REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:
SARA R. STRATTON

Advance Sheets, Volume 317, No. 4
Opinions filed in July – August 2023

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In re B.W.	125,480	Denied	08/01/2023	Unpublished
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State v. Bass	124,602	Denied	08/25/2023	Unpublished

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ADMINISTRATIVE LAW:

Act Provides Remedy to Appeal Relocation Benefits—Procedure. K.S.A. 58-3509(a) of the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act, K.S.A. 58-3501 et seq., provides a comprehensive remedy for vindicating the statutory right to relocation benefits and assistance. K.S.A. 58-3509(a) allows a displaced person to appeal to the state, agency, or political subdivision within 60 days of the initial determination of relocation benefits. If such an appeal is made, an independent hearing examiner shall be appointed by the condemning authority within 10 days and a determination of the appeal made within 60 days. After administrative review is complete, any party wishing to appeal the ruling of the hearing examiner may do so by filing a written notice of appeal with the clerk of the district court within 30 days of the hearing examiner's decision. Any such appeal to the district court shall be a trial de novo only on the issue of relocation benefits.
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Administrative Agency—Subject Matter Jurisdiction Derived from Statutes. An administrative agency derives subject matter jurisdiction over a matter from statutes. *Fisher v. Kansas Dept. of Revenue* 119

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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.
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Motion to Reconsider Treated as Motion to Alter or Amend—Appellate Review. Appellate courts generally treat motions to reconsider as motions to alter or amend. When reviewing the district court's ruling on a motion to alter or amend, we apply an abuse of discretion standard. A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.
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New Claims Cannot Be Raised on Appeal. A defendant cannot raise new claims for the first time on appeal unless an exception applies.
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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.
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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. *State v. Spencer* ……..……..... 295

ARBITRATION:

Arbitration Action—Not Judicial Determination of Comparative Fault. Under Kansas law, an arbitration action does not qualify as a judicial determination of comparative fault. *Hodges v. Walinga USA, Inc.* ……...…. 535*

Confirmation of Arbitration Award—Not Judicial Determination of Comparative Fault for Invoking One-Action Rule. Under Kansas law, the confirmation of an arbitration award by a state court judgment does not qualify as a judicial determination of comparative fault for purposes of invoking the one-action rule. *Hodges v. Walinga USA, Inc.* ……...…. 535*

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. *Shelton-Jenkins v. State* ……...…. 141

Disciplinary Proceeding—Disbarment. Attorney charged in a formal complaint by the Disciplinary Administrator, with violations of KRPC 1.15 (safekeeping

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property) and 1.16.(declining or terminating representation), voluntarily surrendered his license to practice law in Kansas. *In re Angst* ……..…….. 282

——. 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. 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

— **Indefinite Suspension**. Respondent was ordered indefinitely suspended due to the unauthorized practice of law following a prior suspension of his license. Respondent entered into a Summary Agreement in which he admitted various violations of the KRPCs and stipulated to findings of fact by the disciplinary panel. The Supreme Court ordered Respondent's license be indefinitely suspended. *In re Ayesh* ……..... 405

— **One Hundred Eighty-day Suspension**. Attorney is suspended from the practice of law in Kansas for 180 days for violating KRPCs that related to his mishandling of the transfer of a mineral interest title. Respondent did not dispute the findings or recommendations of the disciplinary hearing panel or the Disciplinary Administrator. The Supreme Court suspended the respondent for 180 days. *In re Eland* ……..….. 315

— **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

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—— Attorney who was indefinitely suspended in 2011, requiring a full reinstatement hearing prior to consideration of reinstatement, now has filed a petition for reinstatement. In its final hearing report, a hearing panel recommended reinstatement with a three-year probation plan and other terms and conditions. The Supreme Court approved the reinstatement with the three-year probation plan with conditions and limitations on her practice, as set out in this order, including paying attorney registration fees and complying with CLE requirements. *In re Shaw* ……..…… 546*

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—— Attorney who was suspended for six months now petitions for reinstatement of his license under Rule 232. The Supreme Court grants the order of reinstatement conditioned upon the payment of attorney registration fees and compliance with CLE requirements and costs. *In re Jahn* ……. 497*

— **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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Action for Wrongful Conviction and Imprisonment—Statutory Application. K.S.A. 2022 Supp. 60-5004(d)(2)'s use of the phrase "convicted, imprisoned and released from custody" refers to the imprisonment for which a claimant is seeking compensation, rather than some other, unrelated imprisonment. *In re Wrongful Conviction of Bell* ……..…..…….. 334

Moot Case—Actual Controversy has Ended. A case is moot when the actual controversy has ended and the only judgment that could be entered would be ineffectual for any purpose and would not impact any of the parties' rights. *Sierra Club v. Stanek* ……...……..…….. 358

CONSTITUTIONAL LAW:

Right to Self-Representation under Sixth Amendment—Requirements. Under the Sixth Amendment to the United States Constitution, criminal defendants generally have the right to self-representation provided that they knowingly and intelligently forgo their right to counsel and that they are able and willing to abide by rules of procedure and courtroom protocol. *State v. Couch* ……. 566*

COURTS:

Appellate Review of Cases Decided on Documents and Stipulated Facts. Appellate courts need not defer to the district court when reviewing cases decided on documents and stipulated facts. *In re Marvin S. Robinson Charitable Trust* …. 492

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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 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

Kansas Supreme Court has Power to Take Actions Necessary for the Administration of Justice. The Kansas Supreme Court has the inherent power to take actions reasonably necessary for the administration of justice, provided the exercise of that power in no way contravenes or is inconsistent with the substantive statutory law. *State v. Steinert* ……..…….. 342

CRIMINAL LAW:

Absent Illegal Sentence Claim—Lack of Jurisdiction by Appellate Court to Review Agreement Approved by Sentencing Court. Absent a valid illegal sentence claim under K.S.A. 2022 Supp. 22-3504, an appellate court lacks jurisdiction to review a sentence resulting from an agreement between the State and the defendant that the sentencing court approves on the record. *State v. Johnson* ……..…….. 458

Admission of Prior Bad Acts Evidence—Three Types of Prejudice. At least three types of prejudice can result from the admission of prior bad acts evidence: (1) a jury might exaggerate the value of other crimes as evidence showing that, because a defendant previously committed a crime, it might be properly inferred that he or she committed the currently charged offense; (2) a jury might conclude that a defendant deserves punishment because he or she is a general wrongdoer, even if the prosecution has not otherwise met its burden to establish guilt beyond a reasonable doubt; and (3) a jury might conclude that because the defendant is a criminal, the evidence he or she presents on his or her own behalf should not be believed. *State v. Campbell* …….. 511*

Aggravated Arson Charge—No Double Jeopardy Violation When Convicted on Multiple Counts. A defendant charged with aggravated arson committed under K.S.A. 2022 Supp. 21-5812(b)(1)—that is, arson committed upon a property in which there is a person—does not suffer a double jeopardy violation when convicted on multiple counts arising from damage by fire to separate apartments, each with a person inside.
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Application of Traditional Canon of Statutory Construction to Statute—Intent of Legislature to Tie Single Unit of Prosecution to Multiple Items of Paraphernalia. Applying traditional canons of statutory construction to K.S.A. 2016 Supp. 21-5709(b), we hold the Legislature intended to tie a single unit of prosecution to multiple items of paraphernalia in indeterminate numbers. *State v. Eckert* ……...……. 21

Challenge to Constitutional Validity of Waiver— Outside Definition of Illegal Sentence. A claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence, overruling *State v. Duncan*, 291 Kan. 467, 472-73, 243 P.3d 338 (2010). *State v. Johnson* …… 458

Challenge to Restitution Order—Burden of Proof on Defendant to Show Restitution Is Unworkable. When a defendant challenges the workability of restitution, the burden of proof lies with the defendant to show compelling circumstances that would render restitution unworkable, either in whole or in part. To sustain that burden, defendants must generally present evidence of their inability to pay when the financial obligation is due. *State v. Taylor* ……...…….. 364

Charge of Attempted Crime Requires Proof of an Overt Act Committed Toward Perpetration of Target Crime. When a defendant is charged with an attempted crime, the State must prove the accused committed an overt act toward perpetration of the target crime. No definite rule about what constitutes an overt act can or should be laid down. Each case depends on its particular facts and the reasonable inferences a jury may draw. But some guidelines are settled. The accused must have taken steps beyond mere preparation by doing something directly moving toward and bringing nearer the crime the accused intends to commit. The accused's action must approach near enough to consummation of the offense to stand either as the first or some later step in a direct movement toward the completed offense. *State v. Larsen* ……...…… 552*

Charge of Attempted Crime Requires Proof of Specific Intent for Each Element of the Target Crime. If the State charges an attempted crime under K.S.A. 2022 Supp. 21-5301(a), it must prove specific intent for each element of the target crime, even those elements of the target crime without a specific intent requirement. This means the State must prove a defendant charged with attempted aggravated burglary specifically intended to enter a dwelling in which there was a person, overruling *State v. Watson*, 256 Kan. 396, 401, 885 P.2d 1226 (1994). *State v. Larsen* ……...…… 552*

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

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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

Conviction of Taking or Confining Someone with Intent to Facilitate Commission of Another Crime—Appellate Review—Application of Three-Part Test of State v. Buggs. When a defendant is convicted of taking or confining someone with the intent to facilitate the commission of another crime under K.S.A. 2022 Supp. 21-5408(a)(2), the three-part test set out in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), applies. Under that test, an appellate court will vacate the conviction if: (1) the confinement is slight, inconsequential, and merely incidental to the other crime; (2) the confinement is inherent in the nature of the other crime; or (3) the confinement did not make commission of the other crime substantially easier or substantially lessen the risk of detection. *State v. Butler* 605*

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 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

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preponderance of the evidence based on the totality of the circumstances involved. *State v. Spencer* 295

Denial of Pretrial Request to Proceed Pro Se Based on Disruptive Behavior by Defendant—Bifurcated Standard of Review. When a district court denies a defendant's request to proceed pro se based on the defendant's seriously disruptive behavior, we review the district court's decision using a bifurcated standard of review. We review the district court's fact-findings about the defendant's behavior for substantial competent evidence, and we review the district court's legal conclusion de novo. *State v. Couch* 566*

Denial of Pretrial Request to Proceed Pro Se if Disruptive Behavior by Defendant. To justify denial of a timely pretrial request to proceed pro se, a criminal defendant must have exhibited seriously disruptive behavior during pretrial proceedings, and that behavior must strongly indicate the defendant will continue to be disruptive in the courtroom. *State v. Couch* 566*

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 be established by circumstantial evidence, provided any inferences made from that evidence are reasonable. *State v. Spencer* 295

Guilt-based Defense Utilized by Defendant's Counsel—Court Considers if Defense Was Deficient Performance and Prejudicial. When there

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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

Harmless Error Standard—Determination Whether Erroneous Admission of Prior Drug Crime Evidence under K.S.A. 60-455 Prejudicial to Party's Substantial Rights. The harmless error standard of K.S.A. 60-2105 and K.S.A. 2022 Supp. 60-261 applies to determine if erroneous admission of prior drug crime evidence under K.S.A. 2022 Supp. 60-455 prejudicially affected a party's substantial rights, considering the entire record. Where an error implicates a statutory but not a federal constitutional right, the harmless error test is whether there is a reasonable probability that the erroneous admission of prior drug crime evidence affected the outcome of the trial, considering the entire record. The party benefiting from the improper admission of evidence bears the burden to show harmlessness. *State v. Campbell* ……...……...…… 511*

Illegal-Sentence Claim May Be Raised First Time on Appeal. A challenge to the classification of a prior conviction and the resulting criminal-history score presents an illegal-sentence claim that may be raised for the first time on appeal. *State v. Steinert* ……..…….. 342

Invocation of Right to Self-Representation—Requires Clear and Unequivocal Expression of Desire to Proceed Pro Se—Invocation Before Trial Is Unqualified Right. To invoke the right to self-representation, a defendant must clearly and unequivocally express a desire to proceed pro se. If a defendant invokes the right after trial starts, the district court has discretion in deciding whether to grant the request. If invoked before trial, our court has described the right as "unqualified." But an unqualified right to self-representation does not mean the right is absolute. In fact, the unqualified right to self-representation rests on an implied presumption that the court will be able to achieve reasonable cooperation from the pro se defendant. The right to self-representation does not permit defendants to abuse the dignity of the courtroom or to disregard the relevant rules of procedural and substantive law. Thus, a district court may deny a pretrial request to proceed pro se based on defendant's serious and obstructionist misconduct. *State v. Couch* ……. 566*

Journal Entry of Judgment—Correction by Nunc Pro Tunc Order. A journal entry of judgment may be corrected at any time by a nunc pro tunc order, which is appropriate for correcting arithmetic or clerical errors arising from oversight or omission. If there is no arithmetic or clerical error arising from oversight or omission, a nunc pro tunc order is not appropriate. *State v. Turner* ……...…….. 111

Motion to Correct Illegal Sentence—File on Direct Appeal. A defendant may file a motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504(a) in an appellate court while on direct appeal. *State v. Steinert* ……...…..…….. 342

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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

Multiplicity Claims—Double Jeopardy Violation—Test for Determination. When analyzing whether sentences relating to two convictions that arise from unitary conduct result in a double jeopardy violation, the test to be applied depends on whether the convictions arose from the same statute or multiple statutes. If the double jeopardy issue arises from convictions for multiple violations of a single statute, the unit of prosecution test is applied. If the double jeopardy issue arises from multiple convictions of different statutes, the strict-elements test is applied. *State v. Eckert* ……...….... 21

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

New Rule for Conducting Criminal Prosecutions—Application. A new rule for conducting criminal prosecutions is to be applied to all cases pending on direct review or not yet final. *State v. Steinert* ……..……...…….. 342

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

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). *State v. Bentley* ……...…… 222

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

Restitution Statute—Order Imposing Restitution Is the Rule—Finding that Restitution Is Unworkable Is the Exception. Kansas' criminal restitution statute makes clear that an order imposing restitution is the rule and a finding that restitution is unworkable is the exception. *State v. Taylor* ……..... 364

Restitution Statute Provides Sentencing Court Shall Order Restitution for Damage or Loss Caused by Crime—Restitution Due Immediately—Exceptions. Kansas' criminal restitution statute, K.S.A. 2022 Supp. 21-

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6604(b)(1), provides that a sentencing court shall order restitution, including damage or loss caused by the defendant's crime. Such restitution shall be due immediately unless: (1) the sentencing court orders that the defendant be given a specified time to pay or be allowed to pay in specified installments; or (2) the sentencing court finds compelling circumstances that would render restitution unworkable, either in whole or in part.
State v. Taylor 364

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

— Classification of Prior Out-of-State Felony under Statute. Under K.S.A. 2022 Supp. 21-6811(e)(3)(B)(iii), a prior out-of-state felony must be classified as a nonperson felony if the elements of the out-of-state offense do not require proof of any of the circumstances listed in subsections (B)(i) or (ii).
State v Busch 308

— 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

— Presentencing Investigation Report May be Considered Regarding Offender's Criminal History. Under K.S.A. 2021 Supp. 21-6814(b), a presentence investigation report may be considered at sentencing by the district court to determine whether the State's burden of proof has been satisfied regarding an offender's criminal history. *State v Busch* 308

— 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. *State v. Johnson* 283

— Sentencing Court Retains Jurisdiction to Correct Illegal Sentence or Clerical Error. Under K.S.A. 2022 Supp. 21-6820(i), a sentencing court retains jurisdiction to correct an illegal sentence or clerical error under K.S.A. 22-3504 irrespective of a defendant's appeal. *State v. Steinert* 342

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— Unsworn Responses May Be Considered by District Court. While sworn testimony may be more credible than unsworn responses, a district court is not precluded from considering—and even relying on—the responses it has elicited at sentencing. *State v. Taylor* ……..……. 364

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. *State v. Strong* ……..……..… 197

***State v. Buggs* Three-Part Test Applicable Only to Conviction under K.S.A. 2022 Supp. 21-5408(a)(2).** The three-part test set out in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), applies only when the defendant is convicted of taking or confining a person with the intent to facilitate the commission of another crime under K.S.A. 2022 Supp. 21-5408(a)(2). The test does not apply when the defendant is convicted of taking or confining a person with the intent to inflict bodily injury or to terrorize the victim or another under K.S.A. 2022 Supp. 21-5408(a)(3). *State v. Butler* ….…. 605*

Successive Motion to Correct Illegal Sentence—Application of Res Judicata. Res judicata bars a defendant from raising the same claim in a second or successive motion to correct an illegal sentence under K.S.A. 2022 Supp. 22-3504, unless subsequent developments in the law shine new light on the original question of whether the sentence was illegal when pronounced. *State v. Moncla* …….. 413

— Party has Burden of Proof to Show Subsequent Development in Law. A party filing a successive motion to correct an illegal sentence bears a threshold burden to prove that a subsequent development in the law undermines the earlier merits determination. A successive motion that merely seeks a second bite at the illegal sentence apple is susceptible to dismissal according to our longstanding, common-law preclusionary rules. *State v. Moncla* ……...……. 413

*S***ufficiency of Evidence Challenge—Appellate Review**. When the sufficiency of the evidence is challenged in a criminal case, appellate courts review the evidence in a light most favorable to the State to determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. Appellate courts do not reweigh evidence, resolve evidentiary conflicts, or weigh in on witness credibility.
State v. Buchanan …….. 443

Sufficiency of Evidence Challenge by Defendant—Appellate Review. When a defendant challenges the sufficiency of the evidence supporting the defendant's conviction, an appellate court asks whether, viewing the evidence in the light most favorable to the State, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In making this determination, an appellate court does not reweigh evidence, resolve evidentiary conflicts, or assess witness credibility. *State v. Larsen* …… 552*

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Untimely Motion for New Trial—May Be Summarily Denied if Determined that Movant Not Entitled to Relief. A district court judge may summarily deny an untimely motion for new trial based on dissatisfaction with counsel without appointing counsel if the judge determines from the motion, files, and records that the movant is not entitled to relief.
State v. Buchanan 443

Unit of Prosecution Is Ambiguous in K.S.A. 2016 Supp. 21-5709(b)—Application of Traditional Canons of Statutory Construction. K.S.A. 2016 Supp. 21-5709(b) is ambiguous regarding the unit of prosecution, so application of traditional canons of statutory construction is necessary to discern its meaning.
State v. Eckert 21

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 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

DIVORCE:

Division of Retirement Account—Judgment Subject to Dormancy If Qualifies as Final Determination of Parties' Interests. A district court's division of a retirement account in a divorce proceeding constitutes a judgment subject to dormancy under K.S.A. 2022 Supp. 60-2403 when the division order qualifies under K.S.A. 2022 Supp. 60-254(a) as a final determination of the parties' interests in the marital estate. *In re Marriage of Holliday* 469

— *In re Marriage of Shafer* 481

K.S.A. 60-260 Not Applicable When Movant Requests to Clarify Original Property Division Order. The relief from judgment statute, K.S.A. 2022 Supp. 60-260, is not applicable when a movant merely requests to

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clarify the original property division order that does not require any substantive change to the order. *In re Marriage of Shafer* ….…… 481

Statutory Tolling Provision Prevents Division of Interests in KPERS Retirement Account Until Benefits are Payable. K.S.A. 2022 Supp. 60-2403(c)'s tolling provision prevents a divorce decree dividing the parties' interests in a retirement account with the Kansas Public Employee Retirement System from becoming dormant until benefits become payable to the plan member. *In re Marriage of Holliday* ……...……..…….. 469

EMINENT DOMAIN:

Eminent Domain Procedure Act Limits Judicial Review in Appeals to Just Compensation under Statute. The Eminent Domain Procedure Act, K.S.A. 26-501 et seq., limits the scope of judicial review in eminent-domain appeals to the issue of just compensation as defined by K.S.A. 26-513. Relocation benefits are not a component of just compensation under K.S.A. 26-513. *Kansas Fire and Safety Equipment v. City of Topeka* ……...… 418

No Implied Private Right of Action under K.S.A. 26-518. K.S.A. 26-518 does not create an implied private right of action allowing displaced persons to sue a condemning authority for relocation benefits and assistance in a civil cause of action filed directly in district court.
Kansas Fire and Safety Equipment v. City of Topeka ……...… 418

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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INSURANCE:

Insured's Duty to Act with Reasonable Care or Duty to Act in Good Faith—Question for Trier of Fact. Generally, a court commits legal error by articulating the insurer's implied contractual duty to act with reasonable care or the implied contractual duty to act in good faith in a more particularized, fact-specific manner because it conflates the question of duty, a question of law, with the question of breach, a question typically reserved for the trier of fact. *Granados v. Wilson* 34

Insurer's Duty to Its Insured in Kansas—Failure to Fulfill Contractual Duties Results in Action for Breach of Contract—Four Elements. An insurer's failure to fulfill its implied contractual duties to act with reasonable care and in good faith gives rise to an action for breach of contract, rather than an action in tort, because an insurance policy is typically a contract. Even so, Kansas law applies tort concepts to evaluate whether an insurer has breached the implied contractual terms to act with reasonable care and in good faith. Thus, plaintiffs asserting such claims must prove four well-known elements: a duty owed to the plaintiff; a breach of that duty; causation between the breach of duty and the injury to the plaintiff; and damages suffered by the plaintiff. *Granados v. Wilson* 34

Liability for Judgment Exceeding Coverage Limits—Requirement of Causal Link between Insurer's Breach of Duty and Excess Judgment. For an insurer to be liable for a judgment exceeding the coverage limits under the policy of insurance, there must be a causal link between the insurer's breach of duty and the excess judgment. *Granados v. Wilson* 34

Third-Party Liability Claims—Insurer Owes Two Legal Duties to Its Insured—Duty to Act with Reasonable Care and Duty to Act in Good Faith. Under established Kansas precedent, an insurer owes its insured two legal duties when handling third-party liability claims against the insured: the duty to act with reasonable care and the duty to act in good faith. These two legal duties are implied contractual terms incorporated into liability insurance policies in our state. *Granados v. Wilson* 34

JUDGES:

Magistrate Judge May Issue Search Warrant Authorizing Use of Tracking Device and May Grant Extensions. A magistrate may issue a search warrant authorizing the installation and use of a tracking device to collect data for a specified period of time. Upon a showing of good cause by the State, the magistrate may grant extensions of the search warrant. *State v. Campbell* 511*

JUDGMENTS:

Dormancy Period under Statute Does Not Run if Judgment is Stayed or Prohibited. The dormancy period under K.S.A. 2022 Supp. 60-2403(c) does not run "during any period in which the enforcement of the judgment by legal process is stayed or prohibited." *In re Marriage of Holliday* ...469

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JURISDICTION:

Supreme Court has Jurisdiction in Appeals from Judgments Regarding Restitution in First-degree Murder Convictions. Under K.S.A. 60-2101(b) and K.S.A. 2022 Supp. 22-3601, the Kansas Supreme Court has jurisdiction over appeals from district court judgments upholding or reversing the validity of restitution orders imposed in first-degree murder convictions. *State v. Bailey* …….. 487

MARRIAGE:

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

— **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

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. *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

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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

REAL PROPERTY:

Prescriptive Easement—Exclusivity Requirement. The exclusivity requirement for a prescriptive easement is met if the landowner's actions fail to substantially interrupt the prescriptor's use of the land for the prescriptor's specific purpose during the prescriptive period. *Pyle v. Gall* ……...…….. 499*

— Requirements. A prescriptive easement is established by the use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) for a set prescriptive period; and (5) adverse. *Pyle v. Gall* ……..…….…….. 499*

SEARCH AND SEIZURE:

Evaluating Search Warrant Technical Irregularities—Practical Accuracy Test. No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. In Kansas, the test used to evaluate search warrant technical irregularities is one of practical accuracy rather than one of hyper technicality. The label of "technical irregularity" is generally reserved for clerical mistakes or omissions that do not otherwise affect the substance of the warrant. *State v. Campbell* ……...…….. 511*

Presumption of Validity—Burden on Challenging Party to Establish Illegality. Absent a showing of illegality, search warrants and their supporting affidavits are presumed valid. The party challenging the validity of the search warrant bears the burden of establishing its illegality. *State v. Campbell* …….. 511*

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

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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. 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

Determination Whether Statute Implies Private Right of Action—Two-Part Test. Kansas courts generally follow a two-part test to determine whether a statute implies a private right of action. First, the party must show that the statute was designed to protect a specific group of people rather than to protect the general public. Second, the court must review legislative history to determine whether a private right of action was intended.
Kansas Fire and Safety Equipment v. City of Topeka …….…….... 418

Interpretation—Question of Law—Appellate Review. Statutory interpretation presents a question of law over which appellate courts have unlimited review.
State v. Steinert ……...……...……. 342

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

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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

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

Determination Whether Lesser Included Offense Instruction Is Factually Appropriate—Sufficiency of Evidence Challenge. In determining whether a lesser-included offense instruction is factually appropriate, the question is not whether the evidence is more likely to support a conviction for the greater offense. Instead, the question is whether the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. *State v. Couch* …….. 566*

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

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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

Jury Instructions—Defendant's Use of Controlled Substance May Be Admitted Subject to Requirements of K.S.A. 60-455—PIK Crim. 4th 57.040 Instruction Is Disapproved. Although PIK Crim. 4th 57.040 states that a defendant's use of a controlled substance is a factor the jury can consider in a nonexclusive possession case, the pattern instruction fails to adequately summarize the nuances of this court's caselaw relating to K.S.A. 2022 Supp. 60-455 evidence. While a defendant's use of a controlled substance may be admitted—subject to the requirements of K.S.A. 2022 Supp. 60-455—when such evidence is relevant to prove a disputed material fact, the defendant's use of a controlled substance is not a factor that is automatically admissible as an exception to the specific mandates of K.S.A. 2022 Supp. 60-455. To the extent PIK Crim. 4th 57.040 suggests otherwise, the instruction is disapproved. To the extent past appellate cases in this state suggest otherwise, they also are disapproved. *State v. Campbell* 511*

— 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

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

— **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). *State v. Bentley* ……..... 222

— 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

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

Jury Instructions Define Elements of Offense More Narrowly Than Charging Document—Sufficiency of Evidence Measured against Elements of Jury Instructions. When the jury instructions define the essential elements of the offense more narrowly than the charging document, due process considerations require the reviewing court to measure the sufficiency of the evidence against the narrower statutory elements of the jury instructions, rather than the broader statutory elements charged in the complaint. *State v. Couch* ……..……. 566*

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

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

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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

TRUSTS:

Charitable Trust—Supreme Court has Subject Matter Jurisdiction to Review District Court Order Modifying Charitable Trust. The Kansas Supreme Court has subject matter jurisdiction to review an uncontested district court order retroactively modifying a charitable trust to decide whether the district court's order should be binding on federal tax authorities under *Commissioner v. Estate of Bosch*, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). *In the Marvin S. Robinson Charitable Trust* …….. 492

No. 124,587

In the Matter of MICHAEL P. JAHN, *Petitioner.*

(531 P.3d 532)

ORDER OF REINSTATEMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Order of Reinstatement.*

On May 20, 2022, this court suspended Michael P. Jahn's license to practice law in the state of Kansas for six months. The court directed the suspension could be stayed after three months provided that Jahn enter a one-year probation plan with specified conditions. See *In re Jahn*, 315 Kan. 625, 509 P.3d 552 (2022).

