained that "[i]n deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it." 442 U.S. at 157 n.16.

Here, Martinez challenges the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e)(2) on its face. But Martinez would have standing to bring a facial challenge to K.S.A. 2022 Supp. 21-5705(e)(2) only if the statute's mandatory presumption was applied to him through the jury instructions. As Martinez concedes in his supplemental brief, the district court instructed the jury on a permissive inference, not the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). Because the statute's mandatory presumption was never applied to Martinez, he lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2) on its face. In turn, we lack subject matter jurisdiction over his facial constitutional challenge to the statute.

C. *The Permissive-Inference Instruction Was Legally Inappropriate But Does Not Require Reversal of Martinez' Conviction*

Martinez raises two challenges to the permissive-inference instruction given at his trial. First, Martinez contends that the instruction is legally inappropriate because it deviates from K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption. Second, Martinez contends the instruction also violated his federal due-process rights because it fails the "rational connection" test as applied to the evidence presented at trial. In other words, he argues there was no rational connection between the State's evidence at trial and the threshold amount triggering the instruction's permissive inference. See 442 U.S. at 155 (when challenge involves a permissive inference, courts apply rational-connection standard to the facts of the case). And Martinez has standing to bring this constitutional challenge because the permissive inference was applied in his case through the challenged instruction. See 442 U.S. at 155, 157 n.16.

The panel did not address these arguments because it concluded that Martinez did not raise an instructional challenge. But as we explained above, the panel erred in reaching that conclusion. Thus, we must address the merits of Martinez' instructional challenges.

We review claims of instructional error in multiple steps. We first consider jurisdiction and whether the issue is preserved. Then we consider whether the instruction was both legally and factually appropriate. Finally, we review any error for harmlessness, using different standards depending on whether the claim has been preserved. If a defendant failed to object to the instruction at trial, then we will reverse only for clear error. Under the clear-error standard, the defendant has the burden to firmly convince us that the jury would have reached a different verdict if the instructional error had not occurred. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). Martinez concedes that he did not object to the permissive-inference instruction at trial. Thus, we review any error in that instruction for clear error.

As to his first challenge to the permissive-inference instruction, Martinez is correct that the instruction was legally inappropriate under

our recent decisions in *Valdez* and *Holder*. Jury instructions "must always fairly and accurately state the applicable law." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). But as we explained in *Holder* and *Valdez*, the permissive-inference instruction *deviates* from the applicable law. While K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption *requires* the jury to find the presumed fact (the intent to distribute) based on evidence supporting the predicate fact (possession of at least 3.5 grams of methamphetamine), the instruction's permissive inference informs the jury that it "may accept or reject" the presumed fact. See *Holder*, 314 Kan. at 804-05; *Valdez*, 316 Kan. at 8-9. And because the permissive-inference instruction deviates from the mandatory presumption in the statute, it is not legally appropriate.

Of course, jurors may still draw reasonable inferences about a defendant's intent to distribute based on the trial evidence, and, if that inference is reasonably grounded in the evidence, prosecutors may encourage them to do so. Nothing in this opinion, or in *Holder* and *Valdez*, should be taken to suggest otherwise. See, e.g., *Holder*, 314 Kan. at 806 ("[A] defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic."). Even so, because the permissive-inference instruction does not incorporate the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2), it is an incomplete statement of the law. Thus, the instruction is legally inappropriate because it does not "fairly and accurately state the applicable law." *Plummer*, 295 Kan. at 161.

Because we have concluded that the permissive-inference instruction was legally inappropriate for failing to state the applicable law, we need not decide whether the instruction was also unconstitutional under *Leary*'s rational-connection test. As we noted when the defendant raised the same argument in *Valdez*, the crux of the challenge is that the permissive-inference instruction relieved the State of its burden to prove every element of the intent-to-distribute charge beyond a reasonable doubt. 316 Kan. at 6-7 (citing *Ulster*, 442 U.S. at 157). Even if we agreed with Martinez, we would apply the same clear-error standard of review that we do for other unpreserved instructional challenges, and Martinez would still have the burden to firmly convince us

that the jury would have reached a different verdict had the permissive-inference instruction not been given. See, e.g., *State v. Cameron*, 300 Kan. 384, 395, 329 P.3d 1158 (2014) (applying "a clearly erroneous standard of review" to reject the defendant's argument, raised for the first time on appeal, that a jury instruction "unconstitutionally shifted the burden to him to prove that he was not guilty"). Because reaching the merits of the due-process challenge to the instruction would not affect our reversibility analysis, we simply presume without deciding that Martinez has also established this error and proceed to our clear-error review. See *Butler v. Shawnee Mission School District Board of Education*, 314 Kan. 553, 574, 502 P.3d 89 (2022) (courts should refrain from "deciding constitutional questions unless it is necessary to do so").

Upon review of the entire record, Martinez has not firmly convinced us that the verdict would have changed had the permissive-inference instruction not been given. If the district court had given a legally appropriate instruction that mirrored K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption, we are not convinced the verdict would have changed because the instruction would have *required* the jury to find that Martinez intended to distribute the methamphetamine found in his jacket. In other words, such an instruction would have been more prejudicial to Martinez than the one given.

If, on the other hand, the district court had not instructed the jury on the permissive inference or the mandatory presumption in the statute, the uncontroverted trial evidence still firmly established Martinez' intent to distribute. The sheriff's investigator testified that the amount of methamphetamine seized was worth about $2,400, a value indicative of drug distribution, and the quantity was many dozen times greater than the amount a personal user would typically possess. He also explained that large shards of methamphetamine, like the ones recovered from the bag inside Martinez' jacket, generally are possessed by distributors, who then break the large crystals down and sell them to individual users. Further, as the panel noted, Martinez did not seek to controvert that testimony. And his defense at trial "rested on denying any knowing possession of the 111 grams of methamphetamine at all and not on whether it was for personal use rather than commercial

distribution." *Martinez*, 2021 WL 4352387, at *3. We therefore hold that Martinez has not met his burden to show clear error warranting the reversal of his conviction for possession of methamphetamine with intent to distribute.

II. *Sufficient Evidence Supports Martinez' Conviction for Possession of Methamphetamine with the Intent to Distribute, and that Conviction Is Not the Product of Impermissible Inference Stacking*

Martinez next argues there was insufficient evidence to support his conviction for possession of methamphetamine with the intent to distribute. Our standard of review is well established: we will not overturn a conviction when, after reviewing all the evidence in a light most favorable to the prosecution, we are convinced that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. When making that determination, we do not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018).

The State charged Martinez with one count of unlawful possession of more than 100 grams of methamphetamine with the intent to distribute, in violation of K.S.A. 2017 Supp. 21-5705(a)(1) and (d)(3). To find Martinez guilty of that offense, the jury had to find beyond a reasonable doubt that Martinez (1) possessed at least 100 grams of methamphetamine and (2) intended to distribute the drug. The district court properly instructed the jury on those elements.

The State presented circumstantial evidence in support of both elements. See *State v. Thach*, 305 Kan. 72, 84, 378 P.3d 522 (2016) ("[C]ircumstantial evidence may sustain even the most serious convictions and . . . may be used to show intent."). On the first element, the State presented circumstantial evidence that Martinez possessed at least 100 grams of methamphetamine: a bag with about 111 grams of methamphetamine was found in the pocket of a jacket that Martinez discarded while fleeing from police. On the second element, the State relied on the undisputed testimony of the Finney County Sheriff's investigator to establish Martinez' intent to distribute the controlled substance. As noted in our clear-error analysis in the previous section, the investigator

testified that the quantity, street value, and composition of the methamphetamine signified a commercial supply. When that evidence is viewed in a light most favorable to the prosecution, a rational fact-finder could have found beyond a reasonable doubt that Martinez possessed more than 100 grams of methamphetamine with the intent to distribute.

But Martinez insists that such a conclusion necessarily relied on impermissible inference stacking. See *State v. Banks*, 306 Kan. 854, 859, 397 P.3d 1195 (2017) (The State may draw reasonable inferences from the facts presented at trial but may not ask the jury to make a presumption based on another presumption.). We disagree. As the panel aptly put it, "each element was proved through a separate line of circumstantial evidence grounded in the trial testimony and exhibits." *Martinez*, 2021 WL 4352387, at *5. Martinez' possession of the methamphetamine was established by the fact that it was found in his discarded jacket. His intent to distribute the methamphetamine was established by independent circumstantial evidence—testimony that the quantity, value, and composition of the methamphetamine reflected a commercial supply. The circumstantial evidence supporting Martinez' conviction did not require the jury to arrive at its conviction by improperly stacking one inference upon another. See *Valdez*, 316 Kan. at 12 (Defendant's conviction was not founded on improper inference stacking where the State presented circumstantial evidence in support of the possession element and other circumstantial evidence in support of the intent to distribute element.).

III. *The District Court Did Not Abuse Its Discretion when It Responded to a Question the Jury Submitted During Deliberations*

Martinez next challenges what he characterizes as an instruction given by the district court during deliberations. A few hours after the jury began deliberating, it sent a note stating, "We are at 10 and 2 any sugges[t]ions?" The district court did not speak with the presiding juror or gather more information about whether continued deliberations could be fruitful. Instead, with the agreement of the parties, the court sent a written response stating, "Members of the jury, all I can do is encourage you to continue

your deliberations." After another hour of deliberating, the jury returned its verdict.

Martinez contends the district court's response was an *Allen* instruction. An *Allen* instruction is a supplemental instruction given to the jury and designed to encourage a divided jury to agree on a verdict. See *Allen v. United States*, 164 U.S. 492, 501-02, 17 S. Ct. 154, 41 L. Ed. 528 (1896). Because *Allen* instructions can exert undue influence
on the jury, we have "a long and justified history of disapproving *Allen*-type jury instructions," especially when "given to the jury during deadlocked deliberations." *State v. Tahah*, 302 Kan. 783, 794, 358 P.3d 819 (2015).

But the panel held that the invited-error doctrine precluded it from reaching the merits of Martinez' argument. *Martinez*, 2021 WL 4352387, at *6. It noted that the district court "met with the lawyers and Martinez outside the presence of the jury to discuss the question posed" and that "Martinez' lawyer discussed and endorsed the approach the district court took in responding and approved the content of the written answer to the jury." 2021 WL 4352387, at *6. According to the panel, "[w]hen the lawyer for a defendant participates in formulating and then approves the answer the district court provides in response to a question from jurors, the invited error rule precludes raising the adequacy of the response as a point for reversal on appeal." 2021 WL 4352387, at *6.

But Martinez insists the record shows his attorney had no hand in formulating the response. In other words, Martinez contends he merely acquiesced, but did not affirmatively induce, the district court's response to the jury's question. We agree.

The transcript shows the district court formulated the response on its own and Martinez' attorney simply did not object to it:

"THE COURT: Let the record reflect that this Court is now back in session and on the record with regard to Case No. 17 CR 548, with this portion of this jury trial occurring outside of the presence of the jury, with Mr. Sherwood continuing to appear on behalf of the State of Kansas, with Mr. Martinez continuing to appear in person together with his counsel, Ms. Lobmeyer.

"At 3:09 p.m. this afternoon I received the following written question from the jury: 'We are at 10 and 2. Any suggestions?'

"I don't know whether they are talking about one count or multiple counts. I don't know what I can possibly do other than encourage them to continue to deliberate. I could tell them that if they've reached an agreement on some counts and not all the counts, that they could enter verdicts as to those counts, but I think before I ever got to that point I would want them to tell me that they are at a complete impasse, and then I could inquire of them in court with you all present whether or not this is an issue with regard to one count, two counts, three counts, or four counts.

"Give me your input, Mr. Sherwood.

"MR. SHERWOOD: That sounds fine, Judge.

"MS. LOBMEYER: That would be fine.

"THE COURT: So my response at this point is going to be all I can do at this point in time is encourage you to continue your deliberations with regard to this case; correct?

"MR. SHERWOOD: Right.

"MS. LOBMEYER: Yes.

"THE COURT: All right. We'll be in recess for just a few minutes to get this typed up, and then we'll be back on the record, so don't anybody leave. All right?

"(There was a short pause and continued with the defendant and counsel present.)

"THE COURT: Picking up where we left off, the question I was given at 3:09 is, 'We are at 10 and 2. Any suggestions?'

"My response, 'Members of the jury, all I can do is encourage you to continue your deliberations.'

"Acceptable, Mr. Sherwood?

"MR. SHERWOOD: Yes.

"THE COURT: Ms. Lobmeyer?

"MS. LOBMEYER: Yes.

"THE COURT: Then we will be in recess until further notice."

In *State v. Douglas*, 313 Kan. 704, 708, 490 P.3d 34 (2021), we recently harmonized our caselaw addressing the invited-error doctrine in the context of jury instructions. See *State v. Roberts*, 314 Kan. 835, 846, 503 P.3d 227 (2022). We clarified that "the doctrine's application turns on whether the instruction would have been given—or omitted—but for an affirmative request to the court for that outcome later challenged on appeal." *Douglas*, 313 Kan. at 708. Thus, "[t]he ultimate question is whether the record reflects the defense's action *in fact induced* the court to make the claimed error." 313 Kan. at 708. Mere acquiescence to a district court instruction does not warrant the application of the invited-error doctrine. See 313 Kan. at 709. The same rationale applies

equally when assessing the doctrine's applicability to a district court's response to a jury question.

The record here reflects that Martinez' attorney merely acquiesced to the district court's formulation of the response. Defense counsel's conduct did not induce the content of the district court's written response to the jury's question. The panel therefore erred by invoking the invited-error doctrine.

Even so, Martinez' argument fails on the merits. We review a district court's response to a jury-submitted question for an abuse of discretion. *State v. Walker*, 308 Kan. 409, 423-24, 421 P.3d 700 (2018). A district court's response constitutes an abuse of discretion when it is objectively unreasonable or when the response includes an error of law or fact. 308 Kan. at 423.

We see no error of law or fact in the district court's response, nor do we find it objectively unreasonable. The district court followed the procedures set out in K.S.A. 2022 Supp. 22-3420(d) for responding to a jury question submitted during deliberations, and Martinez does not suggest otherwise. The jury asked the question only a few hours into deliberations. And the district court's response merely encouraged the jury to keep deliberating. Martinez cites no authority suggesting this response constitutes an improper *Allen* instruction. And the response did not include language from the *Allen* instruction found in the Pattern Jury Instructions for Kansas. See *State v. Makthepharak*, 276 Kan. 563, 569, 78 P.3d 412 (2003) (citing several cases disapproving of use of PIK Crim. 3d 68.12 after deliberations have begun based on finding that instruction could exert undue pressure on jury to reach a verdict). Nor did the response include any of the language that Kansas courts have found objectionable, such as "another trial would be a burden on both sides," or "like all cases this case must be decided some time." See, e.g., *State v. Salts*, 288 Kan. 263, 264-65, 200 P.3d 464 (2009) (court held it was error to instruct deadlocked jury that "'[*a*]*nother trial would be a burden on both sides*'"); *State v. Anthony*, 282 Kan. 201, 216, 145 P.3d 1 (2006) (citing series of cases in which court disapproved instruction given after deliberations that "'all cases . . . must be decided sometime'"). For these reasons, we hold that the district court did

not abuse its discretion in formulating its response to the jury question.

IV. *The District Court Should Have Instructed the Jury on Simple Possession of Methamphetamine But this Error Does Not Warrant Reversal*

Martinez raises one final claim of instructional error. He argues the district court erred by not instructing the jury on simple possession of methamphetamine under K.S.A. 2022 Supp. 21-5706(a). Simple possession is a lesser included offense of the crime the State charged him with—possession with intent to distribute methamphetamine under K.S.A. 2022 Supp. 21-5705(a)(1) and (d)(3). Like his other instructional-error claims, Martinez raises this issue for the first time on appeal.

Because Martinez did not request the instruction, we employ the same multi-step standard of review we have already described: we first consider jurisdiction and preservation, then decide whether the instruction would have been legally and factually appropriate, and finally determine whether reversal is warranted under the clear-error standard. *Valdez*, 316 Kan. at 6. That said, when the party's objection is based on an omitted instruction, rather than error in the instructions given, we must also consider whether the instructions given by the district court, considered as a whole, accurately stated the applicable law and were not reasonably likely to mislead the jury. *State v. Shields*, 315 Kan. 814, 820, 511 P.3d 931 (2022). If so, then the district court did not err by failing to give the omitted instruction, even if that instruction would have been legally and factually appropriate. 315 Kan. at 820. In other words, we are mindful that a party is not entitled to *every* factually and legally appropriate instruction.

The Court of Appeals panel held that the district court did not err by omitting the instruction. The panel concluded that the instruction would have been legally appropriate because simple possession is a lesser included crime of possession with intent to distribute. *Martinez*, 2021 WL 4352387, at *5. The State concedes that point. See *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019) ("'An instruction on a lesser included crime is legally appropriate.'"). But the panel held that the simple-possession

instruction would not have been factually appropriate because the undisputed testimony of the sheriff's investigator about the weight, value, and composition of the methamphetamine would not have reasonably justified a conviction for simple possession. *Martinez*, 2021 WL 4352387, at *5.

In other words, in deciding whether an instruction on simple possession would have been factually appropriate, the panel considered whether the evidence at trial was more likely to support a conviction for the lesser offense rather than the greater offense of possession with intent to distribute. But we have rejected this standard for determining the factual appropriateness of a lesser included offense instruction. See *State v. Berkstresser*, 316 Kan. 597, 603, 520 P.3d 718 (2022). Rather than focusing on the evidence supporting the greater offense, we have held that a lesser included offense instruction is factually appropriate if the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. 316 Kan. at 604.

Here, there is circumstantial evidence that Martinez possessed roughly 111 grams of methamphetamine. This evidence is sufficient to support a conviction for simple possession of methamphetamine. See *State v. Scheuerman*, 314 Kan. 583, 592, 502 P.3d 502 (2022) ("[W]here the undisputed evidence establishes the possession of a *greater* quantity of contraband than a charged crime encompasses, that evidence is sufficient to establish the possession of the amount contemplated by the charged crime."). Thus, a simple-possession instruction would have been factually appropriate.

But as we noted above, a district court's failure to provide a legally and factually appropriate instruction does not always constitute error. If the district court's instructions, considered as a whole, accurately stated the applicable law and were not reasonably likely to mislead the jury, then the omission of an instruction is not erroneous—even if the omitted instruction would have been legally and factually appropriate. *Shields*, 315 Kan. at 820. But the instructions here gave an incomplete account of the applicable law. Under K.S.A. 2022 Supp. 22-3414(3), a district court must instruct the jury on "any" lesser included crime "[i]n cases where there is some evidence which would reasonably justify a conviction" on that lesser charge. Here, there was sufficient evidence to support a conviction on the lesser included offense, meaning the

evidence would have reasonably justified a conviction for simple possession of methamphetamine. Thus, the district court erred by failing to instruct the jury on that lesser offense. In turn, the panel erred by concluding that the omission of that instruction was proper.

Even so, we again conclude that reversal is not warranted under the clear-error standard. Given the undisputed testimony of the sheriff's investigator, Martinez has not firmly convinced us that, if faced with a simple-possession instruction, the jury would not have convicted him of possession of methamphetamine with the intent to distribute. See *Valdez*, 316 Kan. at 17 (no clear error for failing to instruct on lesser included offense when strong weight of evidence showed the defendant possessed requisite amount with the intent to distribute it).

V. *The Cumulative Effect of the Trial Errors Did Not Deny Martinez a Fair Trial*

Finally, Martinez argues the cumulative impact of the trial errors requires reversal, even if such errors are harmless in isolation. The effect of separate trial errors may require reversal of a defendant's conviction when the totality of the circumstances establish that the defendant was substantially prejudiced by the errors and denied a fair trial. *State v. Hirsh*, 310 Kan. 321, 345, 446 P.3d 472 (2019). In assessing the cumulative effect of the trial errors, appellate courts examine the errors in the context of the entire record, considering how the trial judge dealt with the errors as they arose; the nature and number of errors and their interrelationship, if any; and the overall strength of the evidence. 310 Kan. at 345-46. If any of the errors being aggregated are constitutional, their effect must be harmless beyond a reasonable doubt. *State v. Robinson*, 306 Kan. 1012, 1034, 399 P.3d 194 (2017). Under that constitutional harmless-error standard, reversal is warranted unless the State shows "'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.'" *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016).

We have identified two instructional errors in Martinez' trial. First, the district court should have instructed the jury on simple possession of methamphetamine. Second, the permissive-inference instruction was legally inappropriate because it deviated from K.S.A. 2022 Supp.

21-5705(e)(2)'s mandatory presumption. We also presumed without deciding that the permissive-inference instruction was not rationally connected to the trial evidence, which would violate Martinez' federal due-process rights under *Leary*. Because we presumed that the permissive-inference instruction violated Martinez' due-process rights, we will also presume that the constitutional harmless-error standard applies.

Even under that heightened standard, we conclude that the cumulative effect of the trial errors is no greater than when analyzed independently—in other words, the whole is no greater than the sum of its parts. Granted, the trial errors are related in that they all touch on Martinez' intent to distribute the methamphetamine. But had the district court given a jury instruction that matched K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption, rather than the permissive-inference instruction given, the likelihood of Martinez' conviction would have been even greater. Such an instruction would have required the jury to find an intent to distribute. Also, as we have repeatedly emphasized, the trial testimony establishing Martinez' intent to distribute is compelling and undisputed. We are therefore convinced that there is no reasonable possibility the jury-instruction errors contributed to the guilty verdicts.

CONCLUSION

For the reasons outlined above, we affirm the panel's decision upholding Martinez' convictions, though in some instances under a different rationale than the panel employed. Judgment of the Court of Appeals is affirmed. Judgment of the district court is affirmed.

* * *

STEGALL, J., concurring: I concur in the result based on the rationale expressed in my concurrence in *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023).

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

No. 121,460

STATE OF KANSAS, *Appellee*, v. MATTHEW PAUL SLUSSER, *Appellant.*

(527 P.3d 565)

SYLLABUS BY THE COURT

1. TRIAL—*Invited-Error Doctrine—Application—Appellate Review.* The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. In determining whether the invited-error doctrine applies, appellate courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error.

2. SAME—*Invited-Error Doctrine—Jury Instructions—Failure to Object to Instruction Does Not Trigger Invited-Error Doctrine.* In the context of jury instructions, the mere failure to object to an instruction does not trigger the invited-error doctrine. And the doctrine does not automatically apply every time a party requests an instruction at trial but then, on appeal, claims the district court erred by giving it. But application of the doctrine is appropriate when the party proposing an instruction before trial could have ascertained the instructional error at that time.

3. APPEAL AND ERROR—*Party Must Seek Review to Preserve Issue on Appeal.* A party aggrieved by a Court of Appeals' decision on a particular issue must seek review to preserve that issue for Kansas Supreme Court review.

4. TRIAL—*Prosecutor's Latitude 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 prosecutors step outside the bounds of proper argument if they lower the State's burden to prove the defendant's guilt beyond a reasonable doubt or shift the burden onto the defendant.

5. EVIDENCE—*Inferences and Presumptions—Inference Is Conclusion Drawn from Facts—Presumption is Rule of Law*. There is a legally significant difference between inferences and presumptions. An inference is a conclusion rationally drawn from a proven fact or set of facts. In contrast, a presumption is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence.

6. SAME—*Presumptions*. Because presumptions direct jurors to draw certain conclusions once the State has satisfied a certain evidentiary predicate, they have the potential to relieve the State of its burden to prove the defendant's guilt beyond a reasonable doubt and shift the burden onto the defendant to prove his or her innocence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 23, 2020. Appeal from Shawnee District Court; DAVID DEBENHAM, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Bates*, of the same office, was on the briefs for appellant.

Steven J. Obermeier, assistant solicitor general, argued the cause, and *Derek Schmidt*, attorney general, was with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: This appeal raises several issues addressing the showing needed under Kansas law to establish that a defendant intended to distribute a controlled substance. The matter began when two law enforcement officers stopped Matthew Paul Slusser for a traffic infraction in Topeka. Two minor children were riding in the car with Slusser at the time. After discovering Slusser's driver's license was suspended, the officers arrested him and conducted a search, which led to the discovery of 11.2 grams of methamphetamine in Slusser's pocket.

A jury convicted Slusser of one count of driving while suspended (second offense) in violation of K.S.A. 2017 Supp. 8-262(a)(1); two counts of aggravated child endangerment in violation of K.S.A. 2017 Supp. 21-5601(b)(2) (establishing an intent to distribute as one of the elements of the offense); and one count of possessing methamphetamine with intent to distribute in violation of K.S.A. 2017 Supp. 21-5705(a)(1).

Whether Slusser intended to distribute the methamphetamine in his possession was a central issue at trial and on appeal. To convict Slusser of possessing methamphetamine with intent to distribute, the State had to prove beyond reasonable doubt that he: (1) possessed methamphetamine; and (2) intended to distribute the drug. As to the second element, K.S.A. 2022 Supp. 21-5705(e)(2) further provides that "*there shall be a rebuttable presumption* of an intent to distribute if any person possesses . . . 3.5 grams or more of . . . methamphetamine." (Emphasis added.) This statute creates a mandatory (albeit rebuttable) presumption of an intent to distribute. In other words, it requires the jury to presume Slusser

intended to distribute methamphetamine if he possessed 3.5 grams or more of the controlled substance, unless he rebuts this presumption with affirmative evidence to the contrary. See *State v. Holder*, 314 Kan. 799, 805, 502 P.3d 1039 (2022).

But rather than instructing the jury on this mandatory presumption, the district court provided a "permissive inference" instruction founded on PIK Crim. 4th 57.022 (2013 Supp.). This permissive inference instruction informed the jury that if the evidence showed Slusser possessed 3.5 grams or more of methamphetamine, then it *could* (but was not required to) *infer* that Slusser intended to distribute the controlled substance.

On appeal, Slusser raised three challenges to his convictions—all related to the "intent to distribute" issue. First, he argued to a panel of the Court of Appeals that the district court's permissive inference instruction was legally inappropriate because it was inconsistent with the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e). See, e.g., 314 Kan. at 802-08. Second, Slusser argued the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2) was unconstitutional. Finally, he argued the prosecutor erred in closing argument by characterizing the permissive inference instruction as a mandatory presumption. The panel was not persuaded and affirmed Slusser's convictions.

Slusser now seeks review of the panel's decision. As to Slusser's instructional challenge, we decline to reach the merits. The Court of Appeals held that Slusser invited the error by proposing the very instruction he now challenges on appeal. And in his briefing to our court, Slusser failed to explain why the panel's application of the invited-error doctrine was erroneous. Further, we conclude the panel's application of the invited-error doctrine in these circumstances was appropriate and consistent with our precedent.

As to Slusser's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)(2), we again decline to reach the merits. In his petition for review, Slusser failed to seek review of the panel's holding on that issue. Thus, Slusser failed to preserve this constitutional challenge for our court's review.

But we do reach the merits of Slusser's prosecutorial error claim. We hold that the prosecutor erred by mischaracterizing the

permissive inference jury instruction, effectively arguing the instruction described a presumption that relieved the State of its burden to prove beyond reasonable doubt that Slusser intended to distribute the methamphetamine. And we conclude that the State failed to carry its burden to prove this error was harmless, at least as to those convictions that required the State to prove Slusser's intent to distribute. Thus, we reverse Slusser's convictions for aggravated endangering a child and possession of methamphetamine with intent to distribute. We affirm his conviction for driving while suspended. And we remand the case to the district court for a new trial and resentencing.

FACTS AND PROCEDURAL BACKGROUND

Two officers stopped Slusser for a traffic infraction in Topeka. At the time, Slusser had two minor children riding in the car with him. The officers soon learned Slusser's driver's license was suspended, and they arrested him for driving with a suspended license. While searching Slusser following his arrest, officers found a plastic bag in his pocket containing 11.2 grams of methamphetamine. Officers also searched the car but did not find any other items commonly associated with drug distribution, such as plastic baggies, a scale, multiple cell phones, or a large sum of cash. Slusser told the officers he was working with a DEA agent, but that was not true.

Slusser was indicted on one count of possession with intent to distribute; two counts of aggravated endangering a child; and one count of driving while suspended (2nd offense).

The two officers involved in Slusser's arrest both testified at trial. One officer testified that methamphetamine users usually have a gram or less of methamphetamine at a time, while methamphetamine dealers usually have more. The other officer testified that the most significant factor in distinguishing personal users of narcotics from dealers is the quantity they possess, and methamphetamine dealers would have significantly more than a gram. That officer also testified that personal users usually have less than 3.5 grams, but he admitted it is possible a user could possess more than that amount. When pressed on this point during cross-examination, the officer said he believed the 3.5-gram

threshold came from a statute. But he did not rely exclusively on that statutory presumption to determine whether someone was a dealer. Instead, the officer explained that in his experience weighing narcotics after arrest, methamphetamine dealers usually possessed more than 3.5 grams.

The jury convicted Slusser on all counts. After designating the possession with intent to distribute count as Slusser's primary offense of conviction for sentencing purposes, the district court imposed a controlling term of 135 months' imprisonment. Slusser appealed, and the Court of Appeals affirmed. *State v. Slusser*, No. 121,460, 2020 WL 7636318 (Kan. App. 2020) (unpublished opinion).

We granted Slusser's petition for review. And we heard oral argument from the parties on December 12, 2022. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petition for review of Court of Appeals decision); K.S.A. 60-2101(b) (providing Supreme Court jurisdiction over cases subject to review under K.S.A. 20-3018).

ANALYSIS

I. *Did the District Court Commit Instructional Error?*

For his first claim of error, Slusser argues the district court provided an erroneous instruction to the jury. The challenged instruction informed the jury it could, but was not required to, infer Slusser intended to distribute methamphetamine if the evidence showed he possessed 3.5 grams or more of the drug.

Slusser argues this permissive inference instruction, founded on PIK Crim. 4th 57.022, was legally inappropriate because it deviates from the applicable law. See *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012) (to be legally appropriate, jury instruction must fairly and accurately reflect the applicable law). The pattern instruction cites K.S.A. 21-5705(e) as its legal authority. PIK Crim. 4th 57.022. But that statute provides "there *shall be* a rebuttable *presumption* of an intent to distribute if any person possesses . . . 3.5 grams or more of . . . methamphetamine." (Emphasis added.) K.S.A. 2022 Supp. 21-5705(e)(2). Slusser argues

the plain language of the statute imposes a mandatory presumption of an intent to distribute when the evidence shows defendant possessed 3.5 grams or more of methamphetamine. But the instruction to the jury described a permissive inference under the same set of circumstances. And we have recognized that "[a] rebuttable presumption has a different legal effect than a permissive inference." *Holder*, 314 Kan. at 806.

Normally, we review claims of instructional error using a multi-step standard of review. *State v. Douglas*, 313 Kan. 704, 709, 490 P.3d 34 (2021). But here, the Court of Appeals held Slusser invited the instructional error he complains of on appeal. *Slusser*, 2020 WL 7636318, at *2. If the panel is correct, and Slusser did invite the error, we need not reach the merits of his instructional challenge. See *State v. Fleming*, 308 Kan. 689, 701, 423 P.3d 506 (2018) ("Kansas courts do not review for clear error . . . when the invited-error doctrine applies . . . to claimed errors in a jury instruction.").

Thus, we must determine whether the panel erred by applying the invited-error doctrine to this instructional challenge. We begin by discussing the applicable standard of review and legal framework. Then, we identify additional facts relevant to our analysis. Finally, we analyze the panel's invited-error holding and affirm its decision both because Slusser's briefing waived any challenge to the panel's holding and because the panel's reasoning is legally sound.

A. *Standard of Review and Legal Framework*

Whether the invited-error doctrine applies is a question of law over which this court has unlimited review. *Douglas*, 313 Kan. at 706. But see *Fleming*, 308 Kan. at 695-97 (questioning whether standard of review should technically be abuse of discretion but finding resolution of that question unnecessary because defendant's argument was based on a claim of legal error).

The invited-error doctrine precludes a party who has led the district court into error from complaining of that error on appeal. *State v. Roberts*, 314 Kan. 835, 846, 503 P.3d 227 (2022). There is no bright-line rule for the doctrine's application. Instead, appel-

late courts must carefully consider the party's actions and the context in which those actions occurred to determine whether that party in fact induced the district court to make the alleged error. *Douglas*, 313 Kan. at 707-08.