After three months had passed, Jahn twice moved to dismiss the suspension and be placed on probation pursuant to a probation plan approved by the Disciplinary Administrator. The court denied both motions for lack of proper service.

Jahn now petitions for reinstatement of his license under Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293). In his petition, Jahn requests a reinstatement hearing "to determine that there are no current impediments to his ability to practice law."

In response to the petition, the Disciplinary Administrator certifies that Jahn has complied fully with the requirements of Rule 232(b)(1)(A) through (D) and that the Disciplinary Administrator believes sufficient time has elapsed since the date of suspension to justify this court's reconsideration of its order. Because Jahn has now served the entirety of his six-month suspension, the Disciplinary Administrator recommends Jahn be fully reinstated to the practice of law without probation.

The court agrees with the Disciplinary Administrator, grants Jahn's petition, and orders the full reinstatement of Jahn's license to practice law in Kansas.

The court further orders Jahn to pay all attorney registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education requirements. See Supreme Court Rule 812 (2023 Kan. S. Ct. R. at 609) (outlining CLE requirements following reinstatement). The court directs that once OJA receives proof of Jahn's completion of these conditions, OJA must add Jahn's name to the roster of attorneys actively engaged in the practice of law in Kansas.

Finally, the court orders the publication of this order in the official Kansas Reports and the assessment of all costs herein to Jahn.

Dated this 5th day of July 2023.

Pyle v. Gall

No. 123,823

DENNIS D. PYLE and JENNIFER J. PYLE, *Appellees*, v. JAMES N. GALL JR., Individually and as Trustee of the JAMES N. GALL FAMILY TRUST, *Appellants*.

(531 P.3d 1189)

SYLLABUS BY THE COURT

1. REAL PROPERTY—*Prescriptive Easement—Requirements*. A prescriptive easement is established by the use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) for a set prescriptive period; and (5) adverse.

2. SAME—*Prescriptive Easement—Exclusivity Requirement*. The exclusivity requirement for a prescriptive easement is met if the landowner's actions fail to substantially interrupt the prescriptor's use of the land for the prescriptor's specific purpose during the prescriptive period.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 29, 2022. Appeal from Brown District Court; JAMES A. PATTON, judge. Oral argument held February 2, 2023. Opinion filed July 7, 2023. Judgment of the Court of Appeals reversing the district court on the issue subject to review is reversed. Judgment of the district court is affirmed.

Charles D. Baskins, of Euler Law Offices, LLC, of Troy, argued the cause and was on the briefs for appellants.

James S. Willard, of Willard Law Office, LLC, of Topeka, argued the cause and was on the briefs for appellees.

The opinion of the court was delivered by

WILSON, J.: The Pyles claim a prescriptive easement over land owned by their neighbors, the Galls. The district court determined a prescriptive easement existed, but a panel of the Court of Appeals reversed. The panel reasoned that the Pyles' use was not exclusive because the Pyles did not exclude all others from the asserted easement. We reverse the panel on the issue subject to review and affirm the district court.

FACTS AND PROCEDURAL BACKGROUND

The Pyles own a tract of farmland in Brown County, Kansas, which lies directly east of a tract of farmland owned by the James N. Gall Family Trust. Walnut Creek flows northeast across both

tracts, leaving a small field (the Field) on the Pyle tract accessible only from a neighbor's field to the north or by crossing the Gall tract from the west. The Pyles took ownership of their tract in the 1990s and have since accessed the nearly 2-acre Field by crossing the northern 60 feet of the Gall tract. The Gall tract has been farmed by James and Lee Mueller for around 20 years. The Pyles and their agents farm the Field.

Tensions arose when the parties disagreed on the appropriate north-south boundary line between their respective tracts. The Galls unsuccessfully offered to purchase the Field. Both parties then hired surveyors to determine the boundaries of the tracts. The surveyors reached different conclusions and the Galls erected a fence in accordance with their surveyor's findings.

The Pyles then petitioned the district court to quiet the title to the land. The petition alleged the Pyles acquired the contested boundary land by adverse possession and also alleged they acquired either a prescriptive easement or an easement by necessity to the Field over the northern 60 feet of the Gall tract.

Following a bench trial, the district court found the Pyles acquired the disputed boundary land by adverse possession. The court also found the Pyles acquired a prescriptive easement across the northern 60 feet of the Galls' land. The court did not consider whether the Pyles had also acquired an easement by necessity.

The Galls appealed. A panel of the Kansas Court of Appeals affirmed the district court's adverse possession findings but reversed the district court's finding of a prescriptive easement and remanded the case to the district court to reach the easement by necessity claim. *Pyle v. Gall*, No. 123,823, 2022 WL 1277628, at *1 (Kan. App. 2022) (unpublished opinion).

Citing *Koch v. Packard*, 48 Kan. App. 2d 281, 288-89, 294 P.3d 338 (2012), *rev. denied* 298 Kan. 1203 (2013), the panel said the evidence "did not show that the Pyles exclusively used the northern boundary of the Galls' land. Pyle and the Muellers both used the northern boundary for agricultural purposes—Pyle used it to reach his field, and the Muellers planted the northern boundary and used it to cross the Galls' land." *Pyle*, 2022 WL 1277628, at *4. Further, "both [the Muellers and the Pyles] used the route to reach their respective crops." 2022 WL 1277628, at *4. The panel

then concluded the district court erred in finding exclusivity and thus erred in finding the existence of a prescriptive easement. 2022 WL 1277628, at *4. The Pyles petitioned this court for review of the panel's holding that the Pyles did not exclusively use the asserted prescriptive easement.

Jurisdiction is proper. See K.S.A 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review.).

ANALYSIS

Standard of Review

Whether a prescriptive easement exists is a question of fact. See *Fiest v. Steere*, 175 Kan. 1, 6, 259 P.2d 140 (1953); see also 28A C.J.S. Easements § 270. The existence of a prescriptive easement must be shown by clear and convincing evidence. *Hale v. Ziegler*, 180 Kan. 249, 256, 303 P.2d 190 (1956). Clear and convincing evidence is evidence sufficient to establish that the truth of the facts asserted is highly probable. *In re Adoption of C.L.*, 308 Kan. 1268, 1278, 427 P.3d 951 (2018). Clear and convincing evidence is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. 308 Kan. at 1278.

We review a district court's findings of fact for substantial competent evidence and exercise unlimited review over legal conclusions based on those factual findings. *Rivera v. Schwab*, 315 Kan. 877, 914, 512 P.3d 168 (2022). We consider whether the district court's findings of fact "are sufficient for the plaintiffs to have prevailed on their claims under the correct legal standard." 315 Kan. at 914. "Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion." *State, ex rel. Secretary, DCF v. M.R.B.,* 313 Kan. 855, 862, 491 P.3d 652 (2021). While conducting this review, "'an appellate court does not weigh conflicting evidence, evaluate witnesses' credibility, or redetermine questions of fact.'" *Board of Miami County Comm'rs v. Kanza Rail-Trails Conservancy, Inc.*, 292 Kan. 285, 325, 255 P.3d 1186 (2011) (quoting *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d

1251 [2009]). "Rather, the appellate court should review the facts of the case in the light most favorable to the prevailing party below to ascertain whether the trial court's decision is properly supported by substantial competent evidence." *In re Adoption of J.M.D.*, 293 Kan. 153, 171, 260 P.3d 1196 (2011). Put differently, "appellate review of factual questions should accord a great deal of deference to the trial judge's determination, even in those instances where the appellate jurists might have decided the case differently." 293 Kan. at 171.

Prescriptive Easements in Kansas

In 1953, we outlined the elements of a prescriptive easement:

"'A prescriptive right to a private way is substantially the same in quality and characteristics and would arise in substantially the same manner as would title to land by adverse occupancy. It must not only be continued for the requisite period, but it must be adverse, and under a claim of right, and must be exclusive and uninterrupted; and all this with the knowledge and against the consent of the owner of the estate out of which the easement is claimed; reasonable opportunity for knowledge on his part being accounted to him for such knowledge. If one claiming an easement has been occupying an estate for the given period with the consent of the owner, this does not constitute adverse possession, but is simply a license so to do, out of which an estate by prescription can never arise. " *Fiest*, 175 Kan. at 5-6 (quoting *Insurance Co. v. Haskett*, 64 Kan. 93, 96, 67 P. 446 [1902]).

Fiest also noted:

"'To obtain an easement for a private way by prescription, the use of such private way must be substantially such a use as, if applied to land, would give title by adverse occupancy. It must have been continuous, exclusive to the extent the nature of the use will permit, and adverse. A use under a mere license will not ripen into an easement by prescription.'" 175 Kan. at 5 (quoting *Haskett*, 64 Kan. 93, Syl. ¶ 2).

A prescriptive easement arises if the individual asserting the easement, the prescriptor, continuously uses another's land for a unique purpose over a set prescriptive period. The prescriptor's use must be open, thereby providing notice to the landowner and obligating the landowner to substantially interrupt the prescriptor's use. See Saxe, *When "Comprehensive" Prescriptive Easements Overlap Adverse Possession: Shifting Theories of "Use" and "Possession,"* 33 B.C. Envtl. Aff. L. Rev. 175, 190

(2006) (explaining continuity "is highly dependent upon the nature and character of the use itself" and that generally "the primary concern in evaluating continuity is whether an interruption in use has occurred that significantly interfered with the user"). Should the landowner fail to interrupt the prescriptor's use, then the prescriptor acquires a right of use over the land. Finally, the prescriptor's use must be what has been variously described as "adverse," "hostile," or "under a claim of right." Morgan, *Balancing Interests: How the Prescriptive Easement Doctrine Can Continue to Efficiently Support Public Policy*, 50 Wake Forest L. Rev. 1253, 1256-57 (2015) ("Comment b to § 2.16 of the Restatement [Third] states that an 'adverse' use means 'a use made without the consent of the landowner, or holder of the property interest used, and without other authorization.'"); 33 B.C. Envtl. Aff. L. Rev. at 187 ("For an easement by prescription to ripen, the use must be adverse or hostile to that of the true owner, thereby indicating a claim of right.").

From this, we clarify these elements are necessary to establish a prescriptive easement in Kansas: use of a private way that is (1) open; (2) exclusive, meaning unique to the prescriptor; (3) continuous; (4) for a set prescriptive period; and (5) adverse.

This clarification is necessary because over time the elements of prescriptive easements have become conflated with the elements of adverse possession, a related but distinct doctrine of property law. Some of our earliest prescriptive easement cases suggested adverse possession and prescriptive easements were similar. See, e.g., *Chinn v. Strait*, 173 Kan. 625, 630, 250 P.2d 806 (1952); *Jobling v. Tuttle*, 75 Kan. 351, 362-64, 89 P. 699 (1907); *Insurance Co. v. Haskett*, 64 Kan. 93, 96, 67 P. 446 (1902).

In 1963, the Legislature enacted K.S.A. 60-503 as part of a broad revision to the Kansas Code of Civil Procedure. The statute codified the elements of adverse possession. It provides:

> "No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years. This section shall not apply to any action commenced within one (1) year after the effective date of this act." K.S.A. 60-503.

Nearly a decade later, in *Armstrong v. Cities Service Gas Co.*, 210 Kan. 298, 502 P.2d 672 (1972), we discussed the details of K.S.A. 60-503 while evaluating prescriptive easement claims. We noted: "Thus we see statutory authorization of a doctrine of adverse possession *(or prescription in the case of easements)* which gives protection to those who in good faith enter and hold possession of land for the prescribed period in the belief it is theirs." (Emphasis added.) 210 Kan. at 308. The language and reasoning of *Armstrong* show we understood the doctrines of adverse possession and prescriptive easements to be mutually informing.

A panel of the Court of Appeals recognized this language in *Allingham v. Nelson*, 6 Kan. App. 2d 294, 298, 627 P.2d 1179 (1981). The panel, citing *Armstrong* and two adverse possession cases, explained that adverse possession and prescriptive easements were traditionally distinguished but the distinction in Kansas had become "blurred" with "the cases on prescriptive easements us[ing] the statute of adverse possession (K.S.A. 60-503) as a basis for evaluating claims." 6 Kan. App. 2d at 298.

Since *Allingham*, two more of our cases likely contributed to this conflation. First, in *Union Gas System, Inc. v. Carnahan*, 245 Kan. 80, 87, 774 P.2d 962 (1989), *superseded by statute as stated in Northern Natural Gas Co. v. Martin, Pringle, et. al.,* 289 Kan. 777, 217 P.3d 966 (2013), we cited K.S.A. 60-503 when evaluating theories of adverse possession and a prescriptive easement. We rejected both theories in one paragraph without separating our analysis. 245 Kan. at 87. Second, in *State ex rel. Meek v. Hays*, 246 Kan. 99, 107, 785 P.2d 1356 (1990), we considered a public prescriptive easement claim and, citing K.S.A. 60-503, explained the prescriptive period was 15 years.

Exclusivity in Prescriptive Easements

Because cases have sometimes discussed the two doctrines without carefully separating their respective analyses, the exclusivity element of a prescriptive easement has become "blurred" with the exclusivity element of adverse possession. We have never directly evaluated this element and various Court of Appeals panels have understood it differently. For example, in *Dameron v.*

Kelsay, No. 96,462, 2007 WL 2580598, at *5 (Kan. App. 2007) (unpublished opinion), the panel explained:

"We agree that the type of 'exclusiveness' is not the same for a prescriptive easement and adverse possession. Adverse possession requires that the possession of the property be exclusive, while a prescriptive easement requires that the use of the land be exclusive only to the extent the nature of the use will permit."

Five years later, another panel provided a contrary evaluation of prescriptive easement exclusivity in *Koch*, 48 Kan. App. 2d at 284-89. The case involved Koch's claim of a prescriptive easement across his neighbor's land. The panel observed that Kansas courts look to the rules of adverse possession when considering prescriptive easements. It then explained exclusivity by citing *Stith v. Williams*, 227 Kan. 32, 37, 605 P.2d 86 (1980), and *Thompson v. Hilltop Lodge, Inc.*, 34 Kan. App. 2d 908, 910-11, 126 P.3d 441 (2006), both of which only involved adverse possession claims. The panel also cited the *Allingham* court's language describing how Kansas courts have blurred the distinction between adverse possession and prescriptive easements. Indeed, it explicitly recognized the *Allingham* court's discussion of how this blurring has moved Kansas away from the traditional understanding of prescriptive easements as being non-exclusive rights acquired by the manner of use. *Koch*, 48 Kan. App. 2d at 286.

The *Koch* court then found exclusivity did not exist because, among other things, the roadway had been used by others. 48 Kan. App. 2d at 287. It rejected Koch's argument "that the exclusivity requirement does not mean the land at issue must be used solely by the person claiming the prescriptive easement." 48 Kan. App. 2d at 288. The panel conceded that other states sided with Koch's argument that sole usage should not define exclusivity for prescriptive easements, and instead exclusivity should mean the claimant's use is "exclusive against the public at large" and is not dependent on the similar rights of others. 48 Kan. App. 2d at 288.

The panel observed that out-of-state "decisions seem reasonable in light of the fact that a party is not claiming title to real estate but is claiming access," but noted "[n]o Kansas court has ever analyzed the element of exclusivity in a similar manner. When Kansas courts have considered the requirement of exclusiv-

ity in the adverse possession context, those courts have determined the claimant's use of the property at issue must be to the exclusion of *all other persons*." *Koch*, 48 Kan. App. 2d at 288.

Our review of relevant authorities suggests the *Dameron* court's understanding was correct, and the *Koch* court was wrong. The Third Restatement explains:

"The term 'exclusive,' borrowed from adverse-possession doctrine, causes confusion in prescription cases because servitudes are generally not exclusive. The servient owner is entitled to make any use of the servient estate that will not unreasonably interfere with enjoyment of the servitude. In addition, several parties may enjoy similar servitudes in the same land without conflict, as with easements to use roads. In adverse-possession doctrine, the exclusivity requirement describes the behavior of an ordinary possessor and serves to give notice to the owner. In servitudes cases, however, it puts courts into the awkward position of explaining that the requirement does not mean that the use is such as to exclude others, or, that the user in fact has excluded others from the servient estate. Instead, they explain, it simply requires that the user have acted independently of rights claimed by others." Restatement (Third) of Property (Servitudes) § 2.17, comment g (2000).

Corpus Juris Secundum agrees:

"The term 'exclusive' does not mean that the easement must be used by one person only, but simply that the right does not depend for its enjoyment on a similar right in others; it must be exclusive as against the community or public at large. The claimant must show that his or her use is exclusive in the sense that his or her claim of right would have to be particular to himself or herself as opposed to arising simply as a member of the general public." 28A C.J.S., Easements § 35.

Moreover:

"It is frequently asserted that an adverse use must be exclusive for one to obtain a prescriptive easement. This requirement, however, has sharply limited significance. Exclusivity does not mean that the claimant must be the only person using the easement, to the exclusion of all others. It simply connotes that the claimant's use must be independent and not contingent upon the enjoyment of a similar right by others. Hence, use shared with the owner of the servient estate generally may form the basis for a prescriptive easement. Similarly, two persons may independently acquire prescriptive easements across the same land. An individual's use of land in connection with the general public, however, cannot support a private prescriptive right unless the claimant's use is distinctive in some manner. Use by a claimant's customers and lessees does not represent use by the general public, but rather is derivative of the claimant's usage and evidences a claim of right." The Law of Easements & Licenses in Land § 5:23.

Beyond these authorities, we recognize that many other states understand exclusivity differently than the *Koch* court and the panel below. See, e.g., *Nationwide Financial, LP v. Pobuda*, 21 N.E.3d 381, 391 (Ill. 2014) ("'Exclusive' in the context of a prescriptive easement claim 'does not mean that no one may or does use the way, except the claimant of the easement. It means no more than that his right to do so does not depend upon a like right in others, and it does not mean that the claim is necessarily well founded.'") (quoting *Petersen v. Corrubia*, 21 Ill. 2d 525, 531, 173 N.E.2d 499 [Ill. 1961]); *Keener Properties, L.L.C. v. Wilson,* 912 So.2d 954, 957 (Miss. 2005) ("We conclude that the distinction to be made when using the term 'exclusive' as it relates to a prescriptive easement does not mean to keep all others out, but to show a right to use the land above other members of the general public."); see also The Law of Easements & Licenses in Land § 5:23 n.10 (defining the view of prescriptive easement exclusivity in *Koch* as a minority view).

Thus, we take this opportunity to correct any "blurring" of the exclusivity elements in adverse possession and prescriptive easements, and thereby distinguish one from the other. Exclusivity in the context of adverse possession is different than exclusivity in the context of prescriptive easements. In a successful adverse possession claim, the possessor acquires ownership of the owner's interest in the land. The adverse possessor's exclusion of all others during the prescriptive period acts as a challenge to the landowner's right to own and possess the land for all purposes allowed by what he owns. 50 Wake Forest L. Rev. at 1264 (exclusivity in adverse possession refers to "challenging the true owner's right to use the property or preventing the true owner from using the land" so that the possessor's use is "exclusive against all others"). Often, this involves the possessor erecting fencing or other barriers to prevent the landowner and others from making productive use of the land during the prescriptive period. 50 Wake Forest L. Rev. at 1264.

But a prescriptor's exclusive challenge in a prescriptive easement operates differently. In a successful prescriptive easement claim, the prescriptor mounts a more limited challenge because the burden a prescriptor imposes on the land is less onerous than the challenge of the adverse possessor. Cf. 28A C.J.S., Easements § 35 (lesser challenge of a prescriptive easement is justified because of the lesser interests at

stake in gaining the easement and because it is possible for titleholder and prescriptor to use the same strip of property simultaneously). Rather than challenge everyone's ability to enter the land, a prescriptor asserting a prescriptive easement challenges the landowner to prevent the prescriptor from using the land for the prescriptor's particular purpose. 50 Wake Forest L. Rev. at 1264 ("In the prescriptive easement context, on the other hand, exclusive use tends to refer to a challenge to the true owner's right to prevent the [prescriptor] from using the land for the particular use for which the easement is claimed."). So the prescriptor meets the exclusivity requirement for a prescriptive easement if the landowner's actions fail to substantially interrupt the prescriptor's use of the land for the prescriptor's specific purpose during the prescriptive period. Because a prescriptive easement only arises from the prescriptor's specific challenge that the landowner failed to address, a prescriptive easement does not arise if others are expressly or implicitly permitted to do the same thing the prescriptor views as a challenge.

And so, we clarify that even though the elements of adverse possession and prescriptive easements are "substantially the same," the exclusivity test for each doctrine is critically different. *Fiest,* 175 Kan. at 5; *Taylor Inv. Co. v. Kansas City Power & Light Co.*, 182 Kan. 511, 518, 322 P.2d 817 (1958). Necessarily, any analysis of these elements must specifically focus on how the element is understood within the particular doctrine at issue.

The element of exclusivity was established here in the context of a prescriptive easement.

We now turn to the issue on appeal. The Pyles argue the panel erred by applying an incorrect understanding of exclusivity when reviewing the district court's prescriptive easement finding. We agree. The panel made an error of law by relying on *Koch*'s erroneous exclusivity definition when it held that exclusivity does not exist unless the prescriptor's use is "'to the exclusion of *all other persons*.'" *Pyle*, 2022 WL 1277628, at *4 (quoting *Koch*, 48 Kan. App. 2d at 288). For that reason, the panel erroneously concluded the Pyles' use of the land was not exclusive because the Pyles did not exclude everyone from the land.

There is substantial competent evidence for the district court's finding that the Pyles and their agents were the only individuals using

the asserted easement for the particular purpose of accessing the Field. Testimony from Dennis Pyle and his agents support this finding. While the Muellers testified they also used the Gall tract during the prescriptive period, and the Galls sometimes allowed sportsmen to hunt or fish on it, no one who owned or possessed the Gall tract substantially interrupted the Pyles' access to the Field.

Each group, therefore, used the asserted easement over the Gall tract for unique purposes. The Pyles and their agents used the asserted easement as a corridor to access the Field, the hunters and anglers used the asserted easement for outdoor recreation, and the Galls and Muellers used the land for planting and growing crops. Importantly, the Pyles' use of the land was unique to them. Moreover, no one else had a similar right to use the Galls' land as a corridor to the Field. Aside from the occasional errant hunter or fisherman, the Pyles were the only ones that challenged the Galls to exclude them from their asserted easement.

Framed differently, the fact that various individuals used the same strip of the Galls' land is irrelevant to the exclusivity determination of an asserted prescriptive easement. Instead, the relevant question is *how* that land was used. The district court found the Pyles used the land to access the Field. The panel agreed, but it also concluded that "Pyle and the Muellers both used the northern boundary for agricultural purposes." *Pyle*, 2022 WL 1277628, at *4. While both the district court and the panel were correct, the use described by the district court was more specific and was unique to the Pyles. As we have explained, "prescriptive easements are interpreted narrowly because they are created by the adverse use of the property, with the use during the prescriptive period defining the scope of the easement." *Stroda v. Joice Holdings*, 288 Kan. 718, 721, 207 P.3d 223 (2009). It matters not that there may be a common use of the land. It matters whether there is a factor distinguishing the Pyles' use from the use of others.

The element of adversity is not before us.

Turning to another element of prescriptive easements, the Galls argued on direct appeal to the panel that the Pyles' use of their land was not adverse. The panel did not reach this issue because it determined the Pyles' use of the land was not exclusive and therefore the district court erred in finding the Pyles acquired a prescriptive easement. See

Pyle, 2022 WL 1277628, at *4 ("Because a prescriptive easement does not exist without exclusivity, we need not examine the Galls' argument concerning adversity."). Though the Galls make a one-sentence reference to the adversity argument in their supplemental brief, and also raised the issue at oral arguments before us, the Galls did not cross-petition or file a conditional cross-petition asking us to review the adversity issue. The district court's adversity finding therefore controls. *Friends of Bethany Place v. City of Topeka*, 297 Kan. 1112, 1121, 307 P.3d 1255 (2013). We decline to address whether the Pyles' use was adverse. See Supreme Court Rule 8.03(c)(3)(B) (2023 Kan. S. Ct. R. at 57) ("If the Court of Appeals does not decide an issue properly presented to it, the cross-petitioner must raise that issue to preserve it for review."); Rule 8.03(c)(4)(B) (2023 Kan. S. Ct. R. at 58) ("If the Court of Appeals does not decide an issue properly presented to it, the conditional cross-petitioner must raise that issue to preserve it for review.").

The facts have not been reweighed.

As a final matter, the Pyles argue the panel erroneously substituted its own findings of fact for those of the district court. But the district court and the panel agreed on the relevant facts. The disagreement centered on the legal question of how to understand exclusivity, rather than a factual question about who was on the land. As we explained above, the panel erred in this regard by (1) relying on the exclusivity definition in *Koch*, and (2) failing to narrowly interpret the Pyles' use of the prescriptive easement.

CONCLUSION

We find the panel erred in its holding on the exclusivity element of the Pyles' prescriptive easement claim. We do not consider the Galls' issue of adversity in the context of the Pyles' claim of a prescriptive easement. Finally, we find no error in the panel's consideration of the facts. We thus reverse the panel's conclusion that the Pyles did not establish a prescriptive easement over the Gall tract.

Judgment of the Court of Appeals reversing the district court on the issue subject to review is reversed. Judgment of the district court is affirmed.

State v. Campbell

No. 123,190

STATE OF KANSAS, *Appellee*, v. JERRY W. CAMPBELL, *Appellant*.

(532 P.3d 425)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Harmless Error Standard—Determination Whether Erroneous Admission of Prior Drug Crime Evidence under K.S.A. 60-455 Prejudicial to Party's Substantial Rights*. The harmless error standard of K.S.A. 60-2105 and K.S.A. 2022 Supp. 60-261 applies to determine if erroneous admission of prior drug crime evidence under K.S.A. 2022 Supp. 60-455 prejudicially affected a party's substantial rights, considering the entire record. Where an error implicates a statutory but not a federal constitutional right, the harmless error test is whether there is a reasonable probability that the erroneous admission of prior drug crime evidence affected the outcome of the trial, considering the entire record. The party benefiting from the improper admission of evidence bears the burden to show harmlessness.

2. SAME—*Admission of Prior Bad Acts Evidence—Three Types of Prejudice.* At least three types of prejudice can result from the admission of prior bad acts evidence: (1) a jury might exaggerate the value of other crimes as evidence showing that, because a defendant previously committed a crime, it might be properly inferred that he or she committed the currently charged offense; (2) a jury might conclude that a defendant deserves punishment because he or she is a general wrongdoer, even if the prosecution has not otherwise met its burden to establish guilt beyond a reasonable doubt; and (3) a jury might conclude that because the defendant is a criminal, the evidence he or she presents on his or her own behalf should not be believed.

3. TRIAL—*Jury Instructions—Defendant's Use of Controlled Substance May Be Admitted Subject to Requirements of K.S.A. 60-455—PIK Crim. 4th 57.040 Instruction Is Disapproved*. Although PIK Crim. 4th 57.040 states that a defendant's use of a controlled substance is a factor the jury can consider in a nonexclusive possession case, the pattern instruction fails to adequately summarize the nuances of this court's caselaw relating to K.S.A. 2022 Supp. 60-455 evidence. While a defendant's use of a controlled substance may be admitted—subject to the requirements of K.S.A. 2022 Supp. 60-455—when such evidence is relevant to prove a disputed material fact, the defendant's use of a controlled substance is not a factor that is automatically admissible as an exception to the specific mandates of K.S.A. 2022 Supp. 60-455. To the extent PIK Crim. 4th 57.040 suggests otherwise, the instruction is disapproved. To the extent past appellate cases in this state suggest otherwise, they also are disapproved.

4. APPEAL AND ERROR—*Motion to Reconsider Treated as Motion to Alter or Amend—Appellate Review*. Appellate courts generally treat motions to reconsider as motions to alter or amend. When reviewing the district court's

ruling on a motion to alter or amend, we apply an abuse of discretion standard. A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact.

5. JUDGES—*Magistrate Judge May Issue Search Warrant Authorizing Use of Tracking Device and May Grant Extensions*. A magistrate may issue a search warrant authorizing the installation and use of a tracking device to collect data for a specified period of time. Upon a showing of good cause by the State, the magistrate may grant extensions of the search warrant.

6. SEARCH AND SEIZURE—*Presumption of Validity—Burden on Challenging Party to Establish Illegality.* Absent a showing of illegality, search warrants and their supporting affidavits are presumed valid. The party challenging the validity of the search warrant bears the burden of establishing its illegality.

7. SAME—*Evaluating Search Warrant Technical Irregularities—Practical Accuracy Test*. No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused. In Kansas, the test used to evaluate search warrant technical irregularities is one of practical accuracy rather than one of hyper technicality. The label of "technical irregularity" is generally reserved for clerical mistakes or omissions that do not otherwise affect the substance of the warrant.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 1, 2022. Appeal from Douglas District Court; AMY J. HANLEY, judge. Oral argument held March 28, 2023. Opinion filed July 14, 2023. Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded with directions.

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

Brian Deiter, assistant district attorney, argued the cause, and *Suzanne Valdez*, district attorney, and *Derek Schmidt*, attorney general, were with him on the briefs for appellee.

The opinion of the court was delivered by

STANDRIDGE, J.: After law enforcement discovered drugs and items associated with the sale of drugs in a car Jerry W. Campbell was driving on two separate occasions, a jury convicted him of two counts of possessing methamphetamine and four counts of possessing drug paraphernalia with intent to use to distribute. At trial, the district court allowed the State to introduce detailed evidence relating to Campbell's prior convictions for similar crimes

under K.S.A. 2017 Supp. 60-455. Campbell appealed. The Court of Appeals reversed Campbell's convictions, finding the district court erred by allowing the State to introduce the prior crimes evidence. The panel remanded the case for a new trial. Judge Henry Green, concurring in part and dissenting in part, also would have found the prosecutor committed reversible error during voir dire by using an inflammatory hypothetical to explain the presumption of innocence to the prospective jurors.

In its petition for review, the State does not challenge the panel's finding that the district court erroneously allowed introduction of the prior crimes evidence. Instead, the State claims the panel erred in failing to analyze whether this error required reversal. Applying that analysis, the State maintains the error was harmless. We agree that the panel erred in failing to conduct a harmless error analysis but disagree that application of a reversibility analysis results in a finding of harmless error.

Campbell filed a cross-petition for review raising three issues: (1) the panel erred in affirming the district court's reversal of its order suppressing evidence found in Campbell's car, (2) this court should adopt Judge Green's dissent and find the prosecutor committed reversible error during voir dire, and (3) the cumulative effect of the alleged errors violated his constitutional right to a fair trial. Given our holding that introduction of the prior crimes evidence constitutes reversible error, we only reach the merits of Campbell's claim of error relating to his motion to suppress because resolution of this claim will assist the district court on remand. We conclude Campbell has no right to relief on this basis because the district court did not abuse its discretion in reversing its suppression order.

FACTUAL AND PROCEDURAL BACKGROUND

On September 23, 2017, Lawrence Police Officer Matt Roberts saw Campbell driving a blue Lincoln Town Car with a seven-year-old child as a passenger. After learning Campbell had an active warrant for his arrest and a suspended driver's license, Officer Roberts stopped Campbell and arrested him. The officer located several $100 bills in Campbell's pants pockets, along with some $20 bills and other smaller denominations. During a later search

of the car, Officer Roberts discovered several items he associated with the sale of drugs, including a zippered case containing an unknown white powdery substance, a digital scale with white residue, a measuring spoon, Ziploc bags containing white residue and what appeared to be marijuana seeds, and 64 unused Ziploc bags. The residue later tested positive for methamphetamine.

In November 2017, law enforcement applied for and received a search warrant to place a GPS tracking device on the Lincoln Town Car. Although Campbell was not the registered owner of the car, law enforcement regularly saw him driving it. In the affidavit supporting the search warrant, law enforcement alleged Campbell was a methamphetamine distributor and listed previous encounters law enforcement had with Campbell. These encounters included three occasions when law enforcement found what appeared to be methamphetamine and drug paraphernalia in cars driven by Campbell in May 2017 (May stop), July 2017 (July stop), and September 2017, which is the incident referenced above (September stop).

Law enforcement attached the GPS tracking device to the Lincoln Town Car and began monitoring its movements. On the evening of December 28, 2017, and into the early morning hours of December 29, 2017, law enforcement used the GPS tracker to physically follow Campbell as he drove to various locations in Kansas City, Missouri, and back toward Lawrence. Officers saw a female passenger in the car who they later identified as Kayla Stroda.

Around 3:15 a.m., law enforcement stopped Campbell just outside Lawrence and arrested him for driving without a valid license. A drug-sniffing dog alerted law enforcement to the possibility of drugs inside the car. A search revealed a red bag on the passenger floor containing two bags of methamphetamine, a digital scale with white residue, and a large Ziploc bag containing a roll of smaller Ziploc bags. Inside the center console, law enforcement located a small coin purse containing a small bag of methamphetamine, a paper tablet folded up in foil, and a bag of broken pill pieces. Campbell agreed to speak with law enforcement. Campbell admitted he typically drove the car but denied any knowledge of the methamphetamine and said it did not belong to

Stroda either. Campbell advised he often gave rides to people and claimed the methamphetamine could belong to one of these passengers.

The State combined the charges relating to the September and December stops into a single complaint. For the September stop, the State charged Campbell with one count of possessing methamphetamine with intent to distribute, two counts of possessing drug paraphernalia with intent to use to distribute, and one count of child endangerment. For the December stop, the State charged Campbell with one count of possessing methamphetamine with intent to distribute, two counts of possessing drug paraphernalia with intent to use to distribute, one count of possessing diazepam with intent to distribute (the bag of pill pieces), and one count of possessing buprenorphine (the paper tablet).

Before trial, Campbell moved to suppress the evidence seized during the December stop, arguing law enforcement lacked probable cause to search the car. At first, the district court granted the motion based on its finding that law enforcement's use of the GPS tracker to search Campbell's car occurred after the GPS search warrant expired. But after hearing testimony and arguments on the State's motion for reconsideration, the court reversed its ruling and found the evidence seized from Campbell's car during the December stop was admissible because the warrant expired due to a clerical error that did not otherwise affect the substance of the warrant.

In another pretrial ruling, the district court granted the State's motion to introduce detailed evidence of Campbell's prior crimes from the May and July stops under K.S.A. 2017 Supp. 60-455. During the May stop, law enforcement discovered 41.6 grams of methamphetamine and drug paraphernalia associated with the sale of methamphetamine, including a pipe, new and used Ziploc bags, a digital scale with residue, two measuring spoons, and a notepad listing names of people known to possess or distribute methamphetamine next to numbers and dollar amounts, which law enforcement called a "drug ledger." During the July stop, law enforcement located more than 8 grams of methamphetamine separately packaged by common distribution weights. They also found drug paraphernalia associated with the sale of methamphetamine, including a pipe, a plastic Ziploc bag containing smaller unused

bags, plastic bags with distinct imprints commonly used for distributing drugs, a black scale with white residue, and $90.

The case proceeded to a jury trial, where the State presented evidence relating to the May, July, September, and December stops. The district court instructed the jury it could consider the May and July stop evidence "solely as evidence of the defendant's intent, and to prove the truth or falsity of the defendant's innocent explanation." In a different instruction, the court told the jury it could consider Campbell's prior participation in the sale or use of controlled substances to determine whether Campbell possessed the controlled substances in the current case.

The jury returned a relatively favorable verdict for Campbell. It declined to find him guilty of possession with intent to distribute. And it acquitted him of the child endangerment charge and the charges for possessing diazepam and buprenorphine. In total, the jury found Campbell guilty of two counts of the lesser included offense of possession of methamphetamine and four counts of possessing drug paraphernalia with intent to use to distribute. The district court sentenced Campbell to 31 months' imprisonment followed by 12 months' postrelease supervision. The court ordered this sentence to run consecutive to Campbell's sentences for the convictions resulting from the May and July stops.

On appeal, Campbell raised four issues. He argued the district court committed reversible error by allowing the State to introduce the prior crimes evidence and by reversing its order suppressing the December stop evidence. Campbell also alleged the State committed prosecutorial error during voir dire by using an inflammatory hypothetical to explain a defendant's presumption of innocence and the cumulative effect of the alleged errors violated his right to a fair trial.

A Court of Appeals panel reversed Campbell's convictions and remanded the case for a new trial. *State v. Campbell*, No. 123,190, 2022 WL 2392519, at *24 (Kan. App. 2022) (unpublished opinion). The panel agreed the district court erred in allowing the State to introduce evidence of the prior crimes at trial. In reaching this conclusion, the panel stated:

"Because Campbell has established that the trial court erred by granting the State's motion to admit evidence of his May stop and July stop law enforcement

encounters for purposes of establishing his intent and for evaluating the veracity of his innocent explanation, *we consider the prejudicial effect of this error in our cumulative error analysis further below*." (Emphasis added.) 2022 WL 2392519, at *19.

But the panel never analyzed the prejudicial effect of the district court's error in admitting the prior crimes evidence. *Campbell*, 2022 WL 2392519, at *19-24. Instead, it summarily concluded the district court's erroneous admission of prior crimes evidence denied Campbell his right to a fair trial. After rejecting Campbell's remaining claims of error, the panel reversed and remanded the case for a new trial. 2022 WL 2392519, at *24.

The State moved for rehearing or modification based on the panel's failure to address the prejudicial effect resulting from admission of K.S.A. 60-455 evidence or otherwise address whether the error was harmless. Without explanation, the Court of Appeals summarily denied the State's motion. We granted the State's petition for review and Campbell's cross-petition for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

The State raises a single issue on review, arguing the Court of Appeals erred in failing to review the district court's erroneous admission of K.S.A. 60-455 evidence for harmlessness. The State maintains any error in the admission of this evidence was harmless. Campbell raises three points of error in a cross-petition for review, alleging: (1) the district court erred in reversing its order suppressing the December stop evidence, (2) the Court of Appeals majority erred in finding improper comments during voir dire did not deny him a fair trial via prosecutorial error, and (3) cumulative error denied him a fair trial.

A. The State's Petition for Review: Harmlessness

The State's issue is narrow. The parties agree the panel correctly determined the district court erred in allowing the State to introduce evidence of Campbell's prior crimes under K.S.A. 2017

Supp. 60-455. And Campbell does not dispute the State's claim that the panel erred in failing to conduct a harmless error analysis to determine whether the error required reversal. All that remains is whether the erroneous introduction of K.S.A. 60-455 evidence was harmless. The State contends it was.

Given the panel's analytical misstep, we could remand the case to the Court of Appeals to perform the appropriate harmlessness analysis. See *Littlejohn v. State*, 310 Kan. 439, 446, 447 P.3d 375 (2019) (remanding case to Court of Appeals with direction to perform analysis under correct legal standard). Or, in the interest of judicial economy, we may complete the harmless error analysis ourselves. See *State v. Taylor*, 314 Kan. 166, 174, 496 P.3d 526 (2021) ("[W]e believe judicial economy weighs in favor of completing the cumulative error analysis to move the case along for district court disposition."). We choose the latter option.

To decide whether an error in admitting K.S.A. 60-455 evidence is reversible, we apply the harmless error standard of K.S.A. 60-2105 and K.S.A. 2022 Supp. 60-261 to determine if admission of the evidence prejudicially affected a party's substantial rights, considering the entire record. K.S.A. 60-2105 ("[A]ppellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment."); K.S.A. 2022 Supp. 60-261 ("Unless justice requires otherwise, no error in admitting or excluding evidence . . . is ground for . . . disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Where, as here, an error implicates a statutory but not a federal constitutional right, we must determine if there is a "'reasonable probability that error will or did affect the outcome of the trial in light of the entire record.'" *State v. McCullough*, 293 Kan. 970, 981-82, 270 P.3d 1142 (2012) (quoting *State v. Ward*, 292 Kan. 541, 569, 256 P.3d 801 [2011]). As the party who benefits from the improper admission of evidence under the statute, the State bears the burden of proof. *McCullough*, 293 Kan. at 983.

The State claims there is no reasonable probability introduction of K.S.A. 60-455 prior crimes evidence affected the trial's outcome. The State argues that even without the prior crimes evidence, it presented the jury with overwhelming evidence of Campbell's intent to both possess and distribute methamphetamine. In support, the State cites evidence establishing (1) law enforcement discovered drugs and drug paraphernalia typically used for distribution inside the Lincoln Town Car during the September and December stops and (2) Campbell drove the Lincoln Town Car on both occasions and told law enforcement he typically drove the car. Because the jury did not convict Campbell of possession with intent to distribute, the State argues the jury did not improperly rely on the prior crimes evidence.

Campbell disagrees, arguing the State's harmless error argument focuses solely on the *admissible* evidence introduced and disregards in its analysis the *inadmissible* evidence presented to the jury. Campbell points out the State devoted a significant portion of its opening statement to the May and July stops, introduced detailed evidence from these stops and stressed the importance of this evidence during closing argument. Because the jury acquitted him of possessing diazepam and buprenorphine, Campbell suggests the jury relied on his prior methamphetamine convictions to convict him only of the charges involving methamphetamine.

To decide whether the State has met its burden to show there is no reasonable probability the impermissible evidence from the May and July stops affected the outcome of the trial, we must look at the entire record. Given the arguments submitted by the parties, we review the record to assess (1) the prejudicial impact on the outcome of the trial resulting from the impermissible evidence introduced at trial and (2) the prejudicial impact on the outcome of the trial resulting from the district court's instructions to the jury that it could consider the impermissible evidence.

1. *Prejudicial impact on the outcome of the trial resulting from the introduction of impermissible evidence*

In *State v. Gunby*, 282 Kan. 39, 48, 144 P.3d 647 (2006), we reiterated there were at least three types of prejudice resulting from the admission of prior bad acts evidence:

"'First a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed.' [Citation omitted.]" *Gunby*, 282 Kan. at 48-49 (quoting *State v. Davis*, 213 Kan. 54, 58, 515 P.2d 802 [1973]).

Gunby differs from this case in that it measured prejudicial impact against probative value to determine *admissibility* of the evidence under K.S.A. 60-455. But we recently used *Gunby's* "types of prejudice" rationale as a useful perspective when determining *reversibility* in a harmless error analysis as well. See *Taylor*, 314 Kan. at 174-77 (discussing three types of possible prejudice that could result from wrongfully admitting evidence in context of constitutional harmless error standard to determine whether State established beyond a reasonable doubt that cumulative errors did not affect trial's outcome).

Although this case presents a nonconstitutional harmless error analysis, the *Taylor* rationale is persuasive. Applying it here, we find the wrongful admission of evidence from the May and July stops prejudiced Campbell and created a reasonable probability the outcome of the trial would have been different had the State not presented the inadmissible evidence to the jury. Our finding is based on the emphasis placed on evidence from the May and July stops by the State in its opening statement, case-in-chief, and closing argument.

Early in the State's opening statement, the prosecutor referenced law enforcement's familiarity with Campbell from the May stop and then described in detail the methamphetamine and other items associated with methamphetamine distribution found in his car during the May stop. The prosecutor then discussed the July stop, again describing in detail the drug evidence found in Campbell's car during that stop. All told, the prosecutor devoted about half of the opening statement to discussing inadmissible prior crimes evidence from the May and July stops.

Then, during the State's case-in-chief, it presented in detail the inadmissible prior crimes evidence from the May and July stops

through witness testimony. Based on the transcript, it appears the prosecutor brought out as much detail about inadmissible prior crimes evidence as it did about admissible evidence from the September and December stops.

And during closing argument, the prosecutor linked the prior crimes to the present charges, repeatedly telling the jury to consider Campbell's prior crimes as evidence of his intent and again detailing the specific amounts of methamphetamine and the items of drug paraphernalia recovered during the May and July stops. The prosecutor also told the jury it could consider the prior crimes evidence to determine whether Campbell possessed the alleged drug paraphernalia for use or sale and to determine whether an object constitutes drug paraphernalia.

Finally, during rebuttal, the prosecutor emphasized the similarities between Campbell's prior crimes and the present charges:

"Go back. Look at the photos. Look how things are packaged. Look how they're contained. Look if they're similar. And you will see that there's white residue on the scales. 8-ball seems to be a very consistent amount that the defendant liked to sell.

"There were two 8-balls in his hat. July 18th, I think there were seven 8-balls. Yep. On May 21st and on December 29th, there were two 8-balls. And, remember, that's a presumption distribution amount. You heard all the witnesses that testified about distribution amounts say that that is a common distribution amount.

"How do we know his intent? We can't crawl in his head. But [defense counsel] says, 'Well, if an 8-ball is a common distribution amount, then how do we know he wasn't just possessing it for his own personal use? How do we know, on December 29th, that he intended to sell it? How can we be sure?[']

"Well, first of all, there were unused baggies and digital scales in the same bag. That's consistent with May 21st, July 18th, and September 23rd. If you are just intending to use it, why do you need unused baggies? You don't. Why do you need scales? You don't.

. . . .

"Go back and look at the photographs, look at the similarities between the items, and I'm sure that you will be convinced, beyond a reasonable doubt, that the defendant possessed the methamphetamine . . . and the drug paraphernalia intending to distribute methamphetamine.

. . . .

"Did the defendant possess the paraphernalia to distribute? Again, go back and look at the pictures. Look at [the] May 21st pictures, July 28th, December 29th. What do you have? The scales with residue, measuring spoons, unused baggies. It's all consistent, ladies and gentlemen."

The emphasis placed on the inadmissible evidence throughout the trial as described above increases the likelihood that the jury relied on the inadmissible evidence to conclude that, because Campbell committed a similar crime before, (1) he committed the crimes charged here and (2) he deserves to be punished because he is a general wrongdoer even if the prosecution failed to establish guilt beyond a reasonable doubt. See *Gunby*, 282 Kan. at 48-49.

2. *Prejudicial impact on the outcome of the trial resulting from the district court's instructions to the jury that it could consider the impermissible evidence*

The district court provided two instructions to the jury regarding its ability to consider prior crimes evidence. The first instruction told the jury it could consider prior crimes as non-propensity evidence for the limited purpose of evaluating the veracity of Campbell's innocent explanation to decide whether the State proved Campbell's intent to commit the crimes charged. The second instruction told the jury it could consider the prior crimes as propensity evidence to prove that, because Campbell committed similar crimes before, he committed the current crimes.

Non-propensity

In non-sex offense cases, evidence of prior crimes is inadmissible to prove a criminal defendant's propensity to commit the charged crime, but it can be "admissible when relevant to prove some other material fact." K.S.A. 2022 Supp. 60-455(b). Here, the court instructed the jury it could consider prior crimes only to decide "the defendant's intent, and to prove the truth or falsity of the defendant's innocent explanation."

Although the panel did not analyze whether the district court erred in giving this jury instruction, it did hold evidence of a prior drug crime was inadmissible to prove intent or the veracity of an innocent explanation when, as here, the defendant denied having possessed the drugs. *Campbell*, 2022 WL 2392519, at *16 (citing *State v. Boggs*, 287 Kan. 298, 314, 197 P.3d 441 (2008). The panel noted Campbell's theory of defense at trial "'was to present no evidence, to take advantage of his right not to testify, and to hold the State to its burden of proof.'" 2022 WL 2392519, at *12. Given

this theory of defense, the panel determined the State's unilateral introduction of evidence about intent and innocent explanation failed to create a dispute of material fact on those issues. Absent a legitimate dispute about intent or an innocent explanation, the panel concluded the K.S.A. 60-455 exception allowing prior crimes to prove some other material fact did not apply and evidence from the May and July stops was inadmissible. 2022 WL 2392519, at *14-16.

As noted above, the State does not challenge the panel's finding that evidence from the May and July stops was inadmissible to prove intent or innocent explanation, so that issue is not before us. But given the panel's holding that the prior crimes evidence was inadmissible, we find the district court erred by instructing the jury it could consider the inadmissible prior crimes evidence. And given the emphasis placed on the inadmissible evidence in the State's opening statement, case-in-chief, and closing argument, this erroneous instruction increases the likelihood that the jury relied on the inadmissible evidence to conclude that, because Campbell committed a similar crime before, (1) he committed the crimes charged here and (2) he deserves to be punished because he is a general wrongdoer even if the prosecution failed to establish guilt beyond a reasonable doubt.