In the context of jury instructions, the mere failure to object to an instruction does not trigger the invited-error doctrine. *Fleming*, 308 Kan. at 702. And the doctrine "does not automatically apply every time a party requests an instruction at trial but then, on appeal, claims the district court erred by giving it." 308 Kan. at 689. But we have applied the doctrine when the party proposing an instruction before trial could have ascertained the instructional error at that time. See 308 Kan. at 703 (defendant invited error by proposing pretrial instruction that differed from language in complaint because "[t]his difference was as obvious before trial as after"); *State v. Brown*, 306 Kan. 1145, 1166, 401 P.3d 611 (2017) (defendant invited error by proposing pretrial instruction that defined offense more broadly than it had been charged by the State).

B. *Additional Facts*

Before trial, Slusser proposed a permissive inference of intent instruction based on PIK Crim. 4th 57.022:

"If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant."

After proposing this instruction to the district court, Slusser did not later object to the proposed or final jury instruction. The language in Slusser's proposed instruction is identical to the final instructional language he challenges on appeal.

C. *The Panel Did Not Err by Applying the Invited-Error Doctrine*

The Court of Appeals held that Slusser invited any error in the challenged jury instruction. We affirm the panel's holding for two reasons. First, Slusser waived any challenge to the panel's invited-error holding. Second, the panel's application of the invited-error

doctrine was legally sound. We address each basis for affirming the panel's decision in turn.

1. *Slusser Waived Any Challenge to the Panel's Holding that the Invited-Error Doctrine Applies*

In his briefing to our court, Slusser waived any challenge to the Court of Appeals' application of the invited-error doctrine. In his petition for review, Slusser asserted that the Court of Appeals erred by holding he invited the instructional error. But outside of this conclusory assertion (contained only in the headings of the briefing), Slusser failed to develop the issue in his petition for review or his supplemental brief. Slusser's briefing offers no analysis and cites no authority explaining why the panel's application of the invited-error doctrine constituted error in this instance.

Thus, Slusser waived or abandoned any challenge to the panel's holding by failing to adequately brief the issue. See *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021) (issues not adequately briefed are deemed waived or abandoned); see also *State v. Meggerson*, 312 Kan. 238, 246, 474 P.3d 761 (2020) (A point raised incidentally in a brief and not argued therein is deemed waived or abandoned.).

2. *The Panel Correctly Applied the Invited-Error Doctrine*

Moreover, the panel's holding is consistent with our precedent defining the scope and applicability of the invited-error doctrine. Slusser proposed the very permissive inference instruction he now challenges on appeal, and he did not object to that instruction after submitting it to the district court.

Granted, we have acknowledged that the invited-error doctrine should not apply when the error in a defendant's proposed instruction does not become apparent until the close of evidence or after trial. See, e.g., *State v. Sasser*, 305 Kan. 1231, 1238-39, 391 P.3d 698 (2017) (invited-error doctrine did not apply when defendant proposed challenged instruction before trial because alleged alternative means error in instruction would not have become apparent until close of evidence). But where the alleged instructional error was apparent at the time defendant submitted the

proposed instruction and defendant fails to object to the final instructions before the district court delivers them to the jury, the invited-error doctrine applies. See *Fleming*, 308 Kan. at 702-03.

Here, Slusser's instructional challenge falls into the latter category. Certainly, at the time Slusser proposed the instruction, this court had yet to consider the legal appropriateness of PIK Crim. 4th 57.022, the pattern instruction Slusser incorporated into his proposed instructions to the district court. We subsequently held the pattern instruction was legally inappropriate because it provided for a permissive inference and thus did not fairly and accurately reflect the statutory rebuttable presumption set forth in K.S.A. 2022 Supp. 21-5705(e). *Holder*, 314 Kan. 799, Syl. ¶ 4. Using a similar rationale, we later held an inference instruction identical to the one given in Slusser's case was legally inappropriate. *State v. Valdez*, 316 Kan. 1, 8-9, 512 P.3d 1125 (2022).

But Slusser need not have waited for our decisions in *Holder* and *Valdez* to identify the potential error in the inference instruction he proposed. In fact, in Slusser's opening brief and his petition for review (both of which Slusser filed before we issued our decision in *Holder*) he argued the inference instruction was legally inappropriate because it deviated from the language of K.S.A. 2022 Supp. 21-5705(e). This purported error was just as apparent before trial as it was after. Thus, Slusser knew or should have known of this error at the time he submitted the proposed instruction and later when the district court incorporated the proposed instruction into its final instructions to the jury. Under our established precedent, the panel properly applied the invited-error doctrine under these circumstances to foreclose Slusser's instructional challenge on appeal. See *State v. Cottrell*, 310 Kan. 150, 162, 445 P.3d 1132 (2019) (Invited-error doctrine foreclosed review of instructional error where error in defendant's proposed instruction was as obvious before trial as after and defendant did not object to the final instructions.).

Furthermore, applying the invited-error doctrine is consistent with our more recent decisions clarifying that a party must affirmatively induce the alleged error for the doctrine to apply. See *Douglas*, 313 Kan. at 708. Here, Slusser affirmatively requested the instruction he now challenges on appeal, even though he could have readily ascertained before trial that the instruction's language deviated from the language

of K.S.A. 2022 Supp. 21-5705(e). While the State also proposed a similar instruction, Slusser's submission confirmed that both parties agreed that the district court should give the proposed instruction to the jury. And Slusser did not later object to the final instructions. Under these circumstances, Slusser's conduct induced the district court to deliver the instruction as proposed by both parties.

Thus, Slusser waived any objection to the panel's holding by failing to adequately brief the issue before our court. And, here, the panel's application of the invited-error doctrine comports with our established precedent. For these reasons, we affirm the panel's holding and decline to reach the merits of Slusser's challenge to the permissive inference instruction.

II. *Slusser Failed to Preserve His Challenge to the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)*

In his opening brief to the Court of Appeals, Slusser argued K.S.A. 2022 Supp. 21-5705(e) is facially unconstitutional because it violates a defendant's due process rights to have the State prove every element of a crime beyond a reasonable doubt. Slusser claims the statute imposes a mandatory rebuttable presumption which impermissibly shifts the burden of persuasion to the defendant on the element of intent. See *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (mandatory presumption is unconstitutional if it relieves the State of its burden of persuasion on an element of an offense).

The Court of Appeals declined to address Slusser's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)'s rebuttable presumption because the presumption was never applied to him. *Slusser*, 2020 WL 7636318, at *2. As discussed in the analysis of the prior issue, the district court gave an instruction based on PIK Crim. 4th 57.022, which describes a permissive inference rather than a rebuttable presumption. See *Holder*, 314 Kan. 799, Syl. ¶ 4. The panel reasoned that because the jury was never informed of the statute's rebuttable presumption, the jury could not have considered it in convicting Slusser, and thus Slusser would not have been prejudiced by any alleged constitutional infirmity in the statutory presumption. *Slusser*, 2020 WL 7636318, at *2. In other words, the panel held that Slusser lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705. See *Ulster County Court v. Allen*, 442 U.S. 140, 154-55, 99 S. Ct. 2213, 60 L. Ed. 2d 777

(1979) ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights.").

In our order granting review of Slusser's petition, we ordered the parties to provide supplemental briefing regarding whether Slusser has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e). And both parties complied with our order.

Even so, in his petition, Slusser did not ask this court to review the Court of Appeals' holding that he lacks standing to challenge K.S.A. 2022 Supp. 21-5705(e). "A party aggrieved by a decision of the Court of Appeals on a particular issue must seek review in order to preserve the matter for Kansas Supreme Court review." *Snider v. American Family Mut. Ins. Co.*, 297 Kan. 157, 172, 298 P.3d 1120 (2013). Because Slusser failed to include this issue in his petition, he has not preserved this issue for our review. And at oral argument, Slusser's appellate counsel candidly conceded this issue had not been properly preserved. Thus, we will not consider whether Slusser has standing to challenge the constitutionality of the statute or reach the merits of his constitutional challenge. See Supreme Court Rule 8.03(b)(6)(C)(i) (2022 Kan. S. Ct. R. at 56) (Supreme Court will not consider issues not presented or fairly included in the petition for review).

III. *Did the State Commit Prosecutorial Error During Closing Argument?*

Finally, Slusser claims the prosecutor committed error by mischaracterizing the inference of intent instruction during closing argument and relieving the State of its burden to prove Slusser's criminal intent. To analyze Slusser's issue, we first identify the applicable standard of review and legal framework. Then, we set forth additional facts relevant to our analysis. Finally, we address the prosecutorial error issue on its merits.

A. *Standard of Review and Legal Framework*

Slusser did not object to any of the prosecutor's comments that he challenges on appeal. But a defendant need not contemporaneously object to a prosecutor's comments to preserve claims of prosecutorial error for appellate review. *State v. Blevins*, 313 Kan. 413, 428, 485 P.3d 1175 (2021).

To determine whether prosecutorial error has occurred, we consider whether the challenged prosecutorial acts "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, we then determine whether the error prejudiced the defendant's right to a fair trial by considering whether the State can prove that no reasonable possibility exists that the error contributed to the verdict. 305 Kan. at 109.

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. Thomas*, 311 Kan. 905, 910, 468 P.3d 323 (2020). But prosecutors step outside the bounds of proper argument if their comments lower the State's burden of proof or shift the burden onto the defendant. See *State v. Aguirre*, 313 Kan. 189, 222, 485 P.3d 576 (2021); *State v. Hilt*, 307 Kan. 112, 124, 406 P.3d 905 (2017). In determining whether a prosecutor erred during closing argument, we consider the prosecutor's comments in the context in which they were made rather than in isolation. *State v. Thomas*, 307 Kan. 733, 744, 415 P.3d 430 (2018).

B. *Additional Facts*

Slusser's claim of error arises from a portion of the State's closing argument discussing the permissive inference instruction given at Slusser's trial. We recite that portion in full to provide the appropriate context:

"Now, I want to talk to you guys about something called the rebuttable presumption. This is listed in Instruction No. 9 at the very last paragraph and you'll have a copy of this, but I want to read it again briefly.

"If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that he possessed it with the intent to distribute. You may consider the inference along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant and this burden never shifts to the defendant.

"Why is this important? Why am I reading this to you again? You've heard it once already. The point is, this is a rebuttable presumption. What that means is, you can presume it. The law and the legislature tells you, you can presume it, but you don't have to assume. This is not a 100 percent, you must do this. But it's important. Why? During jury selection when we were doing our voir dires no-

body that's seated indicated that they have personal experience with methamphetamine. Therefore, I think it's safe to assume that me and Mr. Luttrell, can assume that you all may not know the differences between a dealer weight, a distributor weight, or a simple user weight. So we have this rebuttable presumption in there for that reason.

"Again, if someone is possessing methamphetamine over 3.5 grams, which is what we have here, remember we have 11.2, you can assume that they are possessing that with the intent to distribute, merely on the weight alone. Again, like I said, you don't have to follow that presumption. And you should consider that with all the other evidence that has been presented in front of you. But you don't have to automatically throw that out. The legislature is trying to give you, and the PIK instruction is trying to give you instruction or guidance on that topic. They have found that typically 3.5 grams or more is—goes along with the intent to distribute. And I would argue that that's what we have here, the intent to distribute."

Slusser claims the prosecutor's comments crossed the line of permissible argument. Rather than present the jurors with facts and evidence from which they could reasonably infer Slusser's intent to distribute, Slusser contends the prosecutor informed jurors they should presume Slusser's criminal intent based solely on the weight of methamphetamine he possessed. He argues the prosecutor's comments not only departed from the inference of intent instruction, but they also effectively relieved the State of its burden of persuasion on the element of intent.

The Court of Appeals rejected Slusser's claim. While not addressing the prosecutor's comments in detail, the panel held the closing argument was, for the most part, fair comment on the law and evidence. *Slusser*, 2020 WL 7636318, at *3. The panel recognized one potential concern—the prosecutor referred to the inference of intent set forth in the jury instruction as a "'rebuttable presumption'" and told the jurors they could "'presume'" Slusser intended to distribute the methamphetamine based on its weight. 2020 WL 7636318, at *3. The panel explained the prosecutor technically mischaracterized the instruction because there is a legal distinction between inferences and presumptions. But the panel held the error would not have prejudiced Slusser because it was doubtful that "lay jurors would impute materially different meanings to presumptions, assumptions, and inferences in the context of the prosecutor's closing argument." 2020 WL 7636318, at *3.

C. *The Prosecutor's Closing Arguments Constituted Reversible Error*

We agree with the panel's conclusion that the prosecutor's comments characterizing the jury instruction as a presumption were problematic. In fact, we hold that these comments fall outside the wide latitude afforded prosecutors in arguing the case. But we disagree with the panel's conclusion that any error was harmless. To substantiate this conclusion, we address the error and prejudice analysis in turn.

1. *The Prosecutor Committed Error During Closing Argument*

We agree with the Court of Appeals that the prosecutor mischaracterized the jury instruction, but we also recognize this case presents us with a particularly unique set of circumstances. For one, we have previously held that the permissive inference of intent instruction given in Slusser's trial was legally inappropriate because it deviates from the mandatory statutory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). See *Valdez*, 316 Kan. at 8-9. Slusser challenges the propriety of the jury instruction given at his trial on this very basis. But we are precluded from addressing the merits of Slusser's instructional challenge because he invited the error. Likewise, we are precluded from addressing the merits of Slusser's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)'s rebuttable presumption because he failed to seek review of the panel's holding that he lacked standing to challenge the constitutionality of the statute.

These unique circumstances also distinguish Slusser's case from *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023). Like the prosecutor in Slusser's case, the prosecutor in *Strong* told the jury in closing argument that the jury "can presume" the defendant had an intent to distribute if he possessed 3.5 grams or more of methamphetamine. 317 Kan. at 215. But unlike Slusser's case, the district court in *Strong* gave an instruction telling the jury that it "may presume" the defendant's intent to distribute based on the amount of methamphetamine in his possession, and that the jury "may consider 'this presumption'" along with the other trial evidence. 317 Kan. at 213-14. Thus, while the prosecutor in *Strong* used

some of the same language that the prosecutor in the present case used, that language matched the given jury instruction at Strong's trial.

Given the unique procedural history and circumstances of Slusser's case, we are left to consider the prosecutor's comments as measured against the jury instruction given in this case and to determine whether those comments impermissibly lowered the State's burden of proof irrespective of K.S.A. 2022 Supp. 21-5705(e). Using that yardstick, we hold that under these unique circumstances the prosecutor erred. See *Thomas*, 311 Kan. at 911 (claims of prosecutorial error are fact specific and outcomes will depend on the particulars of each case).

We begin with the prosecutor's mischaracterization of the permissive inference instruction—that is, her comments indicating that the instruction created a presumption of an intent to distribute, rather than an inference. As the panel recognized, there is a legally significant distinction between inferences and presumptions. An inference is a conclusion rationally drawn from a proven fact or set of facts. *Shim v. Rutgers*, 191 N.J. 374, 386, 924 A.2d 465 (2007); 1 Jones on Evidence § 4:1 (7th ed. 2023). Inferences are derived using reason and logic. See *Computer Identics Corp. v. Southern Pacific Co.*, 756 F.2d 200, 204 (1st Cir. 1985); *Mayland v. Flitner*, 28 P.3d 838, 853 (Wyo. 2001). They are by nature permissive, and the fact-finder is free to accept or reject them. *Johnson v. Missouri Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 631 (Mo. Ct. App. 2004).

A presumption, on the other hand, is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence. *Parson v. Miller*, 296 Va. 509, 524, 822 S.E.2d 169 (2018); *Shim*, 191 N.J. at 386. In other words, "a presumption is a mandatory inference that discharges the burden of producing evidence as to a fact (the presumed fact) when another fact (the basic fact) has been established." 191 N.J. at 386. Thus, the panel was correct that, in a legal sense, the prosecutor mischaracterized the jury instruction by referring to it as a presumption.

But this is not simply a technical error. Even outside the realm of legal jargon, "infer" and "presume" have different meanings. In

common usage, "infer" means to "conclude from evidence or by reasoning." American Heritage Dictionary of the English Language 899 (5th ed. 2011). Yet "presume" means "[t]o take for granted as being true in the absence of proof to the contrary." American Heritage Dictionary of the English Language 1395 (5th ed. 2011). Put another way, "infer suggests the arriving at a decision or opinion by reasoning from known facts or evidence." Webster's New World College Dictionary 745 (5th ed. 2016). But "presume implies a taking something for granted or accepting it as true, usually on the basis of probable evidence in its favor and the absence of proof to the contrary." Webster's New World College Dictionary 1153 (5th ed. 2016).

Thus, the jury instruction, on its face, told the jurors they could use reason to conclude Slusser intended to distribute the methamphetamine in his possession based on the evidence showing he possessed 3.5 grams or more. And the prosecutor read that instruction to the jury during closing argument. But after reading the instruction, the prosecutor then explained how the jury should interpret and apply it. Specifically, the prosecutor explained that the instruction allowed the jury to "presume" Slusser's intent to distribute—that is, the jurors could take for granted that Slusser intended to distribute the methamphetamine if he possessed 3.5 grams or more, unless the defendant's evidence proved otherwise.

The prosecutor's characterization of the jury instruction as a "presumption" is particularly problematic because it diminished the presumption of innocence and the State's burden of proof. In criminal prosecutions, defendants are presumed innocent, and the State may only overcome this presumption through proof beyond a reasonable doubt. K.S.A. 2022 Supp. 21-5108(a) and (b); see also *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019) (criminal defendants have constitutional right to presumption of innocence and jury may find defendant guilty only if State proves defendant's guilt). Inferences do not relieve the State of this burden because it must still persuade the jury to infer a particular fact or element in the State's favor, and the jury remains free to accept or reject the inference. See, e.g., *Francis*, 471 U.S. at 314 ("A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that

the suggested conclusion should be inferred based on the predicate facts proved.").

But presumptions are another matter. Presumptions direct jurors to draw certain conclusions once the State has satisfied a specific evidentiary predicate. In other words, once the State has proved the predicate fact, the State need not produce evidence establishing the presumed fact or persuade the jury to presume that fact, unless the defendant produces evidence to rebut the presumption. See *Shim*, 191 N.J. at 386. Presumptions thus have the potential to relieve the State of its burden to prove the defendant's guilt beyond a reasonable doubt and shift the burden onto the defendant to prove his or her innocence. See *Ulster*, 442 U.S. at 157 ("A mandatory presumption . . . may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden."). And as noted above, this material distinction is reflected in the ordinary meaning of the terms "infer" and "presume."

Here, the prosecutor mischaracterized the instruction by telling jurors they could presume Slusser's criminal intent based on the amount of methamphetamine in his possession. Moreover, her argument described this presumption in a way that effectively relieved the State of its burden to prove that element of the crime. See *Aguirre*, 313 Kan. at 222 (noting "'[a]ny attempt to lower the [State's] burden of proof . . . is [prosecutorial] misconduct'").

For one, the prosecutor used the words "presume" and "assume" interchangeably throughout her argument. For instance, she told jurors they "can presume [Slusser's intent to distribute], but you don't have to assume." And she later said, "if someone is possessing methamphetamine over 3.5 grams . . . you can assume that they are possessing that with the intent to distribute, merely on the weight alone."

"Although *presume* and *assume* both mean 'to take something as true,' 'presume' implies more confidence or evidence backed reasoning. An 'assumption' suggests there is little evidence supporting your guess." Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/words-at-play/assume-vs-presume; see also Garner's Modern America Usage 71 (3d ed. 2009) ("The connotative distinction between these words is that

presumptions are more strongly inferential and more probably authoritative than mere *assumptions*, which are usually more hypothetical."). By equating "presume" with "assume," the prosecutor effectively told the jury it could simply take for granted that Slusser intended to distribute the methamphetamine even if reason or evidence provided little support for that conclusion. Furthermore, the prosecutor told jurors they could "assume" Slusser's intent "merely on weight alone." This reinforced the message that the jurors need not consider whether the totality of the evidence supported the conclusion that Slusser intended to distribute the methamphetamine before accepting that conclusion as true.

Next, the prosecutor bolstered the strength of the supposed presumption, not by referring to evidence presented at trial, but by telling the jury the presumption had the Legislature's imprimatur. Cf. *In re Care and Treatment of Foster*, 280 Kan. 845, Syl. ¶ 4, 127 P.3d 277 (2006) ("It is improper and misconduct for counsel to argue that his or her case or some aspect of it has judicial approval."). According to the prosecutor, the presumption existed because lay jurors "may not know the differences between . . . a distributor weight, or a simple user weight" so "[t]he legislature is trying to give you . . . instruction or guidance on that topic." The prosecutor stated "the law and the legislature tells you, you can presume" an intent to distribute when a person possesses 3.5 grams or more of methamphetamine. More troublingly, the prosecutor told the jury the Legislature "[has] found that typically 3.5 grams or more . . . goes along with the intent to distribute," even though the record contained no evidence of such Legislative fact-findings. See *Thomas*, 311 Kan. at 910 (prosecutor may not comment on facts outside evidence). These comments not only lent unearned credibility to the argued presumption, but also enabled jurors (who were the fact-finders in this case) to simply defer to the supposed legislative findings regarding Slusser's intent to distribute, rather than decide the issue independently based on the evidence submitted at trial. See *Allen*, 442 U.S. at 156 (Evidentiary devices such as presumptions are unconstitutional if they "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt."). Together, these arguments suggested the jury

could simply take for granted that Slusser intended to distribute the methamphetamine because he possessed more than 3.5 grams, and that the jury need not test the logic or evidence supporting that assumption because a credible governmental body had already done so.

Certainly, the prosecutor made some comments which could have mitigated the overall effect of this portion of her closing argument. For example, she told the jury "you should consider [the presumption] with all the other evidence that has been presented in front of you." But she immediately undercut that statement by saying, "But you don't have to automatically throw [the presumption] out." This latter statement reinforced the overall message that the jury could still simply accept as true that Slusser intended to distribute the methamphetamine because he possessed more than 3.5 grams, even if the totality of the evidence did not support that conclusion beyond reasonable doubt.

The prosecutor also told the jurors, "you don't have to follow that presumption" and, "[t]his is not a 100 percent, you must do this." But at most, these comments told the jury it *could* take Slusser's intent to distribute for granted regardless of whether that finding was supported by the weight of the evidence, but the jury did not *have to* take it for granted. Thus, the prosecutor still presented the jury with the option to assume Slusser intended to distribute the methamphetamine, even if such intent had not been proven beyond a reasonable doubt.

2. *The Prosecutorial Error Was Not Harmless*

Having concluded the prosecutor erred, we must now consider whether that error was harmless. Because prosecutorial error implicates a defendant's constitutional right to a fair trial, we apply the traditional constitutional harmlessness standard in determining whether the error requires reversal. *Sherman*, 305 Kan. at 109. Under that standard, the party benefitting from the error must show there is no reasonable possibility the error contributed to the verdict. *State v. Ward*, 292 Kan. 541, Syl. ¶ 6, 256 P.3d 801 (2011). Put another way, the State must show "'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.'" *Sherman*, 305 Kan. at 109.

We begin by noting jurors generally are presumed to follow their instructions. *State v. Brown*, 316 Kan. 154, 170, 513 P.3d 1207 (2022). In this case, however, the nature of the prosecutor's argument regarding the permissive inference instruction overcomes this presumption. While the prosecutor accurately read the instruction during her closing argument, she then proceeded to explain to the jury how it should interpret and apply that instruction. And her explanation mischaracterized the instruction in a legally significant and material manner.

The prosecutor exacerbated this error by signaling to jurors the instruction had special significance. She did this by reading the instruction in closing and repeatedly telling the jury the instruction was "important." And, as noted in the error analysis above, she bolstered the legitimacy and credibility of the supposed "presumption" contained in the jury instruction by referring to facts not in the record. According to the prosecutor, the Legislature had found dealers tend to possess 3.5 grams or more. By suggesting the "presumption" was endorsed by the Legislature's independent findings, the prosecutor's argument encouraged jurors to rely on this "presumption" over the evidence presented at trial. In this regard, the argument enabled the jury to find Slusser intended to distribute methamphetamine without considering whether the evidence supported that finding beyond reasonable doubt.

The panel concluded the error was harmless because it was doubtful that "lay jurors would impute materially different meanings to presumptions, assumptions, and inferences in the context of the prosecutor's closing argument." *Slusser*, 2020 WL 7636318, at *3. But as explained in the error analysis above, the prosecutor's error was not merely technical—the distinction between an inference and a presumption is reflected in the ordinary meaning of these terms. Moreover, the prosecutor reinforced this distinction by equating a "presumption" with an "assumption." Thus, we are not convinced beyond reasonable doubt that the error was beyond the comprehension of lay jurors.

The State also argues the prosecutor's comments during the rebuttal portion of her closing argument rendered the error harmless. During rebuttal, the prosecutor discussed some of the evidence, aside from weight, that would support a finding that Slusser intended to distribute the methamphetamine in his possession. This evidence included the testimony of law enforcement officers who indicated that methamphetamine users typically possess a gram or less while methamphetamine dealers usually buy and carry larger amounts.

But the prosecutor's discussion of this evidence does not render the error harmless. For one, the prosecutor did not discuss any of this other evidence in the opening portion of her closing argument. See *Brown*, 316 Kan. at 170-71 (finding prosecutor's erroneous "we know" statements were harmless in part because they were made while discussing evidence that supported the suggested inference). Instead, the prosecutor focused only on the inference of intent instruction and functionally told jurors the instruction allowed them to simply accept as true that Slusser intended to distribute the methamphetamine because he possessed 3.5 grams or more. By failing to discuss the trial evidence during the opening portion of closing argument, the prosecutor implicitly underscored the message that the jury was under no obligation to consider all the evidence before deciding whether the State had proven Slusser's requisite intent beyond reasonable doubt.

And in discussing the evidence during the rebuttal portion of closing argument, the prosecutor did not suggest it would be reasonable for the jury to infer Slusser intended to distribute the methamphetamine based on the quantity he possessed. Instead, the prosecutor again emphasized that "the legislature" was telling the jury it could "presume" or "assume" Slusser's intent:

> "[W]e do have the weight. The legislature tells you if it's over 3.5 grams, you can assume it's—or presume that he's dealing it. And we're not just toeing the line. I mean, we're not 3.8 grams. We're all the way at 11.2 grams. This is weight, because the defendant was distributing that much weight."

Finally, the strength of the evidence alone does not convince us the error was harmless. See *Sherman*, 305 Kan. at 111 (Explaining that while the "strength of the evidence against the defendant may secondarily impact this analysis one way or the other, it must

not become the primary focus of the [harmlessness] inquiry."). The evidence of Slusser's intent to distribute was not overwhelming. And this distinguishes Slusser's case from others in which we have held that the erroneous permissive inference instruction fell short of prejudicial error (as does the more stringent clear error standard applied in those cases to determine whether unpreserved instructional error requires reversal).

For example, in *State v. Martinez*, 317 Kan. 151, 527 P.3d 531 (2023), the defendant possessed 111 grams of methamphetamine—over 30 times more than the threshold amount triggering the inference of intent set forth in the jury instruction—and uncontroverted trial testimony established that the quantity, street value, and composition of the substance indicated a commercial supply. And in *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023), the State presented evidence that the defendant possessed other items, such as scales and plastic baggies, which would also support a conclusion that the defendant intended to distribute the controlled substances in his possession.

Here, Slusser possessed 11.2 grams of methamphetamine—more than the threshold amount triggering the instruction's inference of intent to distribute, but significantly less than the 111 grams possessed by the defendant in *Martinez*. And on cross-examination of one of the arresting officers, Slusser elicited testimony that a personal user could possess more than 3.5 grams of methamphetamine.

Also, unlike *Strong*, Slusser did not possess any items commonly associated with the distribution of controlled substances. The State points out Slusser was driving his mother's car, which could explain why no other items were found. But this fact provides only marginal support for an inference that Slusser intended to distribute the methamphetamine in his possession despite the absence of other tools of the drug trade.

In the end, the jury may have considered the weight of the evidence and decided the State had proven beyond a reasonable doubt that Slusser intended to distribute the methamphetamine in his possession. But based on the prosecutor's closing arguments, the jury may have also simply assumed Slusser had the requisite intent to distribute because he possessed more than 3.5 grams of methamphetamine, without considering the State's burden of proof and the weight of the evidence presented at trial. The State has not shown beyond a reasonable doubt

that the jury's verdict was founded on the former rationale, rather than the latter one. See *State v. Pabst*, 268 Kan. 501, 511, 996 P.2d 321 (2000) (A prosecutor's improper statements during closing were not harmless in part because "[t]he jury could have found, based on the physical evidence, that [the defendant] was guilty. However, the jury also might have decided [the defendant] was guilty because the prosecutor told it [the defendant] was lying, and if he was lying, it could convict him.").

Because the State has not met its burden to prove the error did not affect the verdict on Slusser's charge of possession with intent to distribute, we reverse that conviction. And because Slusser's aggravated child endangerment convictions also required the jury to find Slusser possessed methamphetamine with an intent to distribute, we also reverse those two convictions. See K.S.A. 2022 Supp. 21-5601(b)(2) ("Aggravated endangering a child is . . . causing or permitting such child to be in an environment where the person knows or reasonably should know that any person is . . . possessing with intent to distribute . . . any methamphetamine."). But because Slusser's intent to distribute was not an essential element of the driving while suspended charge, we affirm this conviction. Even so, because Slusser's conviction for possession with intent to distribute was designated as his primary offense for sentencing purposes and we are reversing that conviction, we remand the driving while suspended conviction to the district court for resentencing. See K.S.A. 2022 Supp. 21-6819(b)(5). Thus, we remand the case to the district court for further proceedings consistent with this opinion.

The judgment of the Court of Appeals is affirmed in part and reversed in part. The judgment of the district court is affirmed in part and reversed in part, and the case is remanded with directions.

* * *

STEGALL, J., concurring: I concur in the result based on the rationale expressed in my concurrence in *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023).

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

State v. Strong

No. 121,865

STATE OF KANSAS, *Appellee*, v. SHAMEKE CAESAR STRONG, *Appellant.*

(527 P.3d 548)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instruction—Legally Appropriate Jury Instruction.* To be legally appropriate, a jury instruction must fairly and accurately reflect the applicable law.

2. CRIMINAL LAW—*Statute Provides Mandatory Presumption of Intent to Distribute if Possess Specific Quantities*. K.S.A. 2022 Supp. 21-5705(e) provides a mandatory, albeit rebuttable, presumption of a defendant's intent to distribute when that defendant is found to have possessed specific quantities of a controlled substance.

3. COURTS—*Courts Exercise Judicial Review Only in Actual Case or Controversy—Requirement of Standing*. While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the right to make a legal claim. To have such a right, a party generally must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction.

4. STATUTES—*Constitutional Challenge to Statute—Party Must Have Standing.* To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. Generally, if there is no constitutional defect in the application of the statute to a litigant, the litigant does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations.

Review of the judgment of the Court of Appeals in 61 Kan. App. 2d 31, 499 P.3d 481 (2021). Appeal from Riley District Court; JOHN F. BOSCH, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Hope E. Faflick Reynolds, of Kansas Appellate Defender Office, argued the cause, and *Jennifer C. Roth*, of the same office, was with her on the briefs for appellant.

David Lowden, deputy county attorney, argued the cause, and *Barry R. Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Shameke Caesar Strong challenges his conviction for possession with intent to distribute a controlled substance within 1,000 feet of a school under K.S.A. 2022 Supp. 21-5705. A subsection of that same statute provides for a rebuttable presumption of intent to distribute if a defendant possesses 3.5 grams or more of methamphetamine. K.S.A. 2022 Supp. 21-5705(e)(2). In other words, under subsection (e)(2), a jury *must* presume that a defendant who possessed at least 3.5 grams of methamphetamine did so with the intent to distribute it, unless the defendant can rebut the presumption with affirmative evidence to the contrary. See *State v. Holder*, 314 Kan. 799, 805, 502 P.3d 1039 (2022).

At Strong's trial, the State presented evidence that Strong possessed more than 11 grams of methamphetamine. But rather than instructing the jury on the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2), the district court provided a slightly modified version of a pattern jury instruction, PIK Crim. 4th 57.022 (2013 Supp.). The district court's instruction informed the jury that if the evidence showed Strong possessed 3.5 grams or more of methamphetamine, then the jury *could*, but was not required to, presume Strong intended to distribute the controlled substance.