Propensity

After the "limited purpose" non-propensity instruction, the court instructed the jury that, when a defendant is in nonexclusive possession of drugs, it could consider prior crimes as propensity evidence to prove the defendant knowingly possessed methamphetamine under the current charges:

"'Possession' means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

"When a defendant is in nonexclusive possession of an automobile in which a controlled substance is found, it cannot be inferred that the defendant knowingly possessed the controlled substance unless there are other circumstances linking the defendant to the controlled substance.

"You may consider all factors supported by the evidence in determining whether the defendant knowingly possessed a controlled substance, including the following:

1. whether the defendant previously participated in the sale of a controlled substance;
2. whether the defendant used controlled substances;
3. whether the defendant was near the area where the controlled substance was found;
4. whether the controlled substance was found in plain view;
5. whether the defendant made any incriminating statements;
6. whether the defendant's behavior was suspicious;
7. whether the defendant's personal belongings were near the controlled substance."

Although this instruction mirrors PIK Crim. 4th 57.040, we find it troubling because the first and second factors in the third paragraph conflict with K.S.A. 2022 Supp. 60-455(a), which prohibits introduction of prior crimes evidence if its only purpose is to establish a propensity to commit the current crime. The Notes on Use explain the factors in the third paragraph originally were based on historical caselaw. PIK Crim. 4th 57.040, Notes on Use. But a review of that caselaw reflects we have disapproved of the unqualified use of these factors because doing so fails to adhere to the prior crime limitations in K.S.A. 60-455. See *Boggs*, 287 Kan. at 318.

In *State v. Faulkner*, 220 Kan. 153, 551 P.2d 1247 (1976), law enforcement discovered illicit drugs and paraphernalia on the passenger floorboard and in the glove box of a car where Faulkner was a passenger. At trial, the State introduced evidence that Faulkner had a prior conviction for possession of a controlled substance. On appeal, Faulkner argued the prior conviction was inadmissible under K.S.A. 60-455 and, without that evidence, his mere presence in the vehicle could not prove he possessed the drugs and paraphernalia. We agreed with Faulkner that "when illicit drugs are found in an automobile containing more than one person, the defendant's mere presence in the vehicle, without more, would not sustain his conviction for possession." 220 Kan. at 160. But we discussed other circumstances that could be introduced to show a person possessed drugs in a nonexclusive possession case:

"Other circumstances which have been held sufficiently incriminating to link a defendant with illicit drugs in a vehicle are his previous participation in the sale of drugs, his use of narcotics, his proximity to the area where drugs are found and the fact the drugs were found in plain view." *Faulkner*, 220 Kan. at 160.

Significantly, however, we held introduction of prior drug crimes in this context was subject to the rule from K.S.A. 60-455 prohibiting consideration of prior crime evidence as propensity evidence and allowing it only when relevant to prove some other material fact in dispute. We ultimately held the prior crime evidence admissible because the State did not introduce it for propensity reasons but to prove a fact substantially in dispute—Faulkner's intent to possess the drugs and paraphernalia. *Faulkner*, 220 Kan. at 157.

In *State v. Bullocks*, 2 Kan. App. 2d 48, 574 P.2d 243 (1978), the Court of Appeals expanded the *Faulkner* discussion to conclude that evidence of prior drug use is a factor that always can be considered in nonexclusive possession cases. The *Bullocks* court explained:

"'Possession' of marijuana is having control over the marijuana with knowledge of, and intent to have, such control. Possession and intent, like any element of a crime, may be proved by circumstantial evidence. [Citation omitted.] Possession may be immediate and exclusive, jointly held with another, or constructive as where the drug is kept by the accused in a place to which he has some measure of access and right of control. [Citation omitted.]

"When a defendant is in nonexclusive possession of premises on which drugs are found, the better view is that it cannot be inferred that the defendant knowingly possessed the drugs unless there are other incriminating circumstances linking the defendant to the drugs. [Citation omitted.] Such parallels the rule in Kansas as to a defendant charged with possession of drugs in an automobile of which he was not the sole occupant. [Citation omitted.] Incriminating factors noted in *Faulkner* are a defendant's previous participation in the sale of drugs, his use of narcotics, his proximity to the area where the drugs are found, and the fact that the drugs are found in plain view. Other factors noted in cases involving nonexclusive possession include incriminating statements of the defendant, suspicious behavior, and proximity of defendant's possessions to the drugs." *Bullocks*, 2 Kan. App. 2d at 49-50.

The *Bullocks* court did not cite to or consider K.S.A. 60-455 in its analysis.

Over the years, our appellate courts consistently relied on the *Bullocks* incriminating factors and circumstances to support an inference that a defendant is in possession of drugs. See, e.g., *State v. Cruz*, 15 Kan. App. 2d 476, 489, 809 P.2d 1233 (1991) (applying factors in *Faulkner* and *Bullocks*).

In 2001, citing *Cruz* and *Faulkner*, the PIK committee recommended courts give a new instruction in nonexclusive possession cases. See PIK Crim. 3d 67.13-D. This instruction provided the jury with the *Bullocks* factors to consider in deciding whether a defendant was the individual who possessed illicit drugs in a nonexclusive possession case. The PIK instruction failed, however, to provide language explaining—as we did in *Faulkner*—that introducing prior drug crimes as an incriminating factor for the jury to consider is subject to the limitations in K.S.A. 60-455.

In 2008, we addressed the tension between K.S.A. 60-455 and PIK Crim. 3d 67.13-D in *Boggs*. There, we reaffirmed *Faulkner*'s holding that introduction of prior drug crimes as a factor for the jury to consider in nonexclusive possession cases was subject to the rule in K.S.A. 60-455. We held prior crime evidence in nonexclusive possession cases is prohibited unless relevant to prove a disputed material fact. In so holding, we disapproved *Bullocks* and any other case holding prior drug use is always a factor juries can consider in nonexclusive possession cases. *Boggs*, 287 Kan. at 317-18.

In 2009, the Legislature codified the common law definition of possession. The Legislature did not include the *Faulkner/Bullocks/Cruz* factors in the definition. And the PIK committee did not include the PIK Crim. 3d 67.13-D *Faulkner/Bullocks/Cruz* factors in the fourth edition of its pattern instructions, published in 2012. See Notes on Use, PIK Crim. 4th 57.040 (2018 Supp.) (concluding "that [the new statutory definition] was meant to supplant the much expanded definition of possession previously found in PIK Crim. 3d 67.13-D").

But in 2019, the PIK committee chose to reinsert the *Faulkner/Bullocks/Cruz* list of nonexclusive possession factors into PIK Crim. 4th 57.040, when appropriate. See PIK Crim. 4th 57.040 [2018 Supp.]. The committee did not explain what it meant by appropriate, but it did cite to "[r]ecent opinions of the Kansas appellate courts [indicating] . . . that the previous list of nonexclusive possession factors survives the legislative change." Notes on Use, PIK Crim. 4th 57.040 (citing *State v. Keel*, 302 Kan. 560, Syl. ¶ 2, 357 P.3d 251 [2015], and *State v. Rosa*, 304 Kan. 429, 434, 371 P.3d 915 [2016]).

In *Keel*, the defendant appealed his convictions for possession of methamphetamine and drug paraphernalia, arguing the State failed to present sufficient evidence to show he had constructive possession of the drugs and paraphernalia found in the residence he shared with his girlfriend. Consistent with our precedent, we held that when "a defendant does not have exclusive control of the premises upon which drugs are found, 'more than mere presence or access to the drugs [is] required to sustain a conviction.'" 302 Kan. at 567. In such cases, we held the State may prove possession by presenting other evidence of incriminating circumstances linking the defendant to the drugs, including "(1) the defendant's previous sale or use of narcotics; (2) the defendant's proximity to the area in which the drugs were found; (3) the fact that the drugs were found in plain view; and (4) the defendant's incriminating statements or suspicious behavior. [Citation omitted.]" 302 Kan. at 567-68. We found Keel's proximity to the drugs, the plain view of the drugs, and Keel's suspicious behavior sufficiently linked him to the contraband and concluded he possessed the contraband. 302 Kan. at 568. Presumably because there was no evidence Keel previously sold or used narcotics, we did not discuss *Boggs*' holding that introduction of prior drug crimes as a factor in nonexclusive possession cases was subject to the rule in K.S.A. 60-455.

In *Rosa*, the State charged Rosa with possession of methamphetamine after discovering a meth lab in the bedroom of a long-term resident living in Rosa's house. Rosa conceded he owned the house and the drugs were found in the house but denied any knowledge the drugs were there. To prove he knew about the drugs, the State introduced witness testimony to show Rosa was in close proximity to the room where the meth lab was discovered, had actual knowledge of its existence, and knew about methamphetamine in general because he used it in the past.

Rosa claimed on appeal that the district court erroneously permitted the jury to consider evidence of his past drug use. Citing *Boggs* and *State v. Preston*, 294 Kan. 27, 34, 272 P.3d 1275 (2012), we reiterated K.S.A. 60-455 prohibits consideration of prior crimes evidence for propensity purposes but allows it when relevant to prove some other material fact in dispute. Rosa claimed he did not know the people living in his house were keeping or

making methamphetamine in the house. Thus, we held the district court properly allowed the roommates to testify about Rosa's prior acquaintance with methamphetamine under K.S.A. 60-455(b) because it was relevant to prove some other material fact—Rosa's knowledge. *Rosa*, 304 Kan. at 436-37.

Keel and *Rosa* adhere to *Boggs*, and we reaffirm that holding here: evidence of prior drug crimes as a factor to consider in nonexclusive drug possession cases is admissible only when the evidence is relevant to prove some other disputed material fact as authorized under K.S.A. 2022 Supp. 60-455(b). See *Boggs*, 287 Kan. at 318. To the extent PIK Crim. 4th 57.040 conflicts with the legislative mandate in K.S.A. 2022 Supp. 60-455 limiting admissibility, we disapprove of its use.

Contrary to *Boggs*, the PIK Crim. 4th 57.040 instruction given here erroneously informed the jury it could consider Campbell's prior drug crimes for any reason, including propensity. Given the emphasis placed on the inadmissible evidence in the State's opening statement, case-in-chief, and closing argument, this erroneous instruction substantially increases the likelihood that the jury relied on the inadmissible evidence to conclude that, because Campbell committed a similar crime before, (1) he committed the crimes charged here and (2) he deserves to be punished because he is a general wrongdoer even if the prosecution failed to establish guilt beyond a reasonable doubt.

3. *Conclusion*

In conclusion, we find a reasonable probability the erroneous admission of prior drug crime evidence affected the outcome of the trial, considering the entire record. For this reason, we hold the district court's error in admitting the prior crimes evidence was not harmless. Our holding is based on the sheer amount of evidence and argument focused on the inadmissible evidence throughout trial, as well as the court's erroneous instructions to the jury that it could consider Campbell's prior drug crimes as propensity evidence. Accordingly, we reverse Campbell's convictions and remand the case to the district court for a new trial. Because we reverse Campbell's convictions on this basis, we need not address all the claims raised in his cross-petition for review. Because it

will provide guidance for the district court on remand, however, we will address Campbell's claim of error relating to his motion to suppress the December stop evidence.

B. Campbell's Cross-Petition for Review: Motion to Suppress

Campbell objects to the district court's reversal of its order suppressing the evidence from the December stop. He alleges the Court of Appeals erred in affirming the district court's decision to grant the State's motion for reconsideration.

Appellate courts generally treat motions to reconsider as motions to alter or amend. When reviewing the district court's ruling on a motion to alter or amend, we apply an abuse of discretion standard. See *Exploration Place, Inc. v. Midwest Drywall Co.*, 277 Kan. 898, 900, 89 P.3d 536 (2004). A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *State v. Levy*, 313 Kan. 232, 237, 485 P.3d 605 (2021).

Before trial, Campbell moved to suppress all evidence seized during the December stop, arguing law enforcement lacked probable cause to search the Lincoln Town Car. At a hearing on Campbell's motion, the district court held law enforcement had probable cause to search the car. But the court questioned whether the search warrant was valid at the time of the December 29, 2017, stop.

The search warrant provided law enforcement with authorization to monitor the tracking device installed on the Lincoln Town Car "for a period of 30 days from the date the tracking device is installed." Law enforcement installed the tracking device on November 28, 2017, but removed the device two days later because it was not working properly. Then, the Lincoln Town Car was not operational and remained parked in front of Campbell's residence, so law enforcement did not reinstall the tracking device until December 19, 2017. On December 27, 2017, Lawrence Police Officer Kristen Kennedy filed an affidavit requesting a 30-day extension of the warrant. Noting the GPS tracking device had been usable for only 8 out of the 30 days allowed for in the original warrant, law enforcement requested "a 30 day extension of the

current search warrant, which is set to expire on Thursday, November 28, 2017." The designation of November 28 instead of December 28 as the date the search warrant expired appears to be a typographical error. The district court granted the request on December 27, 2017, but apparently did not catch the typographical error because it authorized extension of the search warrant "for an extended period of 30 days from the expiration date on the previous search warrant, November 28, 2017."

After reviewing the relevant exhibits and hearing argument from the parties, the district court suppressed the December stop and the evidence seized from Campbell's car on December 29, 2017. Although the court agreed Officer Kennedy and the district court judge who signed the warrant extension mistakenly listed November 28—rather than December 28—as the date the original search warrant was set to expire, the court still granted Campbell's motion to suppress because "[t]hat's a mistake they made."

The State moved for reconsideration, arguing the search warrant extension should be read to expire 30 days after December 28, 2017. The State claimed the district court's interpretation of the search warrant extension conflicted with its plain language and produced an absurd result, which authorized extension of the search warrant for a single day. In support of its motion, the State presented testimony from Officer Kennedy. She testified the affidavit requested a 30-day extension from the December 28, 2017, expiration date of the original warrant. As a result, she believed the new expiration date would be sometime around January 28, 2018. Officer Kennedy pointed out interpreting the search warrant to extend for 30 days from November 28, 2017, would not actually result in an extension because it would cover the same timeframe as the original search warrant.

After hearing Officer Kennedy's testimony, the district court reversed its prior ruling granting Campbell's motion to suppress:

"And I think when you read everything together to avoid unreasonable results, but mainly when reading everything all together that the November 28th modifies the date of the previous search warrant when the tracking device was installed and she wanted—what she wanted was 30 days extension, and it's clear when you look at her reference to Thursday that she did not mean November 28th. She meant December 28th. So I do reconsider and reverse my prior ruling."

On appeal, Campbell argued the district court erred in granting the State's motion for reconsideration because the court's original interpretation of the 30-day extension to the search warrant aligned with the plain language of the warrant extension. The Court of Appeals rejected Campbell's argument, holding it created an unreasonable result and was contrary to K.S.A. 22-2511, which states "[n]o search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused." *Campbell*, 2022 WL 2392519, at *23-24. The panel concluded:

> "Because no evidence should be set aside based on technical irregularities under K.S.A. 22-2511, it necessarily follows that the trial court did not abuse its discretion by granting the State's reconsideration motion. This was something that the trial court needed to do to correct its previous mistaken decision to grant Campbell's suppression motion based on an unreasonable interpretation of the trial court's order extending the GPS search warrant for 30 days." 2022 WL 2392519, at *24.

Campbell argues the panel erred in affirming the district court's reconsideration ruling based on a mistake of law. First, he asserts the incorrect expiration date listed on the search warrant extension constituted a substantive error rather than a technical irregularity under K.S.A. 22-2511. Second, Campbell claims the panel erred in failing to reach his alternative argument that the original suppression order was proper because law enforcement placed the GPS tracking device on his car outside the statutory timeframe set forth in K.S.A. 2022 Supp. 22-2506(b)(2).

1. *K.S.A. 22-2511*

A magistrate may issue a search warrant authorizing the installation and use of a tracking device. K.S.A. 2022 Supp. 22-2502(a)(2). The tracking device may be used to track and collect certain data "for a specified period of time, not to exceed 30 days from the date of the installation of the device." K.S.A. 2022 Supp. 22-2502(b)(1). Upon a showing of good cause by the State, the magistrate may grant one or more 30-day extensions of the search warrant. K.S.A. 2022 Supp. 22-2502(b)(3). A plain reading of the search warrant at issue establishes the 30-day extension expired

on December 28, 2017, the day before law enforcement stopped Campbell's car.

As discussed, K.S.A. 22-2511 states "[n]o search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused." In Kansas, the test used to evaluate search warrant technical irregularities is one of practical accuracy rather than one of hyper technicality:

> "[C]ourts prefer searches conducted under the authority of warrants to those conducted without benefit thereof. Therefore, warrants and their supporting affidavits are interpreted in a common sense, rather than a hypertechnical, fashion. To do otherwise would tend to discourage police officers from submitting their evidence to a judicial officer before acting." *State v. LeFort*, 248 Kan. 332, 335-36, 806 P.2d 986 (1991).

Absent a showing of illegality, search warrants and their supporting affidavits are presumed valid. Campbell, as the party challenging the validity of the search warrant, bears the burden of establishing its illegality. See 248 Kan. at 336.

The label of "technical irregularity" is reserved for clerical mistakes or omissions that do not otherwise affect the substance of the warrant. See, e.g., *State v. Francis*, 282 Kan. 120, 127-29, 145 P.3d 48 (2006) (mere technical irregularity where affidavit identifies one affiant in its text but is signed by different affiant); *LeFort*, 248 Kan. at 337 (failure of warrant to specify exact address of residence to be searched mere technical irregularity where affidavit contained correct description and executing officer familiar with location); *State v. Holloman*, 240 Kan. 589, 595-96, 731 P.2d 294 (1987) (mere technical irregularity when duplicate of warrant and inventory of items to be seized given to defendant's mother rather than defendant); *State v. Spaulding*, 239 Kan. 439, 441-42, 720 P.2d 1047 (1986) (judge's failure to sign warrant mere technicality where probable cause finding made); *State v. Jackson*, 226 Kan. 302, 304, 597 P.2d 255 (1979) (mere technical irregularities found where affidavit failed to specifically allege similarity between circumstances of prior conviction and present crime and also provided inaccurate description of plea to prior conviction); *State v. Ames*, 222 Kan. 88, 92-95, 563 P.2d 1034 (1977) (mere technical irregularities found where warrant return was unsigned, listed incorrect date, failed to list a seized item, and was not served on defendant); *State v. Tryon*, 36 Kan. App. 2d 349, 352, 138 P.3d 1259 (2006) (finding improper date on warrant return a mere technicality insufficient to

overturn search); *State v. Forsyth*, 2 Kan. App. 2d 44, 47, 574 P.2d 241 (1978) (absence of return receipt on search warrant mere technical irregularity). Compare *State v. Journey*, 1 Kan. App. 2d 150, 151-52, 562 P.2d 138 (1977) (lack of jurat signature on search warrant mere technical irregularity), with *State v. Belt*, 285 Kan. 949, 950-54, 960-62, 179 P.3d 443 (2008) (no mere technicality where John Doe search warrants contained insufficient identifying information by failing to particularly describe perpetrator's unique DNA profile).

Campbell argues the incorrect date listed in the search warrant extension is a substantive error, distinct from the technical irregularities contemplated by K.S.A. 22-2511. He reasons law enforcement got exactly what it asked for—a warrant expiring on December 28, 2017—even if it meant to ask for something else. But Campbell's attempt to distinguish the present circumstances from those cases in which our courts have found technical irregularities under K.S.A. 22-2511 is unpersuasive. Campbell does not allege any of the allegations within the body of the affidavit are false or otherwise challenge the sufficiency of the probable cause to support issuance of the search warrant. A review of the evidence presented at the reconsideration hearing confirms the discrepancy in the dates was simply a clerical error. This error did not affect the substance of the warrant and thus constitutes a mere technical irregularity under K.S.A. 22-2511. See *Blackburn v. State*, No. 105,697, 2012 WL 603284, at *1, 3 (Kan. App. 2012) (unpublished opinion) (upholding validity of search warrant signed and executed in February 2006 where law enforcement's probable cause affidavit mistakenly said events occurred in February 2005; had counsel moved to suppress, discrepancy in dates likely would have been found a mere technical irregularity under K.S.A. 22-2511).

2. *K.S.A. 2022 Supp. 22-2506(b)(2)*

Under K.S.A. 2022 Supp. 22-2506(b)(2), law enforcement must install a tracking device within 15 days from the date the search warrant is issued. Here, the search warrant issued on November 20, 2017. Law enforcement placed a tracking device on Campbell's car on November 28, 2017, but removed the device two days later because it was defective. Law enforcement then placed a new tracking device on Campbell's car on December 19, 2017, once the car appeared drivable.

Campbell argues the search warrant was invalid because the second tracking device was not placed on his car within the 15-day window allowed by statute. This argument is as unpersuasive as Campbell's first argument and fails for the same reason. Law enforcement initially installed the tracking device in compliance with K.S.A. 2022 Supp. 22-2506(b)(2). Because of circumstances outside their control, law enforcement had to remove the tracking device but later reinstalled it as soon as practicable. Law enforcement's failure to strictly comply with the statutory timeframe when installing the second tracking device constitutes a technical irregularity under K.S.A. 22-2511 that does not affect the validity of the search warrant. See *LeFort*, 248 Kan. at 335-36 ("[W]arrants and their supporting affidavits are interpreted in a common sense, rather than a hypertechnical, fashion.").

We find any discrepancy in the dates of the search warrant or the timing in placing the tracking device are technical irregularities that did not affect the validity of the search warrant. See K.S.A. 22-2511 ("No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.") As a result, the district court did not abuse its discretion in granting the State's motion to reconsider its erroneous suppression ruling.

Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed, and the case is remanded for a new trial.

No. 125,778

REGAN HODGES, as Representative Heir at Law, and as Administrator of the Estate of TIMOTHY HUNT, *Plaintiff*, v. WALINGA USA INC. and WALINGA INC., *Defendants.*

(532 P.3d 440)

SYLLABUS BY THE COURT

1. ARBITRATION—*Arbitration Action—Not Judicial Determination of Comparative Fault*. Under Kansas law, an arbitration action does not qualify as a judicial determination of comparative fault.

2. SAME—*Confirmation of Arbitration Award—Not Judicial Determination of Comparative Fault for Invoking One-Action Rule*. Under Kansas law, the confirmation of an arbitration award by a state court judgment does not qualify as a judicial determination of comparative fault for purposes of invoking the one-action rule.

On certification of two questions of law from the United States District Court for the District of Kansas, ERIC F. MELGREN, judge. Oral argument held May 18, 2023. Opinion filed July 21, 2023. The answers to the certified questions are determined.

Lyndon W. Vix, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, argued the cause, and *Brennan B. Delaney,* of Langdon & Emison, LLC, of Lexington, Missouri, was with him on the briefs for plaintiff.

Randy P. Scheer, of Baty Otto Coronado Scheer PC, of Springfield, Missouri, argued the cause, and *S. Jacob Sappington*, pro hac vice, of same firm, was with him on the brief for defendants.

The opinion of the court was delivered by

ROSEN, J.: In this opinion, we address two questions of law certified to our court by the United States District Court for the District of Kansas. Certified question proceedings are unique because the lawsuit at issue is not pending before any Kansas state court. See *Bruce v. Kelly*, 316 Kan. 218, 219, 514 P.3d 1007 (2022). The Kansas Legislature has granted this court jurisdiction to answer questions of state law raised in other jurisdictions when the responses may control the outcome of the matter pending before the certifying court and no Kansas precedent addresses the certified questions. See K.S.A. 60-3201 et seq.

The federal lawsuit is a tort action following a worker's death in an agricultural accident. One set of potential defendants agreed to arbitration with the decedent's heirs and was found liable for damages, and a Missouri district court confirmed this award. The decedent's heirs brought a separate action in federal district court against a different set of defendants. Following the defendants' motion for summary judgment, the federal court certified questions to this court to determine whether the separate action is barred by the Kansas one-action rule.

The factual background provides the context for our discussion of the certified questions. Timothy Hunt was an employee of a farm located in Mulvane, Kansas. The farm was operated by numerous entities to whom we will refer collectively as Butts Farms. In the fall of 2019, Hunt was directed to use a grain vacuum produced by Walinga Inc. and Walinga USA Inc. to remove corn from a grain trailer owned by Butts Farms. To do this, Hunt had to stand on top of the corn while operating the vacuum. Hunt became trapped in the corn as he operated the vacuum, and the corn slowly buried him, compressing his chest and eventually preventing him from breathing, ultimately causing his death.

On April 2, 2021, Hunt's daughter Regan Hodges, in her capacity as the administrator of Hunt's estate, filed suit in Kansas federal district court against the Walinga defendants, the manufacturer of the grain vacuum system. Then, on July 26, 2021, while the suit was still in its early stages, Hunt's children, including his daughter Regan Hodges as the administrator of the Hunt's estate, entered into an arbitration agreement with Butts Farms. The parties agreed to conduct the arbitration in a Missouri venue but subject to Kansas substantive and procedural law, when applicable.

On August 9, 2021, the arbitrator entered his award in favor of the claimants. After hearing testimony from various witnesses, he found Butts Farms failed to exercise reasonable care in protecting Hunt from the dangers of operating the vacuum. Specifically, it required him to operate the vacuum without a safety harness; it required him to operate the vacuum without another employee present who could intervene if Hunt was trapped in the corn; and the trailer from which the corn was being removed was improperly maintained. Butts Farms also failed to exercise reasonable care in

providing safe and suitable machinery in that the vacuum system was defective and unreasonably dangerous in several respects: it lacked a shutoff valve; it lacked a sensor with automatic shutoff at the nozzle; and it lacked adequate warning or notice to alert Hunt of the potential hazards.

The arbitrator entered awards of $5,000,000 for past noneconomic damages for Hunt's conscious pain and suffering he experienced prior to his death; $7,000,000 for economic damages for Hunt's wrongful death, including loss of parental care; and $250,000 for noneconomic damages for Hunt's wrongful death, including bereavement and loss of companionship.

On August 10, 2021, Hodges filed in the Circuit Court of Lafayette County, Missouri, an application to confirm the arbitration award. On August 17, 2021, the circuit court entered final judgment confirming the arbitration award. The judgment incorporated the arbitration award.

On March 18, 2022, the Walinga defendants filed a motion for summary judgment in the federal court action, asserting that the suit against them was barred in its entirety by the Kansas one-action rule. They argued that the arbitration proceeding, together with the confirmation in the circuit court, were a judicial proceeding and the plaintiffs had used up their day in court, barring further claims. The federal court was unable to find a definitive answer to whether Kansas law bars a suit against some defendants when other potential defendants have reached an arbitrated resolution of the claims against them. The court certified two questions to this court:

"1. Under Kansas law, does an arbitration action qualify as a judicial determination of comparative fault where no other potential tortfeasors were involved in the arbitration?

"2. If it does not, then under Kansas law, does the confirmation of an arbitration award by state court judgment qualify as a judicial determination of comparative fault in light of *Childs* [*v. Williams*, 243 Kan. 441, 757 P.2d 302 (1988)]." *Hodges v. Walinga USA Inc.*, 640 F. Supp. 3d 1085, 1093 (D. Kan. 2022).

This court formally accepted the certified questions and set a briefing schedule.

The focus of the two questions before us is the interplay between an arbitrated award against one set of tortfeasors and a litigated proceeding against another set of tortfeasors. Hodges and the heirs took their dispute with the Butts Farms to arbitration and prevailed in that proceeding. They seek to resolve their claims against the manufacturer in a separate proceeding in federal court. Kansas follows a "one-action" rule, which generally requires that, in order to determine the relative fault of various parties, all claims must be presented in a single action.

As a prelude to addressing the specific questions before us, we will review the evolution of Kansas law that has led to the uncertainty that generated the questions.

In 1974, Kansas departed from the common-law theory of contributory negligence and adopted a statutory scheme of comparative fault. See L. 1974, ch. 239, § 1; K.S.A. 60-258a. Under K.S.A. 2022 Supp. 60-258a(d), when recovery is permitted against more than one party, each party is liable for that party's portion of the award in the proportion to the causal negligence attributed to all the parties against which recovery is permitted. In wrongful death actions, on the motion of any party against whom a claim of negligence is asserted, any other person whose causal negligence is claimed to have contributed to the death must be joined as an additional party. K.S.A. 2022 Supp. 60-258a(c).

Over time, Kansas adopted a "one-action" rule based on the comparative fault statute. In essence, the rule requires that all defendant tortfeasors be sued in a single action, no matter what the nature of the negligence tort is. This rule reduces the number of suits and simplifies the process of assessing the degree of culpability by various parties in a negligence action, including plaintiffs and multiple defendants. The rule is prudential and does not expressly arise from the Kansas comparative fault statute, and the rule is not followed in all the states that have adopted comparative fault statutes.

The court first articulated the one-action rule in *Eurich v. Alkire*, 224 Kan. 236, 579 P.2d 1207 (1978). The court addressed the situation in which one of two occupants of a vehicle was found liable to the driver of another vehicle after a collision. After that trial, the defendant in that action brought a second action seeking

indemnity from the other occupant of the vehicle. This court disallowed the indemnity suit, holding that defendant in the first trial had an obligation to cross-claim against the other occupant:

"The provision for determining the percentage of causal negligence against each person involved in a negligence action contemplates that the rights and liabilities of each person should be determined in one action. Because all issues of liability are determined in one action there can be no reasonable argument that the issues should be relitigated. Likewise, there is no reasonable argument for the proposition that a claim for damage arising out of one collision or occurrence should not be presented at the time negligence is originally determined. . . .

"We conclude that all persons who are named as parties and who are properly served with summonses are bound by the percentage determination of causal negligence. *Because the statute contemplates that each party has a right to cross-claim against any or all other parties to a lawsuit, we hold that any party who fails to assert a claim against any other party in a comparative negligence action is forever barred.* A corollary rule naturally follows that a person who has not been made a party to a comparative negligence case should not be bound by a judgment therein, even though his causal negligence may have been determined." (Emphasis added.) *Eurich*, 224 Kan. at 238.

In a subsequent case in which this court considered a question certified by the federal district court, we addressed what happens when a driver injured in an accident first successfully brings suit against the driver of another car and then attempts to augment those damages in a subsequent suit against the manufacturer of the plaintiff's vehicle. In *Albertson v. Volkswagenwerk Aktiengesellschaft*, 230 Kan. 368, 371, 634 P.2d 1127 (1981), this court reiterated its adherence to the one-action rule. The court held that the doctrine of comparative fault requires that all parties to a tortious occurrence have their fault determined in one action.

In *Albertson*, the plaintiff's first action—against the other driver, a Kansas resident—was litigated in state court. The second action—against the manufacturer—was brought in federal court under diversity jurisdiction. The plaintiff contended that two suits were permissible because he would not be able to include the other driver in the diversity action. This court pointed out that the plaintiff could have sued the manufacturer in state court, which would have allowed the plaintiff to pursue a single action against both defendants. It was the plaintiff's strategic choice not to join the corporate defendant, and the court held the plaintiff was bound by

that decision, as ill-advised as it turned out to be: "Under the doctrine of comparative fault all parties to an occurrence must have their fault determined in one action, even though some parties cannot be formally joined or held legally responsible. Those not joined as parties or for determination of fault escape liability." 230 Kan. at 374.

What appeared to be an absolute rule in *Albertson* was moderated in *Pape v. Kansas Power and Light Co.*, 231 Kan. 441, 647 P.2d 320 (1982). There, a worker killed in a powerline accident settled with his employer under the workers compensation act; his heirs were statutorily barred from suing his employer, and he could not bring other defendants into the workers compensation proceedings. In that situation, the court held an action against the power company could proceed and the power company could introduce evidence of the employer's negligence in assessing comparative fault and corresponding damages. 231 Kan. at 449. This result pointed out the potential unfairness of binding a plaintiff to just one action, in that case, a statutory workers compensation claim, when the plaintiff had no choice in the matter.

This court again backed away from strict application of the one-action rule in *Mathis v. TG & Y*, 242 Kan. 789, 751 P.2d 136 (1988), where the plaintiff filed successive suits arising out of the same event, naming different defendants in each petition. The plaintiff then settled with the defendants in one suit, and the action was dismissed with prejudice. The issue was whether a dismissal with prejudice in one case precludes a trial in the other action. It was held the settlement and dismissal did not qualify as a "judicial determination of comparative fault" precluding a trial on the merits against different defendants based on the same occurrence. 242 Kan. at 794.

In *Anderson v. Scheffler*, 242 Kan. 857, 752 P.2d 667 (1988), this court addressed the situation in which a plaintiff might not be able to pursue claims against all tortfeasors because of diversity jurisdiction conflicts. The plaintiff sought to sue multiple defendants in state court, but diversity defendants removed the action against them to federal court, and the plaintiff was unable to pursue claims against the entire set of defendants in a single action. This court held that, under those facts, the single-action rule did

not apply: "[W]here a plaintiff is prevented from joining a necessary party in federal court because of loss of diversity, as in this case, the action against that party survives in state court . . . ." 242 Kan. at 865.

Soon thereafter, this court decided the case cited in the federal court certification order. In *Childs v. Williams*, 243 Kan. 441, 757 P.2d 302 (1988), the plaintiff, a minor, settled with one defendant. Because K.S.A. 38-102 allows a minor to disavow a contract within a reasonable time after reaching majority, the settlement was converted to a judgment with court approval to make the settlement binding. Later, the plaintiff filed an action against another defendant. The issue was whether the previously entered judgment precluded a trial on the merits in a second action against a different defendant.

The defendant attempted to distinguish *Mathis*, arguing the district court played a substantive role in evaluating the settlement and reducing it to judgment, whereas *Mathis* dealt only with dismissal by the court. This court was not persuaded and concluded that "each plaintiff must be allowed a trial judicially determining comparative fault, regardless of whether the plaintiff had the opportunity to do so earlier in one action." *Childs*, 243 Kan. at 443. Implicitly, the court held a judgment rendered to ensure that a minor did not later disavow a settlement contract was not a judicial determination of comparative fault precluding a trial on the merits.

This court reaffirmed its commitment to the one-action rule in *Mick v. Mani*, 244 Kan. 81, 766 P.2d 147 (1988), where a surgery patient brought a products liability action against Bethlehem Steel and, in a separate action, a medical malpractice action against the surgeon. In the action against Bethlehem Steel, the jury found no fault on the defendant's part and did not get to whether there was comparative fault on the surgeon's part. Based on the one-action rule, the district court then granted summary judgment to the surgeon in the separate malpractice action. The patient's strategy of pursuing separate and sequential actions backfired. This court affirmed, holding that, where practically feasible, litigation against all possible tortfeasors must be carried out in a single action and a judicial determination of no fault by one tortfeasor precluded a subsequent claim against a different tortfeasor.

We now turn to the first question certified to us by the federal district court: under Kansas law, does an arbitration action qualify as a judicial determination of comparative fault where no other potential tortfeasors were involved in the arbitration? We hold that the answer is no.

Of course, an arbitration action is clearly not a judicial determination of anything standing on its own. The arbitration process is extrajudicial. See *Fidelity and Deposit Co. v. Davis*, 129 Kan. 790, 801, 284 P. 430 (1930) (arbitration agreements are "simple and expeditious extra-judicial settlements").

However, we understand the federal court to be inquiring whether an arbitration action may take the place of a judicial determination of comparative fault for purposes of the one-action rule. In other words, by participating in arbitration with one set of defendants, does a plaintiff forfeit litigation against another set of defendants in a negligence action when the plaintiff does not bring the second set of defendants into the arbitration proceeding for determining comparative fault?

The one-action rule is not expressly contained in the comparative fault statute. It is instead based on principles of judicial economy and avoiding complexity in determining relative degrees of fault. "The rule against the splitting of a cause of action is based upon varied and justifiable concerns: preserving judicial economy and convenience; avoiding repetitive or fragmented litigation; and protecting a party from multiple harassment and expense over the same claim." *Home State Bank v. P.B. Hoidale Co*., 239 Kan. 165, 169, 718 P.2d 292 (1986).

For similar reasons, Kansas courts "have always taken the position that compromise and settlement of disputes between parties should be favored in the law in the absence of fraud or bad faith. *Kennedy v. City of Sawyer*, 228 Kan. 439, 454, 618 P.2d 788 (1980). And this court has permitted parties to settle disputes with some tortfeasors while continuing with litigation against others. See, e.g., *Brown v. Keill*, 224 Kan. 195, 580 P.2d 867 (1978) (car accident tortfeasor settled claim by other driver but owner of other driver's car allowed to proceed with claim for damages to car); *Childs*, 243 Kan. at 449 (minor settled claim against driver of car

in which minor was injured in accident; minor was allowed to proceed with claim against driver of other car involved in accident); *Mathis*, 242 Kan. at 789 (settlement of second suit does not bar plaintiff from proceeding with original action); *Pape*, 231 Kan. at 449 (settlement of claim against employer under workers compensation act does not preclude litigating claim against third party).

One aspect of a negotiated settlement can be an agreement to resolve disputes through arbitration. See, e.g., *Heartland Surgical Specialty Hosp., LLC v. Reed*, 48 Kan. App. 2d 237, 239, 287 P.3d 933 (2012). Arbitration largely avoids consuming court resources, which is a significant objective of the one-action rule. It is a way in which parties with irreconcilable differences may reach an expeditious resolution of their differences without resorting to litigation. It resembles mediation and settlement in that judicial participation is generally limited to confirming the award. In this respect, arbitration is akin to other out-of-court proceedings that do not trigger the one-action rule.

Kansas courts generally favor agreements to arbitrate disputes. See *Coulter v. Anadarko Petroleum Corp*., 296 Kan. 336, 370, 292 P.3d 289 (2013). Arbitration is consistent with the objectives of the one-action rule in much the same way as other prelitigation alternatives that the law favors, such as negotiated and mediated settlements. We will not introduce disincentives to resolving disputes outside the judicial process. Arbitration is not the equivalent of a court proceeding, and, at least under the facts presented to us, it does not qualify as a judicial determination of comparative fault where no other potential tortfeasors were involved in the arbitration.

We turn now to the second question that the federal court certified: does the confirmation of an arbitration award by a state court judgment qualify as a judicial determination of comparative fault in light of *Childs*? We again answer no.

The Walinga defendants urge this court to decide that, at least in the circumstances in which an arbitrator allocates a percentage of fault to the parties to the arbitration, the judicial confirmation of such an award constitutes a judicial determination of fault. We disagree.

The arbitrating parties in this case agreed to apply Kansas procedural law. An arbitration confirmation proceeding is of limited scope. K.S.A. 5-444 provides that, after a party to an arbitration proceeding receives notice of an award, the party may make a motion to a court for an order confirming the award, "at which time the court shall issue a confirming order, unless the award is modified or corrected pursuant to K.S.A. 5-442 or 5-446, and amendments thereto, or is vacated pursuant to K.S.A. 5-445, and amendments thereto." K.S.A. 5-445 sets out limited circumstances under which the court may set aside the award, and there is no allegation that those circumstances apply in this case.

The confirmation process establishes an enforceable judgment. It does not constitute an independent judicial proceeding establishing liability of the parties or comparative fault. It is generally not the role of courts to second-guess arbitration awards or to enter independent judgments when asked to confirm such awards. See *City of Coffeyville v. IBEW Local No. 1523*, 270 Kan. 322, 336, 14 P.3d 1 (2000) (courts bound by arbitrator's findings of fact and conclusions of law so long as errors not in bad faith or so gross as to amount to affirmative misconduct); *Alexander v. Everhart*, 27 Kan. App. 2d 897, 900-01, 7 P.3d 1282, *rev. denied* 270 Kan. 897 (2000) (district court must presume arbitrator's award is valid unless Arbitration Act grounds are specifically proven).

The order confirming the award in this case made no independent factual findings. The court did not conduct an evidentiary hearing and made no explicit findings regarding comparative fault. The parties apparently did not seek such a determination of fault, and the court did not discuss the possible degree of fault by parties that did not participate in the arbitration. Simply approving that an award comports with statutory and due process requirements does not amount to a judicial determination of fault.

In the absence of "a judicial determination of comparative fault," a plaintiff may pursue separate actions against tortfeasors. See *Mick*, 244 Kan. at 93. The *Mick* court stated that the "one-action rule should, perhaps, more accurately be described as the one-trial rule" because it is only through a trial, not through settlements and the removal of potential defendants from actions, that comparative fault can be established. 244 Kan. at 93.

The *Mick* so-called "one-trial rule" was based, in part, on *Childs*. The minor plaintiff in *Childs* settled out of court with the driver of the car in which she was a passenger. A district court order approved the settlement. No determination of comparative fault was made, and the plaintiff made no attempt to preserve a right of action against the driver of the other car in the settlement agreement. This court allowed a suit against the driver of the other car to proceed, acknowledging that "a plaintiff is not barred from bringing further suits against additional defendants concerning the same cause of action until it has actually received a *comparison of fault at trial*." (Emphasis in original and added.) 243 Kan. at 443. Nothing prevented the plaintiffs from joining all the defendants in one suit, but the plaintiff elected to settle against one of the defendants extrajudicially. The result was that there was no judicial determination of comparative fault in the plaintiff's first action, and the plaintiff was allowed to proceed with her second action. This closely resembles the situation in the present case.

We conclude that the confirmation of an arbitration award by a state court judgment does not qualify as a judicial determination of comparative fault so as to invite application of the one-action rule.

In re Shaw

No. 105,339

In the Matter of GILLIAN ROGERS SHAW f/k/a GILLIAN LUTTRELL, *Petitioner.*

(533 P.3d 311)

ORDER OF REINSTATEMENT

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Order of Reinstatement.*

On April 8, 2011, this court indefinitely suspended the Kansas law license of Gillian Luttrell, now known as Gillian Rogers Shaw. The court ordered that Shaw undergo a full reinstatement hearing prior to its consideration of any petition for reinstatement. See *In re Luttrell,* 292 Kan. 51, 252 P.3d 111 (2011); see also Supreme Court Rule 232 (2023 Kan. S. Ct. R. at 293) (procedure for reinstatement after attorney's indefinite suspension).

On June 2, 2022, Shaw filed a petition for reinstatement under Rule 232(b). Upon finding sufficient time had passed for reconsideration of the suspension, the court remanded the matter for further investigation by the Office of the Disciplinary Administrator (ODA) and a reinstatement hearing.

On March 9, 2023, a hearing panel of the Kansas Board for Discipline of Attorneys conducted a hearing on Shaw's petition for reinstatement. A month later, the court received the hearing panel's Reinstatement Final Hearing Report. In that report, the hearing panel recommends that the court grant Shaw's petition for reinstatement, subject to three years' probation under specific terms and conditions outlined in the parties' jointly proposed probation plan plus two additional terms and conditions suggested by the panel.

The court has adopted similar hearing panel recommendations for reinstatement to probation in the past. The court now determines, however, that the court should have been more precise in its terminology.

Under Supreme Court Rule 227 (2023 Kan. S. Ct. R. at 283), the court places an active-licensed respondent on "probation" as a form of discipline upon finding the respondent committed misconduct that can be corrected by probation. What happens after that

is governed by Rule 227(g) (procedure following the respondent's successful completion of probation) or Rule 227(i) (procedure upon an alleged violation of the terms of probation).

In "reinstatement" proceedings under Rule 232, the court does not impose discipline; rather, it decides whether the court should reconsider the petitioner's suspension or disbarment based on various circumstances that have occurred (or have not) since the court suspended or disbarred the petitioner. See generally Rule 232(b)-(e) (outlining the initial procedures for reinstatement in this court). Where, as here, the court determines sufficient time has elapsed to justify reconsideration of an indefinite suspension order and receives the final report from the reinstatement hearing, it determines whether the petitioner has proven that the petitioner's fitness to practice law has been restored and that the factors outlined in Rule 232(e)(4) weigh in favor of reinstatement. If not, the court denies the petition for reinstatement. If so, the court grants the petition for reinstatement and reinstates the petitioner's license to practice law. And under Rule 232(h), the court "may order the [reinstated] attorney to comply with any condition or limitation on the attorney's practice" and "may also order that the attorney's practice be supervised for a period of time."

Having clarified the procedure at issue, the court grants Shaw's petition and reinstates Shaw's Kansas law license. For a period of three years from the date of this order, Shaw must comply with the following conditions and limitations on her practice, which we borrow from the parties' proposed probation plan and the final hearing report.

Conditions and Limitations

- Shaw must limit her law practice to criminal cases involving infractions, misdemeanors, felony levels 5-10, drug felony levels 3-5, domestic cases, and child in need of care cases. Shaw may modify these practice limits with the written approval of the ODA.

- Shaw must maintain a daily updated inventory of all open cases and clients. The inventory must include the client's name, the client's contact information, the client's goal,

the tasks that remain to be completed, all pending deadlines, and the forum (if any) in which the matter is pending.

- Shaw must contact each client by letter at least once every three months concerning the status of the client's case.
- Shaw must resolve all emails on a weekly basis in a case management system established with her supervising attorney.
- Shaw must continue to cooperate with the ODA and timely provide any additional information requested by the ODA.
- Shaw must obtain and maintain lawyer's professional responsibility insurance if she is actively practicing law.
- Shaw must follow the dictates of the Monitoring Agreement with KALAP that she entered on February 15, 2022. This includes following any recommendations made by her KALAP monitor and staff and participating in the KALAP resiliency group.
- Shaw's practice must be supervised by an attorney who agrees to serve and who is mutually agreed upon by the ODA and Shaw.
    - Shaw must allow her supervising attorney complete, unrestricted access to her files, calendar, and other records and must comply with any requests made by the supervisor.
    - Shaw and her supervising attorney must meet weekly unless her supervisor determines their meetings may be at less frequent intervals. During these meetings, Shaw and her supervising attorney must:
        - review all new cases and establish a plan or course of action, including the identification of possible

problems Shaw may face in dealing with difficult legal and client relation problems; and

- review Shaw's schedule to ensure that notices have been sent to all appropriate parties, that deadlines have been met and carried out, that appropriate preparation has been carried out in advance of hearings, and that all updates to the file have been completed.

- Shaw must follow all of her supervising attorney's recommendations, including the correction of any deficiencies outlined in the supervising attorney's monthly reports and quarterly audits.

- Shaw must include in each engagement agreement language notifying each client that her supervising attorney, who must be identified to the client, has authority to contact them throughout the pendency of representation to verify Shaw is complying with the conditions and limitations on her practice and the Kansas Rules of Professional Conduct.

- Shaw must also ensure her supervising attorney has full access to review Shaw's business email account and notify her clients of the supervising attorney's access to her email as required by the Kansas Rules of Professional Conduct.

- Shaw's supervising attorney's duties include the following:

  - prepare and submit to both Shaw and the ODA monthly reports concerning Shaw's compliance with these conditions of reinstatement;

  - audit Shaw's files every three months and provide a report of each audit to both Shaw and the ODA; and

  - determine whether Shaw's diary and billing procedures are appropriate.

Disapproved Conditions

The court disapproves of the following proposed conditions and does not impose them as conditions.

- Probation plan ¶ 16: "[Shaw's supervising attorney] shall be acting as an officer and agent of the Court while supervising the probation of Petitioner and during the monitoring process of legal practice of Petitioner. [Shaw's supervising attorney] shall be afforded all immunities by Supreme Court Rule 223 during the course of this activity and pursuant to this Probation Plan."

- Probation plan ¶ 26: "Petitioner shall follow the dictates of Supreme Court Rule 227."

- Hearing panel's recommendation: "[Shaw must] address her outstanding debt collection accounts and judgments by paying a set percentage of the petitioner's income toward those accounts and judgments. The percentage amount should be determined by the probation supervisor and approved by the disciplinary administrator."

The court issues the following additional directives.

Supervising attorney's immunity: Shaw's supervising attorney has absolute immunity from liability for any act within the scope of the attorney's duties in the same manner that an attorney has absolute immunity under Supreme Court Rule 238 (2023 Kan. S. Ct. R. at 311) when supervising a respondent on diversion under Supreme Court Rule 212 (2023 Kan. S. Ct. R. at 264) or on probation under Rule 227.

Release from the conditions and limitations on practice after three years: If Shaw complies with each condition and limitation on her practice outlined above, at the end of the three-year supervisory period, Shaw may move the court to be discharged from any direct oversight by her supervising attorney or the ODA. Shaw must properly serve the motion on the ODA and include the following as attachments:

- Shaw's affidavit describing her compliance with each of the conditions and limitations above; and

- an affidavit from Shaw's supervising attorney describing Shaw's compliance with the conditions and limitations.

No later than 14 days after Shaw files such a motion, the ODA must file a response explaining whether Shaw has complied with the conditions and limitations on her practice and whether she should be discharged therefrom.

Until the court releases her, Shaw remains obligated to comply with the conditions and limitations on her practice, except that the supervising attorney will be deemed released from the duties outlined in this order after the expiration of the three-year supervisory period unless the ODA moves to extend the supervisory period.

Violation of a condition or limitation on practice: Shaw must immediately notify her supervising attorney and the ODA of any noncompliance with any of the conditions and limitations on her practice outlined above. And again, Shaw's supervising attorney has a duty to immediately inform the ODA when the supervising attorney knows or reasonably believes that Shaw has failed to comply with any of the above conditions or limitations.

Fees and continuing legal education: The court further orders Shaw to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete all continuing legal education (CLE) requirements. See Supreme Court Rule 812 (2023 Kan. S. Ct. R. at 609) (outlining CLE requirements following reinstatement). The court directs that once OJA receives proof of Shaw's completion of these conditions, OJA must add Shaw's name to the roster of attorneys actively engaged in the practice of law in Kansas.

The court orders the publication of this order in the official Kansas Reports and the assessment of all costs herein to Shaw.

Dated this 2nd day of August 2023.

State v. Larsen

No. 122,660

STATE OF KANSAS, *Appellee*, v. RON RICHARD LARSEN JR. *Appellant*.

(533 P.3d 302)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Charge of Attempted Crime Requires Proof of Specific Intent for Each Element of the Target Crime*. If the State charges an attempted crime under K.S.A. 2022 Supp. 21-5301(a), it must prove specific intent for each element of the target crime, even those elements of the target crime without a specific intent requirement. This means the State must prove a defendant charged with attempted aggravated burglary specifically intended to enter a dwelling in which there was a person, overruling *State v. Watson*, 256 Kan. 396, 401, 885 P.2d 1226 (1994).

2. SAME—*Sufficiency of Evidence Challenge by Defendant—Appellate Review*. When a defendant challenges the sufficiency of the evidence supporting the defendant's conviction, an appellate court asks whether, viewing the evidence in the light most favorable to the State, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In making this determination, an appellate court does not reweigh evidence, resolve evidentiary conflicts, or assess witness credibility.