Like two other cases decided this day, Strong's appeal raises a claim of instructional error and a constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)(2). See *State v. Slusser*, 317 Kan. 174, 527 P.3d 565 (2023); *State v. Martinez*, 317 Kan. 151, 527 P.3d 531 (2023). Like the defendants in *Martinez* and *Slusser*, Strong argues the district court's instruction was legally inappropriate because it was inconsistent with the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e). Also like the defendants in *Martinez* and *Slusser*, Strong argues the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e) unconstitutionally shifts the burden of proof to the defendants.

We agree with Strong that the district court's instruction was erroneous because it did not accurately describe K.S.A. 2022 Supp. 21-5705(e)'s mandatory presumption. But we hold that the instructional error does not require reversal of Strong's conviction because he fails to convince us the verdict would have been different but for the error.

As to Strong's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e)'s mandatory presumption, our court lacks jurisdiction over the issue. Granted, courts generally have authority to determine whether a statute is unconstitutional. But the power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires that the court exercise review only when the issues are presented in an actual case or controversy between the parties. Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. A party has standing to challenge the constitutionality of a statute only when it adversely impacts the party's rights. We hold that Strong lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption because it was not applied to him. Thus, it could not have adversely impacted his rights.

Finally, Strong argues his sentence is unconstitutional under both the state and federal Constitutions because the district court judge, rather than a jury, determined his criminal history. But we hold that Strong's challenges to the constitutionality of his sentence are foreclosed by our precedent, and Strong provides no compelling reason for us to depart from that precedent. Thus, we affirm Strong's convictions.

FACTS AND PROCEDURAL BACKGROUND

In October 2018, police executed a search warrant for a residence located within 1,000 feet of a school in Manhattan. During the search, Strong exited a bedroom inside the house. When the police searched that bedroom, they found mail addressed to Strong (but with a delivery address different than the residence being searched), a digital scale, and a zippered sunglasses case. Inside the sunglasses case, officers found a plastic baggie containing 10.24 grams of methamphetamine; another plastic baggie containing 1.4 grams of methamphetamine; and 15 to 20 clean, empty plastic baggies.

At Strong's trial, Detective Michael Parr, who participated in the search of the residence, testified. Based on his experience, Detective

Parr explained that methamphetamine users generally have only a small amount of methamphetamine with them at a time, usually around 1 gram. Methamphetamine dealers, on the other hand, will usually have a larger amount, which they will break down into smaller amounts to sell individually.

Strong testified in his defense. He said he did not live at the residence law enforcement searched, and he went there only to use the shower because of problems with the water main at his house. He brought his mail and a bag containing some clothes and hygiene products with him. But he denied knowing about the sunglasses case containing methamphetamine found in the bedroom.

The jury found Strong guilty of possession with intent to distribute within 1,000 feet of a school and possession of drug paraphernalia. The district court sentenced Strong to a controlling sentence of 186 months' imprisonment. Strong appealed, and the Court of Appeals panel affirmed his convictions and sentence. *State v. Strong*, 61 Kan. App. 2d 31, 499 P.3d 481 (2021).

We granted Strong's petition for review and ordered the parties to provide supplemental briefing on whether Strong has standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e)(2). And we heard oral argument from the parties on December 12, 2022.

ANALYSIS

I. *The District Court Committed Instructional Error, but this Error Does Not Warrant Reversal of Strong's Conviction for Possession with Intent to Distribute a Controlled Substance Within 1,000 Feet of a School*

Strong first raises a claim of instructional error. His claim focuses on Instruction No. 6, which told the jury it could, but did not have to, presume Strong intended to distribute methamphetamine, if he possessed at least 3.5 grams:

> "You may presume that a person had the intent to distribute methamphetamine when the person possessed 3.5 grams or more. You may consider this presumption along with all other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove the required criminal intent of the Defendant. This burden never shifts to the Defendant."

Instruction No. 6 generally reflects the language of the pattern jury instruction PIK Crim. 4th 57.022. The pattern instruction cites K.S.A. 21-5705(e) as its legal authority, and it provides a fill-in-the-blank inference that the jury "may accept or reject":

> "If you find the defendant possessed (450 grams or more of marijuana) (3.5 grams or more of heroin) (3.5 grams or more of methamphetamine) (100 dosage units or more containing *insert name of controlled substance*) (100 grams or more of *insert name of any other controlled substance*), you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant." PIK Crim. 4th 57.022.

The key difference between Instruction No. 6 and the pattern instruction is the use of the word "presume." Instruction No. 6 told the jury it "may presume" an intent to distribute and it "may consider this presumption along with all the other evidence in the case." In contrast, the pattern instruction states that the jury "may infer" an intent to distribute and it "may consider the inference along with all the other evidence." PIK Crim. 4th 57.022.

But Strong's argument is not based on the discrepancy between Instruction No. 6 and PIK Crim. 4th 57.022. Rather, Strong argues Instruction No. 6 was legally inappropriate because it did not accurately reflect K.S.A. 2022 Supp. 21-5705(e). He argues that the statute creates a *mandatory* presumption while Instruction No. 6 described the presumption in *permissive* terms.

A. *Relevant Legal Framework and Standard of Review*

Appellate courts follow a multi-step process when reviewing instructional error issues. First, the court decides whether the issue was properly preserved below. Second, the court considers whether the instruction was legally and factually appropriate. Third, upon a finding of error, the court determines whether that error is reversible. *State v. Douglas*, 313 Kan. 704, 709, 490 P.3d 34 (2021). Whether the instructional error was preserved will affect the reversibility inquiry in the third step of this analysis. *State v. McLinn*, 307 Kan. 307, 317, 409 P.3d 1 (2018).

Strong did not object to the instruction he now challenges, so any error will be reviewed for clear error. *Douglas*, 313 Kan. at 710. And Strong does not challenge the factual appropriateness of

the instruction. Instead, he argues only that the instruction was legally inappropriate. Our appellate review is unlimited when deciding whether the jury instruction fairly and accurately reflects the applicable law. *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). Even if the instruction is legally inappropriate, that error will require reversal under the clear-error standard only if Strong firmly convinces us the jury would have reached a different verdict if the error had not occurred. *Douglas*, 313 Kan. at 710.

B. *The Court of Appeals Panel Erred in Holding Instruction No. 6 Was Legally Appropriate*

In addressing Strong's instructional challenge, the Court of Appeals panel held that Instruction No. 6 was legally appropriate. *Strong*, 61 Kan. App. 2d at 40-41. The panel interpreted K.S.A. 2022 Supp. 21-5705(e) as providing for a permissive inference or presumption, rather than a mandatory one. Thus, the panel held that Instruction No. 6 accurately describes the statutory presumption of intent. 61 Kan. App. 2d at 38, 41. The panel also reasoned that Instruction No. 6 is based on PIK Crim. 4th 57.022, and this court has strongly recommended the use of pattern instructions. 61 Kan. App. 2d at 40-41 (citing *State v. Butler*, 307 Kan. 831, 847, 416 P.3d 116 [2018] [Kansas Supreme Court strongly recommends use of PIK instructions]).

Strong argues the Court of Appeals panel erred in concluding that Instruction No. 6 is legally appropriate, and we agree. As noted, the panel held that Instruction No. 6 accurately reflects the law because K.S.A. 2022 Supp. 21-5705(e) "creates a permissive presumption, not a mandatory one as Strong argues." *Strong*, 61 Kan. App. 2d at 41. But after the panel issued its decision in Strong's case, we subsequently held that K.S.A. 2022 Supp. 21-5705(e) calls for a mandatory, albeit rebuttable, presumption. *Holder*, 314 Kan. at 805; *State v. Valdez*, 316 Kan. 1, 8-9, 512 P.3d 1125 (2022). And we held that the permissive instructions given in those cases, though based on PIK Crim. 4th 57.022, were not legally appropriate because they did not fairly and accurately reflect the mandatory presumption set forth in K.S.A. 2022 Supp. 21-5705(e). *Holder*, 314 Kan. 799, Syl. ¶ 4; *Valdez*, 316 Kan. at 8-9.

A plain language interpretation of K.S.A. 2022 Supp. 21-5705(e) supports our holding in *Holder* and *Valdez*. The guiding principle in statutory interpretation is that legislative intent governs if that intent can be ascertained. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). In ascertaining legislative intent, courts begin with the statute's plain language, giving common words their ordinary meaning. If, however, the statute's language is ambiguous, courts may consult canons of construction to resolve the ambiguity. 316 Kan. at 224. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997); see also *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 275 Kan. 430, 433, 66 P.3d 822 (2003) (in construing statutes, courts should construe words and phrases according to context and approved use of language). Furthermore, even when a statute is plain and unambiguous, the doctrine of *in pari materia* applies, meaning courts should consider not only the words themselves but also their context to bring various provisions of an act into workable harmony, if possible. *Bruce*, 316 Kan. at 224.

We begin our plain language interpretation with the statute's use of the term "rebuttable presumption." As we explained in *Holder*, evidentiary devices such as presumptions and inferences exist along a continuum. 314 Kan. at 804. On one end, there is the permissive inference, which allows, but does not require, the jury to infer the elemental fact once the State has proved the predicate fact, and which places no burden of any kind on the defendant. *Francis v. Franklin*, 471 U.S. 307, 314, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985); *Holder*, 314 Kan. at 804 (citing *Ulster County Court v. Allen*, 442 U.S. 140, 156-57, 99 S. Ct. 2213, 60 L. Ed. 2d 777 [1979]). On the other end, there is the mandatory presumption, which "'instructs the jury that it must infer the presumed fact if the State proves certain predicate facts.'" *Holder*, 314 Kan. at 804 (quoting *Francis*, 471 U.S. at 314).

Mandatory presumptions can be further divided into two camps—conclusive and rebuttable—with different legal effects. *Holder*, 314 Kan. at 804-05.

"'A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element *unless the defendant persuades the jury that such a finding is unwarranted*.'" 314 Kan. at 804-05 (quoting *Francis*, 471 U.S. at 314 n.2).

In *State v. Harkness*, 252 Kan. 510, Syl. ¶ 12, 847 P.2d 1191 (1993), we limited the use of the term "mandatory presumption" to what the *Francis* Court dubbed a "conclusive presumption." See *Holder*, 314 Kan. at 805. But we still defined a rebuttable presumption as an evidentiary device that *requires* the jury to find the presumed element (in this case, the intent to distribute) once the State proves the predicate fact (in this case, possession of at least 3.5 grams of methamphetamine) unless the defendant rebuts the presumption with affirmative evidence to the contrary. *Harkness*, 252 Kan. 510, Syl. ¶ 13. Thus, despite the shift in terminology, rebuttable presumptions are still, by definition, mandatory. And we presume the Legislature was aware of this definition when it first enacted K.S.A. 21-5705(e) in 2012. See *Ed DeWitte Ins. Agency v. Financial Assocs. Midwest*, 308 Kan. 1065, 1071, 427 P.3d 25 (2018) (courts presume Legislature acts with full knowledge about statutory subject matter, prior and existing law, and judicial decisions interpreting prior and existing law and legislation); L. 2012, ch. 150, § 9.

K.S.A. 2022 Supp. 21-5705(e) also provides that "there shall be" a rebuttable presumption of intent to distribute. Viewed in isolation, the term "shall" can be ambiguous because it is susceptible to multiple meanings, including "must," "should," or even "may," depending on the context. See *State v. Raschke*, 289 Kan. 911, 920-22, 219 P.3d 481 (2009) (recognizing "shall" can be either mandatory or directory depending on context); see also Black's Law Dictionary 1653 (11th ed. 2019) ("shall" may mean "[h]as a duty to; more broadly, is required to," "[s]hould," "[m]ay," [w]ill," or "[i]s entitled to"). But reading the statutory language together, as a whole, there is nothing to suggest the Legislature intended the statutory presumption to be permissive. Instead, reading "there shall be" in conjunction with "rebuttable presumption" (which, again, refers to a type of mandatory presumption) indicates the

statutory presumption is mandatory. See 289 Kan. at 921 (in interpreting the word "shall," "'[e]ach case must stand largely on its own facts, to be determined on an interpretation of the particular language used'"); see also *Bruce*, 316 Kan. at 224 (quoting *Othi v. Holder*, 734 F.3d 259, 265 [4th Cir. 2013] ["'"To determine a statute's plain meaning, we not only look to the language itself, but also the specific context in which that language is used, and the broader context of the statute as a whole."'"]).

Thus, K.S.A. 2022 Supp. 21-5705(e)'s plain language provides for a mandatory, albeit rebuttable, presumption. Such a presumption requires or compels the jury to draw a certain conclusion (an intent to distribute) based on a proven fact or set of facts (possession of at least 3.5 grams of methamphetamine), unless the defendant provides evidence contrary to that conclusion. See *Holder*, 314 Kan. at 805; see also *State v. Slusser*, 317 Kan. at 189 ("A presumption . . . is a rule of law that requires the fact-finder to draw a certain conclusion from a proven fact or set of facts in the absence of contrary evidence."). K.S.A. 2022 Supp. 21-5705(e)'s presumption is not only mandatory but also implies a shifting of the burden of proof from the State to the defendant. See *Holder*, 314 Kan. at 805 (K.S.A. 2022 Supp. 21-5705[e]'s statutory presumption implies "some burden shifting, although the operative impact in a given case would depend on the jury instructions as a whole.").

Instruction No. 6 deviates from K.S.A. 2022 Supp. 21-5705(e) because the instruction does not accurately describe the operation and legal effect of the mandatory rebuttable presumption in the statute. Rather than telling the jury "there shall be" a presumption of intent to distribute if the defendant possessed at least 3.5 grams of methamphetamine, Instruction No. 6 told the jury it "may" presume an intent to distribute based on that evidence. The instruction also told the jury it "may accept or reject" the presumption in deciding whether the State had met its burden. Finally, it told the jury that the burden of proof never shifts to the defendant. This last phrase in particular is inconsistent with a mandatory rebuttable presumption, which shifts the burden of proof to defendant once the State establishes the predicate fact—that defendant pos-

sessed at least 3.5 grams of methamphetamine. In short, Instruction No. 6 is legally improper because it describes a permissive presumption or inference, rather than the mandatory rebuttable presumption in the plain language of the statute.

Of course, when deciding whether a defendant intended to distribute a controlled substance, jurors may still draw reasonable inferences from the trial evidence. More specifically, the jury may reasonably infer an intent to distribute based on a defendant's possession of a large quantity of narcotics. See, e.g., *Holder*, 314 Kan. at 806 ("[A] defendant's possession of a large quantity of narcotics certainly may support an inference that the defendant intended to distribute the narcotic."). And if such an inference is reasonably grounded in evidence, the prosecutor may also encourage the jury to make this inference. Nothing in this opinion, or in *Holder*, *Valdez*, *Martinez*, or *Slusser*, should be taken to suggest otherwise.

When viewed in isolation, one might argue that Instruction No. 6 is legally appropriate because it simply recites this basic evidentiary principle—that jurors may draw reasonable inferences from the evidence. But jury instructions "must always fairly and accurately state the *applicable law*." (Emphasis added.) *Plummer*, 295 Kan. at 161. And while jurors remain free to make reasonable inferences from the evidence, Instruction No. 6 fails to incorporate the mandatory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). Thus, the instruction is incomplete and legally inappropriate because it does not "fairly and accurately state the *applicable law*." (Emphasis added.) 295 Kan. at 161.

The State believes Instruction No. 6 accurately reflects the statutory presumption in K.S.A. 2022 Supp. 21-5705(e) when read in conjunction with the evidentiary rules set forth in K.S.A. 60-415 and K.S.A. 60-416. The former statute provides: "If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier consideration of policy and logic. If there is no such preponderance both presumptions shall be disregarded." K.S.A. 60-415. The latter statute provides: "A presumption, which by a rule of law may be overcome only by proof beyond a reasonable doubt . . . shall not be affected by K.S.A. 60-414 or 60-415 and the burden

of proof to overcome it continues on the party against whom the presumption operates." K.S.A. 60-416.

According to the State, K.S.A. 2022 Supp. 21-5705(e)'s statutory presumption conflicts with the presumption of innocence. See K.S.A. 2022 Supp. 21-5108(b) ("A defendant is presumed to be innocent until proven guilty."); *State v. Ross*, 310 Kan. 216, 221, 445 P.3d 726 (2019) ("Every criminal defendant has a constitutional right to the presumption of innocence."). And the State correctly points out the presumption of innocence may be overcome only by proof beyond a reasonable doubt. See K.S.A. 2022 Supp. 21-5108(a) (State has burden to prove defendant's guilt beyond a reasonable doubt); *State v. Colbert*, 26 Kan. App. 2d 177, 180, 987 P.2d 1110 (1999) (State required to overcome presumption of innocence through proof beyond a reasonable doubt). Thus, the State reasons that Instruction No. 6 was drafted to acknowledge that the presumption of innocence is founded on weightier considerations of policy and logic under K.S.A. 60-415, and the burden to overcome that presumption cannot be lowered or shifted under K.S.A. 60-416.

But assuming, without deciding, that the statutory presumption in K.S.A. 2022 Supp. 21-5705(e) conflicts with the presumption of innocence, neither K.S.A. 60-415 nor K.S.A. 60-416 establish that a permissive instruction (like Instruction No. 6) is legally appropriate. K.S.A. 60-415 simply provides that a district court shall determine which of two conflicting presumptions should be applied in a particular case. And K.S.A. 60-416 simply provides that K.S.A. 60-415 is inapplicable to the presumption of innocence. Nothing in either statute makes it legally appropriate to draft a jury instruction that describes a statutory presumption in a way that deviates from the applicable statute.

In sum, the plain language of K.S.A. 2022 Supp. 21-5705(e)(2) provides for a mandatory (albeit rebuttable) presumption of intent to distribute when a defendant is found to have possessed at least 3.5 grams of methamphetamine. Once the State proves defendant possessed at least 3.5 grams of methamphetamine, the statute requires the jury to presume defendant intended to distribute the controlled substance unless the defendant proves

otherwise. See *Holder*, 314 Kan. at 805. But Instruction No. 6 described the statutory presumption in permissive, rather than mandatory, terms and informed the jury that the burden of proof never shifts to the defendant. The instruction does not accurately describe the operation and legal effect of a mandatory rebuttable presumption. Thus, Instruction No. 6 is not legally appropriate because it does not fairly and accurately state the applicable law in K.S.A. 2022 Supp. 21-5705(e). The panel erred in concluding otherwise, likely because it did not have the benefit of our subsequent decisions in *Holder* and *Valdez*.

C. *The Instructional Error Does Not Require Reversal*

Having concluded that the instruction was not legally appropriate, we next consider whether this error warrants reversal of Strong's conviction for possession with intent to distribute a controlled substance within 1,000 feet of a school. For reasons discussed below, we hold it does not.

Because Strong did not object to the instruction, the clear-error standard governs our reversibility analysis. Under that standard, we must reverse Strong's conviction if we are firmly convinced the jury would have reached a different verdict if the instructional error had not occurred. *State v. Timley*, 311 Kan. 944, 955, 469 P.3d 54 (2020). Strong has the burden to establish clear error. 311 Kan. at 955.

Upon review of the entire record, Strong has not firmly convinced us that the verdict would have changed but for the instructional error. If the district court had given a legally appropriate instruction that mirrored K.S.A. 2022 Supp. 21-5705(e)(2)'s mandatory presumption, such an instruction would have *required* the jury to find that Strong intended to distribute the methamphetamine found in the bedroom. Such an instruction would have been more prejudicial to Strong than the permissive instruction given to the jury.

If, on the other hand, the district court offered no instruction on the intent to distribute, the State still presented compelling evidence to support the jury's finding that Strong intended to distribute the methamphetamine in his possession. The evidence showed

Strong possessed a total of 11.64 grams of methamphetamine. Detective Parr testified that methamphetamine users typically carry small quantities, usually around 1 gram. In contrast, methamphetamine dealers usually have a larger quantity.

The methamphetamine was also divided into two plastic baggies: one containing a larger amount and one containing about 1 gram. Detective Parr testified that based on his training and experience the smaller bag had originally come from the larger bag, which is how dealers usually break down their supply for individual sales. Detective Parr also found it significant that there was a digital scale and multiple new, clean plastic baggies near the controlled substances found in the bedroom. He testified that digital scales are commonly used in drug trafficking. And, according to Detective Parr, if a personal user of methamphetamine has empty baggies on them, then those baggies will usually be coated in residue from the methamphetamine.

Also, Strong's defense did not focus on the intent-to-distribute element of the crime. Thus, he did not show or argue that the methamphetamine was intended for personal use. Instead, his defense focused on whether he possessed the methamphetamine—another element of the offense. And Strong testified the methamphetamine was not his at all. Thus, the State's evidence establishing Strong's intent to distribute was essentially uncontroverted.

In *Valdez*, we found an instructional error was harmless for similar reasons. There, the district court gave an instruction patterned after PIK Crim. 4th 57.022, and we held the instruction was not legally appropriate because it did not fairly and accurately reflect the statutory presumption in K.S.A. 2022 Supp. 21-5705(e)(2). *Valdez*, 316 Kan. at 8-9. But we held that the district court did not commit clear error by giving the instruction. For one, the district court's permissive instruction was more favorable than an instruction patterned after the statutory presumption. 316 Kan. at 9-10. And the State had presented ample evidence that the defendant intended to distribute, including evidence showing that Valdez had possessed over 15 grams of methamphetamine, along with a digital scale with white residue, empty plastic baggies, and a text message discussing a potential narcotics transaction. 316 Kan. at 3, 10.

Strong tries to distinguish his case from *Valdez.* He points out that Riley County police recovered less than the 15 grams of methamphetamine recovered in *Valdez*. And the State did not introduce any text messages from Strong implicating him in a drug transaction. Finally, Strong notes that unlike *Valdez*, there is no evidence the digital scale recovered from the bedroom had any white residue on it.

At best, Strong's argument indicates that the State's evidence supporting defendant's intent to distribute in *Valdez* was not identical in all respects to the evidence presented at Strong's trial. But in both matters, the State presented ample evidence of defendant's intent to distribute, including evidence other than the weight of the metham-phetamine in defendants' possession. And again, Strong did not attempt to controvert this evidence as part of his defense. Thus, we conclude that Strong has not met his burden to show the district court committed clear error by giving Instruction No. 6.

II. *Strong Does Not Have Standing to Challenge the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)*

Strong next argues K.S.A. 2022 Supp. 21-5705(e) is facially unconstitutional because it violates a defendant's federal due process right to have the State prove every element of a crime beyond a reasonable doubt. Strong claims the statute imposes a mandatory rebuttable presumption which impermissibly shifts the burden of persuasion on the element of intent to the defendant. See *Francis*, 471 U.S. at 314 (mandatory presumption is unconstitutional if it relieves the State of its burden of persuasion on an element of an offense).

The Court of Appeals panel rejected Strong's argument and concluded that the statute was constitutional. The panel held that K.S.A. 2022 Supp. 21-5705(e)'s statutory presumption "creates a permissive inference telling the jury it may infer intent to distribute if the State proves the defendant possessed the requisite weight of the drug." *Strong*, 61 Kan. App. 2d at 38. It further held that the provision did not violate due process because the inference was justified by reason and common sense. 61 Kan. App. 2d at 38; see also *Francis*, 471 U.S. at 314-15 ("A permissive inference violates the Due Process Clause only if the suggested conclusion is not one

that reason and common sense justify in light of the proven facts before the jury.").

On review, Strong argues the Court of Appeals panel erroneously held that K.S.A. 2022 Supp. 21-5705(e) was constitutional. And he specifically challenges the panel's conclusion that the statute creates a permissive presumption or inference rather than a mandatory rebuttable presumption. But before we can consider the merits of Strong's constitutional challenge to K.S.A. 2022 Supp. 21-5705(e), we must first address the threshold question of whether Strong has standing to challenge the statute.

A. *Standard of Review and Relevant Legal Framework*

While courts generally have authority to determine whether a statute is unconstitutional, this power of judicial review is not unlimited. The separation of powers doctrine embodied in the Kansas constitutional framework requires the court exercise judicial review only when the constitutional challenge is presented in an actual case or controversy between the parties. *Gannon v. State*, 298 Kan. 1107, 1119, 319 P.3d 1196 (2014). Under this case-or-controversy requirement, parties must show (among other factors) that they have standing. Standing is the "right to make a legal claim." 298 Kan. at 1121. To have such a right, a party generally must show an "injury in fact"; absent that injury, courts lack authority to entertain the party's claim. See 298 Kan. 1122-23 (Standing "is a component of subject matter jurisdiction."); see also *In re A.A.-F.*, 310 Kan. 125, 135, 444 P.3d 938 (2019) ("Kansas courts have authority—in other words, the judicial power—to hear only those matters over which they have jurisdiction."). In this respect, standing is both a requirement for a case or controversy, i.e., justiciability, and a component of this court's subject matter jurisdiction. *Gannon*, 298 Kan. at 1122-23.

To establish an injury in fact sufficient to raise a constitutional challenge to a statute, a party must show that the statute affected the party's rights. *State v. Coman*, 294 Kan. 84, Syl. ¶ 3, 273 P.3d 701 (2012); see *Ulster*, 442 U.S. at 154-55 ("A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights."). "As a general rule, if there is no constitutional defect in the application of the statute to a

litigant, he does not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations." 442 U.S. at 155; see *Coman*, 294 Kan. at 90.

In cases such as Strong's, in which the party is challenging the constitutionality of an evidentiary device such as an inference or presumption, the jury instructions will generally determine what type of device was applied in a case, although courts may need to look to the relevant statute and related caselaw in interpreting those instructions. *Ulster*, 442 U.S. at 157 n.16.

Whether a party has standing is a question of law over which this court has unlimited review. *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021).

B. *Strong Lacks Standing to Challenge the Constitutionality of K.S.A. 2022 Supp. 21-5705(e)'s Mandatory Rebuttable Presumption*

While not explicitly using the word "standing," the Court of Appeals panel effectively determined that Strong had standing to challenge the constitutionality of the statute because "[t]he jury instruction's discussion of the presumption of intent to distribute placed the statutory provision's presumption in front of the jury." *Strong*, 61 Kan. App. 2d at 37. But the panel's holding is founded on its conclusion that the statute calls for a permissive presumption or inference. See 61 Kan. App. 2d at 38. If that were true, the jury instruction in Strong's case would have likely put the statutory presumption before the jury. But as discussed in Issue I, K.S.A. 2022 Supp. 21-5705(e) provides for a mandatory (albeit rebuttable) presumption, not a permissive presumption or inference. See *Holder*, 314 Kan. at 805; *Valdez*, 316 Kan. at 8.

In *Martinez*, 317 Kan. at 162-63, we held that defendant lacked standing to bring a facial challenge to K.S.A. 2022 Supp. 21-5705(e) because the district court's instruction based on PIK Crim. 4th 57.022 described a permissive inference. In other words, the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e) was never applied to Martinez. Thus, it could not have adversely impacted his rights, depriving Martinez of standing to raise his constitutional challenge. But the instruction in Strong's case is not identical to the instruction in *Martinez*. Here, instead

of telling the jury it "may infer" an intent to distribute and it may consider "this inference" along with all other evidence, Instruction No. 6 told the jury it "may presume" Strong's intent to distribute and it may consider "this presumption" along with all other evidence.

But this difference in verbiage does not lead to a different outcome in Strong's case. Strong claims K.S.A. 2022 Supp. 21-5705(e) is constitutionally defective because it provides for a mandatory presumption. He argues all mandatory presumptions (rebuttable or otherwise) are unconstitutional because they relieve the State of its burden to prove each element of a crime beyond a reasonable doubt. But here, Instruction No. 6 did not describe a mandatory presumption. While it used the words "presume" and "presumption," it couched those words in permissive terms and clarified that the burden of proof never shifted to Strong. Because the constitutional defect Strong complains of was not applied to him through the jury instruction, he lacks standing to challenge the statute on those grounds. See *Coman*, 294 Kan. 84, Syl. ¶ 3 ("To challenge the constitutionality of a statute, the appellant must have been directly affected by the alleged defect.").

Strong also argues he has standing to challenge K.S.A. 2022 Supp. 21-5705(e)'s constitutionality not because the jury instruction put the statute's mandatory presumption before the jury, but rather because the prosecutor's closing argument did. During that argument, the prosecutor told the jury that Instruction No. 6 "says if [a person] has 3.5 grams or more [of methamphetamine], you can presume that they had the intent to distribute." The prosecutor also argued that Strong "had over three times the amount that you're allowed to make a presumption on." And later he discussed the presumption of intent along with the presumption of innocence, explaining:

> "Presumption or presumed is mentioned twice in the instructions. One instruction says you must presume the defendant to be not guilty. The other one is the instruction relating to the presumption that you can make with the amount of the methamphetamine when it tells you that you may presume that the person held it with intent to distribute."

Based on these comments, Strong claims the prosecutor's argument described Instruction No. 6 to the jury in a manner consistent

with the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e)(2).

We are not persuaded by Strong's argument. Strong's constitutional challenge rests on K.S.A. 2022 Supp. 21-5705(e)'s provision for a *mandatory*, albeit rebuttable, presumption. But the prosecutor consistently used permissive language to describe the presumption of intent. He told the jury it "can" presume or it was "allowed" to presume Strong's intent to distribute if the evidence showed he possessed at least 3.5 grams of methamphetamine. This permissive language contrasts with the compulsory language the prosecutor used to describe the presumption of innocence. In discussing this presumption, he told the jury it "must" presume Strong is not guilty.

Granted, on one occasion, the prosecutor stated that Strong possessed "over three times the amount [of methamphetamine] that a person *is presumed* to have [intended to] distribute[]." (Emphasis added.) This language could suggest the presumption is mandatory. See *Francis,* 471 U.S. at 316 (jury instruction using words "is presumed" was "cast in the language of command"). But placing that comment in context, the prosecutor did not give the overall impression that the presumption described in Instruction No. 6 was mandatory. Rather, he repeatedly used permissive terminology to describe the evidentiary device, consistent with the express language in Instruction No. 6. See *Bland v. Sirmons*, 459 F.3d 999, 1015 (10th Cir. 2006) (presuming jury followed its written instructions even when the prosecutor misstated those instructions in closing argument).

It is also worth mentioning that Strong's arguments regarding the prosecutor's closing are readily distinguishable from the prosecutorial error claim raised in *Slusser*. There, the district court gave an instruction more closely patterned after PIK Crim. 4th 57.022 , and this instruction permitted the jury to "infer" an intent to distribute if defendant possessed at least 3.5 grams of methamphetamine. But in closing argument, the prosecutor repeatedly described the evidentiary device as a "presumption" rather than a reasonable "inference," and we held that this argument constituted prosecutorial error when measured against the plain language of the jury instruction. Here, the instruction does not use the terms

"inference/infer." And Strong does not take issue with the prosecutor's use of "presumption/presume" to describe the evidentiary device in the jury instruction. Thus, Strong's framing of the issue distinguishes this case from *Slusser*.

Because Strong has failed to show K.S.A. 2022 Supp. 21-5705(e)'s mandatory presumption was applied to him, he lacks standing to challenge the constitutionality of that statutory presumption. And because he lacks standing, we lack jurisdiction to hear his constitutional challenge.

III. *The Use of Strong's Prior Convictions to Enhance His Sentence Does Not Violate the State or Federal Constitutions*

Finally, Strong challenges the constitutionality of his sentence. The district court sentenced Strong pursuant to the Kansas Sentencing Guidelines Act, a graduated sentencing scheme which provides increasingly severe presumptive sentences for most convicted felons based on the severity level of the crime of conviction and the defendant's criminal history. A crime's severity level is determined by statute, and a defendant's criminal history score is calculated by considering and scoring the defendant's eligible prior convictions. See K.S.A. 2022 Supp. 21-6810.

Strong's constitutional challenges to his sentence arise from K.S.A. 2022 Supp. 21-6814(a). That statute authorizes the sentencing judge, rather than a jury, to determine the offender's criminal history by a preponderance of the evidence at the sentencing hearing. Strong argues the statute violates his jury-trial rights under section 5 of the Kansas Constitution Bill of Rights. According to Strong, at the time our state Constitution was adopted, American common law required the State to prove the existence of prior convictions to a jury beyond a reasonable doubt, and thus this requirement became enshrined in section 5.

We rejected an identical argument in *State v. Albano*, 313 Kan. 638, 487 P.3d 750 (2021). There, we held section 5 does not guarantee defendants the right to have a jury determine the existence of sentence-enhancing prior convictions because no authority substantiates the claim that defendants had such a jury trial right at common law when the Kansas Constitution was adopted. 313 Kan. 638, Syl. ¶ 4. And the Court of Appeals panel correctly

held that Strong's section 5 challenge failed under *Albano*. *Strong*, 61 Kan. App. 2d at 41-42.