3. SAME—*Charge of Attempted Crime Requires Proof of an Overt Act Committed Toward Perpetration of Target Crime*. When a defendant is charged with an attempted crime, the State must prove the accused committed an overt act toward perpetration of the target crime. No definite rule about what constitutes an overt act can or should be laid down. Each case depends on its particular facts and the reasonable inferences a jury may draw. But some guidelines are settled. The accused must have taken steps beyond mere preparation by doing something directly moving toward and bringing nearer the crime the accused intends to commit. The accused's action must approach near enough to consummation of the offense to stand either as the first or some later step in a direct movement toward the completed offense.

Review of the judgment of the Court of Appeals in an unpublished opinion filed July 29, 2022. Appeal from Johnson District Court; THOMAS KELLY RYAN, judge. Oral argument held February 2, 2023. Opinion filed August 4, 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 brief for appellant.

Jacob M. Gontesky, assistant district attorney, argued the cause, and *Daniel G. Obermeier*, 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

LUCKERT, C.J.: *State v. Watson*, 256 Kan. 396, 401, 885 P.2d 1226 (1994), held the State can convict a defendant for the crime of attempted aggravated burglary without proving the defendant intended to enter a dwelling that was occupied. Ron Richard Larsen Jr. contends this holding is contrary to K.S.A. 2022 Supp. 21-5301(a), which imposes a specific intent requirement for all elements. See *State v. Mora*, 315 Kan. 537, 541-42, 509 P.3d 1201 (2022).

We agree and overrule this holding in *Watson*. But our holding on this point does not lead to relief for Larsen because the State presented sufficient evidence that he intended to enter an occupied dwelling at the time he committed an overt act. We therefore affirm his attempted aggravated burglary conviction.

FACTUAL AND PROCEDURAL BACKGROUND

The State charged Larsen with attempted aggravated burglary, aggravated burglary, felony and misdemeanor theft, and kidnapping arising out of three incidents. At trial, the State presented evidence relating to each incident and a jury convicted Larsen on all counts. The issues before us relate to only one incident and one count—the count of attempted aggravated burglary. We thus focus on the facts surrounding Count I but will briefly discuss the facts relating to the other two incidents because they supply evidence of Larsen's intent.

Count I: Attempted Aggravated Burglary (Donald Tinsley Incident)

Around 10:30 p.m. on the Saturday of a Memorial Day weekend, Donald Tinsley was in the main floor living room of his home watching television when his security system alerted him to motion on the back patio. Tinsley viewed a live video feed on his phone and saw an unfamiliar man looking into the house through a window located behind the couch where Tinsley was seated.

Tinsley got up, went upstairs, called 911, got a gun, and woke his wife. He did not disturb his sleeping children.

Tinsley returned to the main floor, which he found empty. After police cleared the scene, Tinsley found mud on the patio and on stones underneath the window. He also saw that one of the gates to his fenced backyard, which he habitually closed, was open and a footprint was near the gate.

Tinsley described the person on the patio as a black male with a shaved head and ornate, goldish-colored glasses. The man wore a hooded sweatshirt and jeans, and he had a handkerchief over his face. Tinsley and Larsen's parole officer identified Larsen as the person shown in the security video.

Tinsley explained that several lights were on in the house, including a light on the patio above the door leading into the kitchen and one above the kitchen table. The television Tinsley was watching illuminated the room he was in and another "was lighting up the master bedroom," which was on the second floor directly above the living room.

Larsen testified in his own defense. He admitted that he was the person in the security video. He explained he was drunk at the time and upset because he had learned the baby he was expecting with his girlfriend was probably not his. Larsen was out walking and texting his girlfriend. At one point, he thought someone was chasing him, so he put his gray bandana over his face to hide. He ended up behind what he thought was his girlfriend's house, although she lived in Oklahoma. He looked inside and realized he was not familiar with the house. Larsen denied he was there to steal items.

The State questioned Larsen about text messages he exchanged with his girlfriend before and after he looked inside the Tinsley home. The State pointed out a text sent in which Larsen said he was "going to go out and get cash tonight." Then, about 20 minutes before Larsen appeared on Tinsley's video he texted: "Okay. I'm working on money for you. A car of your own. Take your time. I'll let you know what I got for you." Larsen answered the State's questions about the meaning of those messages by admitting he was not out looking for a job and denying that he planned to steal the money or the car.

The State also confronted Larsen with a text he sent after he left the Tinsley house in which he reported: "I just got my phone back, babe. I lost it running from the cops. Someone seen [*sic*] me . . . and I

almost got caught breaking in." Larsen denied that he had dropped his phone while running to avoid apprehension.

Counts II-IV: Aggravated Burglary, Kidnapping, and Theft (Second Incident)

Two nights later, Larsen entered another house around 11 p.m. While Larsen was moving through the house, a male occupant surprised him. Larsen told the occupant he had a gun and ordered the occupant to move away from the backdoor and down some stairs. Larsen then fled. The occupant noticed a window was open as far as possible, and he found the gray bandana worn by the intruder on the house's deck. Keys to two cars and a purse were taken.

Count V: Theft (Third Incident)

The next day a car owner reported her car had been taken from her driveway. The woman and her family had returned from vacation the night before, at about 9 or 9:30 p.m. The family parked the car in their home's driveway and left some items in the vehicle to unpack later. Around 11 p.m., the woman retrieved some items from the car but left other items. She then went to bed. The next morning, they discovered the car was missing.

The car owner usually clipped her car keys in her purse, but she could not remember where she left her purse that night. After finding the purse's contents in the backyard, she came to believe she took her purse with her into her gated backyard and left it there when she took their puppy outside to use the bathroom. She also noticed the side gate to the yard was open.

Larsen was later driving the car when he was in a car accident and ended up in the hospital. He testified he had the car because he went to a park to buy drugs the night the car was stolen and was picked up by someone driving the car. No one other than Larsen was in the car at the time of the accident.

Verdict and Appeal

The jury convicted Larsen on all counts. He appealed to the Court of Appeals, which affirmed his conviction. *State v. Larsen*, No. 122,660, 2022 WL 3017317 (Kan. App. 2022) (unpublished opinion). He then petitioned this court for review of that decision, raising four

issues. We granted review on two issues only, both of which relate to Count 1, the attempted aggravated burglary of the Tinsley home. We have jurisdiction under K.S.A. 20-3018(b) (allowing jurisdiction over petitions for review of Court of Appeals decisions); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

In the two issues we review, Larsen focuses on what he sees as the State's failure to prove he had the specific intent to burglarize a dwelling occupied by a human as required by the elements of aggravated burglary. In one issue, he asks us to revisit *Watson*'s holding that the intent requirement of attempted aggravated burglary does not apply to the aggravating element requiring a person be in the dwelling. 256 Kan. at 401. In the other issue, he argues the evidence is insufficient in two ways: (1) it failed to prove he had the intent to enter an occupied building and (2) it failed to prove he committed an overt act toward completion of an aggravated burglary.

We first address whether *Watson* incorrectly held the State need not prove a specific intent to enter a building that is occupied.

1. *Specific Intent and Attempted Aggravated Burglary*

Summarized, Larsen argues we could affirm his conviction for attempted aggravated burglary only if the State presented evidence showing he intended to enter an *occupied* dwelling with the intent to commit a felony, a theft, or a sexually motivated crime. His arguments require us to interpret statutes, a question of law subject to unlimited review. *Mora*, 315 Kan. at 541. When interpreting statutes, our purpose is to discern legislative intent and, to do so, we look to the language of the statute and apply the ordinary meaning of the words used by the Legislature. *Mora*, 315 Kan. at 541. The relevant statutes here define burglary and attempt.

Aggravated burglary is (1) without authority (2) entering or remaining in any dwelling, building, manufactured home, tent, or other structure that is not a dwelling, (3) in which there is a human being, (4) with the intent to commit a felony, theft, or sexually motivated crime. See K.S.A. 2022 Supp. 21-5807(b). Burglary, in

its simple, unaggravated form, omits the requirement that a human being be present. See K.S.A. 2022 Supp. 21-5807(a).

In *Watson*, this court reviewed decisions discussing the intent requirement of the burglary statute. Those cases held that the aggravated burglary statute requires a defendant enter a building with the intent to commit one of the underlying crimes listed in the burglary statute. "'[B]ut there is no requirement of knowledge that there was someone within the building at the time the entry was made.' [Citation omitted.]" 256 Kan. at 400. Under *Watson* and the two decisions it cited, had Larsen entered the Tinsley house, he could have been guilty of burglary without proof that he intended to enter an occupied house. See *Watson*, 256 Kan. at 400-01; *State v. Price*, 215 Kan. 718, 721, 529 P.2d 85 (1974); *State v. Reed*, 8 Kan. App. 2d 615, 616-17, 663 P.2d 680, *rev. denied* 234 Kan. 1077 (1983).

Larsen was not charged with aggravated burglary, however. Rather, like Alonzo L. Watson, he was convicted of attempted aggravated burglary. Watson, like Larsen does here, argued the State needed to prove an intent to enter a dwelling occupied by a person. The *Watson* court rejected the argument. In doing so, it appeared persuaded by the State's argument that requiring it "to prove knowledge of the presence of a human being to prove attempted aggravated burglary would place a greater burden on the State than would be required in proving the greater offense of aggravated burglary." 256 Kan. at 401.

Here, the State urges us to apply *Watson*. But, as Larsen points out, the *Watson* court did not discuss the legislatively imposed requirements in the attempt statute, making its analysis incomplete. To complete the analysis, we turn to what the Legislature has said. Although recodified in 2010, the statutory definition of attempt found in K.S.A. 2022 Supp. 21-5301 has stayed the same since *Watson*. Compare K.S.A. 2022 Supp. 21-5301 with K.S.A. 1994 Supp. 21-3301.

We look to K.S.A. 2022 Supp. 21-5301, the default definition of attempt because the burglary statute does not include an attempt provision. See *Mora*, 315 Kan. at 542 (discussing different ways Legislature has addressed attempt crimes and when default definition applies). That default definition requires proof of "any overt

act toward the perpetration of *a* crime done by a person who *intends to commit such crime* but fails in the perpetration thereof or is prevented or intercepted in executing such crime." (Emphasis added.) K.S.A. 2022 Supp. 21-5301(a). The default definition applies to attempted burglaries because the burglary statute does not have its own attempt definition.

Larsen argues the plain language of the default definition requires the defendant intend to commit the target crime, here aggravated burglary. Thus, the State must prove he intended to commit each material element of the offense, including that he intended to break into an occupied dwelling. For support he cites *Mora*, 315 Kan. 537, decided after briefing in the Court of Appeals.

In *Mora*, we considered the plain meaning of the phrase "intends to commit such crime" in the default attempt provision. We held those words "require[] the State to prove the defendant had the specific intent to commit the intended crime, even if that crime as a completed crime does not require specific intent." 315 Kan. 537, Syl. ¶ 1.

We found support in Ninth Circuit caselaw. That caselaw identified the uncertainty that exists "'regarding the defendant's purpose to commit the underlying crime—an uncertainty that is not present in the case of a principal who actually commits the crime.'" 315 Kan. at 543 (quoting *United States v. Sayetsitty*, 107 F.3d 1405, 1412 [9th Cir. 1997]). Because of that uncertainty, proof of specific intent to commit the underlying crime is required for an attempt offense even if that intent is not needed to prove the completed offense. 315 Kan. at 543.

Applying that reasoning in Mora's case meant the State had to prove the defendant had the specific intent to commit the underlying offense of aggravated robbery. See *Mora*, 315 Kan. at 543. Extending the *Mora* rule requiring specific intent of each element of the attempted crime, which rests on the plain language of the statute, would mean the State had to prove Larsen had the specific intent to commit each element of the crime of aggravated burglary. That would include the specific intent to "enter[] into or remain[] within any: (1)(A) Dwelling in which there is a human being."

K.S.A. 2022 Supp. 21-5807(b). This holding overrules contrary language in *Watson*, 256 Kan. at 400.

We do not overrule *Watson*'s holding lightly but do so only after carefully considering stare decisis principles, including its purpose of ensuring stability and continuity. See *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 (2004). These principles usually suggest we will follow precedent. We do not always do so, however, because stare decisis "is not a rigid inevitability but a prudent governor on the pace of legal change." *State v. Jordan*, 303 Kan. 1017, 1021, 370 P.3d 417 (2016). Indeed, the principles of stare decisis recognize courts may abandon precedent that "'was originally erroneous or is no longer sound because of changing conditions and [when] more good than harm will come by departing from precedent.' [Citations omitted.]" *Crist*, 277 Kan. at 715.

Here, we can conclude *Watson* was originally erroneous or is no longer sound in light of K.S.A. 2022 Supp. 21-5301 and *Mora*, 315 Kan. 537. *Watson* ignored the default attempt statute and invoked policy rather than the plain language of the statute. We thus depart from *Watson* to hold the Legislature has required the State to prove Larsen had the specific intent to commit the intended crime of aggravated burglary. This means the State needed to prove beyond a reasonable doubt that Larsen specifically intended to enter a dwelling in which there was a person.

This holding sets up one of Larsen's sufficiency challenges, which we turn to next.

2. *Sufficiency of the Evidence*

Larsen raised two challenges to the sufficiency of the evidence. In the one dependent on our holding on the first issue, he argues there was insufficient evidence he intended to enter an occupied residence. In the other, he argues there was insufficient evidence of an overt act toward the perpetration of an aggravated burglary. In making this second argument, he contends the Court of Appeal conflated evidence of intent to commit a burglary with evidence of an overt act.

Our standard of review for each argument is the same: When a defendant challenges the sufficiency of the evidence supporting

his conviction, an appellate court asks whether, viewing the evidence in the light most favorable to the State, a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In making this determination, an appellate court does not reweigh evidence, resolve evidentiary conflicts, or assess witness credibility. *State v. Roberts*, 314 Kan. 835, 849-50, 503 P.3d 227 (2022). Recognizing that standard, we reject both arguments.

2.1 *Intent to Enter an Occupied Dwelling*

As we have discussed, the State had the burden to prove that Larsen committed an overt act toward aggravated burglary with the intent—that is, with the desire or conscious objective—to enter a house that had a person in it. See K.S.A. 2022 Supp. 21-5202(h) ("A person acts 'intentionally,' or 'with intent,' with respect to the nature of such person's conduct or to a result of such person's conduct when it is such person's conscious objective or desire to engage in the conduct or cause the result.").

In doing so, we focus on Larsen's intent at the time he peered into the house. Our focus is directed on this act and this point of time for two reasons. First, the trial court instructed the jury the State had to prove that "[t]he defendant performed an overt act toward the commission of aggravated burglary, to wit: looked inside the windows of residence." Second, criminal conduct occurs when the accused commits the overt act. See K.S.A. 2022 Supp. 21-5301(a) ("An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime . . . .").

Larsen argues the State did not prove that intent. He points out the record includes no direct evidence of his intent to enter a dwelling with a person inside. While this is true, the intent to commit a burglary or aggravated burglary is rarely proved by direct evidence. More often, intent must be discerned from the circumstances, as this court recognized in *State v. Harper*, 235 Kan. 825, 828-29, 685 P.2d 850 (1984), when it said:

"The intent with which an entry is made is rarely susceptible of direct proof; it is usually inferred from the surrounding facts and circumstances. [Citations omitted.] The manner of the entry, the time of day, the character and contents of

the building, the person's actions after entry, the totality of the surrounding circumstances, and the intruder's explanation, if he or she decides to give one, are all important in determining whether an inference arises that the intruder intended to commit a theft."

Harper was discussing intent to enter a building for the purpose of committing a theft or other felony. It was not considering proof of intent in the context of the occupancy requirement. But the Court of Appeals has correctly noted that intent can be shown by circumstances suggesting a defendant tried to learn whether anyone was in the dwelling. For example, in *State v. Hargrove*, 48 Kan. App. 2d 522, 565, 293 P.3d 787 (2013), the defendant rang the doorbell repeatedly, went to his car, returned to ring the doorbell, and tried the door handle. *Hargrove* noted such conduct "could be logically and readily construed as a means to determine if the house were unoccupied, making it a suitable target for a break-in and theft." 48 Kan. App. 2d at 563-64. Logically, similar circumstances can be used to show an accused intended to enter with a person inside. Here, a reasonable fact-finder would have considered several circumstances.

The most persuasive circumstance, according to Larsen, is that he left the Tinsley residence after discovering evidence of occupation. He argues this proves he lacked the intent to enter an occupied dwelling. We agree this is an inference the jury could have drawn from the evidence.

On the other hand, a reasonable jury could infer from the evidence that Larsen intended to enter an occupied dwelling. The State presented evidence supporting a conclusion that Larsen wanted residents to be home so he could gain access to items often carried by a person when away from home—such as purses, billfolds, and keys—and then left near the home's entry upon the resident's return. Other circumstances suggest this was Larsen's intent.

For example, evidence about the other two incidents shows Larsen's plan was to enter houses and grab keys and purses. The three incidents occurred over a three to four-day period, and all reflect Larsen's text declaration that he would get money and a car for his girlfriend. Both other incidents occurred around the same time of night as when Tinsley's security alerted—one at 11 p.m. when Larsen entered an occupied dwelling and the other sometime

after 11 p.m. when one of the car owners retrieved some items from the car and went to bed. In the incident in which Larsen entered a house, he took a purse and keys. And in the other, the thief took a billfold and keys. The keys were used to steal a vehicle, and a credit card taken from the billfold was fraudulently used. A jury could infer a plan and intent to enter occupied dwellings from this series of events so there would be quick access to money, keys, and other valuables while residents were likely to be home but asleep. See K.S.A. 2022 Supp. 60-455(b) (Evidence of other crimes "is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.").

The jury could have also considered the State's questions to Tinsley about which rooms had lights on when Larsen was on the patio. Tinsley's answers could lead a reasonable jury to conclude the house looked occupied before Larsen approached to look through the window. Tinsley testified at least three rooms had lights on or televisions lighting up the room. These rooms—the kitchen, the room where Tinsley watched television, and the master bedroom—were on two levels and at the back of the house where Larsen stood. A reasonable jury could infer that someone planning a burglary of an unoccupied dwelling would view this lighting pattern in multiple rooms in the house as a signal to retreat from the dwelling. Larsen did the opposite by moving onto the patio and looking inside the house.

These actions contrast with defendants in other appellate cases who wanted to enter an unoccupied dwelling. Sean Arnell Hargrove, for example, approached a house midday when people were unlikely to be home. Then, as previously noted, he rang the doorbell repeatedly, went to his car, returned to ring the doorbell, and tried the door handle. These actions suggest Hargrove tried to enter the house only after there was no response and no other sign the building was occupied. See 48 Kan. App. 2d at 565. Larsen, on the other hand, entered the Tinsley's fenced backyard, stepped onto the patio, and looked inside the house with lights on in multiple locations around 10:30 p.m.—a time when people commonly would be home and often would be asleep. Indeed, four of the five

people in the Tinsley home were sleeping. It was only when Larsen saw an adult male who was not asleep that he fled.

Granted, reasonable fact-finders might view Larsen's peeking into the window to be a precaution like Hargrove's action of ringing the doorbell. And from this the jury could conclude Larsen hoped to find the house unoccupied. But when all the evidence is viewed in the light most favorable to the State, the fact Larsen ignored signs that the house was occupied before he approached the house weakens the inference in Larsen's favor. And the inference in Larsen's favor is further weakened by evidence from the other incidents that suggests a plan to enter occupied houses where purses, billfolds, and keys can be grabbed. Rather, the peeking inside the house suggests that Larsen's plan was to enter the house while the residents slept or were in a part of the house where they would not hear or see him.

In summary, considering the entire record in a light most favorable to the State, we hold a reasonable jury could decide beyond a reasonable doubt that Larsen looked inside with the desire or conscious objective to enter a house with people in it. In other words, the State presented sufficient evidence. Larsen's sufficiency claim based on the lack of evidence supporting an intent to enter an occupied dwelling fails.

2.2 *Sufficient Evidence of an Overt Act*

Finally, Larsen argues the State did not present sufficient evidence that he took an overt act in furtherance of the perpetration of aggravated burglary. Larsen more specifically argues that looking in the window of the Tinsley residence was mere preparation to commit a crime, not an overt act toward the commission of the crime. In making this argument, Larsen relies on *State v. Garner*, 237 Kan. 227, Syl. ¶ 3, 699 P.2d 468 (1985).

In *Garner*, this court held that "[n]o definite rule as to what constitutes an overt act for the purposes of attempt can or should be laid down. Each case must depend largely on its particular facts and the inferences which the jury may reasonably draw therefrom." The opinion elaborated: "The accused must have taken steps beyond mere preparation by doing something directly moving toward and bringing nearer the crime he intends to commit."

An overt act sufficient to prove an attempt offense "must approach sufficiently near to consummation of the offense to stand either as the first or some subsequent step in a direct movement toward the completed offense." 237 Kan. at 238. Larsen argues he did not cross the line of preparation to an act that is a step toward the completed crime because "[h]e took no steps toward the actual entry into the house."

We disagree. The evidence of Larsen peeking into the window was a step toward the completed crime analogous to similar actions this court has found to be an overt act. For example, we concluded that entering a backyard was a sufficient overt act to support a jury's verdict of felony murder while in perpetration of the crime of burglary or attempted burglary. *State v. Chism*, 243 Kan. 484, 490, 759 P.2d 105 (1988). We relied on the rule from *Garner* in concluding that the trial judge in *Chism* erred by taking the determination of an overt act from the jury because, "[u]nder the circumstances of the case at bar, the jury could have reasonably found the overt act had been committed when the appellants entered the victim's backyard." 243 Kan. at 490.

Below, Larsen tried to distinguish his case from *Chism*, pointing to other steps the two men involved in the *Chism* attempted burglary took in preparing to enter the house, including removing a window air conditioner. That distinction does not change the applicability of the *Chism* holding to the facts presented here, however. *Chism* did not base its holding on the series of acts. Instead, it recognized a reasonable jury could find the entry into the backyard was an overt act. 243 Kan. at 490. While the *Chism* court discussed the evidence of further action, it did so in the context of assessing harmless error. Again, it did not require more than the backyard entry as proof of an overt act. Likewise, Larsen's peek into the house was more than mere preparation. It was one in a series of acts—including entering the backyard—that moved him closer to the completed crime.

That point is made in *Hargrove*, 48 Kan. App. 2d 522, which the Court of Appeals relied on to find sufficient evidence Larsen committed an overt act. *Larsen*, 2022 WL 3017317, at *8. *Hargrove*, in discussing a sufficiency argument, cited *Garner* for the proposition that "[t]he divide between an overt act and mere preparation isn't always

well marked; it often depends upon the facts of the case and the nature of the crime." *Hargrove*, 48 Kan. App. 2d at 563. The Court of Appeals considered Hargrove's actions—tampering with an alarm system and jimmying a backdoor—sufficient for a reasonable jury to conclude the acts exceeded mere preparation. But the *Hargrove* decision also highlights other conduct that a reasonable jury could conclude was an overt act, including ringing the doorbell repeatedly, going to the car, returning to ring the doorbell, and trying the door handle. *Hargrove* distinguished these acts from mere preparation, "such as placing the gloves, screwdriver, or other burglary tools in the car." 48 Kan. App. 2d at 564.

Similarly, a reasonable fact-finder could determine that Larsen took logical steps toward the crime of aggravated burglary when he peeked into the house through the window. Larsen himself recognized he was breaking-in because he texted his girlfriend and said: "Someone seen me[,] and I almost got caught breaking in." He recognized his actions as part of the act of burglarizing the Tinsley home, and the jury had heard sufficient evidence of an overt act.

Larsen also complains that the Court of Appeals conflated his intent to commit burglary with an overt act. It did not. The Court of Appeals reviewed Larsen's intent because it is an element of the offense, and one Larsen disputed. But the Court of Appeals also separately considered Larsen's conduct that evening, noting Larsen entered a fenced backyard, then approached the house, and committed the overt act of looking through the window. See *Larsen*, 2022 WL 3017317, at *9. This discussion is distinct from the Court of Appeals' discussion of Larsen's intent.

In sum, the Court of Appeals correctly concluded that this evidence, viewed in the light most favorable to the State, supported a reasonable jury deciding that "Larsen did more than just prepare to commit the crime of burglary at the Tinsley residence." 2022 WL 3017317, at *9. We affirm.

CONCLUSION

We affirm Larsen's attempted aggravated burglary conviction.

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

STANDRIDGE, J., not participating.

State v. Couch

No. 122,156

STATE OF KANSAS, *Appellee*, v. MICHAEL WAYNE COUCH, *Appellant.*

(533 P.3d 630)

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Right to Self-Representation under Sixth Amendment—Requirements*. Under the Sixth Amendment to the United States Constitution, criminal defendants generally have the right to self-representation provided that they knowingly and intelligently forgo their right to counsel and that they are able and willing to abide by rules of procedure and courtroom protocol.