On review, Strong invites us to reconsider *Albano* but provides no new arguments as to why the decision reached an incorrect result or why more good than harm will come by departing from this precedent. See *McCullough v. Wilson*, 308 Kan. 1025, Syl. ¶ 5, 426 P.3d 494 (2018) ("An appellate court may decline to apply the doctrine of stare decisis if it is clearly convinced that the rule of law in issue was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."). We thus decline Strong's invitation.

Strong also argues that K.S.A. 2022 Supp. 21-6814(a) violates his rights under the Sixth and Fourteenth Amendments to the United States Constitution, as recognized in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. But *Apprendi* recognized that prior convictions were an exception to this general rule. 530 U.S. at 490. Based on this exception, we have held that *Apprendi* does not apply where the sentence imposed was based in part on a defendant's criminal history score under the Kansas Sentencing Guidelines Act. *State v. Ivory*, 273 Kan. 44, Syl., 41 P.3d 781 (2002). Applying *Ivory*, the Court of Appeals panel rejected Strong's federal constitutional challenge to his sentence. On review, Strong concedes his argument is foreclosed by *Ivory*, and he raises the issue only to preserve it for federal review.

CONCLUSION

We hold that Instruction No. 6 was legally inappropriate because it did not fairly and accurately reflect the mandatory rebuttable presumption set forth in K.S.A. 2022 Supp. 21-5705(e), and the Court of Appeals panel erred by holding otherwise. Nevertheless, Strong failed to meet his burden to show this error requires reversal under the clear-error standard.

We also hold that Strong lacks standing to challenge the constitutionality of K.S.A. 2022 Supp. 21-5705(e), depriving the appellate courts of jurisdiction over the challenge. We thus vacate the panel's holding that the statute is constitutional and do not reach the merits of Strong's challenge.

While we disagree with the panel's rationale on these two issues, we nevertheless affirm the Court of Appeals' judgment affirming Strong's convictions. See *State v. Brown*, 314 Kan. 292, 306-08, 498 P.3d 167 (2021) (affirming Court of Appeals' judgment as right for the wrong reason).

Finally, Strong's constitutional challenges to his sentence are foreclosed by *Albano* and *Ivory*. We thus affirm the Court of Appeals' decision upholding Strong's sentence.

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

* * *

STEGALL, J., concurring: Here is what is going on. In 1985, the United States Supreme Court held that a "mandatory rebuttable presumption is . . . unconstitutional" because it "relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding"—thereby amounting to "unconstitutional burden-shifting." *Francis v. Franklin*, 471 U.S. 307, 317-18, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

Then, in 2012 the Kansas Legislature passed an amendment to K.S.A. 21-5705 which contains the mandatory rebuttable presumptions at issue in this and related cases. The following year, the Pattern Instructions in Kansas committee had to draft an instruction to implement K.S.A. 21-5705. Confronted with an obvious constitutional dilemma, the committee substantively altered K.S.A. 21-5705 from a mandatory rebuttable presumption to a permissive inference. The committee presumably understood that mandatory rebuttable presumptions are suspect while permissive inferences are routine and are constitutionally permitted. See, e.g., *State v. Kriss*, 232 Kan. 301, 304-05, 654 P.2d 942 (1982) ("'Because [a] permissive [inference] leaves the trier of fact free to

credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.'").

Following the PIK committee's work, it appears that—at least judging by the cases that have reached Kansas appellate courts—everyone involved at the trial court level (including prosecutors, defendants, and district court judges) has recognized the potential constitutional deficiencies in K.S.A. 21-5705 and has been satisfied to give juries the permissive inference instruction drafted by the PIK committee and contained in PIK Crim. 4th 57.022 (2013 Supp.).

But then our court began to weigh in. First in *State v. Holder*, 314 Kan. 799, 502 P.3d 1039 (2022), and *State v. Valdez*, 316 Kan. 1, 4, 512 P.3d 1125 (2022), and continuing today in *Strong*, *Slusser*, *Martinez*, and *Bentley*. *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023); *State v. Slusser*, 317 Kan. 174, 527 P.3d 565 (2023); *State v. Martinez*, 317 Kan. 151,527 P.3d 531 (2023); *State v. Bentley*, 317 Kan. 223, 526 P.3d 1060 (2023). In the process, we have confused our broader jury instruction rules while steadfastly declining to reach the constitutional question at the heart of the matter. Here I will continue to explain my dissenting view—though framed as a concurrence in the result—begun in *Valdez*. 316 Kan. at 28 (Stegall, J., concurring).

Given the fact that, as noted above, the juries in these cases were all given the permissive inference instruction rather than an instruction containing the actual mandatory rebuttable presumption rule stated in K.S.A. 21-5705, we have been unable to reach the merits of the constitutionality of the statute. Instead, we have been mired in a debate over whether PIK Crim. 4th 57.022 is "legally appropriate." The result has created bizarre anomalies that cannot withstand a commonsense examination.

After discussing the question of legal appropriateness in *Holder* (but not reaching the question because we relied instead

on factual appropriateness), a majority of the court in *Valdez* held that PIK Crim. 4th 57.022 is not legally appropriate because it "does not fairly and accurately reflect the statutory rebuttable presumption" contained in K.S.A. 21-5705. 316 Kan. at 9. In response, I observed that the majority conclusion "throws into doubt a bedrock principle of how juries may consider evidence." 316 Kan. at 30 (Stegall, J., concurring). After all, how can a correct statement of the law be "legally inappropriate"? For example, are jurors no longer "permitted to draw reasonable inferences about intent from the amount of illegal drugs possessed by a defendant?" 316 Kan. at 30 (Stegall, J., concurring). What about prosecutors? Would it be error for a prosecutor to tell "a jury it may infer a defendant intended to sell drugs due to the large quantity in evidence"? 316 Kan. at 30 (Stegall, J., concurring).

Instead of comparing PIK Crim. 4th 57.022 to K.S.A. 21-5705 and asking only the myopic question of whether they match (obviously they do not), I proposed instead that "we ought to ask if the permissive inference instruction—standing alone—is a correct statement of the law." 316 Kan. at 31 (Stegall, J., concurring). And I answered, "[c]learly, it is . . . because permissive inferences are always lawful so long as the facts make such inferences reasonable." 316 Kan. at 31 (Stegall, J., concurring).

In today's cases, in response to these concerns, the majority makes it clear that permissive inferences are still lawful. The majority observes that "the jury may reasonably infer an intent to distribute based on a defendant's possession of a large quantity of narcotics" and that "if such an inference is reasonably grounded in evidence, the prosecutor may also encourage the jury to make this inference." *Strong*, 317 Kan. at 207.

Nevertheless, the majority insists that PIK Crim. 4th 57.022, while being a correct statement of the law, is still legally inappropriate because it "fails to incorporate the mandatory presumption" from K.S.A. 21-5705 and therefore it does not "fairly and accurately state the *applicable law*." *Strong*, 317 Kan. at 207. It is a consolation, I suppose, that the majority expressly preserves a longstanding evidentiary rule by conceding that PIK Crim. 4th 57.022 is legally correct. Unfortunately, this conclusion only

deepens the confusion with respect to rules pertaining to jury instructions.

This is my takeaway—the rule created by the majority is that a legally correct jury instruction is not legally appropriate if it does not incorporate a statute that is almost certainly unconstitutional and is recognized as such by the PIK committee, by the parties to the underlying criminal litigation, and by the district court judges charged with giving the instructions. Such a rule cannot survive basic questioning.

For example, what if our Legislature passed a statute that simply said, "In Kansas, there shall no longer be a presumption of innocence in criminal proceedings." Such a statute would be plainly and obviously unconstitutional. See *State v. Ward*, 292 Kan. 541, 570, 256 P.3d 801 (2011) (The right to a fair trial and presumption of innocence are guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.).

Assume that because of this brazen unconstitutionality, the PIK committee decides not to draft a pattern instruction implementing the statute. Additionally, the prosecutors of the State know not to request an instruction based on the statute, and the district court judges understand such an instruction would almost guarantee a reversal. Are we really to think that this court, following the rule of law we pronounce today, would say that jury instructions are erroneous and do not "fairly and accurately state the applicable law" if they don't tell the jury that "in Kansas a criminal defendant is not presumed innocent until proven guilty"? This is the kind of outcome I imagine in the mind of Mr. Bumble (of Dickensian fame) when he declared, "If the law supposes that, . . . the law is a[n] ass." Dickens, Oliver Twist 451 (First Tor ed.: 1998 [1838]).

It seems to me the majority is hung up on the technical question of what is the "applicable law" in this instance. Being procedurally prevented from reaching an explicit holding that K.S.A. 21-5705 is formally declared unconstitutional has acted as the proverbial headlight to our frozen deer. We seem powerless—due to an overweening sense of procedural propriety—to take the commonsense step of simply acknowledging that of course the Constitution is also "applicable law." And that if the legal community

charged with "getting it right" at the trial court level has uniformly decided not to give the jury a constitutionally questionable instruction (thereby also denying the possibility of appellate review), we shouldn't step in to declare an otherwise correct statement of the law is error simply because everyone below did the substantively correct thing.

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

No. 123,185

STATE OF KANSAS, *Appellee*, v. CORY WAYNE BENTLEY, *Appellant*.

(526 P.3d 1060)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Requirement of Sufficient Jury Trial Waiver before Stipulation to Element of Crime.* A district court must obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime.

2. SAME—*Failure to Obtain Jury Trial Waiver before Stipulation—Appellate Review.* A district court's failure to obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime is reviewed for constitutional harmless error.

3. SAME—*Guilt-based Defense Utilized by Defendant's Counsel—Court Considers if Defense Was Deficient Performance and Prejudicial.* When there is no indication a defendant objected to a guilt-based defense, a court considers whether counsel's decision to utilize such a defense was deficient performance and prejudicial under the circumstances. There is no general requirement that counsel first obtain express approval from the defendant.

4. CRIMINAL LAW—*Possession of Methamphetamine—Larger Amount Does Not Preclude Guilt for Possession of Smaller Amount under Statute.* Possession of a larger amount of methamphetamine that could establish guilt under K.S.A. 2022 Supp. 21-5705(d)(3)(C) does not preclude guilt for possessing a smaller amount under K.S.A. 2022 Supp. 21-5705(d)(3)(A) or (B).

5. TRIAL—*Jury Instructions—Mandatory Rebuttable Presumption under Statute.* An instruction permitting the jury to infer a defendant intended to distribute drugs based on a certain amount of drugs in the defendant's possession is not legally appropriate because it does not reflect the mandatory rebuttable presumption in K.S.A. 2022 Supp. 21-5705(e).

6. MOTOR VEHICLES—*Driving While License Suspended—Proof Notice Mailed to Last Known Address of Licensee—Proof of Receipt Not Required.* In a prosecution under K.S.A. 8-262, for driving while one's license is suspended, the State must offer proof that a copy of the order of suspension, or written notice of that action, was mailed to the last known address of the licensee according to the division's records. The State does not have to prove the licensee actually received the notice, had actual knowledge of the revocation, or had specific intent to drive while the license was suspended.

7. SAME—*Suspension of Driving License— Statutory Compliance if Defendant has Actual Knowledge.* When a defendant has actual knowledge that his

or her license has been suspended, the State is not required to present direct evidence that there has been compliance with K.S.A. 8-255(d).

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 29, 2022. Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Opinion filed April 14, 2023. Judgment of the Court of Appeals affirming in part and reversing in part the district court is affirmed in part and reversed in part. Judgment of the district court is affirmed in part, reversed in part, and remanded with directions.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellant.

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

The opinion of the court was delivered by

ROSEN, J.: A jury convicted Cory Wayne Bentley of two counts of possessing firearms by a felon, one count of possessing methamphetamine with intent to distribute, one count of driving with a suspended license, and a traffic infraction. The Court of Appeals reversed the firearms convictions and affirmed the other convictions. Bentley did not appeal his traffic infraction. This court granted the State's petition for review of the firearms reversal and Bentley's cross-petition for review of the other convictions.

For reasons we set out below, we affirm the firearm and methamphetamine convictions and reverse the suspended license conviction.

FACTUAL AND PROCEDURAL BACKGROUND

On September 5, 2018, Wichita police officer Nicholas Long received an alert to be on the lookout for a car suspected of being involved in a drive-by shooting. That morning, Long and his partner, David Inkelaar, located the unoccupied car in a hotel parking lot. They watched the car and saw a man leave the motel and drive the car out of the parking lot. The officers followed the car and observed several traffic infractions, including improper lane changes and failure to maintain lane positioning. The car then came to a complete stop in the roadway.

Long and Inkelaar approached the car and asked for the driver's identification. The driver told them he did not have a license or other photo identification; instead, he gave the officers his Kansas Department of Corrections number. The driver then identified himself as Cory Bentley.

Inkelaar contacted the police department communications division and determined Bentley's license was suspended and he had two outstanding city bench warrants. The officers then handcuffed Bentley and placed him under arrest. As they prepared to search Bentley after they walked him back to the patrol vehicles, he informed them he had a pistol and dope in his pocket. Long then found a gun and two bags containing a white crystalline powder in Bentley's pockets. The bags were later determined to contain respectively 7.13 grams and 20.57 grams of methamphetamine.

While standing outside the police vehicles, Bentley told a third officer at the scene, Steven Thornton, that he should tell Long and Inkelaar that another firearm was located under the seat of his car. A vehicle search turned up the weapon under the seat. The search also turned up five small empty Ziplock baggies in the car's center console and floorboards.

After Bentley was taken to the city police offices, Detective Daniel Weidner interrogated him. The interview lasted about three hours, including breaks during which Weidner left the room. Weidner informed Bentley of his *Miranda* rights, and Bentley agreed to speak with him without a lawyer present. Bentley told Weidner he had won $900 at a casino and was able to buy a larger quantity of drugs. Bentley said he planned to use the contents of the smaller bag that day. He said he planned to share some of the other bag in order to stay with various people. Bentley's exact words were that he would have "to break the house off," a phrase that Weidner understood from his experience and training to mean to break off a smaller piece of something and give it in exchange for housing or shelter.

The State charged Bentley with possessing methamphetamine with the intent to distribute at least 3.5 grams but less than 100 grams; two counts of unlawful possession of a firearm; unlawful control over stolen property; driving while his license was canceled, suspended, or revoked; and failing to drive within a single

lane. The State subsequently dismissed the stolen property count. Bentley signed a written stipulation that he had previously been convicted of a felony and that he was not in possession of a firearm at the time he committed the prior crime. Bentley's stipulation to a prior felony conviction is an element of the unlawful firearm charges.

A jury found Bentley guilty of possession of 3.5 to less than 100 grams of methamphetamine with intent to distribute; two counts of criminal possession of a weapon by a convicted felon; driving while his license was suspended or canceled; and failing to maintain a single lane. He was sentenced to a high guideline sentence of 137 months for the methamphetamine count, a high guideline sentence of 9 months for each of the weapons counts, a 6-month jail sentence and $100 fine for driving with a suspended license, and a $75 fine for failing to maintain a single lane. The sentences all ran consecutive to each other, for a controlling sentence of 155 months in prison and a consecutive 6-month jail term.

Bentley filed a timely notice of appeal. The Court of Appeals reversed the convictions for illegal possession of firearms and affirmed the remaining convictions. *State v. Bentley*, No. 123,185, 2022 WL 1278482 (Kan. App. 2022) (unpublished opinion). Bentley did not challenge the lane-violation conviction. This court granted both the State's petition for review and Bentley's cross-petition.

ANALYSIS

Did Bentley voluntarily participate in the interrogation by Weidner?

Soon after his arrest, Bentley signed a waiver of his *Miranda* rights and submitted to an interrogation by the police. He made several statements that were used against him at trial. In particular, he told Detective Weidner that he "gotta break the house" in order to have a place to spend the night. Weidner interpreted this statement to mean that Bentley would break off a piece of methamphetamine crystal to use as a quid pro quo for temporary shelter.

During the interrogation, Bentley was shackled to a table. He wept frequently and spoke many of his answers under his breath, especially in the early stages of the interrogation. He argues on

appeal that his mental state was so unstable that he was incapable of making voluntary statements. The State contends that, despite a pretrial motion to suppress, Bentley failed to preserve the issue at trial. In the alternative, the State asks this court to uphold the district court's finding that the interrogation was voluntary. The Court of Appeals held the issue was sufficiently preserved for appellate review but agreed with the district court that Bentley's statements during the interrogation were voluntary. We agree with the findings of the courts below.

As a preliminary matter, the State contends Bentley failed to preserve the core of the arguments he makes on appeal for two reasons. First, Bentley's only argument to the trial court regarding the voluntariness of his interrogation statements was that he was under the influence of methamphetamine at the time. Second, Bentley failed to assert concerns about the voluntariness during the presentation of evidence. The Court of Appeals considered Bentley's various motions and objections collectively and concluded the issue was sufficiently preserved to allow appellate review.

Bentley filed a couple of pretrial motions seeking to suppress the statements he made during his postarrest interrogation. One was a "Motion to Suppress Illegally Seized Evidence Pursuant to K.S.A. 22-3216 and Motion to Suppress Confession or Admission Pursuant to K.S.A. 22-3215," which primarily argued that the vehicle stop and subsequent arrest was illegal. He also filed a pretrial motion to determine the voluntariness of his statements under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964).

The district court conducted an evidentiary hearing addressing both motions and a subsequent hearing where counsel argued their positions. Bentley's counsel argued Bentley was "still high on methamphetamine, because that is likely the state that he's in" at the time of the interrogation. His counsel added that "to believe that Mr. Bentley is making knowing, intelligent, voluntary and free choices to waive his *Miranda* rights and then having this conversation, when he's probably still high on methamphetamine, I think that stretches the imagination." He raised additional arguments about the lawfulness of the stop and seizure. After making

extensive findings, the court held the interrogation was voluntary and denied the motion to suppress.

At trial, Bentley requested and was granted a standing objection to admission of evidence from the interrogation based on "the stop seizure interrogation." Generally, any pretrial objection to the admission or exclusion of evidence must be preserved by contemporaneously objecting at trial, which can be accomplished through a standing objection. See *State v. Richard*, 300 Kan. 715, 721, 333 P.3d 179 (2014).

The State argues Bentley improperly relies on objections that were based on something other than the arguments he makes on appeal. But Bentley framed part of his suppression motion on lack of voluntariness under *Jackson v. Denno*, 378 U.S. 368, and, in ruling on the motions, the district court meticulously addressed the question of whether Bentley's statements were voluntary. To be sure, Bentley's argument at the suppression hearing seemed limited to the unsubstantiated assertion that he was "high" on methamphetamine at the time of the interrogation, but the court went beyond that claim in making its ruling.

The Court of Appeals determined that Bentley's objections sufficed to preserve the issue:

> "Bentley's counsel objected—rather obliquely—'to evidence of the stop seizure interrogation.' From this, we take it that Bentley was renewing his pretrial objections to the validity of the stop, the validity of his subsequent arrest, and the admissibility of evidence obtained through police interrogation thereafter. The objection was overruled, but the court gave Bentley a standing objection to such testimony.
>
> "Under these circumstances, we find that Bentley's counsel preserved his pretrial objections to the admission of Bentley's statements to the police during his interrogation, which included all the factors relating to voluntariness enumerated in *Davis*, which were addressed by counsel and by the court in its ruling on the suppression motion, not just the issue of whether Bentley was high on drugs at the time of the interrogation." *Bentley*, 2022 WL 1278482, at *4.

We agree with the analysis by the Court of Appeals. Bentley's preservation of the issue was not a model of clarity or directness, but it was adequate for appellate review.

We turn now to the merits of Bentley's assertion that he lacked the state of mind necessary to make voluntary statements to Weidner during the interrogation.

The district court was able to review the videorecording of the interrogation, which the Court of Appeals and we likewise do. At a hearing on the motions to dismiss, the district court also heard Weidner's testimony and referred to that testimony in making its findings.

When reviewing a decision ruling on a motion to suppress statements to police, this court applies a dual standard. The court reviews the factual underpinnings of the decision under a substantial competent evidence standard. The ultimate legal conclusion drawn from those facts is reviewed de novo. The appellate court does not reweigh the evidence, assess the credibility of the witnesses, or resolve conflicting evidence. *State v. Dern*, 303 Kan. 384, 392, 362 P.3d 566 (2015).

Pursuant to the Fifth Amendment to the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Under this provision, the State may not introduce statements a defendant made during a custodial investigation unless those statements were freely and voluntarily given. *State v. Galloway*, 311 Kan. 238, 245, 459 P.3d 195 (2020).

The State may introduce a defendant's previous statements if the judge finds the defendant was conscious and capable of understanding what he said and did. The State is not permitted to induce the defendant to make the statement under compulsion or by prolonged interrogation under such circumstances as to render the statement involuntary. The State may not use threats or promises concerning action to be taken by a public official with reference to the crime that would likely cause the defendant to make such a statement falsely. *State v. Garcia*, 297 Kan. 182, 189, 301 P.3d 658 (2013).

The State has the burden to prove the voluntariness of a confession by a preponderance of the evidence—that the statement was the product of the defendant's free and independent will. *State v. Mattox*, 305 Kan. 1015, 1042, 390 P.3d 514 (2017). The courts look at the totality of the circumstances surrounding a confession and determine its voluntariness by considering the following nonexclusive factors: (1) the defendant's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the defendant to communicate on request with the outside world; (4) the

defendant's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the defendant's fluency with the English language. *State v. Woods*, 301 Kan. 852, 867, 348 P.3d 583 (2015); see *Mattox*, 305 Kan. at 1042-43.

"'These factors are not to be weighed against one another with those favorable to a free and voluntary confession offsetting those tending to the contrary. Instead, the situation surrounding the giving of a confession may dissipate the import of an individual factor that might otherwise have a coercive effect. Even after analyzing such dilution, if any, a single factor or a combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act.' [Citation omitted.]" *Mattox*, 305 Kan. at 1043.

We reject Bentley's request to review the issue de novo because the district court made findings of fact related to the circumstances of the interrogation. And those findings were founded on the recording of the interrogation and the testimony of Detective Weidner and other officers. We therefore give deference to the district court's factual findings, examining whether substantial competent evidence supported them, even as we exercise unlimited review of the legal conclusions to be drawn from those findings.

Both the district court and the Court of Appeals examined in detail the six nonexclusive factors set out in *Woods* and *Mattox*. We have reviewed the records of the motions hearings, the recording of the interrogation, the factual findings, and the analysis on which both those courts based their conclusions that Bentley's statements were voluntary. The discussion by the Court of Appeals in affirming the district court is thorough and persuasive. We see no reason to repeat it here but incorporate it by reference into this opinion. See *Bentley*, 2022 WL 1278482, at *5. We conclude the district court did not err in finding Bentley's statements were voluntary and admissible at trial.

Should this court overrule State v. Johnson *and hold no jury trial waiver is required before a defendant stipulates to an element of a crime?*

The State charged Bentley with two counts of criminal possession of a weapon by a convicted felon. Bentley stipulated to one element of these charges. The Court of Appeals reversed those

convictions in accordance with *State v. Johnson,* 310 Kan. 909, 453 P.3d 281 (2019), because the district court failed to obtain a jury trial waiver of the stipulated-to element before accepting the stipulation. Judge Gardner concurred. She agreed the analysis correctly followed *Johnson* but urged this court to overrule *Johnson* or to hold the error should be reviewed for harmlessness. The State argues this court should adopt the reasoning in Judge Gardner's concurrence.

"'The Sixth Amendment to the United States Constitution and Sections 5 and 10 of the Kansas Constitution Bill of Rights guarantee a criminal defendant the right to a jury trial.'" *State v. Redick*, 307 Kan. 797, 803, 414 P.3d 1207 (2018). This guarantee includes a right to "'a jury determination that [the defendant] is guilty of every element of the crime with which [the defendant] is charged, beyond a reasonable doubt.'" *Johnson*, 310 Kan. at 918 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 [2000]). A defendant may waive the right to have a jury decide their guilt, but a court must first obtain a constitutionally sufficient waiver. A waiver is sufficient only if the court advises the defendant of their right to a jury trial, and the defendant then personally waives that right in writing or in open court on the record. *State v. Harris*, 311 Kan. 371, 376, 461 P.3d 48 (2020) (citing *State v. Irving*, 216 Kan. 588, 590, 533 P.2d 1225 [1975]). If a court bypasses a jury without an effective waiver, the court unconstitutionally denies the right to jury trial. See *Irving*, 216 Kan. at 590 ("in the absence of an effective waiver, [a] defendant [is] entitled to a trial by jury").

Long-standing caselaw has required sufficient jury trial waivers before a defendant proceeds to a bench trial or pleads guilty. See *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) (waiver of constitutional right to jury trial before guilty plea will not be presumed on silent record); *Irving*, 216 Kan. at 590 (vacating conviction after court failed to secure valid jury trial waiver before bench trial).

In *Johnson*, we clarified that sufficient waivers are required with equal force before a defendant stipulates to an element of a crime. 310 Kan. at 918-19. We reasoned that an elemental stipulation eliminates jury consideration of that element, so a jury

waiver is necessary. 310 Kan. at 918-19. Because we remanded the case to the Court of Appeals for consideration of other issues, we did not consider whether the error was subject to harmless error review. 310 Kan. at 919. But the Court of Appeals has been interpreting *Johnson* to require reversal whenever a district court fails to obtain on the record a jury trial waiver before a defendant stipulates to any element of a crime. *State v. Portillo-Ventura*, No. 122,229, 2022 WL 569362, at *11 (Kan. App. 2022) (unpublished opinion); *State v. Ramos*, No. 122,657, 2021 WL 1826884, at *2 (Kan. App. 2021) (unpublished opinion); *State v. Lax*, No. 121,540, 2020 WL 7409957, at *8 (Kan. App. 2020) (unpublished opinion).

The State urges us to overturn our holding in *Johnson*.

Under the doctrine of stare decisis, "'once a point of law has been established by a court, it will generally be followed by the same court and all courts of lower rank in subsequent cases when the same legal issue is raised.'" *State v. Sherman*, 305 Kan. 88, 107-08, 378 P.3d 1060 (2016) (quoting *Simmons v. Porter*, 298 Kan. 299, 304, 312 P.3d 345 [2013]). But this court will overturn precedent "if it is '"clearly convinced [the rule of law] was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent."'" *McCullough v. Wilson*, 308 Kan. 1025, 1036, 426 P.3d 494 (2018) (quoting *Simmons*, 298 Kan. at 304).

Bentley argues this court should not overturn *Johnson* because the State failed to offer any argument in its briefing regarding whether more good than harm will come from overturning *Johnson*. He also argues that, even if this court addresses the issue, the State cannot show more good than harm would come from overturning this precedent. Bentley claims that lower courts have easily been adjusting to this "minimal procedural requirement," and there is no evidence it has "impeded the ability of defendants" to offer elemental stipulations. Bentley claims requiring a waiver has great benefit because it reduces collateral litigation and increases confidence in the validity of a jury trial waiver.

We agree with Bentley. When the State failed to brief the first requirement of overturning precedent, it abandoned its claim that we overrule *Johnson*. See *State v. Funk*, 301 Kan. 925, 933, 349

P.3d 1230 (2015) (issue not adequately briefed is deemed abandoned). Consequently, *Johnson* stands, and a district court must obtain a constitutionally sufficient jury trial waiver before a defendant stipulates to an element of a charged crime.

Next, the State argues that if *Johnson* stands, the error should be reviewed for harmlessness. We agree.

Whether an error may be reviewed for harmlessness is a question of law subject to plenary review. *Johnson*, 310 Kan. at 913.

Some constitutional errors may be reviewed for harmlessness. *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Others are deemed "structural" and require automatic reversal of a conviction. 527 U.S. at 8. An error is structural when it constitutes "'a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" 527 U.S. at 8 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 [1991]).

Generally, the deprivation of the right to a jury trial is "unquestionably" structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 282, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993). This is because the right reflects "'a profound judgment about the way in which law should be enforced and justice administered'" and its deprivation produces "consequences that are necessarily unquantifiable and indeterminate." 508 U.S. at 281-82 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444, 20 L. Ed. 2d 491 [1968]).

And this court, along with others, generally treats the denial of the jury trial right through the failure to obtain a sufficient jury trial waiver as a structural error. See, e.g., *Harris*, 311 Kan. at 377; *Irving*, 216 Kan. at 590; see also *United States v. Shorty*, 741 F.3d 961, 969 (9th Cir. 2013) (insufficient jury trial waiver structural error); *Miller v. Dormire*, 310 F.3d 600, 604 (8th Cir. 2002) (same); *United States v. Perez*, 356 Fed. Appx. 770, 773 (5th Cir. 2009) (unpublished opinion) (same). But see *United States v. Williams*, 559 F.3d 607, 614 (7th Cir. 2009) (failure to advise defendant of right to jury trial not structural error). Other jurisdictions have explained the error is structural because it "affect[s] the basic framework" of a defendant's trial. *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997); *Perez*, 356 Fed.

Appx. 770, 773 (same); *State v. Le Noble*, 216 Ariz. 180, 184-85, 164 P.3d 686 (Ct. App. 2007) (same).

This court is now asked to decide whether the failure to obtain a jury trial waiver before an elemental stipulation—rather than before a bench trial or guilty plea—also constitutes structural error. We conclude it is not structural, because a failed waiver before a stipulation to less than all elements of the charged crime does not constitute "a defect affecting the framework within which the trial proceeds." *Neder*, 527 U.S. at 8. Rather, it affected only one aspect of the process while maintaining the general framework of a jury trial.

The error here is akin to a court's failure to submit an element of the charged crime to the jury. The United States Supreme Court and this court have held that this kind of error is subject to harmlessness review. In *Neder*, the trial court erroneously decided an element of a crime itself instead of submitting the element to the jury. 527 U.S. at 7. The Supreme Court recognized its earlier observation in *Sullivan* that harmless error review is meaningless without a jury verdict. But it concluded this is not necessarily the case when the court simply fails to secure a verdict on *some* elements of the crime, rather than all of them. Important to the Court's reasoning was that the element the jury had not been permitted to consider was not contested by the defendant and would not be contested if the conviction were vacated and a new trial ordered. The Court opined: "We do not think the Sixth Amendment requires us . . . to reach such a result." *Neder*, 527 U.S. at 15. The Court then concluded the error was harmless because "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 17.

This court adopted the *Neder* reasoning to apply harmless error analysis when a trial court fails to submit an uncontested element to the jury. See *State v. Carr*, 314 Kan. 744, Syl. ¶ 12, 502 P.3d 511 [2022]; *State v. Reyna*, 290 Kan. 666, 681, 234 P.3d 761 (2010), *overruled on other grounds by State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

Today, we extend the *Neder* reasoning to cases in which the district court failed to obtain a constitutionally sufficient jury trial

waiver before a defendant stipulated to some elements of a charged crime. In such cases, the error should be reviewed under the constitutional harmless error standard. We move to that analysis.

A constitutional error is harmless only if the party benefitting from the error demonstrates "beyond a reasonable doubt the error will not or did not affect the trial's outcome in light of the entire record, i.e., when there is no reasonable possibility the error contributed to the verdict." *State v. Corey*, 304 Kan. 721, 731-32, 374 P.3d 654 (2016).

The State and Judge Gardner's concurrence argue the error did not affect the trial's outcome. They assert that the elements to which Bentley stipulated to—prior convictions—"were facially valid or easy to verify," and "would not have furnished even a colorable defense, as the decision to stipulate itself reflected." *Bentley*, 2022 WL 1278482, at *21 (Gardner, J., concurring).

While compelling, the State and Judge Gardner's concurrence ignore the fact that there was no evidence other than the stipulation that would have allowed the jury in this trial to find Bentley guilty of having prior convictions. Thus, if the failure to secure a constitutionally sufficient jury trial waiver led to the stipulation, then it clearly affected the verdict, because the jury had to rely on that stipulation to find that the State proved that element of the crime.

But we think it is appropriate to view the harmlessness inquiry here through a more focused lens. We have concluded the stipulation effectively decided the stipulated-to elements for the jury, thereby paving the way for a guilty verdict. Thus, it is logical to consider whether the error here led to the stipulation. In other words, we will review whether there is a reasonable possibility the failure to inform Bentley of his right to jury trial led to his decision to enter the stipulation.

The Supreme Court of California takes the same approach when it considers whether a statutory violation of a jury trial waiver amounted to harmless error. See *People v. Sivongxxay*, 3 Cal. 5th 151, 171, 180, 219 Cal. Rptr. 3d 265, 396 P.3d 424 (2017) (reviewing statutory violation of jury trial waiver to see whether there was "a reasonable probability that defendant would have de-

manded a jury trial" absent the error and finding violation harmless because defendant had personally entered knowing and intelligent jury trial waiver without uncertainty or confusion, and evidence against the defendant was overwhelming).

And such an inquiry would track the harmless error analysis federal courts apply when the trial court fails to advise the defendant at a plea hearing that the defendant has no right to withdraw a guilty plea if the court does not follow the State's sentencing recommendation, as is required by Rule 11 of the Federal Rules of Criminal Procedure. See *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004) (courts should consider whether the defendant has shown "a reasonable probability that, but for the error, he would not have entered the plea" in reviewing a Rule 11 error). The Supreme Court advised in *Dominguez Benitez* that evidence relevant to whether a defendant would still have pled guilty absent a Rule 11 error included any representations the defendant or counsel made regarding the topic, the overall strength of the case against them, and any possible defenses. 542 U.S. at 85.

The facts to which Judge Gardner's concurrence points suggest Bentley would have offered a stipulation even if the court had advised him of his right to jury trial—that these were easily provable elements and Bentley would have had no defense had the State offered evidence to establish these elements. And there was no suggestion Bentley meant to defend his case based on these elements. A section from the record further supports such a conclusion. During the hearing on a motion for new trial based on a claim of ineffective assistance of counsel, newly appointed counsel had the following exchange with Bentley's trial counsel:

"Q: I believe that the basis of that—of that part of his motion was the fact that you and Ms. Schauf made a stipulation for the second charge, which was possession of a weapon by a criminal. Would that be a fair statement?

"A. We probably did make a stipulation to try and keep Mr. Bentley's criminal history out of the knowledge of the jury.

"Q. And that stipulation was—you presented that to Mr. Bentley?

"A. I believe I did.

"Q. And had his agreement to publish it?

"A. I believe I did. I think he would have thought that was just as good an idea as I would to keep knowledge from the jury of his prior criminal history, yes, sir."

On cross-examination, the State had the following exchange with trial counsel:

"Q. And along those same lines, the stipulation that was entered into— . . . Did you go over that with Mr. Bentley?

"A. His signature's right here on the bottom left, underneath my signature, and he and I would have had possession of that document at the same time and we would have signed it at the same time, I think.

"Q. Okay. So was it your strategy to keep from the jury specifically what Mr. Bentley had been convicted of in the past?

"A. Yes.

"Q. And in fact, you had filed a pre-trial motion asking the Court to limine out any reference to the defendant's criminal history, absent what was contained in this stipulation?

"A. Yes."

This testimony supports the State's claim that Bentley would have elected to stipulate to this element of the crimes even if he had been informed of his right to submit them to a jury on the State's evidence. We conclude beyond a reasonable doubt that the error did not affect Bentley's decision to enter the stipulation and, consequently, the error did not affect the trial's outcome. We affirm Bentley's convictions for possession of a firearm.

Did the district court and Court of Appeals err in holding trial counsel was not ineffective in pursuing a guilt-based defense?

After the jury convicted Bentley, he moved for a new trial, arguing his counsel had been ineffective. The district court denied the motion and the Court of Appeals affirmed. Before this court, Bentley maintains his claim that his trial counsel was ineffective because it pursued a guilt-based defense without Bentley's express approval. We affirm the Court of Appeals.

"The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel . . . ." *Balbirnie v. State*, 311 Kan. 893, 897, 468 P.3d 334 (2020). "If trial counsel fails to provide effective assistance, a defendant may be entitled to a new trial." *State v. Dinkel*, 314 Kan. 146, 148, 495 P.3d 402 (2021). To evaluate a claim of ineffective assistance, courts apply a two-step test. They first consider whether the defendant has shown "'counsel's representation fell below an objective standard of reasonableness.'" *Balbirnie*, 311 Kan. at 897

(quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 [1984]). If the defendant makes this showing, they must next establish that "the deficient performance prejudiced the defense." *Balbirnie*, 311 Kan. at 897.

This court uses a mixed standard of review to assess a district court's conclusions regarding ineffective assistance of counsel. It considers whether substantial competent evidence supports the court's factual findings. It reviews the court's conclusions of law de novo. *Balbirnie*, 311 Kan. at 897-98.

After the jury found him guilty, Bentley argued that trial counsel had been generally incompetent. The court appointed new counsel and held a hearing on the motion. During the hearing, Bentley had the following exchange with his counsel:

"[Defense counsel:] Can you tell me any other incidents—inferences that [trial counsel] might have done to the Court that would make you believe he was ineffective?

"[Bentley:] I believe it was his opening statement.

"Q. What did he say?

"A. He not only told them that I possessed drugs in the opening statement, told them that I had everything I needed to use the drugs and that wasn't even—simply wasn't even the case.

"Q. So his theory of the case was that you were a drug user and not a drug seller?

"A. Yes, I believe that's the defense he was going for, but he did not even—he just—yeah, he didn't do me right.

"Q. What do you mean, he didn't do none of that?

"A. He did a terrible job of even trying to present it as such. He said I had the drugs, he said I had everything to use the drugs and knowing that that wasn't the case, that I didn't possess any paraphernalia to use the drug.

"Q. Based on this opening statement you think he was ineffective?

"A. Yes.

"Q. And due to that you're asking the Court for a new trial?

"A. Yes."

The court denied Bentley's motion. It held trial counsel had not been deficient. The court noted this was a difficult case, given the defendant's admission the methamphetamine was his, and the issue came down to "was this individual possession for personal use or was this for distribution . . . [a]nd Mr. Smartt hit that issue and argued it from—and marshaled the evidence before the jury to the best of his ability." The court further ruled that even if coun-

sel's performance had been deficient, there was no reasonable possibility the jury would have reached a different result without the deficiency.

On appeal, Bentley argued trial counsel had been ineffective by pursuing a guilt-based defense without Bentley's express approval when he admitted Bentley possessed methamphetamine for personal use but did not intend to distribute it. In support, Bentley cited *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, 200 L. Ed. 2d 821 (2018), and *State v. Carter*, 270 Kan. 426, 14 P.3d 1138 (2000).

In *McCoy*, the State charged the defendant with three counts of premeditated first-degree murder. The defendant maintained he had not committed the murders and "adamantly objected to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. But his counsel concluded admitting guilt was the best way to avoid the death penalty and, even though "the defendant vociferously insisted that he did not engage in the charged acts," told the jury the defendant was guilty. *McCoy*, 138 S. Ct. at 1505. The Supreme Court reversed the eventual death verdict. It held "the defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *McCoy*, 138 S. Ct. at 1505.

In *Carter*, the State charged the defendant with premeditated first-degree murder and felony murder in the alternative. After the jury had been selected and sworn in, Carter told the court he did not want to proceed to trial because he disagreed with defense counsel's strategy, which was to concede guilt of felony murder but argue there had been no premeditation. Carter maintained his complete innocence. The district court denied Carter's request to appoint new counsel and proceeded to trial over Carter's strong objection. This court reversed the conviction. It reasoned defense counsel had been ineffective when it pursued "a guilt-based defense against Carter's wishes." 270 Kan. at 441. The court held this violated Carter's Sixth Amendment right to counsel and denied him a fair trial. Because this "was a breakdown in our adversarial system of justice," the court presumed prejudice. 270 Kan. at 441.

The panel here observed a key difference between the cited cases and Bentley's: in *McCoy* and *Carter*, the defendants had voiced objections to a guilt-based defense, and the courts had held a lawyer may not pursue the defense over that objection. In contrast, Bentley offered no objection.

Before this court, Bentley argues the panel erred by concluding a lawyer may pursue a guilt-based defense unless the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." He insists a lawyer is per se ineffective if the lawyer proceeds with a guilt-based defense without a defendant's express approval.

Bentley misconstrues the panel's holding. It did not set a new requirement that a lawyer may pursue a guilt-based defense unless a defendant "vociferously insist[s]" they did not commit the charged acts and "adamantly object[s]" to such a defense. The panel used this language to describe the distinguishing factor in *McCoy*. The panel's holding was narrower. It concluded Bentley had failed to establish counsel's performance was deficient because he made no showing "trial counsel abandoned Bentley or took any actions against his wishes." *Bentley*, 2022 WL 1278482, at *12.

We conclude the panel's ruling was in line with *McCoy* and *Carter*. Both cases held that a lawyer errs by pursuing a guilt-based defense that was clearly contrary to the defendant's claims of innocence. They do not stand for the notion that a lawyer must obtain express authorization before pursuing such a defense, as Bentley claims. See *Harris v. State*, 358 Ga. App. 802, 808, 856 S.E.2d 378 (2021) (nothing in *McCoy* "requires counsel to obtain the express consent of a defendant prior to conceding guilt"). And Bentley has neither shown nor alleged that trial counsel disregarded an express directive from Bentley.

Thus, to succeed on his claim, Bentley must convince us we should extend the reasoning of *McCoy* and *Carter* to adopt his contention that a lawyer may not proceed with a guilt-based defense unless they first obtain a defendant's express approval. Bentley argues this logically follows from the notion expressed in *McCoy* that "it is the client's decision whether to use a guilt-based defense." Bentley also cites *Johnson*, 310 Kan. 909, in support of

his position. He argues that using a guilt-based defense removes the admitted-to elements from the jury and, in this way, it is the same as an elemental stipulation. Because, under *Johnson*, a district court must obtain a knowing and valid waiver of the right to jury trial before accepting an elemental stipulation, Bentley argues, a lawyer must obtain something similar—express agreement—from a defendant before pursuing a guilt-based defense.

A United States Supreme Court case published before *McCoy* cuts against Bentley's position. In the capital case *Florida v. Nixon*, 543 U.S. 175, 178, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), trial counsel proposed a guilt-based defense as the best strategy to avoid the death penalty. The defendant was unresponsive to counsel's attempts to explain the defense, so counsel proceeded. The Florida Supreme Court overturned the conviction, reasoning a guilt-based defense is "'the functional equivalent of a guilty plea'" and thus requires the defendant's "'affirmative, explicit acceptance.'" 543 U.S. at 188 (quoting *Nixon v. Singletary*, 758 So. 2d 618, 624 [Fla. 2000]).

The United States Supreme Court reversed. It ruled the Florida Supreme Court erred in equating a guilt-based defense to a guilty plea. The Court explained a guilty plea is "'a stipulation that no proof by the prosecution need be advanced.'" 543 U.S. at 188. In contrast, when the defendant pursues a guilt-based defense, the State is still "obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes . . . ." 543 U.S. at 188 (quoting *Boykin v. Alabama*, 395 U.S. 238, 243 and n.4, 89 S. Ct. 1709, 23 L. Ed. 2d 274 [1969]). The defense also maintains "the right to cross-examine witnesses for the prosecution and could endeavor . . . to exclude prejudicial evidence. . . . In addition, in the event of errors in the trial or jury instructions, a concession of guilt would not hinder the defendant's right to appeal." *Nixon*, 543 U.S. at 188. The Court ruled that, rather than presuming deficient performance and applying a presumption of prejudice, the Florida Supreme Court should have applied the standard set forth in *Strickland*, 466 U.S. 668, and considered whether counsel's concession strategy was unreasonable and prejudicial. The Supreme Court concluded it was not, explaining "in a capital case . . . when counsel informs the defendant of

the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." 543 U.S. at 192.

Bentley did not face a capital case, and there is no evidence he was nonresponsive to his counsel's guilt-based defense suggestions. But *Nixon* is instructive. It supports the notion that a guilt-based defense does not require explicit approval. The State still had to submit its evidence, and Bentley had the chance to challenge and test that evidence. Thus, the guilt-based defense did not remove the question from the jury or relieve the State from its burden of proof. Because a guilt-based defense does not erode these rights, we need not adopt a rule to safeguard those rights by requiring informed and express authorization before counsel pursues a guilt-based defense.

Bentley has failed to show the panel erred. It did not adopt a new rule requiring a defendant "vociferously insist" against a guilt-based defense, and its decision was in line with *McCoy* and *Carter*. And Bentley has not persuasively argued this court should extend the reasoning in *McCoy* and *Carter* to require express approval from a defendant before a lawyer may pursue a guilt-based defense. Rather, when there is no indication the defendant objected to a guilt-based defense, we will continue to consider generally whether counsel's decision to utilize such a defense was deficient performance and prejudicial under the circumstances. Bentley does not argue that counsel was deficient for pursuing such a defense in the absence of a rule requiring express approval. Consequently, we affirm the panel's ruling that trial counsel was not ineffective.

Did the district court err when it gave no lesser included instructions for possession of methamphetamine with intent to sell?

Bentley contends that, although he had in his possession two baggies containing 7.13 grams and 20.57 grams of methamphetamine, the trial court erred when it instructed the jury only on possession with intent to distribute between 3.5 and 100 grams of the drug, a level 2 felony. He argues that, even though he did not request alternate instructions, the court should have instructed on

lesser degrees of possession: possession with intent to distribute less than a gram and possession with intent to distribute between 1 and 3.5 grams, which are level 4 and level 3 felonies respectively. The Court of Appeals held that instructions on the lesser offenses were legally appropriate but were not supported by the facts. We conclude that the Court of Appeals was wrong in finding the lesser instructions factually inappropriate, but we decline to reverse the conviction on this basis.

When reviewing a claim that a district court has committed an error by failing to issue a jury instruction, this court engages in a four-step analysis:

First, the court considers the reviewability of the issue from both jurisdiction and preservation viewpoints, exercising an unlimited standard of review; next, the court applies an unlimited review to determine whether the instruction was legally appropriate; then, the court determines whether there was sufficient evidence, viewed in the light most favorable to the defendant or the requesting party, that would have supported the instruction; and, finally, if the district court erred, the appellate court must determine whether the error was harmless, utilizing the test and degree of certainty set forth in *State v. Ward*, 292 Kan. 541, 565, 256 P.3d 801 (2011). *State v. Timley*, 311 Kan. 944, 954, 469 P.3d 54 (2020).

If there was instructional error but the defendant did not object to the district court's jury instructions—as was the case here—the reviewing court applies the clear error standard required by K.S.A. 2022 Supp. 22-3414(3). Under that standard, the reviewing court determines whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred. The defendant has the burden to establish reversibility, and, when examining whether the defendant has met that burden, the reviewing court makes a de novo determination based on the entire record. *Timley*, 311 Kan. at 955.

K.S.A. 2022 Supp. 21-5705(d)(3) states that possessing with the intent to distribute material containing any quantity of methamphetamine is a:

"(A) Drug severity level 4 felony if the quantity of the material was less than 1 gram;

"(B) drug severity level 3 felony if the quantity of the material was at least 1 gram but less than 3.5 grams;

"(C) drug severity level 2 felony if the quantity of the material was at least 3.5 grams but less than 100 grams; and

"(D) drug severity level 1 felony if the quantity of the material was 100 grams or more."

K.S.A. 2022 Supp. 21-5109(b)(1) states that a defendant may be convicted of either the crime charged or a lesser included crime. A lesser included crime is a "lesser degree of the same crime." By these statutory provisions, the lesser included severity levels would have been legally appropriate for Bentley's jury to consider. See *State v. Valdez*, 316 Kan. 1, 15-16, 512 P.3d 1125 (2022); *State v. Scheuerman*, 314 Kan. 583, 592, 502 P.3d 502, *cert. denied* 143 S. Ct. 403 (2022). This was the conclusion of the Court of Appeals, and we agree.

The next question is whether the evidence produced at trial warranted lesser included instructions. The Court of Appeals concluded that the instructions were not factually appropriate, but we disagree.

This court considered a similar set of facts in *Valdez*, where the defendant had a bag containing 1 gram of methamphetamine in his pocket and a bag containing about 14 grams of methamphetamine in a bag in the defendant's living room. 316 Kan. at 2-3. We held that instructions on lesser included offenses would have been factually appropriate because the jury could have concluded that the defendant possessed and intended to distribute only the 1-gram packet. 316 Kan. at 16-17.

One device this court has used for analyzing the propriety of a lesser included instruction is a sufficiency of the evidence test. When there is at least some evidence supporting convictions for lesser crimes, this court will not reverse a verdict for insufficient evidence. See *State v. Haberlein*, 296 Kan. 195, 204, 290 P.3d 640 (2012). In such an instance, the instruction for a lesser included offence is factually appropriate. 296 Kan. at 204.

In *Scheuerman*, 314 Kan. 583, this court held that an individual who is guilty of possessing a large amount of methamphetamine may also be guilty of possessing a smaller amount. The amounts are not mutually exclusive: a person who possesses 100

grams of methamphetamine with intent to distribute can be convicted of possession of 1 gram with intent to distribute. 314 Kan. at 590. In the present case, if the jury had convicted for possession with intent to sell less than 1 gram, this court would not have reversed for lack of evidence—after all, the evidence was the same for possession with intent to sell more than 3.5 grams. The facts therefore supported lesser included offense instructions, and it was error not to give the instructions.

But Bentley did not request those instructions. His appeal is therefore subject to review for clear error. As noted earlier, this means that the court must determine whether it is firmly convinced that the jury would have reached a different verdict had the lesser included felony instructions been given. Bentley has the burden to establish reversibility, and, when examining whether he has met that burden, this court makes a de novo determination based on the entire record. See *Timley*, 311 Kan. at 955.

In *Valdez*, evidence was plentiful that the defendant intended to distribute the larger quantities found in his home: a message indicating he was looking for buyers, a digital scale with drug residue, empty baggies, and multiple baggies containing methamphetamine. The court concluded that "the evidence strongly shows Valdez possessed more than 3.5 grams of methamphetamine and intended to distribute it. We hold clear error is not demonstrated. His arguments for reversal are speculative and insufficient to carry his burden." 316 Kan. at 17.

In the present case, there were several indications that Bentley intended to distribute at least some of the methamphetamine. He told the interrogating officer he intended to "break the house off," possibly meaning he intended to break off portions of the crystals in exchange for places to stay. He also had small, unused baggies in his car. Weidner testified that methamphetamine users typically consume from a quarter gram to a gram a day. This would translate into between 20 and 82 doses in Bentley's larger bag, a large amount for personal use.

Although the lesser included instructions *might* have resulted in conviction of a lesser degree of the felony, that is not the standard for finding clear error. We are not firmly convinced that the jury *would* have reached a different verdict if the instructions had

been given. For this reason, we find no clear error and affirm the conviction.

Did the district court clearly err when it gave an inference of intent to distribute instruction?

The State charged Bentley with possession of methamphetamine with intent to distribute between 3.5 and 100 grams. The district court gave a pattern instruction to the jury that permitted it to infer Bentley intended to distribute methamphetamine if he possessed 3.5 grams or more of methamphetamine. Bentley argues this instruction was legally erroneous because it does not accurately reflect the law and because it is arbitrary and thus violates due process.

This court uses a four-part framework when reviewing instructional errors. First, it exercises unlimited review in considering jurisdiction and whether the issue was preserved. Second, it considers de novo whether the instruction was legally appropriate. Third, it determines whether the instruction was factually appropriate. Fourth, it addresses any error for harmlessness, utilizing different standards depending on whether the error has been preserved. *Valdez*, 316 Kan. at 6.

Bentley acknowledges he did not object to this instruction in district court. He argues the second prong of instructional error review: that the instruction was not legally appropriate and amounted to clear error.

The court provided the following instruction:

"If you find the defendant possessed 3.5 grams or more of methamphetamine, you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. This burden never shifts to the defendant."

This instruction describes a *permissive* inference. But it is based on the following statutory provision, which describes a *mandatory* rebuttable presumption:

"(e) In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses the following quantities of controlled substances or analogs thereof:

(1) 450 grams or more of marijuana;

(2) 3.5 grams or more of heroin or methamphetamine;
(3) 100 dosage units or more containing a controlled substance; or
(4) 100 grams or more of any other controlled substance." K.S.A. 2022 Supp. 21-5705(e)(2).

In the Court of Appeals, Bentley argued the instruction was legally erroneous because the amount that triggered the inference of intent to distribute was arbitrary and thus violated the Due Process Clause. See *County Court of Ulster Cty., v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) (although jury may infer elemental fact from proof of predicate fact, the inference violates due process if "there is no rational way the trier could make the connection permitted by the inference").

The panel did not address Bentley's argument that the permissive inference instruction was arbitrary. It held K.S.A. 2020 Supp. 21-5705(e)(2) was "facially constitutional" because it did not describe a mandatory presumption. *Bentley*, 2022 WL 1278482, at *15; see *Francis v. Franklin*, 471 U.S. 307, 317, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (mandatory presumptions constitutionally problematic because they threaten to relieve the State of its burden of proof). It further held the instruction was legally appropriate because it followed the PIK instruction and "informed the jury that the presumption was permissive . . . rather than mandatory." *Bentley*, 2022 WL 1278482, at *15.

Before this court, Bentley maintains his argument that the instruction, although not mandatory, was nonetheless unconstitutional because the triggering amount was arbitrary. He further argues that the instruction was legally inappropriate because it describes a permissive inference while the applicable law describes a mandatory presumption.

Bentley is correct that the instruction was legally inappropriate. Jury instructions "must always fairly and accurately state the applicable law." *State v. Plummer*, 295 Kan. 156, 161, 283 P.3d 202 (2012). As we observed in *Holder*, 314 Kan. 799, and *Valdez*, 316 Kan. 1, and reiterate today in *State v. Martinez*, 317 Kan. 151. 527 P.3d 531 (2023), *State v. Slusser*, 317 Kan. 174, 527 P.3d 565 (2023), and *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023), the law applicable here *requires* a jury presume a defendant intended to distribute methamphetamine if it finds the defendant

possessed 3.5 grams of methamphetamine. K.S.A. 2022 Supp. 21-5705(e)(2). This conclusion is supported by a plain language interpretation of K.S.A. 2022 Supp. 21-5705(e). See *Strong*, 317 Kan. at 204. The panel erred by interpreting the statute to provide for a permissive inference rather than a mandatory presumption and assessing its facial constitutionality based on this error. Because the statute provides for a mandatory presumption, the permissive inference instruction in this case deviated from that law by permitting the jury to accept or reject such an inference. Consequently, the instruction was not legally appropriate.

Because we hold that the instruction was legally inappropriate, we need not consider Bentley's alternate claim that the permissive-inference instruction was legally inappropriate because the triggering amount was arbitrary and thus violated due process. Even if he is correct, the same clear error standard of review would apply here. *Martinez*, 317 Kan. at 164. Thus, we move directly to harmless error review.

An error is clear if this court is "firmly convinced the trial's result would have been different without the error." *Valdez*, 316 Kan. at 9.

In *Valdez*, this court held the instructional error was not clear because the State presented ample evidence Valdez intended to distribute. This included evidence of a far greater quantity than necessary to trigger the inference, empty plastic baggies, a digital scale, and testimony from a detective Valdez had sent a text asking if anyone was looking for drugs. *Valdez*, 316 Kan. at 9-10. In *Holder*, the error was not clear because there a co-defendant testified she worked with Holder to distribute marijuana and officers found 44 pounds of marijuana but no paraphernalia that might have suggested personal use. *Holder*, 314 Kan. at 807.

In this case, there was evidence of intent to distribute beyond the permissive inference. Bentley had a large quantity of methamphetamine—nearly 28 grams—and he told the interviewing detective he was going to have to "break the house off" of his 20.57 gram bag of methamphetamine. The detective testified he understood that to mean Bentley was going to share some of the methamphetamine in exchange for a place to stay. And there were plastic baggies in Bentley's vehicle. Based on this evidence, we are

not firmly convinced the jury result would have been different had the court not given the permissive inference instruction. We affirm Bentley's possession with intent to distribute conviction.

Did the evidence support the suspended license conviction?

Bentley argues the State failed to present evidence of a necessary element of the crime of driving while his license was suspended. We agree.

When the sufficiency of the evidence is challenged in a criminal case, this court reviews 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. The court does not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. Furthermore, there is no distinction between direct and circumstantial evidence in terms of probative value. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). A verdict may be supported by circumstantial evidence, if such evidence provides a basis for a reasonable inference by the fact-finder regarding the fact in issue. *State v. Logsdon*, 304 Kan. 3, 25, 371 P.3d 836 (2016).

In *State v. Jones*, 231 Kan. 366, Syl., 644 P.2d 464 (1982), this court held that, in order to obtain a conviction for driving with a suspended license, the State must prove that it complied with K.S.A. 8-255(d), requiring that the Division of Vehicles "immediately notify the person in writing" when suspending a person's driving privileges:

> "In a prosecution under K.S.A. 1981 Supp. 8-262, for driving while one's license is suspended, it is incumbent upon the State to offer proof that a copy of the order of suspension, or written notice of that action, has been mailed to the last known address of the licensee according to the division's records. The State need not prove that the licensee actually received the notice, had actual knowledge of the revocation, or had specific intent to drive while the license was suspended."

Once the State has complied with the mailing requirement of K.S.A. 8-255, "the presumption of receipt arises and is not rebuttable." *Jones*, 231 Kan. at 368.

In addition, "[w]hen a defendant has actual knowledge that his or her license has been suspended," the State is not required to present direct evidence that there has been compliance with K.S.A. 8-255(d). *State v. Campbell*, 24 Kan. App. 2d 553, 556, 948 P.2d 684 (1997). See *State v. Thomas*, 266 Kan. 265, Syl., 970 P.2d 986 (1998).

In the present case, the State made no attempt to demonstrate that the Division of Vehicles ever mailed Bentley notice that his license was suspended. The State instead sought to demonstrate Bentley had actual knowledge his license was suspended.

The only evidence in the record relating to Bentley's knowledge consisted of this testimony by Officer Long:

"Q. Did you ask him for his driver's license?
"A. Yes.
"Q. And did he tell you he didn't have one?
"A. Correct.
. . . .
"Q. And your assumption that he had a suspended driver's license, was that, in part, based upon the fact that he wasn't able to—or he told you he didn't have a license?
"A. Correct."

In closing argument, the prosecutor explained to the jury:

"Was the defendant driving without [*sic*] a suspended license? Well, you heard on the Axon video, when Officer Long asked him for his license, he said he didn't have one, tried to give him a KDOC number. . . . And *it's clear he knew* [*his license was suspended*]*, because he said I don't have one* and tried to give them a KDOC number instead." (Emphasis added.)

Was this testimony sufficient to prove Bentley knew his license was suspended? It demonstrated that Bentley knew he was driving without having a valid license on his person. But Long's testimony was highly ambiguous regarding knowledge of a *suspended* license. Because the evidence proved nothing other than that Bentley did not have a valid license with him, it does not, by itself, show he was not carrying the license because he knew it was suspended. Even in hindsight, given the full record, we have no way of knowing whether Bentley knew his license was suspended.

We do not see proving notice to be an onerous burden on the State. Surely it cannot be difficult to obtain from the Division of Vehicles a showing that it mailed or attempted to mail a defendant a notice of suspension. Or the law enforcement officers could have simply asked Bentley whether he knew his license was suspended. If he answered yes, then no further proof would have been needed.

Because the evidence presented in this case did not suffice to prove an essential element of the crime, we reverse the conviction for driving with a suspended license.

We reverse the portion of the Court of Appeals decision that reversed the firearms convictions and affirm those convictions. We reverse the portion of the Court of Appeals decision that affirmed the driving with a suspended license conviction and reverse that conviction. We affirm the conviction for possessing methamphetamine with intent to distribute. Remanded for resentencing.

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

* * *

STEGALL, J., concurring: I concur in the result based on the rationale expressed in my concurrence in *State v. Strong*, 317 Kan. 198, 527 P.3d 548 (2023).

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

No. 121,956

STATE OF KANSAS, *Appellee*, v. BRADY ALLEN NEWMAN-CADDELL, *Appellant*.

(527 P.3d 911)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Sentencing—Application of Extreme Sexual Violence Departure Factor Not an Error.* A court does not err in applying the extreme sexual violence departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) when sentencing a defendant for an aggravated kidnapping involving a nonconsensual act of sexual intercourse or sodomy.

2. SAME—*Sentencing—Motion to Correct Illegal Sentence—Not Used for Constitutional Due Process Claim.* A motion to correct an illegal sentence may not be used to litigate a constitutional due process claim.

3. SAME—*Sentencing—Appellate Review of Departure Sentence*. An appellate court may affirm a departure sentence as long as one or more of the factors relied on by the sentencing court was substantial and compelling.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 22, 2021. Appeal from Johnson District Court; BRENDA M. CAMERON, judge. Opinion filed April 21, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

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

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Stephen M. Howe*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: After entering a guilty plea to one count of aggravated kidnapping, two counts of rape, and one count of aggravated sodomy, Brady Newman-Caddell appeals his aggravated kidnapping sentence. The district court judge doubled the presumptive sentence after finding two aggravating factors: (1) Newman-Caddell committed a crime of extreme sexual violence and was a sexual predator and (2) he posed a risk of future dangerousness to society. On appeal, Newman-Caddell argues the judge erred because neither aggravating factor applies.

He first contends his aggravated kidnapping conviction is not a crime of extreme sexual violence as defined by the departure sentence statute. Under that statute, a crime of extreme sexual violence is a felony "crime involving a nonconsensual act of sexual intercourse or sodomy with any person." K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a). Newman-Caddell pleaded guilty to rape and sodomy, both of which are crimes of extreme sexual violence. But he contends the departure factor cannot apply to aggravated kidnapping because it does not include an element of sexual violence.

We reject Newman-Caddell's contention that the elements of aggravated kidnapping must include an act of extreme sexual violence for K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) to apply. Nothing in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) explicitly imposes that requirement; instead, it extends the aggravating factor to any crime *involving* a nonconsensual act of sexual intercourse or sodomy. The kidnapping statute contemplates that a kidnapping will involve other crimes. The Legislature has defined kidnapping to include "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person: . . . (2) to facilitate flight or the commission of *any* crime." (Emphasis added.) K.S.A. 2022 Supp. 21-5408(a). Any crime may include a crime of extreme sexual violence.

Consistent with the kidnapping provision, the State charged Newman-Caddell with "unlawfully, knowingly, and feloniously tak[ing] or confin[ing] a person . . . with the intent to hold such person to facilitate the commission of a crime, to wit: rape and/or aggravated sodomy." Newman-Caddell stipulated to facts supporting his plea to rape and aggravated sodomy and to an aggravated kidnapping in which he took or confined a person with the intent to commit rape, a nonconsensual act of sexual intercourse, or sodomy. In other words, Newman-Caddell committed an aggravated kidnapping involving crimes of extreme sexual violence. We thus hold the district court judge did not err in applying the statutory departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i).

Because we affirm Newman-Caddell's sentence based on the first departure factor, we need not—and do not—address his second argument that increasing his sentence based solely on a nonstatutory aggravating factor of future dangerousness to society would violate his due process rights. We affirm his sentences.

FACTUAL AND PROCEDURAL BACKGROUND

Newman-Caddell was convicted of one count of aggravated kidnapping, two counts of rape (one as an aider and abettor and the second as the assailant), and one count of aggravated sodomy (as an aider and abettor). The focus of this appeal is on the upward durational departure sentence for his aggravated kidnapping conviction.

The State charged Newman-Caddell with aggravated kidnapping in the criminal complaint by alleging:

> "COUNT I - That between the 7th day of October, 2016 and the 8th day of October, 2016, [in the] County of Johnson and State of Kansas, BRADY ALLEN NEWMAN-CADDELL, did then and there unlawfully, knowingly and feloniously take or confine a person, to-wit: H.J., by force, threat or deception, with the intent to hold such person to facilitate the commission of a crime, to-wit: rape and/or aggravated sodomy, as defined in K.S.A. 21-5503, 21-5504, and/or to inflict bodily injury or to terrorize the victim, and did inflict bodily harm on such person, a severity level 1 person felony, in violation of K.S.A. 21-5408(b), K.S.A. 21-6804 and K.S.A. 21-6807. (aggravated kidnapping)"

Factual Basis for Plea

At the plea hearing, the State recited a factual basis for the plea. The criminal activities began when a male assailant struck H.J. in the head and then forced her into a car driven by Newman-Caddell. The assailant raped and sodomized H.J. while Newman-Caddell drove around. Eventually, the car stopped, and the men switched places. Newman-Caddell then inserted something in H.J.'s vagina; she could not tell if it was his penis or fingers. After driving for a considerable time, the men eventually let H.J. out of the car and drove away.