2. CRIMINAL LAW—*Invocation of Right to Self-Representation—Requires Clear and Unequivocal Expression of Desire to Proceed Pro Se—Invocation Before Trial Is Unqualified Right*. To invoke the right to self-representation, a defendant must clearly and unequivocally express a desire to proceed pro se. If a defendant invokes the right after trial starts, the district court has discretion in deciding whether to grant the request. If invoked before trial, our court has described the right as "unqualified." But an unqualified right to self-representation does not mean the right is absolute. In fact, the unqualified right to self-representation rests on an implied presumption that the court will be able to achieve reasonable cooperation from the pro se defendant. The right to self-representation does not permit defendants to abuse the dignity of the courtroom or to disregard the relevant rules of procedural and substantive law. Thus, a district court may deny a pretrial request to proceed pro se based on defendant's serious and obstructionist misconduct.

3. SAME—*Denial of Pretrial Request to Proceed Pro Se if Disruptive Behavior by Defendant*. To justify denial of a timely pretrial request to proceed pro se, a criminal defendant must have exhibited seriously disruptive behavior during pretrial proceedings, and that behavior must strongly indicate the defendant will continue to be disruptive in the courtroom.

4. SAME—*Denial of Pretrial Request to Proceed Pro Se Based on Disruptive Behavior by Defendant—Bifurcated Standard of Review*. When a district court denies a defendant's request to proceed pro se based on the defendant's seriously disruptive behavior, we review the district court's decision using a bifurcated standard of review. We review the district court's fact-findings about the defendant's behavior for substantial competent evidence, and we review the district court's legal conclusion de novo.

5. TRIAL—*Jury Instructions Define Elements of Offense More Narrowly Than Charging Document—Sufficiency of Evidence Measured Against Elements of Jury Instructions.* When the jury instructions define the essential

elements of the offense more narrowly than the charging document, due process considerations require the reviewing court to measure the sufficiency of the evidence against the narrower statutory elements of the jury instructions, rather than the broader statutory elements charged in the complaint.

6. TRIAL—*Determination Whether Lesser Included Offense Instruction Is Factually Appropriate—Sufficiency of Evidence Challenge*. In determining whether a lesser-included offense instruction is factually appropriate, the question is not whether the evidence is more likely to support a conviction for the greater offense. Instead, the question is whether the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 19, 2022. Appeal from Finney District Court; MICHAEL L. QUINT, judge. Oral argument held March 30, 2023. Opinion filed August 11, 2023. Judgment of the Court of Appeals affirming the district court on the issues subject to review is affirmed in part and reversed in part. Judgment of the district court is affirmed in part and reversed in part on the issues subject to review, and the case is remanded with directions.

Kai Tate Mann, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Tamara S. Hicks, assistant county attorney, argued the cause, and *Susan Lynn Hillier Richmeier*, county attorney, and *Derek Schmidt*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: Michael Wayne Couch broke into the home of H.D., threatened her with a knife, and then raped and sodomized her. The State charged Couch with several offenses, including aggravated battery, aggravated kidnapping, aggravated criminal sodomy, and rape. Dissatisfied with his appointed counsel, Couch filed a pretrial motion to represent himself, but the district court denied the motion based on his previous courtroom behaviors. Couch's case proceeded to trial, and the jury convicted Couch on all charges.

Couch appealed his convictions and sentence to a panel of the Court of Appeals, raising several claims of error. The panel affirmed Couch's convictions. It also affirmed Couch's sentence, except for an attorney-fee assessment not relevant to this opinion. Couch now argues the panel erred in holding that: (1) the district

court properly denied his request to proceed pro se; (2) Couch's aggravated-kidnapping conviction is supported by sufficient evidence; (3) lesser-included-offense instructions for aggravated battery were not factually appropriate; and (4) cumulative error did not deprive him of a fair trial.

We agree with the judgment of the panel of the Court of Appeals, if not its rationale, on all but one of Couch's issues. As to Couch's pretrial motion to proceed pro se, we conclude that substantial competent evidence supports the district court's fact-findings about Couch's disruptive pretrial behavior. And that behavior provided a lawful basis for the district court to deny Couch's request to represent himself at trial.

But as to the sufficiency of the evidence supporting Couch's aggravated-kidnapping conviction, we conclude the State did not present sufficient evidence to sustain that conviction. While the State charged Couch with kidnapping to "facilitate flight or the commission of any crime," the jury instructions more narrowly defined the crime by including only the specific intent to facilitate "commission of any crime" and eliminating the specific intent to "facilitate flight." See K.S.A. 2018 Supp. 21-5408(a)(2). Due process considerations require us to measure the sufficiency of the evidence against the theory of criminal liability reflected in the jury instructions. And while the record evidence may have supported an aggravated kidnapping with intent to facilitate flight, there is insufficient evidence to sustain an aggravated kidnapping with intent to facilitate any crime. In short, the evidence failed to show the crimes of rape or sodomy were facilitated by a confinement independent of the force used to carry out the sex crimes, as required under *State v. Buggs*, 219 Kan. 203, 214, 547 P.2d 720 (1976).

As to Couch's instructional-error claim, we agree with Couch that the panel erred by holding that jury instructions on the lesser-included offenses of aggravated battery were not factually appropriate. But we affirm the panel's judgment because the instructional error does not warrant reversal of Couch's aggravated-battery conviction.

Finally, as to Couch's cumulative-error claim, even assuming the cumulative-error doctrine applies, the cumulative effect of the trial errors do not require reversal.

In sum, we reverse Couch's conviction for aggravated kidnapping and vacate his sentence for that conviction. We affirm Couch's remaining convictions and remand for resentencing under K.S.A. 2022 Supp. 21-6819(b)(5).

FACTS AND PROCEDURAL BACKGROUND

On the morning of December 18, 2018, H.D. traveled to Walmart. She returned home at about 10:50 a.m. She left the garage door open because she planned to be home for only a few minutes before leaving to meet a friend for lunch.

While wrapping a gift for her friend at the dining room table, H.D. heard the access door connecting the garage to the kitchen open. As she went to shut the door, a stranger came through the door, pushed H.D. against the kitchen sink, and held a knife to her throat. As H.D. struggled with her assailant, she grabbed his knife trying to protect herself and cut her hands. H.D. fell to the ground screaming for help, but the assailant threatened to hurt her if she did not stop yelling. About that time, H.D. and the assailant noticed the cuts on H.D.'s hands. The assailant repeatedly said, "oh shit," and let H.D. wash her hands and wrap them in a towel. The assailant then grabbed H.D.'s right arm and began to lead her out of the kitchen. H.D. reached for her phone, but the assailant pushed the phone back onto the counter and told H.D. she would not need it. The assailant then took H.D. to the master bedroom.

The assailant placed H.D. on the bed, unbuckled her belt, and pulled her pants and underwear off. The assailant demanded that H.D. kneel on the floor and ordered her to put his penis in her mouth, but he soon became frustrated when he could not maintain an erection. He ordered H.D. back onto the bed and penetrated her vagina with his fingers. The assailant threatened H.D. with a pocketknife, telling her he would hurt her if she "didn't finish the job." He then penetrated H.D.'s vagina with his penis. As he did so, he lifted his sweatshirt, and H.D. noticed he had three swastika tattoos on his right abdomen.

Still unable to maintain an erection, the assailant became increasingly frustrated. He retrieved H.D.'s toothbrush from her bathroom and forcibly anally sodomized her with it. He then demanded H.D. come to the nearby hallway bathroom with him. In the bathroom, he put some lotion on her hands. He then ordered H.D. to follow him back to the bedroom and forced her to manipulate his penis. He again told her he would hurt her if she "didn't finish the job," and demanded that she put his penis in her mouth.

Sometime during the attack, H.D. used her Apple Watch to contact her emergency contact, and her husband, parents, and sister began calling her. The assailant then tore off her Apple Watch and threw it on the ground.

After the attack, the assailant told H.D. his name was Michael and H.D.'s husband had paid him to rape her. He wrapped H.D. in a comforter, pulled the charging cords for H.D.'s phone and Apple Watch from the wall, and used the cords to bind her hands and feet. He also left his knife so she could cut herself free but told her not to use it until he had left. After the assailant left, H.D. wriggled her arms out of the restraints and cut her legs free. She retrieved her phone from the kitchen and informed her husband she had been attacked. She then grabbed a gun, hid in the bedroom closet, and called 911.

H.D. described her assailant as wearing a black stocking cap, a brown work jacket, and a gray sweatshirt with the words "Nova Scotia" on it. Law enforcement showed her several photo lineups, but she did not identify Couch, who was depicted in one of the photo arrays. She also told police that a bottle of lotion, a bottle of hand soap, and her toothbrush were missing from her home after the attack.

The sexual assault nurse who examined H.D. reported that H.D. had injuries to her genitalia and rectum consistent with her reported history. H.D. had cuts on three of her

left fingers and two of her right fingers, all of which required sutures. She also had four superficial lacerations on her neck, ligature abrasions on both her wrists, and bruising on her right upper arm.

Surveillance video collected by police showed that a white truck had followed H.D. home from Walmart on the day of the

attack. Garden City police posted an image of the truck on social media and later received a tip that the truck was in an impound lot in Goodland, Kansas. Apparently, a few days after the attack, local police had encountered Couch in Goodland. They arrested Couch and impounded the white truck after learning it was stolen. At the time Couch was arrested, he was wearing a black stocking cap, a brown work jacket, and a gray sweatshirt with the words "Nova Scotia" on it. Booking photos also showed he had several swastika tattoos on his torso.

During a search of the white truck, officers found a duffel bag containing a bottle of the same type of lotion used during H.D.'s attack and a bottle of hand soap. The lotion bottle found in the truck contained a mixture of DNA from at least two individuals, with a major DNA profile consistent with H.D. and a partial minor DNA profile consistent with Couch. Police also found a suitcase in the white truck with a pair of blue jeans inside. DNA testing of several blood stains on the jeans revealed DNA profiles consistent with H.D. and Couch.

At trial, the State presented more DNA evidence tying Couch to the scene. A vaginal swab taken during H.D.'s sexual assault examination, a swab of a blood stain on the knife H.D. used to free herself, and a swab of the doorknob from the access door to the garage all contained a male DNA haplotype consistent with Couch. And a swab of a blood stain from the access door showed a major DNA profile consistent with Couch.

H.D. also identified Couch as her assailant at trial. She said she had trouble picking him out of the photo lineups because she could not see his body or hear his voice, and she only wanted to identify him if she was "110 percent certain."

Couch testified in his own defense. He said he drove to Liberal, Kansas, on the evening of December 17, 2018. There, he picked up a stranger, began drinking, and then passed out in his truck. He later woke up in Colby, Kansas, on the afternoon of December 18 but could not remember how he had gotten there. He saw the stranger he had picked up standing outside wearing Couch's brown work jacket. Couch demanded his jacket back, and then drove to Goodland without the stranger. He was then arrested in Goodland for reasons unrelated to the attack on H.D. Couch

admitted telling an investigating officer: "Couldn't control myself and that's what happened. I cut the fucking dog shit out of her, blood everywhere."

A jury convicted Couch of three counts of aggravated criminal sodomy and one count each of rape, aggravated burglary, aggravated battery, and aggravated kidnapping. The district court sentenced Couch to 1,306 months' imprisonment and ordered Couch to pay $3,962.84 in restitution, and $31,612.50 in BIDS attorney fees.

Couch appealed, raising several issues related to his convictions and sentence. On appeal, the State conceded that the district court erred in imposing BIDS attorney fees, and the Court of Appeals vacated that order. *State v. Couch*, No. 122,156, 2022 WL 3570874, at *10 (Kan. App. 2022) (unpublished opinion). But the panel otherwise affirmed Couch's convictions, sentence, and restitution. 2022 WL 3570874, at *1.

Couch petitioned for review, and we granted review of all issues raised in his petition. We heard oral argument in March 2023. Jurisdiction is proper. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

Couch raises four claims of error. First, he argues the district court violated his right to self-representation when it improperly denied his pretrial request to proceed pro se. Second, he argues there was insufficient evidence to support his conviction for aggravated kidnapping. Third, he argues the district court erred in failing to instruct the jury on the lesser-included offenses of aggravated battery. Finally, he argues cumulative error deprived him of a fair trial. We address these issues in turn.

I. *The District Court Did Not Commit Structural Error by Denying Couch's Motion to Represent Himself*

For his first issue, Couch argues the panel erred by affirming the district court's denial of his pretrial request to proceed pro se. Couch contends his right to proceed pro se was "unqualified" because he timely asserted it before trial. And he argues the panel erred in affirming the district court's decision based on Couch's lack of decorum at

pretrial proceedings. Couch claims these rulings deprived him of his right to self-representation —a structural error requiring reversal of all his convictions. See *State v. Bunyard*, 307 Kan. 463, 471, 410 P.3d 902 (2018) (failure to honor the defendant's properly asserted right to self-representation is structural error)

To resolve Couch's challenge, we first identify additional facts relevant to his pretrial motion. Then, we review the controlling legal framework governing a defendant's constitutional right to self-representation. Finally, we apply that framework by analyzing whether substantial competent evidence supports the district court's fact-findings and whether those fact-findings support the court's legal conclusion. Ultimately, we affirm the panel's holding.

A. *Additional Facts Relevant to Couch's Pretrial Motion*

A month before trial, Couch moved to represent himself. At a hearing on the motion, the district court provided Couch with an opportunity to argue his position. Couch explained he was "tired of lawyers" and said his appointed attorneys had accused him of committing the crimes. He then explained what he believed were the weaknesses in the State's case against him. He said he "ha[d] a lot of motions to put in, Your Honor." At one point, he said, "[F]or the prosecution to say that that is my DNA on that vagina swab, excuse me, but fuck you. And you too." And later he told the court, "The fucking dude's [perpetrator's] fingerprints are on the Goddamn cell phone. If you want to gag me, that's fine. But gag me after I say this. His fingerprints are on the Goddamn cell phone, which I'm putting a motion in to have that tested."

Later in the hearing, when one of Couch's attorneys addressed the court, Couch told her, "Ma'am, if you continue I'll bite your fucking face off." The district court then inquired into Couch's education level. The court also asked if Couch had any legal training, to which he responded, "Illegal, that's it."

The district court then denied Couch's request to proceed pro se:

> "I'm going to make the finding that you are not competent even in your own case to represent yourself for purposes of trial. The concern I have is that you have on numerous occasions in my presence spoke out at a time when other people were talking or trying to represent their position to the court. You have effectively threatened your own attorney here in today's hearing . . . Court is not going to grant your request for pro se representation.

. . . .

". . . And, to be honest, in every hearing that we've had, other than the waiver of the preliminary hearing, you have been disruptive of the proceedings and, frankly, you've been threatened with at least some form of contempt action on at least two occasions.

"I would anticipate that if you cannot control your own actions, there is a very real possibility you'll be watching your trial from a camera and that you won't be allowed to be personally present. That may pose problems for your appeal or for your proper representation, but we will not have disruptive behavior in the courtroom, which seems to go with your—your approach to this particular case at least. So the attorneys will continue to act as your primary legal representative."

The district court later filed a journal entry addressing several pretrial motions. In that journal entry, the court summarized its findings and conclusions on Couch's motion to proceed pro se, explaining:

"Despite the defendant's experience in criminal cases, the defendant has shown lack of restraint and understanding the full scope of defenses that are available to him at his upcoming trial. He has, on at least three occasions given verbal out bursts when he disapproves of something that's been said or presented in court. On one particular occasion, the defendant specifically threatened his defense attorney with language to both threaten and disturb his attorney. Court finds defendant lacks both legal understanding and restraint to approach criminal jury trial in a professional manner. Defense counsel will be given exclusively, the right to cross examine State's witnesses and present evidence on behalf of the defense."

On the first and second days of trial, Couch continued to engage in disruptive behavior. He used profanity, insulted the prosecutor, and claimed he would strangle someone if his restraints were removed. Couch renewed his request to represent himself on two more occasions, but the district court affirmed its earlier ruling on his motion. Eventually, the court ordered Couch's removal from the courtroom on the second day of
trial, and he was placed in a separate room where he could observe his trial via closed-circuit television. Couch remained physically absent from the courtroom until the fourth day of trial when he testified in his own defense.

B. *Standard of Review and Relevant Legal Framework*

Generally, we review questions related to the rights of assistance of counsel and the related right to self-representation de novo. *Bunyard*, 307 Kan. at 470. But in denying Couch's request,

the district court made fact-findings about Couch's behavior during pretrial proceedings. Thus, we will apply a bifurcated standard of review, reviewing the district court's fact-findings for substantial competent evidence and the district court's legal conclusion de novo. See, e.g., *State v. Allen*, 62 Kan. App. 2d 802, 808, 522 P.3d 355 (2022) (exercising unlimited review over questions related to right to counsel and self-representation but reviewing district court fact-findings related to waiver of counsel for substantial competent evidence); see also *United States v. Tucker*, 451 F.3d 1176, 1180 (10th Cir. 2006) (in reviewing trial court's denial of request to proceed pro se, appellate court reviews factual findings for clear error and ultimate question of whether constitutional violation occurred de novo).

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

While the Sixth Amendment does not expressly provide for the right to self-representation, the United States Supreme Court has held that such a right is implied from the Sixth Amendment's guarantee of the right to counsel. *Faretta v. California*, 422 U.S. 806, 821, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). And the Court has clarified that defendants have the right to conduct their own defense, "provided only that [defendant] knowingly and intelligently forgoes [the] right to counsel and that [defendant] is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

Section 10 of the Kansas Constitution Bill of Rights also provides that "[i]n all prosecutions, the accused shall be allowed to

appear and defend in person, or by counsel." And we have authority to interpret the Kansas Constitution independent of corresponding provisions of the United States Constitution. Comparing section 10 with the Sixth Amendment, the two provisions have obvious textual differences. And such textual differences may provide a basis for recognizing different constitutional guarantees under our state Constitution. See *State v. Albano*, 313 Kan. 638, 644, 487 P.3d 750 (2021) (recognizing textual and structural differences between Sixth Amendment's jury trial right and section 5 of the Kansas Constitution Bill of Rights' jury trial right means the provisions may not provide the same protections in all cases); *Hodes & Nauser, MDs v. Schmidt*, 309 Kan. 610, 624-25, 638, 440 P.3d 461 (2019) (independently interpreting section 1 of the Kansas Constitution Bill of Rights in manner different from the Fourteenth Amendment to the United States Constitution based on textual differences). But we have not previously analyzed the text of section 10 to determine whether the scope of the right to self-representation is coextensive with or broader than the right as guaranteed by the Sixth Amendment.

Couch bases his constitutional challenge on both the Sixth Amendment and section 10. But his briefing does not use our established rules of constitutional interpretation to analyze whether the textual differences between section 10 and the Sixth Amendment are legally significant. See *State v. Hillard*, 315 Kan. 732, 759, 511 P.3d 883 (2022) (Issues not adequately briefed are deemed waived and abandoned.). Further, both his petition for review and his briefing rely on federal caselaw interpreting the Sixth Amendment's right to self-representation and Kansas decisions applying this federal caselaw. Thus, we analyze Couch's alleged error under Sixth Amendment principles only.

C. *The District Court Properly Denied Couch's Motion to Proceed Pro Se Based on Couch's Disruptive Behavior*

To invoke the right to self-representation, a defendant must clearly and unequivocally express a desire to proceed pro se. *State v. Vann*, 280 Kan. 782, 793, 127 P.3d 307 (2006). Couch did just that by filing a pretrial motion requesting to represent himself. If defendant invokes the right after trial starts, the district court has

discretion in deciding whether to grant the request for self-representation. *State v. Cromwell*, 253 Kan. 495, 505, 856 P.2d 1299 (1993). If invoked before trial starts, our court has described the right to self-representation as "unqualified." 253 Kan. at 505.

But an "unqualified" right to self-representation does not mean the right is absolute. See *Indiana v. Edwards*, 554 U.S. 164, 171, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008) (right to self-representation is not absolute); *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161, 120 S. Ct. 684, 145 L. Ed. 2d 597 (2000) (same). In fact, an unqualified right to self-representation "rests on an implied presumption that the court will be able to achieve reasonable cooperation" from the pro se defendant. *United States v. Dougherty*, 473 F.2d 1113, 1126 (D.C. Cir. 1972). The right to self-representation "permits defendants neither 'to abuse the dignity of the courtroom' nor to disregard the 'relevant rules of procedural and substantive law.'" *United States v. Taylor*, 21 F.4th 94, 104 (3d Cir. 2021) (quoting *Faretta*, 422 U.S. at 834 n.46). Thus, a district court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Faretta*, 422 U.S. at 834 n.46. And "a defendant's conduct may prove obstreperous enough to justify denying his request [to proceed pro se] at the outset in some cases." *Taylor*, 21 F.4th at 104; see also *Tucker*, 451 F.3d at 1180 ("To properly invoke the right to self-representation . . . the defendant 'must be "'able and willing to abide by rules of procedure and courtroom protocol."'"); *Davis v. Grant*, 532 F.3d 132, 143 (2d Cir. 2008) ("[A] judge *may* use willingness and ability to abide by courtroom protocol as prerequisites for accepting a defendant's waiver of his right to counsel.").

That said, behavior which merely tries the district court's patience is not enough to deny a defendant's request to proceed pro se. See *Taylor*, 21 F.4th at 104-05. Rather, to justify denial of a timely pretrial request to proceed pro se, the defendant must have exhibited seriously disruptive behavior during pretrial proceedings, and that behavior must strongly indicate the defendant will continue to be disruptive in the courtroom. See *United States v. Smith*, 830 F.3d 803, 810-11 (8th Cir. 2016); *United States v. Flewitt*, 874 F.2d 669, 674 (9th Cir. 1989); *Vanisi v. State*, 117

Nev. 330, 340, 22 P.3d 1164 (2001); *People v. Battle*, 200 A.D.3d 1712, 1715, 158 N.Y.S.3d 517 (2021), *rev. denied* 38 N.Y.3d 1132 (2022). Such extreme behavior was exhibited by the defendant in *United States v. Hausa*, 922 F.3d 129 (2d Cir. 2019), when he hummed and screamed, and rambled incoherently; cursed at the judge and threatened to kill him; and repeatedly had to be removed from pretrial hearings. The Second Circuit held the defendant's conduct provided an independent basis for denying his pretrial request to proceed pro se. 922 F.3d at 136.

In denying Couch's initial motion to proceed pro se, the district court mainly focused on Couch's disruptive behavior, finding Couch had regularly been disruptive at pretrial hearings and had threatened his attorney. The district court also reasoned that Couch lacked the legal understanding to represent himself. Couch focuses on this latter rationale, arguing it is not a valid basis for denying a pretrial request to proceed pro se.

Couch is correct that a "'defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel'" and proceed pro se. *State v. Burden*, 311 Kan. 859, 865, 467 P.3d 495 (2020) (quoting *Godinez v. Moran,* 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 [1993]). And if the district court also considered Couch's motive or reasons underlying his request to proceed pro se, that would also be an invalid basis for denying a pretrial request to proceed pro se—a court may only consider that factor when ruling on a request made after trial has started. See *Cromwell*, 253 Kan. at 505.

Even so, the heart of the district court's decision rested on Couch's disruptive pretrial behavior. Indeed, the Court of Appeals upheld the district court's denial of Couch's motion because "the true foundation for its denial was Couch's inability to restrain himself." *Couch*, 2022 WL 3570874, at *4. Because a defendant's seriously disruptive behavior is valid grounds for denying a motion to proceed pro se, we may still affirm the district court's decision despite its other comments about Couch's legal acumen. See *United States v. Simpson*, 845 F.3d 1039, 1051 (10th Cir. 2017) ("Our case law permits us to affirm the district court['s denial of motion to proceed pro se], notwithstanding the court's statements

about a defendant's lack of preparedness, if the district court's decision appears to be justified by a valid reason.").

Here, the record supports the district court's fact-findings about Couch's unruly pretrial conduct. For example, at Couch's first appearance, he was absent from the courtroom because he "refus[ed] to cooperate to come into court." Couch spoke out of turn at multiple pretrial hearings, used profanity, and often tried to argue about the strength of the State's case against him. The district court also warned Couch twice that he would be removed if he could not be quiet.

As an illustration of Couch's conduct, the following exchange took place during a pretrial hearing on Couch's motion for DNA testing:

"THE COURT: [Addressing defense counsel.] Do you know who would be testing it? Have you identified the scientist that—

"Mr. Couch, you are probably being heard by your attorney, but I can't hear you, and that's okay. I don't need to hear you so long as you are passing the message. If you would like a tablet to write on to pass messages to her, that would probably be well for you and her both, if that would help you in any way.

"[COUCH]: I just—I want everything tested, Your Honor. I want everything tested. Anything that the victim says that he touched, I want it fingerprinted. I mean—hey—no, no, enough! The victim says, hey, he touched my cell phone.

"[DEFENSE COUNSEL]: Mr. Couch—

"[COUCH]: —but the detectives did not test that cell phone. They didn't even fingerprint it. What kind of a detective agency wouldn't even fingerprint a cell phone? I don't care about the DNA. Find the motherfucker—

"[DEFENSE COUNSEL]: Mr. Couch—

"[THE COURT]: Okay. My question is, whether there is enough time between now and trial time for [DNA] test results to be validly taken."

Later at that same hearing, the prosecutor offered some DNA reports into evidence only for evaluating the veracity of Couch's statements about the DNA test results. The following exchange took place:

"[PROSECUTOR]: . . . Mr. Couch caused me to pull these [reports] and I asked to admit them sooner than I would have other than—

"[COUCH]: Please, Your Honor, please look at those reports.