DNA evidence, the discovery of some of H.J.'s belongings in Newman-Caddell's possession, and other evidence led to him being charged. On the eve of trial, Newman-Caddell entered a guilty plea, without a plea agreement, and stipulated to the factual basis for the plea. Although he waived his right to have a jury determine whether he was guilty, he requested a jury determine whether the State met its burden to prove beyond a reasonable doubt the two departure factors it had set out in a motion seeking an upward durational departure sentence.

Departure Motion and Sentencing

In the State's departure motion filed before Newman-Caddell entered his guilty plea, the State asserted two departure factors applied: (1) "[T]he current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender" and (2) "substantial and compelling facts" show "the defendant presents risk of future dangerousness to the public safety."

Before the trial on the departure motions, Newman-Caddell waived his right to have a jury determine whether the State met its burden to prove the two aggravating factors beyond a reasonable doubt. His waiver included a stipulation "that sufficient facts exist to prove the existence of aggravating factors number 1 and number two in the State's Notice of Intent and Motion for Upward Durational Departure." He also stipulated that evidence proved beyond a reasonable doubt that substantial and compelling reasons support an upward durational departure and that these aggravating circumstances outweigh any mitigating circumstances. He recognized his sentence could be up to 660 months total and he would have to register as a sex offender.

The district court judge reviewed Newman-Caddell's waiver on the record. Newman-Caddell confirmed he signed the waiver and initialed, read, and understood each paragraph. The judge walked through each paragraph to confirm Newman-Caddell understood and agreed with the statements in the document he had signed. The judge then accepted the waiver and stipulation but still set the case for an evidentiary hearing on the State's upward durational departure motion.

At the departure hearing, H.J. testified about the crimes committed against her. Her testimony detailed the facts of the two men kidnapping and raping her and of Newman-Caddell's co-assailant sodomizing her. She discussed being hit and choked which caused pain, mental trauma, and bodily harm.

The State also called T.H., who testified about a different incident when multiple men, including Newman-Caddell, broke into her apartment and sexually assaulted her in the presence of her young daughter. Newman-Caddell and another man repeatedly raped and sodomized her for about 30 minutes to an hour. A third man then joined the sexual assault. All three penetrated or tried to

penetrate T.H. at the same time. DNA connected Newman-Caddell to the crimes against T.H. When confronted with the DNA evidence, Newman-Caddell admitted penetrating T.H.'s vagina. Newman-Caddell also acknowledged T.H.'s two-year-old was in bed next to her while this was going on and the child awoke during the rape.

The State also presented the testimony of two women who had been in abusive domestic relationships with Newman-Caddell in which he had caused them physical harm and threatened to kill them.

Finally, the State presented expert testimony from a board-certified psychiatrist and neurologist, who concluded Newman-Caddell posed a threat of future dangerousness that neither drugs nor therapy would lessen. The expert identified Newman-Caddell as a leader in the assault, pointing to Newman-Caddell's role in saying when the assault was over and letting H.J. leave the car.

In arguments before sentencing, Newman-Caddell's counsel acknowledged his client's conduct was egregious. But counsel argued the sentence should be less than the maximum departure requested by the State because "any objective analysis would conclude that [Newman-Caddell's co-assailant's] conduct . . . was the more egregious" and H.J. told detectives she thought the outcome would have been worse if Newman- Caddell had not been in the car. He pointed out that Newman-Caddell was an aider and abettor on two of the counts. Counsel also noted that Newman-Caddell had cooperated with law enforcement.

Newman-Caddell spoke before sentencing. He apologized to H.J. and her family. Describing himself as sick and weak and ruined by drug addiction, he said he was ashamed and regretted his actions. He promised to make himself a better person in prison and asked that any sentence provide him a chance to "rectify my life and my mistakes."

Following these arguments and statements, the judge explained her decision to grant the upward durational departure, noting, "It's hard to put into words truly how horrific this case is. There really are no words. No words to adequately describe the horror that [H.J.] endured." The judge also stated, "[T]here are no words to describe how dangerous this defendant is." Although acknowledging that Newman-

Caddell was not as aggressive as his co-assailant, the judge also found that "[t]he defendant was not a minor participant at all. He was, in fact, a leader in this."

The judge ended her discussion of the circumstances of the crime by saying, "The crimes in this case are particularly heinous and cruel. In and of themselves, [Newman-Caddell] has shown to be a tremendous risk and a predator, but that's not all." The judge then turned to the testimony of the other witnesses, noting T.H. had testified to Newman-Caddell's "horrific" conduct and the two domestic violence victims had testified "about the pain they suffered in his hands."

The judge then discussed the testimony of the State's psychiatrist and stated she "was moved by how very dangerous Mr. Newman-Caddell is." She found that Newman-Caddell had exhibited predatory aggression and a history of violence since he was 16. She also cited the psychiatrist's opinion about various risk factors for future dangerousness observed in Newman-Caddell's history. The judge also noted that the psychiatrist found "psychopathic traits, which makes him much more likely to commit crimes again." Further the psychiatrist "didn't know of anything to treat this sort of disorder, and the defendant has a longstanding trait in this defendant not usually responsive to medication, and he doesn't see any decrease in dangerousness for this defendant." Continuing to address Newman-Caddell's future dangerousness, the judge observed that the psychiatrist "testified the defendant is a sexual predator, and he's even concerned for the women who work in the Department of Corrections, as well as the pets in pet therapy."

Based on this evidence the judge found that Newman-Caddell was a "predator. He is a great risk to women in our community, as well as women in the Department of Corrections. He is a great risk to future harm, absolutely a predator and a risk to future harm." The judge ended her findings by saying, "This crime was horrific, and Mr. Newman-Caddell is extremely dangerous. He deserves every single minute of every single day that I can give."

The district court sentenced Newman-Caddell to the maximum 165-month sentence on Count 1, aggravated kidnapping, then doubled it to 330 months. The district court imposed the 165-month sentence for Count 2, rape, then doubled it to 330 months. The district court explained it departed on Counts 1 and 2 based "upon the fact the defend-

ant is a predator and future harm." The district court ordered the sentences be consecutive for a 660-month term. The district court imposed a 165-month sentence for Count 3, rape, to run consecutive to Count 1 and concurrent to Count 2. The district court imposed a 165-month sentence for Count 4, aggravated criminal sodomy, to run consecutive to Count 1 and concurrent to Counts 2 and 3.

Appeal

Newman-Caddell timely appealed. The Court of Appeals affirmed the departure sentence, holding Newman-Caddell committed a crime of extreme sexual violence by kidnapping H.J. to facilitate rape and sodomy. The panel concluded it need not address the district court's findings of future dangerousness because the extreme sexual violence aggravating factor alone supported the district court's departure sentence. See *State v. Newman-Caddell*, No. 121,956, 2021 WL 4932035, at *6 (Kan. App. 2021) (unpublished opinion).

Newman-Caddell timely petitioned for review. The State filed a conditional cross appeal, urging us to reach the issue of Newman-Caddell's future dangerousness and to affirm the judge on that basis if we reject Newman-Caddell's argument that his aggravated kidnapping conviction was not a crime of extreme sexual violence. This court granted the petition and cross-petition and has jurisdiction. See K.S.A. 20-3018(b) (providing for jurisdiction over petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

The revised Kansas Sentencing Guidelines Act (KSGA) applies to Newman-Caddell's sentence. See K.S.A. 2022 Supp. 21-6801; K.S.A. 2022 Supp. 21-6802. The KSGA provides that a district court "shall impose the presumptive sentence provided by the sentencing guidelines unless the judge finds substantial and compelling reasons to impose a departure sentence." K.S.A. 2022 Supp. 21-6815(a). The statute provides a nonexclusive list of aggravating factors that may support an upward departure sentence. See *State v. Nguyen*, 304 Kan. 420, 426, 372 P.3d 1142 (2016) (recognizing statutory factors are nonexclusive). Here, the State relied on the crime of extreme sexual violence statutory

factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). It also presented the nonstatutory factor of future dangerousness to society. See *State v. Yardley*, 267 Kan. 37, 44, 978 P.2d 886 (1999) ("Future dangerousness may constitute a factor for an upward departure.").

Newman-Caddell's petition for review first focuses on the Court of Appeals' ruling upholding the district court's decision to depart because Newman-Caddell committed a crime of extreme sexual violence. Newman-Caddell argues his sentence was illegal because aggravated kidnapping is not a crime of extreme sexual violence. He asks us to limit crimes of extreme sexual violence as defined by K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) to those explicitly including a statutory element requiring a nonconsensual act of sexual intercourse or sodomy. K.S.A. 2022 Supp. 21-5408(a), defining kidnapping and aggravated kidnapping, does not refer to nonconsensual acts of sexual intercourse or sodomy. Newman-Caddell thus argues his departure sentence was illegal because it depended on an erroneous application of K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i).

Illegal Sentence Considerations and Standard of Review

Newman-Caddell presents this issue for the first time on appeal. Usually, a party may not raise an issue for the first time on appeal. This general rule does not apply, however, when a defendant frames the issue on appeal as an illegal sentence claim because a defendant may raise an illegal sentence claim at any time while serving the sentence. See K.S.A. 2022 Supp. 22-3504(a); *State v. Eubanks*, 316 Kan. 355, 360, 516 P.3d 116 (2022).

A sentence is illegal if (1) a court without jurisdiction imposes it, (2) it fails to conform to the applicable statutory provision in character or term of authorized punishment, or (3) it is ambiguous as to the time and manner it is to be served. K.S.A. 2022 Supp. 22-3504(c). Newman-Caddell's argument hinges on the second basis for sentence illegality. He contends the sentence fails to conform to the applicable statutory provision because the phrase "a crime of extreme sexual violence" does not encompass the offense of aggravated kidnapping. See K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). Sentence legality poses a question of law subject

to unlimited review. *State v. Jamerson*, 309 Kan. 211, 214, 433 P.3d 698 (2019).

Newman-Caddell's stipulation that facts supported the departure factor also does not foreclose his appeal because the appeal presents a question of law. It is well-settled Kansas law that stipulations "cannot be invoked to bind or circumscribe a court in its determination of questions of law." *In re Estate of Maguire*, 204 Kan. 686, 691, 466 P.2d 358 (1970).

We thus consider the question of the legality of the sentence for the first time on appeal. At the heart of this question of law is the meaning of K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). Statutory interpretation also presents a question of law subject to unlimited review. *Jamerson*, 309 Kan. at 214.

Well-established principles guide courts when interpreting a statute. First, we recognize that legislative intent controls. To discern that intent, we consider the statute's words. When the statutory language is plain and unambiguous, we apply the language as written. But when the language is not plain but ambiguous, we may determine legislative intent by considering other sources, such as legislative history, canons of construction, and background considerations. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020).

We recently clarified a point that applies when, as with K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i), other statutory provisions may help determine legislative intent. The doctrine of *in pari materia* means that statutes relating to the same matter may be read together to discern intent. While the doctrine is sometimes applied to an ambiguous statute, courts may also use it "to assess whether the statutory language is plain and unambiguous in the first instance." *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). Courts may look to the context in which the Legislature used the language and the broader context of the entire statute to discern legislative intent. In this way, the doctrine "can provide substance and meaning to a court's plain language interpretation of a statute." 316 Kan. at 224.

If, however, we conclude the statutory language in a criminal statute is ambiguous, courts may apply the rule of lenity by strictly construing the provision and resolving any reasonable doubt as to

the meaning in the defendant's favor. "But this is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative intent." *State v. Griffin*, 312 Kan. 716, 720, 479 P.3d 937 (2021).

With these principles in mind, we consider the sentencing scheme that applies to upward durational departure sentences and the offense of aggravated kidnapping.

Crime of Extreme Sexual Violence Aggravating Factor

The statutory provision we here interpret allows a departure from the presumptive sentence if the "current crime of conviction is a crime of extreme sexual violence and the defendant is a predatory sex offender." K.S.A. 2022 Supp. 21-6815(c)(2)(F). The statute defines what crimes a court may consider to be a "crime of extreme sexual violence" with a list of criteria. The only criteria potentially applicable here is "a crime involving a nonconsensual act of sexual intercourse or sodomy with any person." See K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a).

Newman-Caddell stipulated to the existence of this statutory factor before the district court. Now on appeal, he does not dispute the district court judge's finding that he is a predator, but he does contend his crime of aggravated kidnapping is not a crime of extreme sexual violence. As we have noted, he argues the statutory definition of a crime of extreme sexual violence requires the crime include or incorporate elements of a nonconsensual act of sexual intercourse or sodomy, which aggravated kidnapping does not.

Reading the definition of crime of extreme sexual violence *in pari materia*, we conclude this is too narrow a reading. K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) states:

"(i) 'Crime of extreme sexual violence' is a felony limited to the following:

"(a) A crime involving a nonconsensual act of sexual intercourse or sodomy with any person;

"(b) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is 14 or more years of age but less than 16 years of age and with whom a relationship has been established or promoted for the primary purpose of victimization;

"(c) a crime involving an act of sexual intercourse, sodomy or lewd fondling and touching with any child who is less than 14 years of age;

"(d) aggravated human trafficking, as defined in K.S.A. 21-5426(b), and amendments thereto, if the victim is less than 14 years of age; or

"(e) commercial sexual exploitation of a child, as defined in K.S.A. 21-6422, and amendments thereto, if the victim is less than 14 years of age."

Unlike subpart (a), which is at issue, subparts (d) and (e) include the phrase "as defined in" and then refer to a specific statute that sets out elements of a crime. This wording thus incorporates the elements defined by those statutes—the outcome Newman-Caddell seeks under subpart (a).

Subparts (a), (b), and (c) do not include similar wording, however, and instead describe crimes *involving* specified acts. "Involving" is the gerund of the verb involve. "Involve" has different meanings, including "to have within or as part of itself: include"; "to require as a necessary accompaniment: entail"; "affect"; "to relate closely: connect." See Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/involve; American Heritage Dictionary 923 (5th ed. 2011).

In subparts (c)(2)(F)(i)(a), (c)(2)(F)(i)(b), and (c)(2)(F)(i)(c), the Legislature defined the crime as "involving" certain described sexual acts but without incorporating elements of a crime. Rather than describe or incorporate elements, each describes facts that must exist. Subpart (a) requires the facts establish that nonconsensual intercourse or sodomy occurred. Subparts (b) and (c) also apply when there is proof of sexual intercourse or sodomy. But, unlike subpart (a), they do not require a lack of consent and apply only when the victim of a prescribed sexual act is of an age within a specified range. Although subparts (a), (b), and (c) have differences, in each, the Legislature used the word "involving" before specifying a sex act, an age of the victim, or another circumstance to define whether the charged crime is a crime of extreme sexual violence. The Legislature thus intended consideration of the facts involved, not the elements delineated in a statute defining a crime.

Other uses of the verb "involve" in parts of K.S.A. 2022 Supp. 21-6815(c)(2) other than (F)(i), the extreme sexual violence provision, confirm this interpretation. For example, (c)(2)(D) provides that an aggravating factor may be found when the "offense involved a fiduciary relationship which existed between the defendant and the victim." This subsection uses the term "involved" to preface a description of the factual relationship that must be found to exist for the aggravating factor to apply. Cf. *State v.*

Horn, 40 Kan. App. 2d 687, 697, 196 P.3d 379 (2008) (existence of fiduciary relationship determined on case-by-case basis), *rev'd on other grounds by* 291 Kan. 1, 11-12, 238 P.3d 238 (2010).

These various provisions considered *in para materia* reveal that the Legislature could have narrowed the scope of K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a) to specific crimes as it did in (c)(2)(F)(i)(d) and (c)(2)(F)(i)(e) if that had been its intent. Instead, it drafted (a) broadly enough to encompass those instances, such as this one, when a crime, as committed, involves nonconsensual acts of sex or sodomy even when the statute defining the crime of conviction did not prescribe such conduct as a necessary element of the offense.

At oral argument, Newman-Caddell's counsel made a different *in para materia* argument, suggesting the Legislature used the terms "offense" and "crime" to mean different things in the statute. He posited the Legislature used "offense" when it intended that a jury or a court could look at the facts of the offense but used "crime" when the Legislature intended a jury or a court to look only at the elements set forth in the statute defining the crime of conviction. We disagree.

Our review of K.S.A. 2022 Supp. 21-6815 reveals the Legislature used the terms synonymously. Perhaps the clearest example of this is in K.S.A. 2022 Supp. 21-6815(c)(1)(E), defining a mitigating factor as the "degree of harm or loss attributed to the current *crime* of conviction was significantly less than typical for such an *offense*." (Emphases added.) Here, the phrase "such an offense" refers to the "current crime of conviction," showing the Legislature equates "offense" with "crime," at least for purposes of this statute. Other places in the statute also show equivalence between offense and crime in describing mitigating and aggravating factors. E.g., K.S.A. 2022 Supp. 21-6815(c)(1)(C)-(D), 21-6815(c)(2)(B)-(D), (G) (using offense); 21-6815(c)(1)(A)-(B), (F), 21-6815(c)(2)(F), (H), 21-6815(c)(3) (using crime). In short, the Legislature here uses "crime" and "offense" to mean the same thing in this statute.

We thus reject Newman-Caddell's statutory interpretation arguments and hold K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a) unambiguously allows consideration of the facts involved in the crime when determining whether the State has proven the extreme sexual crime aggravating factor.

We find no constraints against such an interpretation of the statute. While Newman-Caddell argues against considering the facts involved in the crime, he cites no authority in his petition for review suggesting any statutory or constitutional provision forbids such an approach. Below, he cited two cases, neither of which prohibits the approach we take today.

First, Newman-Caddell relied on this court's opinion in *State v. Spencer*, 291 Kan. 796, 825, 248 P.3d 256 (2011). There, we noted that crimes of extreme sexual violence include "rape, aggravated criminal sodomy, and aggravated indecent liberties perpetrated on children younger than 14." As the Court of Appeals panel noted in distinguishing the case, "the *Spencer* court did not find that the crimes covered by the statute were limited to the exclusive list highlighted by Newman-Caddell." *Newman-Caddell*, 2021 WL 4932035, at *5. The *Spencer* list merely highlights some crimes covered, and Newman-Caddell overreads that brief description to say it "emphasiz[ed] the nature of the crimes themselves, meaning the elements of the crimes, as opposed to the acts committed during those crimes." The *Spencer* court did not decide the question now presented about whether we look to elements or facts when applying K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i)(a). *Spencer* does not support Newman's preferred statutory interpretation. See *Spencer*, 291 Kan. at 819-29.

Second, Newman-Caddell cited *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to the Court of Appeals. But *Apprendi*'s protections do not apply to him because he voluntarily waived the right to a jury trial on the departure factors and stipulated "that sufficient facts exist to prove the existence of aggravating factors number 1 and number two in the State's Notice of Intent and Motion for Upward Durational Departure." He also stipulated that evidence proved beyond a reasonable doubt that substantial and compelling reasons support an upward durational departure and that these aggravating circumstances outweigh any mitigating circumstances. See *Horn*, 291 Kan. at 11 ("To summarize, if a defendant waives a trial jury by pleading guilty to the criminal offense and the district court has accepted the plea and the trial jury waiver, K.S.A. 21-4718[b][4] directs that an upward durational departure sentence proceeding is to be conducted by the court, not a jury.");

see also *State v. Bello*, 289 Kan. 191, 199, 211 P.3d 139 (2009) ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." [quoting *Blakely v. Washington*, 542 U.S. 296, 303-04, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004)]).

Newman-Caddell gives us no basis to conclude constitutional or statutory law precluded the judge from applying the departure factor for a crime of extreme sexual violence after finding that the factual basis for his plea established he had committed an aggravated kidnapping to facilitate rape and sodomy.

In sum, the district court judge did not err in applying the extreme sexual violence departure factor in K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i) because Newman-Caddell committed an aggravated kidnapping involving a nonconsensual act of sexual intercourse or sodomy. We hold the district court imposed a legal sentence when it granted the State's upward departure motion.

Unpreserved Due Process Challenge

Newman-Caddell also challenged his upward durational departure sentence as violating due process because the district court relied on a nonstatutory factor to support its decision—its determination he presented a risk of future dangerousness. He acknowledges he failed to raise the issue below, but he argues we may consider it a motion to correct an illegal sentence or under a preservation exception.

But a motion to correct an illegal sentence may not be used to litigate a constitutional due process claim. See *State v. Kingsley*, 306 Kan. 530, 536, 394 P.3d 1184 (2017) ("Kingsley's due process claim is not cognizable in a motion to correct an illegal sentence."); see also K.S.A. 2022 Supp. 22-3504(c)(1) (defining "illegal sentence"). Newman-Caddell thus may not raise his due process challenge as an illegal sentence claim under K.S.A. 2022 Supp. 22-3504.

That means we should consider Newman-Caddell's due process argument only if we, in our discretion, apply a preservation exception. *State v. Keys*, 315 Kan. 690, 696, 510 P.3d 706 (2022). We decline to exercise that discretion here. We have recognized that an appellate court may affirm a departure sentence as long as one or more of the factors relied on by the sentencing court was substantial and compelling. *State v. Ippert*, 268 Kan. 254, Syl. ¶ 2, 995 P.2d 858 (2000). And

we have already affirmed the district court's upward departure sentence because Newman-Caddell's crime was a crime of extreme sexual violence and he is a sexual predator. Addressing this unpreserved question would change nothing in this case. We would in essence be rendering an advisory opinion, something we do not do. *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 898, 179 P.3d 366 (2008). We decline to exercise our discretion to consider Newman-Caddell's unpreserved constitutional due process challenge to the nonstatutory departure factor applied by the district court here.

Likewise, we need not consider the State's conditional cross-petition on this issue. The State asked us to address this issue only if we found the district court judge erred in finding Newman-Caddell committed a crime of extreme sexual violence. And we have affirmed that finding.

CONCLUSION

We hold Newman-Caddell's aggravated kidnapping committed to facilitate rape and aggravated sodomy constituted a crime of extreme sexual violence under K.S.A. 2022 Supp. 21-6815(c)(2)(F)(i). We affirm the district court's upward durational departure sentence on the aggravated kidnapping count.

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

STANDRIDGE, J., not participating.

No. 125,499

In the Matter of JEFF L. MCVEY, *Respondent*.

(527 P.3d 900)

ORIGINAL PROCEEDING IN DISCIPLINE

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

Original proceeding in discipline. Opinion filed April 21, 2023. One-year suspension.

Gayle B. Larkin, Disciplinary Administrator, argued the cause and was on the formal complaint for the petitioner.

Thomas J. Berscheidt, of Berscheidt Law Office, of Great Bend, argued the cause, and *Jeff Lee McVey*, respondent, argued the cause pro se.

PER CURIAM: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator (ODA) against the respondent, Jeff L. McVey, of Great Bend, an attorney admitted to the practice of law in Kansas in 1993. This matter involves the filing of a formal complaint, a hearing on the complaint, and findings of the hearing panel. 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), McVey timely responded. In due course, respondent filed a proposed probation plan. An appointed panel held a formal hearing on the complaint, during which respondent personally appeared and was represented by counsel. The hearing panel determined the respondent violated KRPC 1.15 (2023 Kan. S. Ct. R. at 372) (safekeeping property); KRPC 8.4(c) (2023 Kan. S. Ct. R. at 434) (professional misconduct); and Rule 210 (2023 Kan. S. Ct. R. at 263) (duty to cooperate).

More specifically, the panel made the following findings of fact and conclusions of law, together with its recommendation to this court:

"*Findings of Fact*

. . . .

"20. The hearing panel finds the following facts, by clear and convincing evidence:

"21. From 1993 until May 29, 2020, the respondent practiced with the firm McPherson Law Offices, Chtd. From 1993 to 1997, the respondent was an associate attorney of McPherson Law Offices. In 1997, the respondent became a shareholder of the firm. The respondent paid attorney Brock McPherson $25,000 for the ownership interest in McPherson Law Offices.

"22. The $25,000 the respondent paid for his ownership interest in McPherson Law Offices was paid in $2,500 installments. The respondent received a salary of $52,500 per year every year from 1998 until he left the firm, and a $2,500 annual bonus plus accrued interest. After receiving the bonus, the respondent wrote a check back to Mr. McPherson for $2,500 plus accrued interest to go toward the $25,000 owed for his ownership interest in the firm. The interest purchased was to be ninety-five percent of the stock.

"23. Mr. McPherson never assigned any stock to respondent. Respondent believed this violated the agreement but never pressed Mr. McPherson on the issue. When the respondent left McPherson Law Offices on May 29, 2020, Mr. McPherson did not buy back the respondent's ownership interest. The respondent's name was removed from annual filings for McPherson Law Offices with the Kansas Secretary of State in 2019.

"B.G. Domestic Matter

"24. On March 13, 2020, B.G. retained the respondent and paid him $1,000 in cash as an advanced fee to represent B.G. in Russell County District Court case number 2019-DM-000051.

"25. The respondent placed the $1,000 cash from B.G. into his desk drawer. The respondent failed to deposit the $1,000 into the firm's trust account, or give the funds to the firm at all, at any point. The respondent did not note this payment from B.G. in the firm's records.

"26. The respondent memorialized the $1,000 payment from B.G. on the back of a 'McPherson & McVey Law Offices, Chartered' business card.

"27. The respondent was to bill against the $1,000 advanced funds from B.G. at a rate of $200 per hour. The $1,000 was not earned when the respondent received it from B.G.

"28. The respondent testified that after he put this cash in his desk drawer, 'it got commingled with other funds and deposited somewhere else.' The respondent further testified, 'frankly, I don't know for sure where it went.'

"29. The respondent did not repay the $1,000 because the firm owed the respondent more than that amount when the respondent left the firm on May 29, 2020. The respondent was owed $1,009.61 for his last week's wages, the amount of his ownership interest in the firm, and some unreimbursed mileage expenses. The respondent believed that by May 29, 2020, he had earned the full $1,000.

"30. At the time, the respondent was under extreme stress and was taking medication for depression and anxiety that affected his memory and alertness.

"M.K. Escrow Matter

"31. In addition to practicing law, the respondent ran a rental management business out of the McPherson Law Offices building.

"32. A separate receipt book was provided to the firm's receptionist to utilize for receiving rental management business payments.

"33. The respondent began managing rental properties for M.K. around 2010. The respondent would list the properties, locate tenants, collect rent, address minor repairs, and disburse the rental income to M.K. on a monthly basis.

"34. The respondent opened a checking account with Community Bank to use for the rental management business in 2007. The checking account was a personal checking account in the name of the respondent and the respondent's wife.

"35. The respondent testified that he had a separate written agreement with M.K. for managing M.K.'s rental properties informing M.K. that the respondent was not managing the rentals as part of the firm's law practice. However, when asked during the disciplinary investigation to provide a copy of the written agreement, the respondent did not provide a copy.

"36. The respondent had also at times represented M.K. as her attorney. In 2012, M.K. asked the respondent to draft a buy-sell agreement for real property M.K. owned on Odell Street.

"37. The respondent did not manage the Odell Street property as he had the rental properties.

"38. After drafting the buy-sell agreement for M.K.'s Odell Street property, the respondent served as an escrow agent for payments made by the buyers of the Odell Street property to M.K.

"39. In July 2015, M.K. sold all of her rental properties.

"40. The respondent testified that during the time he managed the escrow for the Odell Street property, M.K. was elderly.

"41. The respondent continued to serve as escrow agent for receiving payments from the buyers of the Odell Street property. The respondent deposited the monthly cash payments from the buyers into the Community Bank personal checking account under his name and his wife's name that was used for his rental management business. The respondent also paid expenses such as real estate taxes and insurance for the Odell Street property from this personal checking account.

"42. M.K. expected to receive monthly disbursements from the respondent for the payments to M.K. from the escrow but would typically wait five to six months before receiving a disbursement from the respondent. M.K. relied in part on these payments to pay her living expenses.

"43. M.K. told law enforcement that she received letters from the respondent on the McPherson law firm letterhead, but the checks she received from the respondent for the escrow disbursements came from a personal checking account in the respondent's name and his wife's name.

"44. In January 2020, February 2020, and March 2020, the respondent received three payments—the January, February, and March payments—from the Odell Street property buyers. At that time, the payments were between $400 and $450 per month. These three payments had not yet been disbursed to M.K. Thus, when the April 21, 2020, Community Bank statement was issued, the balance in the account should have been at least $1,200.

"45. The April 21, 2020, Community Bank statement shows an ending balance of $138.44.

"46. In April 2020, the respondent received the April payment from the Odell property buyers. By then, four payments for January through April had not yet been disbursed to M.K. Thus, the balance in the Community Bank account should have been at least $1,600. The May 19, 2020, Community Bank statement shows an ending balance of $122.36.

"47. The unredacted portions of the bank statements in Exhibit 6 show several debits made from this account to Dillons and Wal-Mart. The respondent testified that the redactions were incomplete and he failed to redact these Dillons and Wal-Mart transactions.

"48. The respondent testified that he used M.K.'s funds to pay for personal expenses.

"49. The respondent did not distribute the January 2020, February 2020, March 2020, or April 2020 payments to M.K. until August 6, 2020, when he gave M.K. a cashier's check for $1,700, as discussed further below.

"50. The August 6, 2020, payment to M.K. was not made from Community Bank, but via a cashier's check issued from Bank of the West.

"51. The respondent had commingled the Odell Street property buyers' cash payments with other cash and had to deposit other funds in order to cover the $1,700 payment the respondent made to M.K. on August 6, 2020.

"52. During the lunch hour, on May 29, 2020, one of the buyers came to McPherson Law Offices to make the May 2020 payment under the buy-sell agreement. The respondent was away for lunch and an employee of the firm received the payment and provided a receipt.

"53. Later in the day on May 29, 2020, Mr. McPherson terminated the firm's business relationship with the respondent. Mr. McPherson asked the respondent to clean out his desk and leave that day. The respondent did not receive the May 2020 payment for the Odell Street property, and this payment was apparently provided by McPherson Law Offices to M.K. The record does not reflect respondent asserted any objection to Mr. McPherson's authority to terminate him, even though respondent believed he owned ninety-five percent of the corporation.

"54. On June 9, 2020, R.A., one of the buyers making payments for the Odell Street property, reported to law enforcement that she paid $450 to the respondent in January, February, March, and April 2020, but that the respondent had not forwarded the payments to M.K. The matter was referred to the Kansas Bureau of Investigation for criminal investigation.

"55. The respondent and M.K. were interviewed by the KBI.

"56. The respondent informed the buyers by letter that he was no longer at McPherson Law Offices. Although M.K. was cc'd on the letter to the buyers, M.K. did not receive a copy of the letter. The buyers were told in the letter to continue making payments for the Odell Street property to the respondent at a new address.

"57. M.K. never received notice from the respondent that he had left the McPherson Law Offices.

"58. M.K. called the respondent's phone number to ask for the four January through April 2020 payments. The respondent's wife answered the phone and told M.K. she would go get the respondent, but after M.K. waited for several minutes the phone would disconnect and M.K. never got to talk to the respondent.

"59. M.K. also drove to the respondent's house and although there were several vehicles at the respondent's home, no one answered the door.

"60. M.K. also wrote the respondent a letter that she sent via registered mail to try to collect the January through April escrow payments the respondent should have been holding on her behalf.

"61. Because she was unable to contact the respondent, M.K. called the respondent's mother B.M. M.K. told B.M. that M.K. could not reach the respondent. At one point, M.K. went to B.M.'s house to speak to B.M. and B.M. slammed the door in her face. B.M. told M.K. that M.K. ruined the respondent's life.

"62. The respondent was not ultimately charged with a criminal offense.

"63. The respondent provided M.K. with a cashier's check from Bank of the West, dated August 6, 2020, for $1,700. The memo line of the check read 'Paid in Full'.

"64. In an email to disciplinary investigator Gerald O. Schultz dated September 17, 2020, the respondent wrote that the reason he paid M.K. $1,700 is because that is the amount M.K. stated she was owed.

"Disciplinary Investigation

"65. On July 10, 2020, now retired deputy disciplinary administrator Kate F. Baird sent a letter to the respondent notifying the respondent that the complaint in this matter had been docketed for investigation and directing the respondent to provide a written response within 20 days.

"66. The respondent provided a timely response.

"67. Gerald O. Schultz was assigned to investigate the complaint against the respondent. Mr. Schultz requested additional information from the respondent, including a copy of the written agreement between the respondent and M.K. regarding management of the Odell Street property escrow as well as documentation of payments made by the buyers and how those payments were distributed. The respondent did not provide a written agreement or sufficient documentation of the payments and how those payments were distributed.

"68. On October 12, 2020, the respondent sent an email to Mr. Schultz attaching PDF copies of bank statements that the respondent stated reflected the payments for real estate taxes and insurance for the Odell Street property. The attached bank statements were for a personal checking account at Community Bank, in the respondent's name and the respondent's wife's name.

"69. The bank statements attached to the respondent's emails were for statement dates: May 19, 2020, April 21, 2020, December 17, 2019, April 16, 2019, May 15, 2018, April 17, 2018, March 20, 2018, February 20, 2018, January 16, 2018, October 17, 2017, and March 15, 2016. The bank statements provided had significant redactions done with a dark marker, which did not completely conceal the typed information underneath.

"70. The respondent testified that he made the redactions on these bank statements. He said he did not recall why he made these redactions.

"71. The unredacted portions of the bank statements in Exhibit 6 show several debits made from this account to Dillons and Wal-Mart. The respondent testified that the redactions were incomplete and he failed to redact these Dillons and Wal-Mart transactions.

"72. The respondent did not provide a full accounting of the income and disbursements for the Odell Street property escrow account to Mr. Schultz, even though Mr. Schultz asked for them two or three times.

"73. The respondent obtained the bank statements that he did provide through the Community Bank website. The respondent testified that he did not print off all of the statements because he 'printed off what [he] believed was relevant at the time.'

"74. In addition, retired disciplinary administrator Stanton Hazlett contacted counsel for the respondent requesting an accounting of the buyers' payments and how those payments were distributed. The respondent did not provide an accounting.

"75. On August 2, 2021, the respondent wrote a letter to Mr. Hazlett providing some peripheral information about the Odell Property escrow arrangement and his leaving McPherson Law Offices. However, the respondent did not provide an accounting as requested by Mr. Hazlett.

"76. The respondent told the disciplinary investigators and also asserted during the formal hearing that Mr. McPherson kept the respondent's file containing the Odell Street property escrow management. The respondent admitted that he took no action to request or obtain those records from Mr. McPherson.

"*Conclusions of Law*

"77. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.15 (safekeeping property), KRPC 8.4(c) (professional misconduct), and Rule 210 (duty to cooperate).

"78. During the formal hearing, the disciplinary administrator argued that the evidence presented during the hearing showed that the respondent also violated KRPC 1.16 (declining or terminating representation) by failing to take proper steps to withdraw from representing B.G. The amended formal complaint did not specify KRPC 1.16 as a rule violated by the respondent.

"79. When the formal complaint alleges facts that would support findings of violations of additional rules, the hearing panel is allowed to consider additional violations. *See State v. Caenen*, 235 Kan. 451, 681 P.2d 639 (1984) ('It is not incumbent on the board to notify the respondent of charges of specific acts of misconduct as long as proper notice is given of the basic factual situation out of which the charges might result.' [Internal citations omitted.]).

"80. However, even if the hearing panel determined that proper notice was given of the basic facts supporting a KRPC 1.16 violation, the hearing panel concludes there was not clear and convincing evidence of a KRPC 1.16 violation.

"81. On July 27, 2022, the parties filed a joint stipulation to the following fact: 'After the respondent's employment was terminated by Brock McPherson on May 29, 2020, Mr. McPherson represented [B.G.] in case number 2019-DM-000051 in Russell County District Court.'

"82. The parties' stipulation establishes that McPherson Law Offices continued to represent B.G. in the Russell County District Court matter, which negated the need to allow time for employment of other counsel or surrendering B.G.'s papers and other property (which McPherson Law Offices still held). Further, the respondent testified that by May 29, 2020, the $1,000 advanced fee paid by B.G. had been earned, and clear and convincing evidence was not presented to contradict this assertion.

"83. Accordingly, the hearing panel does not conclude that the respondent violated KRPC 1.16 (declining or terminating representation).

"84. The hearing panel does, however, conclude that the respondent violated KRPC 1.15 (safekeeping property), KRPC 8.4(c) (professional misconduct), and Rule 210 (duty to cooperate), as detailed below.

"KRPC 1.15(a)

"85. Lawyers must properly safeguard the property of their clients and third persons. Properly safeguarding the property of others necessarily requires lawyers to deposit unearned fees into an attorney trust account. KRPC 1.15(a) specifically provides, in part, that lawyers 'shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded.'

"86. The respondent failed to utilize an attorney trust account to deposit the $1,000 advance fee paid by B.G. Instead, the respondent placed the $1,000 cash payment into his desk drawer where it became commingled with other cash placed in the drawer and eventually was lost or spent. As a result, the respondent failed to adequately safeguard B.G.'s $1,000 advanced fee.

"87. Further, the respondent received the four January through April 2020 payments belonging to M.K. from the buyers of the Odell Street property and failed to properly safeguard those funds or keep them separate from the respondent's own property.

"88. The respondent either held onto the January through April 2020 payments in cash and commingled it with other cash belonging to himself or third persons, or the respondent deposited the funds into the Community Bank personal checking account in the name of himself and his wife and spent it on personal expenditures.

"89. The Community Bank statements show that on more than one occasion the account dropped below the amount that the respondent should have been holding at the time on M.K.'s behalf for the Odell Street property escrow.

"90. Further, the bank statements in Exhibit 6 show many redacted entries plus several unredacted debits made from the Community Bank checking account to Dillons and Wal-Mart. The respondent testified that he used M.K.'s funds to pay for personal expenses.

"91. Further, it is clear that the respondent held the funds in connection with his representation of M.K. First, M.K. hired the respondent to draft the buy-sell contract between M.K. and the buyers of the Odell Street property. Second, while he stated he had a separate written agreement with M.K. to manage her rental

properties, the respondent did not produce a copy of the agreement when requested during the disciplinary investigation. The respondent's assertion that a separate agreement existed lacks credibility. Also, there was no evidence that the respondent had any agreement with M.K. establishing a relationship that was not an attorney-client relationship for the escrow management under the buy-sell contract. Third, when the respondent communicated with M.K. about the Odell Street escrow, he wrote to her from the McPherson law office. Finally, M.K. told law enforcement that it was because the respondent was an attorney that she elected to have the respondent manage the escrow as opposed to having a bank manage the escrow. Respondent admitted that M.K. could have rightfully believed respondent was acting as her attorney in providing the escrow-like services, and that the situation blurred the lines between legal representation and property management. Even if respondent was an escrow agent he had a fiduciary duty to safeguard M.K.'s funds.

"92. It is clear that without the respondent's attorney-client relationship with M.K., M.K. would not have selected the respondent to manage the escrow for the transaction.

"93. The hearing panel concludes that the respondent managed the Odell Street escrow for M.K. in connection with his representation of M.K.

"94. In his answer to the amended formal complaint, the respondent admitted he violated KRPC 1.15.

"95. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15(a) by failing to properly safeguard funds belonging to B.G. and M.K. and keep their property separate from the respondent's own property.

"KRPC 1.15(b)

"96 Lawyers must deal properly with the property of their clients. Specifically, KRPC 1.15(b) provides: 'Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.' Further, 'a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.' KRPC 1.15(b).

"97. The respondent violated KRPC 1.15(b) when he failed to promptly notify M.K. that he had received payments from the Odell Street property buyers for January, February, March, and April 2020 and failed to promptly deliver those funds to M.K. that M.K. was entitled to receive.

"98. In his answer to the amended formal complaint, the respondent admitted he violated KRPC 1.15.

"99. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.15(b) by failing to promptly notify M.K. of funds he held on her behalf and by failing to promptly distribute those funds to M.K.

"KRPC 1.15(d)

"100. KRPC 1.15(d) requires an attorney to preserve 'the identity of funds and property of a client.'

"101. The respondent violated KRPC 1.15(d) by placing the $1,000 cash advanced fee paid by B.G. into his desk drawer where other cash was kept by the respondent. The respondent testified that after he put this cash in his desk drawer, 'it got commingled with other funds and deposited somewhere else.' The respondent further testified, 'frankly, I don't know for sure where it went.'

"102. The respondent also violated KRPC 1.15(d) by failing to deposit and/or failing to properly account for the January through April 2020 payments from the Odell Street property buyers that belonged to M.K. The respondent was unable to recall whether he deposited all of the buyers' cash payments into the Community Bank account, and even if he had, acknowledged that he failed to properly account for those deposits and spent M.K.'s money on the respondent's personal expenditures.

"103. The respondent was responsible for properly accounting for and identifying M.K.'s funds. However, the respondent was not certain how much of M.K.'s money he was supposed to be holding. The respondent paid $1,700 to M.K. on August 6, 2020, simply because that was the amount M.K. said she was owed.

"104. In his answer to the amended formal complaint, the respondent admitted he violated KRPC 1.15.

"105. The respondent violated KRPC 1.15(d) by comingling B.G.'s funds with his own and/or third person's funds by placing the $1,000 cash advanced fee into his desk drawer, not depositing the cash into the firm's trust account, failing to account for the cash, and eventually not being aware of where the cash went. The respondent also violated KRPC 1.15(d) by commingling M.K.'s funds with his own funds, not depositing and/or accounting for M.K.'s funds, and eventually spending M.K.'s funds on his own personal expenditures. As such, the hearing panel concludes that the respondent violated KRPC 1.15(d).

"KRPC 8.4(c)

"106. 'It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.' KRPC 8.4(c).

"107. The respondent also engaged in conduct that involved dishonesty, deceit, and misrepresentation when he represented to M.K. that he was managing the escrow funds for the Odell Street property as a professional fiduciary but instead was spending M.K.'s escrow funds on his own personal expenditures.

"108. Further, M.K. had to go to great efforts to find the respondent to get her funds back from him.

"109. When the respondent finally provided M.K. a cashier's check on August 6, 2020, the amount paid was not based on a proper accounting by the respondent of what M.K. was owed but instead was based on the amount M.K. demanded.

"110. The respondent converted M.K.'s funds to his own use, and it is not clear whether M.K. has been fully paid what she is owed.

"111. Finally, the respondent redacted bank statements he provided to the disciplinary administrator without any legitimate explanation. The respondent stated he intended to redact several Dillons and Wal-Mart transactions on one of the pages, but missed them. These transactions show the respondent spent funds deposited into the account he used to manage rental businesses for his own personal expenditures.

"112. As such, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"[Rule] 210

"113. Lawyers must cooperate in disciplinary investigations. Rule 210 provides the requirements in this regard:

'(b) Duty to Respond. An attorney must timely respond to a request from the disciplinary administrator for information during an investigation and prosecution of an initial complaint or a report, a docketed complaint, and a formal complaint.'

"114. The respondent was asked two or three times by investigator Schultz and on at least one occasion by Mr. Hazlett to provide an accounting of the Odell Street property escrow funds. The respondent provided a few bank statements, but what was provided was heavily redacted, covered only two months of the most relevant time period, and did not contain enough information to provide an accounting.

"115. The respondent failed to request or do anything to try to obtain the Odell Street property escrow file from McPherson Law Offices, where the respondent claimed the file remained after he left in May 2020.

"116. The Community Bank statements the respondent did provide were obtained from the Community Bank website, which the respondent testified contained additional statements that he did not print and provide to the disciplinary investigator.

"117. Because the respondent knowingly failed to provide bank statements available to him, failed to provide an accounting with the information available to him, and failed to make any attempt to request or obtain his Odell Street property file from Mr. McPherson, the hearing panel concludes that the respondent violated Rule 210.

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

"118. 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.

"119. *Duty Violated*. The respondent violated his duty to his clients and to the public.

"120. *Mental State*. The respondent knowingly violated his duties.

"121. *Injury*. As a result of the respondent's misconduct, the respondent caused potential injury to M.K. and B.G. Evidence presented at the hearing indicated that the respondent may have earned the $1,000 advanced fee paid by B.G. soon after it was accepted, however, the best practice to protect an advanced fee is to deposit it into a trust account as soon as reasonably practicable. Further, the respondent caused actual injury to the public by failing to maintain his personal honesty and integrity.

"Aggravating and Mitigating Factors

"122. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"123. *Dishonest or Selfish Motive*. The respondent's conduct exhibited dishonest and selfish motive. The respondent was dishonest in his handling of M.K.'s funds by not depositing them in an appropriate account by a reasonable time and by spending the funds on his own personal expenditures while maintaining the appearance that the funds were safeguarded. The respondent was selfish in spending the funds on his own personal expenditures. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by dishonesty and selfishness.

"124. *Bad Faith Obstruction of the Disciplinary Proceeding by Intentionally Failing to Comply with Rules or Orders of the Disciplinary Process*. Despite multiple requests, the respondent failed to provide documentation, including a written agreement with M.K. that he claimed existed for the Odell Street property escrow arrangement, bank statements covering additional periods, and an accounting of M.K.'s escrow funds. The respondent's repeated failure to provide this documentation amounts to bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules and orders of the disciplinary process.

"125. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1993. At the time of the misconduct, the respondent has been practicing law for around 27 years.

"126. *Indifference to Making Restitution*. The respondent eventually paid M.K. the $1,700 she requested on August 6, 2020. However, M.K. told law enforcement that she had to go to great lengths to find the respondent to collect the money owed to her, and still the respondent has not provided information to confirm that the $1,700 paid was the full amount owed to M.K. The hearing panel concludes the respondent showed indifference to making restitution to M.K.

"127. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"128. *Absence of a Prior Disciplinary Record*. The respondent has not previously been disciplined. The hearing panel concludes this is a mitigating factor.

"129. *Personal or Emotional Problems if Such Misfortunes Have Contributed to Violation of the Kansas Rules of Professional Conduct*. The evidence during the formal hearing indicated a volatile working relationship between the respondent and Mr. McPherson by 2019 and 2020. The respondent had been removed from the official documents for the business filed with the secretary of state in 2019 without his interest in the company having been bought out. The respondent testified that Mr. McPherson told him to leave the office on May 29, 2020, and that his files would be provided for him to pick up at a later time. The respondent also testified he was taking medication to manage the stress that affected his memory and alertness at the time. The hearing panel concludes that the respondent's personal and emotional problems contributed to his misconduct.

"130. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

"4.11 'Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.'

"4.12 'Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.'

"4.13 'Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.'

"4.62 'Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.'

"4.63 'Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.'

"5.12 'Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.'

"5.13 'Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.'

"7.2 'Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"7.3 'Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.'

"*Recommendations of the Parties*

"131. The disciplinary administrator recommended that the respondent be suspended for one year and that the respondent be required to undergo a reinstatement hearing pursuant to Rule 232.

"132. The respondent did not offer a recommendation, but counsel for the respondent offered some argument that public censure or probation would be appropriate under the circumstances.

"*Recommendation of the Hearing Panel*

"133. Based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be suspended for a period of one year. The hearing panel further recommends that prior to reinstatement, the respondent be required to undergo a hearing pursuant to Rule 232.

"134. 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.'

"135. On June 14, 2022, the respondent filed and served the hearing panel and the disciplinary administrator a probation plan. The probation plan proposed by the respondent is not substantial or detailed and does not contain adequate safeguards to protect the public and ensure the respondent's compliance with the Kansas Rules of Professional Conduct, the Rules Relating to Discipline of Attorneys, or the respondent's oath of office. Further, the respondent engaged in conduct involving dishonesty, deceit, and

misrepresentation, which renders probation ineffective to guard against future misconduct. *See In re Stockwell*, 296 Kan. 860, 868, 295 P.3d 572 (2013) ('this court is generally reluctant to grant probation where the misconduct involves fraud or dishonesty because supervision, even the most diligent, often cannot effectively guard against dishonest acts').

"136. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

DISCUSSION

In a disciplinary proceeding, this court considers the evidence, the findings of the hearing panel, and the arguments of the parties and determines whether violations of KRPC exist and, if they do, what discipline should be imposed. Attorney misconduct must be established by clear and convincing evidence. *In re Foster*, 292 Kan. 940, 945, 258 P.3d 375 (2011); see Supreme Court Rule 226(a)(1)(A) (2022 Kan. S. Ct. R. at 281). "Clear and convincing evidence is 'evidence that causes the factfinder to believe that "the truth of the facts asserted is highly probable."'" *In re Lober*, 288 Kan. 498, 505, 204 P.3d 610 (2009) (quoting *In re Dennis*, 286 Kan. 708, 725, 188 P.3d 1 [2008]).

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. The respondent timely filed a proposed probation plan that was provided to the Disciplinary Administrator and each member of the hearing panel. 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) (2023 Kan. S. Ct. R. at 288). We hold that the facts found by the hearing panel were established by clear and convincing evidence. We agree with the panel in holding that respondent violated KRPC 1.15 (2023 Kan. S. Ct. R. at 372) (safekeeping property); and KRPC 8.4(c) (2023 Kan. S. Ct. R. at 434) (professional misconduct). A majority of the court finds that respondent also violated Rule 210 (2023 Kan. S. Ct. R. at 263) (duty to cooperate), although a minority of the court disagrees and would find that respondent fulfilled at least the minimum requirements of Rule 210 in his efforts to cooperate with ODA and this court during the course of investigation.

The only remaining issue is to decide the appropriate discipline for these violations. 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 and all recommendations, we conclude appropriate discipline is respondent's suspension for one year from the practice of law. After completing his term of suspension, respondent may apply for reinstatement. A minority of the court would impose a lesser penalty.

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 Jeff L. McVey is suspended for one year from the practice of law in the state of Kansas, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. R. at 281) for violations of KRPC 1.15, 8.4(c), and Rule 210.

IT IS FURTHER ORDERED that respondent shall comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292).

IT IS FURTHER ORDERED that if respondent applies for reinstatement, he shall comply with Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) and be required to undergo a reinstatement hearing.

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

Bar Docket No. 10428

In the Matter of ALLEN B. ANGST, *Respondent.*

(527 P.3d 930)

ORDER OF DISBARMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Disbarment.*

This court admitted Allen B. Angst to the practice of law in Kansas on May 28, 1982. In March 2021, Angst transferred from "active" to "retired" status. In a letter signed April 19, 2023, Angst voluntarily surrendered his license to practice law under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290).

At the time Angst surrendered his license, he faced a hearing before the Kansas Board for Discipline of Attorneys on an amended formal complaint filed by the Office of the Disciplinary Administrator. That amended complaint alleged Angst had violated Kansas Rules of Professional Conduct 1.15(a) and (d) (2023 Kan. S. Ct. R. at 372) (safekeeping property) and 1.16(d) (2023 Kan. S. Ct. R. at 377) (declining or terminating representation).

This court accepts the surrender of Angst's license, orders Angst disbarred from the practice of law pursuant to Rule 230(b), and revokes Angst's license and privilege to practice law in Kansas.

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

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

Finally, the court directs that this order be published in the Kansas Reports, that the costs herein be assessed to Angst, and that Angst comply with Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292).

Dated this 28th day of April 2023.

No. 123,825

STATE OF KANSAS, *Appellee,* v. BYRON K. JOHNSON, *Appellant.*

(528 P.3d 258)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Sentencing—Scoring Pre-1993 Out-of-State Convictions in 2011*. In 2011, the law in Kansas required a district court to score pre-1993 out-of-state convictions according to the comparable Kansas offense.

Review of the judgment of the Court of Appeals in an unpublished opinion filed December 23, 2021. Appeal from Wyandotte District Court; J. DEXTER BURDETTE, judge. Opinion filed April 28, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Joseph A. Desch, of Law Office of Joseph A. Desch, of Topeka, argued the cause and was on the briefs for appellant.

Garett Relph, assistant district attorney, argued the cause, and *Daniel G. Obermeier*, assistant district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: The State charged Byron K. Johnson with multiple sex crimes for sexual encounters with his then-minor stepdaughter between 2005 and 2009. A jury convicted him of one count of rape and four counts of aggravated incest. In 2011, a court sentenced Johnson to 400 months in prison—272 months for rape and 32 months for each count of aggravated incest, with each count running consecutive. In doing so, the court gave Johnson a criminal history score of C based in part on a 1992 Illinois armed robbery conviction, designated as a person felony. Johnson directly appealed and the Court of Appeals affirmed Johnson's conviction in 2013. *State v. Johnson*, No. 107,524, 2013 WL 2321167 (Kan. App. 2013) (unpublished opinion).

In May 2014, we held that all out-of-state pre-1993 convictions must be classified as nonperson offenses. *State v. Murdock*, 299 Kan. 312, Syl. ¶ 5, 323 P.3d 846 (2014) (*Murdock I*), *overruled by State v. Keel*, 302 Kan. 560, Syl. ¶ 8, 357 P.3d 251 (2015). Relying on that decision, Johnson filed a pro se motion to correct

an illegal sentence arguing his sentence was illegal because, according to *Murdock I*, his 1992 Illinois conviction should have been classified as a nonperson felony as it occurred before 1993. The district court denied his motion reasoning the statutory amendments made by 2015 House Bill No. 2053 in response to *Murdock I* operated retroactively. L. 2015, ch. 5, § 1.

Johnson timely appealed, but due to circumstances outside of Johnson's control, the appeal was not docketed until 2021. A panel of the Court of Appeals affirmed the district court and we granted review. See *State v. Johnson*, No. 123,825, 2021 WL 6069024 (Kan. App. 2021) (unpublished opinion).

DISCUSSION

All parties agree that whether a sentence is illegal under K.S.A. 22-3504 is controlled by the law as it existed at the time of sentencing. As we made clear in *Murdock II*, the "legality of a sentence is fixed at a discrete moment in time—the moment the sentence was pronounced. At that moment, a pronounced sentence is either legal or illegal according to then-existing law." *State v. Murdock*, 309 Kan. 585, 591, 439 P.3d 307 (2019) (*Murdock II*). Because of this, a change in the law after sentencing can never render a sentence illegal. 309 Kan. at 591. We exercise plenary review over the questions of law at the heart of illegal sentence challenges. *State v. Parks*, 312 Kan. 487, 489, 476 P.3d 794 (2020); *State v. Coleman*, 311 Kan. 305, 308, 460 P.3d 368 (2020).

We note at the outset that while the language in K.S.A. 22-3504 has gone through a few legislative revisions since Johnson initially filed his motion, those revisions are not applicable to Johnson's motion. *Hayes v. State*, 307 Kan. 9, 14, 404 P.3d 676 (2017) ("[A] statute operates prospectively unless its language clearly indicates a legislative intent to operate retroactively."); *State v. Roat*, 311 Kan. 581, 602, 466 P.3d 439 (2020) ("Even if the [2019] amendment applies retroactively, it applies only to situations in which the defendant has not yet filed a motion before the operative date of the amendment.").

Thus, this case boils down to the following question—in 2011, what was the then-existing law in Kansas concerning how

pre-1993 out-of-state convictions must be scored for purposes of criminal history? Johnson argues that the law in 2011 was that such convictions must be scored as nonperson felonies. To arrive at this conclusion, he relies on our 2010 decision in *State v. Williams*, 291 Kan. 554, 244 P.3d 667 (2010), *overruled by State v. Keel*, 302 Kan. 560, 357 P.3d 251 (2015).

In *Williams*, we held that "comparable offenses in Kansas shall be determined as of the date the defendant committed the out-of-state crimes." 291 Kan. 554, Syl. ¶ 4. *Williams* did not expressly hold that pre-1993 out-of-state convictions had to be scored as nonperson felonies. That issue was simply not raised or addressed by the controversy in *Williams*. It was not until four years later, in *Murdock I*, that we relied on the precedent set in *Williams* to hold that "[w]hen calculating a defendant's criminal history that includes out-of-state convictions committed prior to enactment of the Kansas Sentencing Guidelines Act, K.S.A. 21-4701 *et seq.*, the out-of-state convictions must be classified as nonperson offenses." *Murdock I*, 299 Kan. 312, Syl. ¶ 5. As such, Johnson's reliance on *Williams* is misplaced.

Johnson argues that because *Murdock I* relied on our holding in *Williams*, *Williams* must be interpreted to include the ultimate holding of *Murdock I*. We note that his argument is not without logical appeal, suggesting as it does that the law emerges whole out of legal maxims and doctrines, rather than piece-meal out of concrete cases and disputes. The dissent essentially takes this view as well. In this view, the law pre-exists judicial decisions and a court such as the *Murdock I* court can be said to merely have discovered and articulated a rule that was always present. Without rejecting this view in its entirety, we find the question of discerning the controlling law in a period of uncertainty to be decidedly murkier than the dissent suggests.

First, as already noted, it is clear that *Williams* was not directly on-point. *Williams* dealt with the comparison of out-of-state convictions for a post-1993 offense. *Williams*, 291 Kan. at 555 (prior convictions were 2001 and 2002 identity theft crimes in the state of Washington). *Williams* did not directly address the issue of

whether pre-1993 offenses could be classified as person or nonperson offenses. That specific rule did not arrive until 2014 when the *Murdock I* court declared it.

Therefore, prior to 2014, *Williams* left a gap—if not in logic, then at least in terms of a binding holding from the Kansas Supreme Court. And prior to *Murdock I*, the Kansas Court of Appeals consistently filled that gap with their own rule, expressed through a series of unpublished opinions. Two September 2011 cases show that the Court of Appeals had refused to extend *Williams* to pre-1993 out-of-state convictions. See *State v. Murdock*, No. 104,533, 2011 WL 4031550, at *2 (Kan. App. 2011) (unpublished opinion) (Filed on September 9, 2011, the court rejected defendant's arguments that *Williams* mandated that pre-1993 offenses be scored as nonperson felonies.); *State v. Mims*, No. 103,044, 2011 WL 4563068, at *5 (Kan. App. 2011) (unpublished opinion) (Filed on September 30, 2011, the court, though not directly considering the application of *Williams*, again held that its precedent required making a distinction between person and nonperson felonies occurring before 1993.).

Therefore, in November 2011, prior to Johnson's sentencing, the Court of Appeals had two recent unpublished opinions that considered the application of the principles of *Williams* and determined it did not apply to pre-1993 offenses.

This is because the then-existing rule for pre-1993 offenses codified in K.S.A. 2005 Supp. 21-4711(e) (later changed to K.S.A. 21-6811[e] after the recodification of our criminal code effective July 1, 2011) stated in part: "The state of Kansas shall classify the crime as person or nonperson. *In designating a crime as person or nonperson comparable offenses shall be referred to.* If the state of Kansas does not have a comparable offense, the out-of-state conviction shall be classified as a nonperson crime." (Emphasis added.) In applying this statutory directive, courts used the "closest approximation" test as articulated in *State v. Vandervort*, 276 Kan. 164, 179, 72 P.3d 925 (2003) (to be scored as a person or nonperson offense, the out-of-state conviction "need only be comparable, not identical").

It is true that *Murdock I* would eventually declare those opinions to be in error. Yet before that, these decisions were the most

authoritative declaration of the specific law governing how to score pre-1993 out-of-state convictions. It is true that unpublished opinions by the Court of Appeals are not binding precedent on the district courts. This procedural fact does not dissuade us from giving significant weight to these decisions with respect to how a district court, at the time of Johnson's sentencing, was to understand the state of the law.

We reiterate that the holding of *Murdock I* was distinctly new in Kansas law. And it was a *change* in the law vis-à-vis how the Kansas Court of Appeals sought to reconcile *Williams* and *Vandervort*. Indeed, subsequent developments in this court and in our Legislature have been kinder to *Vandervort* than to *Williams* and *Murdock I*. See *Keel*, 302 Kan. at 590 ("[T]he classification of a prior conviction or juvenile adjudication as a person or nonperson offense for criminal history purposes under the KSGA is determined based on the classification in effect for the comparable Kansas offense at the time the current crime of conviction was committed."); *Murdock II*, 309 Kan. at 593 ("We reject the State's argument that *Murdock* [*I*] was simply an aberration or 'oops' in the law. Instead, *Murdock* [*I*] was controlling law [albeit for a short window of time] and in effect when Murdock's second sentence was pronounced. Second, *Keel* changed the law because it explicitly overruled *Murdock* [*I*'s] holding that prior out-of-state crimes must be scored as nonperson offenses. . . . [W]e acknowledge that *Keel* controls for defendants sentenced after *Keel* was decided. [Citation omitted.]"); *State v. Campbell*, 307 Kan. 130, 134, 407 P.3d 240 (2017) (applying *Keel*, rather than *Murdock I* to a case which was pending as of the date of *Keel*'s publication); *State v. Terrell*, 315 Kan. 68, 75, 504 P.3d 405 (2022) (applying the rationale of *Keel* to post-guidelines crimes when post-guideline classifications have changed over time).

We need not fall down the rabbit hole of wondering whether those yet-later-still developments in the law demonstrate that the Court of Appeals was correct all along in *Murdock I*. Instead, we take a decidedly more practical approach—one that recognizes the law as a forward-facing institution that develops through concrete controversies over time, resolved by courts of differing authority.

Therefore, to evaluate the legality of Johnson's sentence on November 11, 2011, we are limited to the legal framework available to the district court on that date. We will not read later pronouncements backwards in time to divine their reflection in earlier caselaw.

Having settled the question of the applicable law in November 2011, we must review the district court's application of that law to Johnson's case. At the time of his sentencing, the district court was required to decide whether his pre-1993 out-of-state conviction was comparable to a Kansas crime. To determine comparability, the district court was required to follow the "closest approximation" test articulated in *Vandervort* and still required by the Kansas Court of Appeals at the time of Johnson's sentencing. *Vandervort*, 276 Kan. at 179.

The out-of-state statutes under which Johnson was convicted, Ill. Rev. Stat. ch. 38 para. 18-1 (1991 Supp.) and Ill. Rev. Stat. ch. 38 para. 18-2 (1991 Supp.), define armed robbery as:

"Sec. 18-1. Robbery. (a) A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force. "

"Sec. 18-2. Armed Robbery. (a) A person commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon.

"(b) Sentence.

Armed Robbery is a Class X felony."

The closest comparable version of the applicable Kansas statutes in effect in 2005 defining aggravated robbery were K.S.A. 21-3426 and K.S.A. 21-3427:

"Robbery is the taking of property from the person or presence of another by force or by threat of bodily harm to any person." K.S.A. 21-3426 (Furse 1995).

"Aggravated robbery is a robbery, as defined in K.S.A 21-3426 and amendments thereto, committed by a person who is armed with a dangerous weapon or who inflicts bodily harm upon any person in the course of such robbery.

"Aggravated robbery is a severity level 3, person felony." K.S.A. 21-3427 (Furse 1995).

Effective July 1, 2011, the comparable version of the applicable Kansas statute defining aggravated robbery was K.S.A. 2011 Supp. 21-5420:

"(a) Robbery is knowingly taking property from the person or presence of another by force or by threat of bodily harm to any person.

"(b) Aggravated robbery is robbery, as defined in subsection (a), when committed by a person who:

(1) Is armed with a dangerous weapon; or

(2) inflicts bodily harm upon any person in the course of such robbery.

"(c) (1) Robbery is a severity level 5, person felony.

(2) Aggravated robbery is a severity level 3, person felony."

Under *Vandervort*, the language in the Illinois statute is comparable to both the 2005 and 2011 versions of the Kansas statute for aggravated robbery, which under either version is classified as a person felony. Thus, under the law as it existed in 2011, the district court properly scored Johnson's 1992 Illinois conviction as a person felony. Therefore, Johnson's criminal history score was correctly calculated as C and his sentence "conformed to the applicable statutory provision," in "term of authorized punishment." *State v. Gilbert*, 299 Kan. 797, 800-01, 326 P.3d 1060 (2014). Consequently, Johnson's sentence is not illegal under K.S.A. 22-3504, and the judgment of the lower courts is affirmed.

Affirmed.

* * *

BILES, J., dissenting: I would hold the controlling law for sentencing purposes in 2011 was *State v. Williams*, 291 Kan. 554, 244 P.3d 667 (2010), *overruled by State v. Keel*, 302 Kan. 560, Syl. ¶ 9, 357 P.3d 251 (2015). *Williams* expressly held "the comparable offenses in Kansas *shall be determined as of the date the defendant committed the out-of-state crimes*." (Emphasis added.) 291 Kan. 554, Syl. ¶ 4. And its decision flowed seamlessly from the applicable statute that also did not differentiate pre-1993 out-of-state prior convictions from post-1993 out-of-state prior convictions. See K.S.A. 21-6811(e). We repeated that point four years later when we held *Williams* compelled the outcome in *State v. Murdock*, 299 Kan. 312, 323 P.3d 846 (2014) (*Murdock I*), *overruled by Keel*, 302 Kan. 560, Syl. ¶ 9. The upshot is that Byron Johnson's 2011 sentence is illegal because the district court did not score his 1992 Illinois armed robbery conviction by using the

date when he committed the out-of-state offense. For that reason, I dissent.

To be fair, this area of criminal sentencing law has been a source of consternation for most all involved. The majority acknowledges as much. Slip op. at 4. But for the criminal defendant, this has proven to be a life-altering game of musical chairs hoping not to be left out when the caselaw settled down and the music stopped. The higher stakes, of course, are longer prison sentences.

The majority asserts *Williams* was not a change in the law at least for pre-1993 offenses because *Williams* dealt specifically with a post-1993 out-of-state conviction. Slip op. at 4. And because of that, the majority reasons this presented an unaddressed gap for pre-1993 offenses that was filled by unpublished Court of Appeals decisions. But, as mentioned, that presupposes the applicable statute in Johnson's case, K.S.A. 2011 Supp. 21-6811(e), distinguished between pre-1993 and post-1993 prior out-of-state convictions when it set out how to calculate his criminal history score, which it didn't.

In relevant part K.S.A. 2011 Supp. 21-6811(e) straightforwardly provides: "The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson comparable offenses shall be referred to." Nowhere in the statute—or for that matter anywhere else in the Revised Kansas Sentencing Guidelines Act, K.S.A. 2011 Supp. 21-6801 et seq.—did the statutory scheme make a pre- and post-1993 distinction for prior out-of-state convictions when classifying person or nonperson felonies. So the only hole I see is with the majority's reasoning.

When statutory language does not treat characteristics such as these differently, we are not free to take out our pencils and write something in the law's margins we think is better. See *State v. Bodine*, 313 Kan. 378, 399, 486 P.3d 551 (2021) ("[Courts] should refrain from reading something into the statute that is not readily found in its words."). *State v. Crosby*, 312 Kan. 630, 636, 479 P.3d 167 (2021) ("The best and safest rule for discerning this intent is the plain language of the statute."). This caution is especially important when a stated legislative purpose for our state's sentencing

guidelines is to apply them "equally to all offenders." K.S.A. 2022 Supp. 21-6802(a).

In its syllabus paragraphs, the *Williams* court stated:

"3. The appellate rule that the penalty parameters for an offense are fixed as of the date of the commission of the offense is fair, logical, and easy to apply. Neither the State nor a defendant may maneuver a sentencing date to take advantage of or avoid a change in a statute.

"4. When calculating a defendant's criminal history that includes out-of-state convictions and juvenile adjudications under K.S.A. 21-4711, the State shall classify the out-of-state crime as a person or nonperson. In designating these crimes as person or nonperson, the comparable offenses in Kansas shall be determined as of the date the defendant committed the out-of-state crimes." *Williams*, 291 Kan. 554, Syl. ¶¶ 3-4.

Paragraph 3 provides the rationale for Paragraph 4. Together, they state the applicable law going forward. See *State v. Valdez*, 316 Kan. 1, 9, 512 P.3d 1125 (2022) (noting syllabus paragraphs are "'the points of law'" that the court has determined; relying on K.S.A. 20-203). And the *Williams* court understood what it was doing because it noted: "using the date of commission of the prior out-of-state crime to calculate the criminal history would be consistent with our fundamental rule of sentencing for a current in-state crime: sentencing in accordance with the penalty provisions in effect at the time the crime was committed." *Williams*, 291 Kan. at 560.

Without differentiating pre- and post-1993 prior convictions, the *Williams* court considered—but rejected—the argument that *State v. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003) (comparing defendant's prior out-of-state conviction with the comparable Kansas offense in effect at the time of the current crimes of conviction), *overruled in part on other grounds by State v. Dickey*, 301 Kan. 1018, 350 P.3d 1054 (2015), should apply in classifying the defendant's prior out-of-state convictions as person or nonperson felonies. The *Keel* court saw this for what it was, when it observed, *Williams* "depart[ed] from *Vandervort*." *Keel*, 302 Kan. at 582.

We know now from subsequent caselaw that *Williams* "was a mistake," but that does not make *Williams* "an aberration or 'oops' in the law." *Keel*, 302 Kan. at 582, 585 ("*Williams* . . . did not fully acknowledge *Vandervort*'s application of this rule. Consequently,

Williams failed to apply the rule to the classification issue before it."); *State v. Murdock*, 309 Kan. 585, 593, 439 P.3d 307 (2019) (*Murdock II*). Even so, *Williams* was still the controlling law in 2011 when Johnson's sentence was pronounced and remained so until 2015 when *Keel* overruled it. See *Murdock II*, 309 Kan. at 593. *Williams* did in fact depart from *Vandervort*. And since K.S.A. 21-6811(e) does not instruct courts to treat pre- and post-1993 prior convictions differently, our courts lacked the authority to do so. That's the point *Williams* made. *Williams*, 291 Kan. 554, Syl. ¶ 4.

I also disagree with the majority's characterization of *Murdock I* when it concludes "the holding of *Murdock I* was distinctly new in Kansas law. And it was a *change* in the law vis-à-vis how the Kansas Court of Appeals sought to reconcile *Williams* and *Vandervort*." 317 Kan. at 288. It makes this claim even though it acknowledges *Murdock I* "*relied* on the precedent set in *Williams*." (Emphasis added.) 317 Kan. at 286; see also *Murdock II*, 309 Kan. at 586 (noting *Murdock I* "[f]ollow[ed]" *Williams*). To be clear, without *Williams*, *Murdock I* would not have ended where it did.

Finally, I believe the majority finds illusory comfort in its notion that there was a void—a lack of law dealing with the comparison of out-of-state convictions for pre-1993 offenses—filled by unpublished Court of Appeals decisions such as *State v. Murdock*, No. 104,533, 2011 WL 4031550, at *2 (Kan. App. 2011) (unpublished opinion), and *State v. Mims*, No. 103,044, 2011 WL 4563068, at *5 (Kan. App. 2011) (unpublished opinion). Slip op. at 4. *Murdock I* debunks that by explaining the flaws and inconsistencies that resulted from the Court of Appeals not following *Williams*. Although long, we meticulously explained:

> "The *Murdock* panel held that pre-1993 offenses should be designated based on the current guidelines offenses, reasoning: 'Kansas courts have routinely classified pre-1993 offenses as either person or nonperson for criminal history purposes *by comparing the offenses to current guidelines offenses*.' (Emphasis added.) *Murdock,* 2011 WL 4031550, at *2; see *State v. Mitchell,* No. 104,833, 2012 WL 1649831, at *7 (Kan. App. 2012) (unpublished opinion), *petition for rev.* filed June 4, 2012; *State v. Mims,* No. 103,044, 2011 WL 4563068, at *5 (Kan. App. 2011) (unpublished opinion).

"Notably, this reference to 'current guidelines offenses' is ambiguous. For example, how is the panel's rule applied in cases like *Williams* when the legislature modified the classification after the KSGA was adopted? Seemingly, the rule would conflict with this court's controlling law as stated in *Williams.* In addition, the view followed by the Court of Appeals in these cases is troubling because it originated in a series of Court of Appeals cases that predate this court's *Williams* decision. See, *e.g., State v. Henderson,* No. 100,371, 2009 WL 2948657, at *3 (Kan. App. 2009) (unpublished opinion), *rev. denied* 290 Kan. 1099 (2010); *State v. Boster,* No. 101,009, 2009 WL 3738490, at *4 (Kan. App. 2009) (unpublished opinion), *rev. denied* 290 Kan. 1096 (2010). The *Murdock* panel did not address *Williams* in its analysis despite citing it as holding 'comparable Kansas offenses are determined by the date the defendant committed the prior out-of-state offenses' while summarizing Murdock's claims. *Murdock,* 2011 WL 4031550, at *1 (citing *Williams,* 291 Kan. at 560-62).

"The panel did cite *Farris v. McKune,* 259 Kan. 181, 185-86, 911 P.2d 177 (1996), as sufficiently analogous to support its holding. *Murdock,* 2011 WL 4031550, at *2. But *Farris* is not applicable because it addresses the Department of Corrections' conversion of three offenders' preguidelines sentences to the sentencing guidelines, which was controlled by K.S.A. 21-4724(c)(1). The *Farris* court held that '"[i]n converting a sentence, the legislature intended that the Department of Corrections use records available to it to determine what the defendant did when the crime was committed and convert that crime to an analogous crime existing after July 1, 1993."' 259 Kan. at 195 (quoting *State v. Fierro,* 257 Kan. 639, 650, 895 P.2d 186 [1995]). The KSGA lacks a similar provision for persons who were not imprisoned at the time the KSGA was enacted.

"In the absence of a statutory directive, we are left with our decision in *Williams* that the comparable Kansas offense should be determined as of the date the out-of-state offenses were committed. Even though the State seeks a different rule in this appeal, we must emphasize we adopted the current rule at the State's urging in *Williams.* See 291 Kan. at 559 (State argued this court should score the Washington offenses according to their Kansas equivalents when the Washington offenses were committed)." *Murdock I*, 299 Kan. at 317-18.

In other words, these unpublished Court of Appeals decisions did not fill a gapping void in the law—they were just wrong. They failed to follow K.S.A. 2011 Supp. 21-6811(e) ("The state of Kansas shall classify the crime as person or nonperson. In designating a crime as person or nonperson comparable offenses shall be referred to.") as *Williams* instructed. They also are not binding precedent. See Supreme Court Rule 7.04(g)(2)(A) (2022 Kan. S. Ct. R. at 48) ("An unpublished memorandum opinion . . . is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.").

To circle back to where I started, *Murdock I* did not depart from the then-existing law. Rather, *Murdock I* followed *Williams*

and applied its governing principles about how to classify prior out-of-state convictions. See *Murdock II*, 309 Kan. at 592 (distinguishing true changes in the law from developments in the law). And as we held in *Murdock I*,

> "Our analysis in *Williams* is indistinguishable from the analysis applicable to the circumstances presented here, and the same policy considerations continue to apply. Using the date the prior out-of-state crime was committed to calculate a defendant's criminal history score is 'consistent with our fundamental rule of sentencing for a current in-state crime: sentencing in accordance with the penalty provisions in effect at the time the crime was committed.' [*Williams*], 291 Kan. at 560. Moreover, fixing the penalty parameters as of the date the crime was committed is fair, logical, and easy to apply. 291 Kan. at 560. Applying that rule, robbery as defined in K.S.A. 21-3426 (Ensley 1981) is the comparable Kansas offense. The penalty provision of that pre-1993 statute classifies robbery as a class C felony, and it does not designate the offense as person or nonperson." 299 Kan. at 318.

For these reasons, I would hold Johnson's 2011 sentence to be illegal because the district court did not score his 1992 Illinois armed robbery conviction as *Williams* dictated relying on the applicable statute—using the date when Johnson committed the out-of-state offense. Accordingly, I dissent.

WILSON and STANDRIDGE, JJ., join the foregoing dissenting opinion.

State v. Spencer

No. 124,804

STATE OF KANSAS, *Appellee*, v. MICAELA LEE SPENCER, *Appellant.*

(527 P.3d 921)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Defendant's Incriminating Statements to Law Enforcement—State's Burden of Proof.* When challenged, the State must prove a defendant voluntarily made incriminating statements to law enforcement by a preponderance of the evidence based on the totality of the circumstances involved.

2. SAME—*Defendant's Incriminating Statements to Law Enforcement—Determination of Voluntariness – Two-Step Standard of Review.* An appellate court reviews a district court's determinations about the voluntariness of a defendant's incriminating statements to law enforcement by using a two-step standard of review. First, the appellate court decides whether substantial competent evidence supports the factual underpinnings of the district court's decision. Second, the reviewing court views the district court's ultimate legal conclusion drawn from those facts de novo. In this process, the appellate court must not reweigh evidence or reassess witness credibility.

3. SAME—*Defendant's Incriminating Statements to Law Enforcement—Conditions Considered in Determining Voluntariness of Statement.* A defendant's incriminating statements to law enforcement are not involuntary simply because the defendant was tired or under the influence of drugs. Any such condition must have rendered the defendant confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent.

4. APPEAL AND ERROR—*Sufficiency of Evidence Challenge to Conviction—Appellate Review.* When a defendant challenges sufficiency of the evidence supporting a conviction, an appellate court looks at all the evidence in the light most favorable to the prosecution to decide whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In this process, the reviewing court must not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility.

5. CRIMINAL LAW—*First-Degree Murder—Premeditation—Proof Established by Direct or Circumstantial Evidence.* As an element of first-degree murder, premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. It need not be proved by direct evidence. It can also be established by circumstantial evidence, provided any inferences made from that evidence are reasonable.

Appeal from Sedgwick District Court; DAVID L. DAHL, judge. Opinion filed April 28, 2023. Affirmed.

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

Matt J. Maloney, assistant district attorney, argued the cause, and *Marc Bennett*, district attorney, and *Derek L. Schmidt*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: A jury convicted Micaela Spencer of first-degree premeditated murder, selling sexual relations, and two counts of felony theft. On appeal, she argues sleep deprivation and drug use tainted her early morning consent to an interview with law enforcement officers when she confessed to the murder. She also argues insufficient evidence supports the premeditation element required for her murder conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

William Callison worked as a lot attendant for PayDay Motors in Wichita. He lived in a fifth wheel camper across the street. On Monday, May 13, 2019, he did not show up for work. His boss, Nelson Tucker, received an unexpected and suspicious text message from Callison's phone saying he was going to Colorado on vacation. Later that day, Tucker spotted Callison's truck pulling a car trailer owned by Tucker that contained a restored 1963 Corvette. Suspicious, Tucker followed and eventually stopped the truck. He found Royce Thomas driving and Spencer in the passenger seat. They claimed Callison sent them to pick up the trailer. Tucker called 911; but before police arrived, the pair unhooked the trailer, left it on the street, and drove off in the truck.

Officers eventually found the pair, along with the truck and the camper belonging to Callison, parked in a residential driveway. When asked, Spencer acknowledged the truck belonged to Callison but claimed the camper was hers. She said Callison was not with them, so police tried to call his cell phone. The call went straight to voicemail. Officers then entered the camper as a welfare check. They discovered Callison's body with "approximately 40 sharp force injuries." His penis also had been mutilated.

The State charged Spencer with first-degree premeditated murder, selling sexual relations, and two counts of felony theft. A jury convicted her as charged, and the district court sentenced her to life in prison without the possibility of parole for 50 years. This is her direct appeal.

Spencer raises two issues: (1) the voluntariness of her statements to police; and (2) the sufficiency of the premeditation evidence. Jurisdiction is proper. See K.S.A. 60-2101(b) (Supreme Court jurisdiction over direct appeals governed by K.S.A. 22-3601); K.S.A. 2022 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crime cases permitted to be directly taken to Supreme Court); K.S.A. 2022 Supp. 21-5402(b) (first-degree murder is off-grid person felony).

SPENCER'S STATEMENTS TO POLICE

When challenged, the State must prove a defendant voluntarily made incriminating statements to law enforcement by a preponderance of the evidence based on the totality of the circumstances involved. *State v. Sesmas*, 311 Kan. 267, 275, 459 P.3d 1265 (2020). The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires a trial judge to make a preliminary examination as to a confession's voluntariness, resolve evidentiary conflicts, and submit to a jury only those confessions the judge believes to be voluntary. *State v. Canaan*, 265 Kan. 835, 839-40, 964 P.2d 681 (1998).

An appellate court uses a two-step standard of review when examining a district court's determination about a defendant's willingness to speak with law enforcement. First, the appellate court decides whether substantial competent evidence supports the factual underpinnings of the district court's decision. Second, the reviewing court considers the ultimate legal conclusion drawn from those facts de novo. In this process, the appellate court does not reweigh evidence or reassess witness credibility. *Sesmas*, 311 Kan. at 275.

Spencer's interviews with police

Officers took Spencer into custody on a Monday evening and put her in an interview room alone at 8:03 p.m., where she waited about

seven and half hours (around 3:33 a.m., Tuesday) before Detective Michelle Palmer and her partner began questioning. Spencer acknowledged where she was and provided her biographical information, including current and previous addresses, date of birth, social security number, height, weight, medical history, and mother's phone number. She said she slept Sunday night about four hours but not since. She complained of a stomachache.

Palmer explained Spencer could stop the interview at any time and needed to make sure Spencer was "sober" and "clearheaded" before administering *Miranda* rights. Spencer said the drugs she had taken on Sunday (the day of the murder) had worn off and said she had not consumed alcohol or drugs during the previous 24 hours. Spencer agreed to speak with the officers after they advised her of her rights. This early morning interview took about two and a half hours with two breaks, each lasting between 40 and 45 minutes. Spencer napped while alone in the room.

Spencer said she had not planned to kill Callison but only intended to exchange money for sex. She acknowledged a green knife used to stab Callison was hers. She said her thought just before stabbing him was that she was going to "hit him with the window breaker portion of the pocketknife, and then it unfolded differently from there." She "was seeing red and began stabbing him."

About 48 hours later, Palmer returned to question Spencer around noon on Thursday. Palmer asked Spencer, who was still in custody, if she had enough sleep. Spencer said she went to bed around 8 p.m. the night before and woke up around 7 a.m. She again acknowledged being sober and clearheaded. Palmer repeated the *Miranda* warnings and Spencer agreed to keep talking. She told Palmer largely the same story as before, other than "she remembered that when she went to get the knife out, she was thinking about where to stab [Callison]." This differed from her previous statement that she had only wanted to hit Callison with the knife's handle. She also said the night "played out" her "fantasy murder plan" for him. Otherwise, she did not change or alter her description of the incident.

The district court's ruling on admission of the incriminating statements

The State filed a pretrial motion to determine the admissibility of Spencer's statements under *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct.

1774, 12 L. Ed. 2d 908 (1964). At the hearing, Palmer testified Spencer was allowed to use the restroom and offered food and water during the first interview. She described Spencer as appearing "pleasant, and calm, and awake." The detective said Spencer was "responsive" and "[a]ware of her surroundings," as well as able to intelligibly answer questions, clarify any misunderstandings, and correct herself when needed. She said Spencer told her she had a GED and could read, write, and understand English. Palmer acknowledged her police experience made her familiar with people who are either intoxicated or under the influence of drugs, and that she had concluded Spencer's behavior showed no signs of impairment.

Transitioning to the Thursday interview, Palmer said Spencer was crying but "still able to communicate and respond." And at no time, the detective continued, did Spencer ask for an attorney or to stop the questioning. Defense counsel argued Spencer's statements were not voluntary, noting the total time she spent in the interview room, her waiting time before the interview, her drug use before the interview, and her complaints about stomach pains.

When the hearing finished, the court said it would watch the recorded interviews before ruling. At trial, it read into the record its decision that had been sent earlier to the parties:

> "In my e-mail to all of you I said . . . Ms. Spencer's comments during the first two interviews are admissible. The defendant was properly Mirandized, and had been Mirandized previous times on unrelated matters. She spoke freely, was under no alcoholic or chemical influence. She had a GED, was cogent, and was intellectually capable of understanding what she was doing. She was mentally and physically capable of understanding her rights under Miranda. She understood what she was saying and doing. She remembered background factual information flawlessly. Ms. Spencer's statements were freely, voluntarily, and knowingly given, and are admissible."

Defense counsel lodged a continuing objection to admitting Spencer's statements into evidence, which the court overruled.

Discussion

The question is whether the district court erred in determining Spencer's incriminating statements were made voluntarily. See *State v. Swanigan*, 279 Kan. 18, 23-24, 106 P.3d 39 (2005) ("'In determining whether a confession is voluntary, a court is to look at the totality of the circumstances. . . . The essential inquiry in

determining the voluntariness of a statement is whether the statement was the product of the free and independent will of the accused.'"). To resolve this, the following nonexclusive factors are typically considered:

"'(1) the accused's mental condition; (2) the manner and duration of the interview; (3) the accused's ability to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the officer's fairness in conducting the interview; and (6) the accused's fluency with the English language.

"In addition,

"'[t]hese factors are not to be weighed against one another with those favorable to a free and voluntary confession offsetting those tending to the contrary. Instead, the situation surrounding the giving of a confession may dissipate the import of an individual factor that might otherwise have a coercive effect. Even after analyzing such dilution, if any, a single factor or a combination of factors considered together may inevitably lead to a conclusion that under the totality of circumstances a suspect's will was overborne and the confession was not therefore a free and voluntary act.' [Citation omitted.]" *Sesmas*, 311 Kan. at 276.

The district court found Spencer was mentally and physically able to understand her *Miranda* rights and what she was saying and doing. It concluded her confessions were freely, voluntarily, and knowingly given. The court's ruling follows our precedent.

In *State v. Galloway*, 311 Kan. 238, Syl. ¶ 2, 459 P.3d 195 (2020), the court observed, "A statement is not involuntary simply because a defendant was tired or under the influence of drugs; the condition must have rendered the defendant confused, unable to understand, unable to remember what had occurred, or otherwise unable to knowingly and voluntarily waive the right to remain silent." And nothing in the video evidence shows Spencer confused or unable to understand what was going on or to remember what had happened. Instead, it shows her calm and cogent—consistent with Detective Palmer's testimony. For example, the detective obtained Spencer's detailed biographical information before advising her of her rights and asking questions. See *State v. Gonzalez*, 282 Kan. 73, 101-06, 145 P.3d 18 (2006) (noting defendant had not slept for two days and "he was 'strung out' on marijuana"; holding defendant's confession was voluntary when looking at the totality of the circumstances).

Spencer characterizes her confinement in the interview room as coercive. But the evidence supports the district court's finding that it was not. She was alone for the first seven and a half hours

before questioning began. And once the officers arrived, their first round of questioning lasted only about an hour and 45 minutes before taking a break for 40 minutes, then returning to question Spencer for another 20 minutes, before taking another 45-minute break. The third segment lasted another 35 minutes. The rest of Spencer's time came as she waited for transport to the jail, but that does not affect her previous willingness to talk with investigators. By our count, the combined police interviews took about two hours and 40 minutes. Granted, from Spencer's perspective, she was in the interview room longer, but she had breaks to nap, rest, drink water, eat food, and use the restroom.

Finally, we note the evidence reflects that while she might have experienced some abdominal issues, there is no showing it impaired her understanding or free will in deciding to speak to the detectives. And Palmer testified that when Spencer suggested some stomach pain, she told her: "[I]f she needed anything to let me know or if she needed a break to let me know, so I didn't terminate anything, but left it up to her to tell me."

We hold substantial competent evidence supports the district court's finding that Spencer's statements during the early morning interview were voluntary. See *State v. Makthepharak*, 276 Kan. 563, 567, 78 P.3d 412 (2003) ("'If there is substantial competent evidence to support the trial court's findings that the defendant voluntarily, knowingly, and intelligently waived his rights, such findings will not be disturbed on appellate review.'"). As the district court found, she had a GED, spoke freely, showed no alcohol or chemical influence, appeared cogent and intellectually able to understand what she was doing, and was mentally and physically able to understand what she was saying and doing.

The district court correctly held Spencer's statements were freely, voluntarily, and knowingly given, and admissible at trial. This holding resolves Spencer's remaining challenge to the incriminating statements made in the second interview.

SUFFICIENCY OF THE PREMEDITATION EVIDENCE

As an element of first-degree murder, premeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct. *State v. Hilyard*, 316 Kan. 326, 331, 515

P.3d 267 (2022). Spencer claims the State offered insufficient evidence of premeditation to support her murder conviction.

Standard of review

When a defendant challenges the evidence's sufficiency, an appellate court looks at all the evidence in the light most favorable to the State to decide whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In doing so, the court does not reweigh evidence, resolve evidentiary conflicts, or reassess witness credibility. *State v. Harris*, 310 Kan. 1026, 1030, 453 P.3d 1172 (2019).

The State's premeditation evidence at trial

The State's premeditation evidence consisted of text messages between Spencer and Callison before the murder, video recordings, text messages between Spencer and Thomas just before the murder, two knives found at the crime scene, medical and physical evidence about Callison's injuries, and Spencer's two interviews with Detective Palmer. Spencer did not testify or offer any evidence at trial.

Messages on Spencer's phone and Callison's phone showed that around noon on Saturday, May 11, 2019, the day before the murder, Spencer initiated contact with Callison by stating "a couple favors to ask" and "can ya get any dope?" When Callison expressed reluctance, she wrote she would "take care of" him if he got her dope, meaning methamphetamine. Spencer asked if she could bring her male "friend" who wanted to watch her "get punished . . . but wont get in the way." Other messages showed the three eventually met about 3 p.m. on Sunday, May 12.

Around 6 p.m., Spencer texted Thomas, who was in an adjoining room in the camper, that she did not think Thomas could hear her because of the music playing. Thomas replied, "I hear you good." Between 6:25 p.m. and 8 p.m., Thomas sent Spencer several text messages describing how to kill Callison, although it is not known if she saw them at the time because she did not reply. Thomas texted her:

> "Look when we get ready to leave would you like to kill him. I'm feeling a sort of way get in front and I'll grab him from behind then just start stabbing.

". . . I'll start with mine. You want that babe?

. . . .

"Would you please make sure he is slightly facing away towards this end. . . . Just bite down hard on his dick . . . .

". . . When you bite I'll come finish him off.

"Yes or no. Just show me what you want. My blade is ready whenever.

"Start the video I want to see it as it goes down once we clean up."

Police found two videos taken with Callison's cell phone that were played for the jury. The first showed Callison lying on his back on the bed with his penis exposed. Spencer positioned the phone to record their sexual encounter. The second depicted their sexual acts until about five minutes into the footage when the screen goes black, while the audio continues.

Callison can be heard suddenly screaming and moaning in pain. Thomas' voice can be heard for the first time. Over the next six minutes, as Callison moans and says he is dying, Spencer and Thomas accuse him of having inappropriately touched her siblings. Spencer asks Thomas several times where his "strap" is, and tells Thomas, "If you can't do it, let me know, I have mine." She directs him to "get the heart." At some point, Spencer becomes concerned about how loud their attack was, so she told Thomas to conceal the noise by making it sound like they were "fucking." While Callison is still alive and moaning, Thomas tells her to "hold his dick." In the final minutes, she repeatedly questions whether Callison is "still alive" and directs Thomas to "make sure he's not breathing." Detective Palmer, who watched the recordings several times, testified Spencer was "actively engaged in" the killing.

The police found two foldable knives at the crime scene: the green pocketknife found on Spencer's person, clipped into her pajama pants, and a red pocketknife in the sink inside the camper. Both had a mixture of three possible DNA contributors. For each knife, Thomas and Callison were major contributors, but tests were inconclusive as to whether Spencer was a minor contributor. Even so, a forensic scientist explained at trial that if a knife was used to stab a person, and the person loses "a lot of blood," it "could overwhelm the [DNA] profiles of other people that were present." The crime scene photos showed Callison lost a lot of blood.

A forensic pathologist testified Callison's body had two incised wounds on his face; a stab wound on the back of his neck; 14 stab wounds on his middle to upper chest in the front; a stab wound on the right side of his chest; two stab wounds on the right side of his upper and middle abdomen; four stab wounds on the left side of his abdomen; six sharp force injuries on the left side of his back and flank; two stab wounds on the right side of the back; five sharp force injuries on the right side of the lower back; two stab wounds on the right buttock; three sharp force injuries on the right thigh; seven sharp force injuries on the thigh; and many other injuries including the amputated penis. Some of those injuries went into the ribs, lungs, liver, kidney, pulmonary artery, and heart. The pathologist testified "the penile injury especially is certainly consistent with the green knife as opposed to the red one" and noted "it's possible that any of the wounds on the body are one of the [two] knives or a mixture of both."

Spencer also told Detective Palmer the green knife was hers, and that her thought just before stabbing Callison was that she was going to "hit him with the window breaker portion of the pocketknife, and then it unfolded differently from there." Instead, "she was seeing red and began stabbing him." Two days later, during Palmer's second interview, Spencer said the night "played out" her "fantasy murder plan" for Callison.

Discussion

There is no specific time required for premeditation, but the concept of premeditation requires more than the instantaneous, intentional act of taking another's life. *State v. Moore*, 311 Kan. 1019, 1040, 469 P.3d 648 (2020). Consistent with this, the district court gave the jury the following instruction:

> "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act. Although there is no specific time period required for premeditation, the concept of premeditation requires more than the instantaneous, intentional act of taking another's life."

Premeditation can be established by circumstantial evidence, provided any inferences drawn from that evidence are reasonable. A court typically considers five factors when deciding whether

circumstantial evidence gives rise to an inference of premeditation: (1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) the defendant's threats or declarations before and during the occurrence; and (5) the dealing of lethal blows after the deceased was rendered helpless. *Hilyard*, 316 Kan. at 331. "'[T]he analysis of what inferences can be reasonably drawn is not driven by the number of factors present in a particular case because in some cases one factor alone may be compelling evidence of premeditation.'" *State v. Hillard*, 315 Kan. 732, 787, 511 P.3d 883 (2022).

Spencer argues her statements to police do not show premeditation because her only plan was to get some money and "dope" in exchange for sex. She asserts the direct evidence proved her intention before the stabbing was merely to "batter [him] in an aggravated manner." But this ignores her confession that the night played out her fantasy murder plan for the victim. And unlike typical premeditated cases, in which "[b]y its very nature, premeditation 'is most often proved by circumstantial evidence,'" in this instance, there is both direct and circumstantial evidence supporting premeditation. See *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021). The five factors strongly suggest premeditation.

First, Spencer used a knife and stabbed Callison multiple times for at least six minutes without a break. See *State v. Navarro*, 272 Kan. 573, 580, 35 P.3d 802 (2001) ("[t]he circumstantial evidence in this case supporting the inference of premeditation includes . . . [defendant's] use of the knife, a deadly weapon"). And Spencer brought her own knife to the crime scene, which suggests premeditation and an intent to use the knife to carry out her "fantasy murder plan." Spencer claims that if she had thought about killing Callison beforehand, it would be reasonable to expect her DNA to be conclusively present on at least one knife. But the forensic scientist explained that if a knife is used to stab a person, and the person loses a lot of blood, it could overpower the DNA profiles of other people. So at best, the DNA is inconclusive in proving or disproving premeditation.

Second, as to provocation, Spencer asserts "the overall situation [was] one of provocation and exploitation." She argues "the

entire coercive and deviant arrangement" amounted to provocation. But a contrary conclusion is that Callison's death resulted from Spencer's own intentional acts. She initiated the text messaging to him asking for "dope" and when he expressed reluctance, she offered him sex. And while the evidence does not show who proposed recording the sexual encounter, it is reasonable to infer she did because Thomas asked her to "[s]tart the video" so he could watch it later. Viewing the evidence in the light most favorable to the State, nothing suggests provocation.

Third, Spencer contends her conduct before and after the killing does not support the jury's finding that she thought over the killing beforehand. She asserts she merely wanted drugs and that after the incident, she "obviously lacked a plan as to what to do with [the victim's] body." But when looking again at the record in the light most favorable to the prosecution, her conduct—e.g., texting Callison to insist on meeting; bringing Thomas to their meeting; taking her knife to the scene; and calmly lying about Callison's whereabouts to Tucker and the police—supports premeditation in Spencer's conduct before and after the killing.

Finally, Spencer does not mention the fourth and fifth factors, but the State does. It notes the jury heard the audio that leaves no doubt Spencer and Thomas acted in a coordinated, premeditated manner. They spoke to each other throughout the stabbing, with Spencer often questioning whether Callison was still alive, and, at one point, telling Thomas to make sure he stopped breathing. When Spencer questioned if they got his heart, Callison said, "You did," and implored them to leave him alone and told them to just go. Yet they continued stabbing and their blades went into many organs including the victim's heart and lungs. Spencer even accused Callison of having inappropriately touched her siblings.

In *State v. Scott*, 271 Kan. 103, 108-09, 21 P.3d 516 (2001), the court held death by a "prolonged" attack can be a strong indicator of premeditation. It noted evidence of a struggle, beating, and then strangulation sufficiently demonstrated premeditation, reasoning that an extended attack gives a defendant time to reflect. See 271 Kan. at 108 ("Premeditation is the time of reflection or deliberation."). In Spencer's case, the killing took about six minutes—more than enough time for reflection. Callison was

screaming and moaning for several minutes. And Spencer's declarations during the attack show she formed her intent to kill before she ended the victim's life. See *Hilyard*, 316 Kan. at 331.

We hold ample evidence supports the jury's premeditation finding.

Affirmed.