"[PROSECUTOR]: —once I got through my argument. That's also part and parcel—

"[COUCH]: Oh, shit.

"[PROSECUTOR]: —with the arguments, though. May I approach judge?

"[THE COURT]: Yeah.

"[COUCH]: By all means, approach.

"[THE COURT]: Mr. Couch, I think you need to be quiet. If I need to, we can gag you. I don't want to do that, so please—

"[COUCH]: What the hell.

"[THE COURT]: —participate quietly or send messages to your attorney in written form.

"[COUCH]: Yes, sir."

Couch was also recalcitrant when given a chance to argue in support of his motion to proceed pro se. He told the prosecutor, "Fuck you," and began cursing while discussing the State's failure to fingerprint H.D.'s cellphone. He also threatened to "bite [his counsel's] fucking face off."

In its opening brief, the State also highlights some of Couch's behavior on the first and second day of trial. But by that point, the district court had denied Couch's motion. So we do not consider this behavior in determining whether the district court erred in denying Couch's initial request to proceed pro se. See *United States v. Dougherty*, 473 F.2d 1113, 1126 (D.C. Cir. 1972) ("We begin by rejecting the Government's approach of using 'disruptive' incidents following the denial of the *pro se* motions as reasons to support that denial.").

The district court's findings about Couch's pretrial misconduct are supported by substantial competent evidence. And these findings provide a lawful basis for the district court's ruling. Even if one were to argue that Couch's pretrial conduct was not as extreme as the defendant's conduct in *Hausa*, Couch's conduct still demonstrated that he was unwilling or unable to abide by rules of procedure and courtroom decorum. His continued interruptions after warnings from the court, his ongoing use of profanity, his combative attitude, and his threat to "bite [his attorney's] fucking face off" show that Couch had engaged in serious obstructionist misconduct. And these behaviors provided the district court with good cause to believe the disruptions would continue. See *United States v. Atkins*, 52 F.4th 745, 751 (8th Cir. 2022) (trial court properly denied defendant's pretrial request to proceed pro se when defendant interrupted and argued with the court; refused to provide responsive answers; insisted trial was not going to happened; and at

least once was removed from the courtroom for unruly behavior); *State v. Johnson*, 328 S.W.3d 385, 396-97 (Mo. Ct. App. 2010) (defendant's pretrial behavior provided sufficient grounds to deny his request to proceed pro se when defendant launched into diatribes against his lawyers and the State, refused to cooperate with order to provide fingerprints, and cursed at the district court judge).

In sum, our review of the record confirms that substantial competent evidence supports the district court's findings about Couch's disruptive pretrial behavior. And that behavior was egregious enough to lawfully support the district court's decision to deny Couch's pretrial request to represent himself. Thus, the district court's ruling did not improperly deprive Couch of his right to self-representation, and we affirm the judgments of the district court and Court of Appeals on this issue.

II. *The Evidence Does Not Support Couch's Conviction for Aggravated Kidnapping when Measured Against the Jury Instructions*

Next, Couch challenges the sufficiency of the evidence supporting his conviction for aggravated kidnapping under K.S.A. 2018 Supp. 21-5408(a)(2) and (b). He claims the State relied only on his act of grabbing H.D.'s arm and dragging her to the bedroom to support this conviction. And he argues this act is not separate and distinct from the underlying sex crimes, as required to support a conviction under our precedent in *Buggs*.

To resolve Couch's second issue, we first identify the standard of review and consider whether the sufficiency of the evidence should be measured against the statutory elements of the offense, the elements as charged, or the elements described in the jury instructions. Through this analysis, we conclude that due-process considerations require us to measure the sufficiency of the evidence against the narrower statutory elements
defined in the jury instructions. Finally, we examine the record evidence against this standard and conclude that it cannot support Couch's conviction for aggravated kidnapping with intent to facilitate the commission of a crime.

A. *Standard of Review and the Proper Measure for Examining the Sufficiency of the Evidence*

The standard for appellate review of a challenge to the sufficiency of the evidence supporting a defendant's conviction is well-established:

> "When a criminal defendant challenges the sufficiency of the evidence used to support a conviction, an appellate court looks at all the evidence 'in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' A reviewing court 'generally will "not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations."' [Citations omitted.]" *State v. Harris*, 310 Kan. 1026, 1030, 453 P.3d 1172 (2019).

In reviewing a sufficiency challenge, appellate courts often look to the jury instructions to determine the elements of the offense that the State needed to prove. But when the jury instructions do not accurately recite the statutory elements of the crime or do not match the elements of the crime as charged, we have departed from this approach. For example, in *State v. Fitzgerald*, 308 Kan. 659, 423 P.3d 497 (2018), the charging document listed the statutory elements of aggravated criminal sodomy under one subsection of the relevant statute, but the jury was instructed on the statutory elements of that crime under a different subsection. And in that case, we measured sufficiency of the evidence against the statutory elements of the charged crime rather than the elements of the crime as described in the jury instructions. 308 Kan. at 666.

Here, we are presented with a different type of variance—the elements in the jury instructions are narrower than those identified in the charging document. Couch was charged with aggravated kidnapping under K.S.A. 2018 Supp. 21-5408(a)(2) and (b). Kidnapping as defined in subsection (a)(2) is "the taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 2022 Supp. 21-5408(a)(2). Aggravated kidnapping requires the added element that bodily harm be inflicted on the victim. K.S.A. 2022 Supp. 21-5408(b).

The complaint, as amended before trial, accurately reflects these statutory elements by alleging Couch "did unlawfully and feloniously take or confine a person, to wit: [H.D.], accomplished

by force, threat or deception and with the intent to hold said person to facilitate flight or the commission of any crime, and with bodily harm being inflicted on [H.D.]."

But the jury instructions identifying the elements of aggravated kidnapping defined the crime more narrowly than the complaint. At the State's request, the district court gave the following aggravated kidnapping instruction:

"1. The defendant confined [H.D.] by force.
"2. The defendant did so with the intent to hold [H.D.] for the commission of any crime.
"3. Bodily harm was inflicted upon [H.D.].
"4. This act occurred on or about the 18th day of December, 2018, in Finney County, Kansas."

By including only "confining" and not "taking," the instruction eliminated one of the alternative means of committing kidnapping or aggravated kidnapping. See *State v. Haberlein*, 296 Kan. 195, 208, 290 P.3d 640 (2012) ("taking or confining" are alternative means of committing kidnapping). By including only "by force," the instruction also eliminated the "by threat or deception" options within a means for committing aggravated kidnapping. 296 Kan. at 208 ("force, threat or deception" are options within a means). Finally, the instruction included only the option of "facilitate . . . the commission of any crime" and eliminated the "facilitat[ing] flight" option for committing aggravated kidnapping. 296 Kan. at 209 ("facilitate flight or the commission of any crime" are options within a means).

Given the disparity between the complaint and the jury instructions, we must first decide which of the two offers the proper measure for assessing the sufficiency of the evidence supporting Couch's aggravated-kidnapping conviction. Couch argues sufficiency of the evidence should be measured against the narrower jury instructions. But with no exposition, the Court of Appeals panel appears to have measured sufficiency of the evidence against the broader statutory elements of the charged offense. See *Couch*, 2022 WL 3570874, at *4.

The jury instructions did not omit any essential element of the statutory offense of aggravated kidnapping. But they did narrow

the scope of the charged offense by eliminating alternative means and options within a means for committing aggravated kidnapping that were in the charging document. In these circumstances, we hold that due process considerations require us to measure the sufficiency of the evidence against the elements in the jury instructions, rather than the elements in the charging document.

In reviewing the sufficiency of the evidence, one of our primary objectives is to give effect to defendant's due process right to receive a jury finding of guilt beyond a reasonable doubt on each element of the offense of conviction. *Musacchio v. United States*, 577 U.S. 237, 243-44, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). And here, the elements instruction for aggravated kidnapping permitted the jury to convict Couch only if he confined H.D. with the intent to facilitate commission of any crime. Because the jury was never instructed on any other methods of committing aggravated kidnapping, the jury could not have found Couch guilty beyond a reasonable doubt based on those omitted methods. See *Chiarella v. United States*, 445 U.S. 222, 236, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980) ("[W]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury."); see also *People v. Johnson*, 498 P.3d 157, 161 (Colo. App. 2021) (recognizing sufficiency of evidence generally measured against statutory elements rather than jury instructions but measuring against instructions which listed only one method of committing crime because "we cannot decide a factual issue not presented to the jury"), *aff'd on other grounds* 524 P.3d 36 (Colo. 2023). In sum, we cannot uphold Couch's conviction for aggravated kidnapping based on a theory of criminal liability that was not included in the instructions to the jury.

The State does not object to this analytical approach. In fact, at oral argument, the State agreed that the sufficiency of the evidence should be measured against the jury instructions given at Couch's trial. Thus, in conducting our review, we consider whether the State offered sufficient evidence to prove the elements of aggravated kidnapping as defined by the jury instructions.

B. *The Evidence Does Not Support Couch's Conviction for Aggravated Kidnapping when Measured Against the Jury Instructions*

To sustain a conviction for aggravated kidnapping as defined by the jury instructions, the State needed to prove beyond reasonable doubt that Couch confined H.D. by force to facilitate the commission of any crime. During closing argument, the State argued Couch confined H.D. by grabbing her arm and dragging her to the bedroom and he did so with the intent to facilitate commission of the rape and sodomies. On appeal, Couch argues the act of grabbing H.D.'s arm and dragging her to the bedroom is not distinct enough from the sex crimes to support a conviction for aggravated kidnapping under this court's holding in *Buggs*.

Buggs held that "a kidnapping statute is not reasonably intended to cover movements and confinements which are slight and 'merely incidental' to the commission of an underlying lesser crime." 219 Kan. at 215. There, defendant accosted the victim in a parking lot and forced her inside a store, where he raped and robbed her. The defendant challenged his aggravated-kidnapping conviction on appeal, arguing the movement and confinement of the victim were merely incidental to the rape and robbery.

In analyzing the defendant's claim of error, *Buggs* interpreted the term "facilitate" in the Kansas kidnapping statute to mean "something more than just to make more convenient." 219 Kan. at 215. The court then identified a three-part test for determining whether a taking or confinement was distinct enough from the underlying crime to support a conviction for kidnapping:

"[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

"(*a*) Must not be slight, inconsequential and merely incidental to the other crime;

"(*b*) Must not be of the kind inherent in the nature of the other crime; and

"(*c*) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection." 219 Kan. at 216.

And to illustrate the application of this framework, *Buggs* explained:

"A standstill robbery on the street is not a kidnapping; the forced removal of the victim to a dark alley for robbery is. The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is not a kidnapping; the removal from a public place to a place of seclusion is. The forced direction of a store clerk to cross the store to open a cash register is not a kidnapping; locking him in a cooler to facilitate escape is. The list is not meant to be exhaustive, and may be subject to some qualification when actual cases arise; it nevertheless is illustrative of our holding." 219 Kan. at 216.

Buggs affirmed the defendant's kidnapping conviction, reasoning that moving the victim from the parking lot "where they were subject to public view" to the "relative seclusion of the inside of the store . . . substantially reduced the risk of detection not only of the robbery but of the rape." 219 Kan. at 216.

Some may question our continued adherence to *Buggs* given more recent developments in our multiplicity jurisprudence. Nevertheless, for nearly a half-century, our appellate courts have consistently relied on *Buggs* to determine whether a taking or confinement to facilitate the commission of any crime can support a conviction for kidnapping apart from the underlying crime. Neither party has asked us to overrule *Buggs*. Nor have they provided an argument justifying a departure from the doctrine of stare decisis in this case. See *State v. Clark*, 313 Kan. 556, 565, 486 P.3d 591 (2021) (doctrine of stare decisis provides that points of law established by a court are generally followed by the same court and courts of lower rank in later cases in which the same legal issue is raised). And we have previously declined to reconsider precedent under similar circumstances. See *Nguyen v. State*, 309 Kan. 96, 108-09, 431 P.3d 862 (2018) (declining to reconsider precedent construing statute when parties did not ask court to reconsider that precedent or brief the issue); *Central Kansas Medical Center v. Hatesohl*, 308 Kan. 992, 1006-07, 425 P.3d 1253 (2018) (declining to reconsider precedent because no party asked court to do so). Thus, for the purpose of analyzing Couch's sufficiency challenge, we apply *Buggs*.

Here, the act of grabbing H.D. and dragging her to the bedroom does not meet the requirements of the *Buggs* test because the act had no independent significance apart from the rape and sodomies. Couch's exertion of physical control over H.D. and his confinement of her within her home were inherent in, and incidental

to, the force or fear supporting Couch's rape and aggravated criminal sodomy charges. See *State v. Cabral*, 228 Kan. 741, 745, 619 P.2d 1163 (1980) (confinement of rape victim within automobile was inherent in the nature of forcible rape and incidental to its commission); *State v. Olsman*, 58 Kan. App. 2d 638, 649, 473 P.3d 937 (2020) ("Rape through force necessarily and inherently requires confinement of the victim to a particular place where the rape occurs.").

Moreover, grabbing H.D.'s arm and taking her to the bedroom neither made the rape and sodomies substantially easier to commit nor substantially lessened the risk of detection. See *Buggs*, 219 Kan. at 216. Nothing suggests that it would have been significantly harder for Couch to commit the sex crimes in the kitchen than the bedroom. See 219 Kan. at 216 (removal of rape victim from room to room within dwelling solely for convenience and comfort of the rapist is not kidnapping). Nor does the evidence suggest that taking H.D. to the bedroom substantially lessened the risk of detection. See *Olsman*, 58 Kan. App. 2d at 649 (evidence did not show movement of victim from one room to another within the seclusion of the home substantially reduced risk of detection).

Granted, this court has affirmed convictions where the victim was confined within a home or taken from room to room. But in those cases, the victim was moved multiple times, restrained for a long time, or secreted away from potential witnesses. For example, in *State v. Chears*, 231 Kan. 161, 164, 643 P.2d 154 (1982), the defendant moved the victim from the living room to the bedroom to sodomize her, "ensur[ing] there would be but one witness" because the defendant's accomplices and the victim's husband and daughter were in the living room and could not see what was happening in the bedroom. In *State v. Howard*, 243 Kan. 699, 702, 763 P.2d 607 (1988), the defendant confined the victim in his bedroom for at least one and a half hours (and possibly as long as three hours) as he raped and sodomized her. And when the victim tried to flee down a hallway, the defendant forced her back into the bedroom. 243 Kan. at 702. And most recently, in *Harris*, 310 Kan. at 1032-33, the defendant restrained the victim in her apartment for two hours, forcibly moving her from room to room while

repeatedly demanding money and acting to prevent her from escaping.

But *Chears*, *Howard*, and *Harris* are all distinguishable from this case. H.D.'s husband was at work at the time of the attack, and there is no evidence that any other potential witnesses were present in the home at the time of the crimes. The evidence also shows H.D.'s confinement lasted less than an hour. H.D. testified she got home from Walmart around 10:50 a.m. on the day of the attack. H.D.'s husband testified that H.D. sent out the emergency alert around 11:30 and he got in contact with her about five minutes later. And an officer testified that she responded to a burglary-in-progress call at H.D.'s home around 11:40 a.m.

In its brief, the State points out that Couch prevented H.D. from picking up her phone before taking her out of the kitchen, and thus he lessened the risk of detection by preventing her from reporting the crime. But as noted, Couch's exertion of physical control over H.D., which would include preventing her from picking up her phone, was incidental to and inherent in the rape and sodomies.

The State also argues that by taking H.D. to the bedroom during the sex crimes, Couch had easier access to the items in the bathroom as well as the charging cords he used to tie her up. But to satisfy *Buggs*, the taking or confinement must have made the rape and sodomies *substantially* easier to commit. Quicker access to items used during and after commission of the sex crimes would not have made those crimes substantially easier to commit. See *Buggs*, 219 Kan. at 215 ("'facilitate' . . . means something more than just to make more convenient").

Along with grabbing H.D.'s arm and dragging her to the bedroom, the evidence shows that Couch also bound H.D.'s arms and legs after he completed the sex crimes. But because the act of binding H.D. occurred after Couch had completed those sex crimes, it could not have facilitated their commission. The State has identified no other crime that may have been facilitated by H.D.'s physical restraint after commission of the rape and sodomies. And while Couch's decision to bind H.D. may have facilitated Couch's flight from the crime scene, the jury was never instructed (nor did the State argue) that Couch could be found guilty

of aggravated kidnapping if he confined H.D. with the intent to facilitate flight.

In sum, the evidence shows Couch's actions were violent and degrading, and he may have aided his escape by tying up H.D. after raping and sodomizing her. But the jury instructions permitted the jury to convict Couch under a narrow theory of aggravated kidnapping. Thus, we are left to consider only whether the evidence shows beyond a reasonable doubt that Couch's acts were done to facilitate the commission of any crime. We hold that the evidence cannot establish this element beyond a reasonable doubt under our precedent in *Buggs*. We thus reverse Couch's conviction for aggravated kidnapping.

III. *The District Court Erred by Failing to Give Instructions on the Lesser-Included Offenses of Aggravated Battery Under K.S.A. 2018 Supp. 21-5413(b)(1)(A), but that Error Does Not Require Reversal*

Next, Couch argues the district court erred by failing to give instructions on the lesser-included offenses of aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A). To resolve this issue, we first identify the well-established standard and framework for examining instructional error. Then, we apply this framework to the instructional challenge. Through this analysis, we hold that the panel erred by concluding that the lesser-included offense instructions were factually inappropriate. Even so, we affirm the panel's judgment because this error does not warrant reversal.

A. *Standard of Review and Relevant Legal Framework*

The multi-step process for reviewing instructional errors is well-known: 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).

Couch was charged with, and convicted of, aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A). K.S.A. 2022 Supp. 21-5413(b) defines aggravated battery as:

> "(1)(A) Knowingly causing great bodily harm to another person or disfigurement of another person;
>
> (B) knowingly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted; or
>
> (C) knowingly causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted;
>
> "(2)(A) recklessly causing great bodily harm to another person or disfigurement of another person;
>
> (B) recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted."

Couch now argues that the district court erred in failing to instruct the jury on the lesser-included versions of aggravated battery as defined in subsections (b)(1)(B), (b)(1)(C), (b)(2)(A), and (b)(2)(B).

Couch concedes he did not request jury instructions on these lesser-included offenses or object to their absence, so any error will be reviewed for clear error. This means we must affirm his conviction for aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(1)(A) unless we are firmly convinced that the jury would have reached a different verdict had any instructional error not occurred. *State v. Berkstresser*, 316 Kan. 597, 605, 520 P.3d 718 (2022).

B. *The Lesser-Included Offense Instructions Were Legally Appropriate*

Jury instructions on lesser-included offenses are generally legally appropriate. *State v. Gentry*, 310 Kan. 715, 721, 449 P.3d 429 (2019). And a lesser-included offense includes a lesser degree of the same crime. K.S.A. 2022 Supp. 21-5109(b)(1).

Aggravated battery as defined in subsection (b)(1)(A) is a severity level 4 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(A). Aggravated battery as defined in subsection (b)(2)(A) is a severity

level 5 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(C). Aggravated battery as defined in subsections (b)(1)(B) and (b)(1)(C) is a severity level 7 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(B). And aggravated battery as defined in (b)(2)(B) is a severity level 8 person felony. K.S.A. 2022 Supp. 21-5413(g)(2)(D).

Because the versions of aggravated battery defined in subsections (b)(1)(B), (b)(1)(C), (b)(2)(A), and (b)(2)(B) are lesser degrees of aggravated battery charged under subsection (b)(1)(A), the Court of Appeals correctly held the instructions on those lesser-included offenses were legally appropriate. *Couch*, 2022 WL 3570874, at *6.

C. *The Lesser-Included Offense Instructions Were Factually Appropriate*

Next, we must consider whether the lesser-included offense instructions were factually appropriate. "A legally appropriate lesser included offense instruction must be given when there is some evidence, viewed in a light most favorable to the defendant, emanating from whatever source and proffered by whichever party, that would reasonably justify the defendant's conviction for that lesser included crime." *Berkstresser*, 316 Kan. at 601; see also K.S.A. 2022 Supp. 22-3414(3) ("In cases where there is some evidence which would reasonably justify a conviction of some lesser included crime . . . the judge shall instruct the jury as to the crime charged and any such lesser included crime."). In determining whether a lesser-included-offense instruction is factually appropriate, the question is not whether the evidence is more likely to support a conviction for the greater offense. Instead, the question is whether the court would uphold a conviction for the lesser offense in the face of a challenge to the sufficiency of the evidence. See 316 Kan. at 602.

The lesser-included offenses of aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(1)(A) can generally be divided into two categories: (1) those versions of
aggravated battery that require a culpable mental state of knowingly but require less harm or injury than subsection (b)(1)(A); and (2) those versions of aggravated battery that require a culpable mental state of recklessly rather than knowingly.

In rejecting Couch's claim of error, the Court of Appeals held that none of the lesser-included offense instructions were factually appropriate. The panel concluded that no evidence showed H.D. suffered anything less than great bodily harm. *Couch*, 2022 WL 3570874, at *8. Likewise, the panel held that the evidence showed that Couch acted knowingly rather than recklessly. 2022 WL 3570874, at *8.

In reaching its conclusion, the panel appears to have analyzed whether the evidence was more likely to support a conviction for the charged offense, aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(1)(A), rather than the lesser-included offenses. But that is not the appropriate inquiry when determining whether a lesser-included-offense instruction is factually appropriate. Rather, the question is whether the evidence would have been sufficient to support a conviction for the lesser-included versions of the offense. Here, the evidence was sufficient to support a conviction for those lesser-included offenses. And we bolster this conclusion by discussing the evidence supporting each of the two general categories of lesser-included offenses: knowing aggravated battery requiring some harm less than great bodily harm and reckless aggravated battery.

1. *Instructions on the Lesser-Included Offenses of Knowing Aggravated Battery Were Factually Appropriate*

K.S.A. 2022 Supp. 21-5413(b)(1) sets forth three versions of the crime of aggravated battery when committed with a culpable mental state of "knowingly." The distinction between these three crimes is the degree of bodily harm inflicted. K.S.A. 2022 Supp. 21-5413(b)(1)(A) criminalizes causing great bodily harm or disfigurement. K.S.A. 2022 Supp. 21-5413(b)(1)(B) criminalizes causing bodily harm with a deadly weapon or in any way which could inflict great bodily harm, disfigurement, or death. And K.S.A. 2022 Supp. 21-5413(b)(1)(C) criminalizes causing physical contact in a rude, insulting, or angry manner with a deadly weapon, or in any way which could inflict great bodily harm, disfigurement, or death.

We have defined "bodily harm as "'any touching of the victim against [the victim's] will, with physical force, in an intentional hostile and aggravated manner.'"" *State v. Robinson,* 306 Kan. 1012, 1027, 399 P.3d 194 (2017). And we have defined "great bodily harm" as "'more than slight, trivial, minor, or moderate harm, [that] does not include mere bruising, which is likely to be sustained by simple battery.'" 306 Kan. at 1027. "Ordinarily, whether a victim has suffered great bodily harm is a question of fact for the jury to decide." *State v. Williams*, 295 Kan. 506, 523, 286 P.3d 195 (2012).

Here, the evidence showed Couch rushed at H.D. while holding a knife, H.D.'s hands were cut with the knife during a struggle, and those cuts required sutures. This evidence, which supported Couch's conviction for knowing aggravated battery causing great bodily harm, would also be enough to show he caused mere bodily harm or simply physical contact in a manner which could cause great bodily harm. See *Williams*, 295 Kan. at 522-23 (Instruction on lesser-included offense for aggravated battery was factually appropriate where evidence showed victim was stabbed in the head with kitchen knife, wound required many stitches, but did not cause excessive pain or require ongoing follow-up care; facts reasonably could have supported a finding of either great bodily harm or mere bodily harm in a manner that could have caused great bodily harm.). Because the evidence was sufficient to support a conviction for aggravated battery under subsection (b)(1)(B) and (b)(1)(C), the district court erred in failing to instruct the jury on those offenses.

2. *Instructions for Reckless Aggravated Battery Were Factually Appropriate*

The primary difference between aggravated battery as defined in K.S.A. 2022 Supp. 21-5413(b)(1) and (b)(2) is the culpable mental state. The versions of aggravated battery set forth in subsection (b)(1) require a culpable mental state of "knowingly." K.S.A. 2022 Supp. 21-5202(i) defines the culpable mental state of "knowingly" as:

"A person acts 'knowingly,' or 'with knowledge,' with respect to the nature of such person's conduct or to circumstances surrounding such person's conduct

when such person is aware of the nature of such person's conduct or that the circumstances exist. A person acts 'knowingly,' or 'with knowledge,' with respect to a result of such person's conduct when such person is aware that such person's conduct is reasonably certain to cause the result."

And we have held that under K.S.A. 2011 Supp. 21-5413(b)(1)(A), a person acts knowingly if "he or she acted while knowing that any great bodily harm or disfigurement of the victim was reasonably certain to result from the action." *State v. Hobbs*, 301 Kan. 203, 211, 340 P.3d 1179 (2015).

On the other hand, aggravated battery under K.S.A. 2022 Supp. 21-5413(b)(2) requires a culpable mental state of "recklessly." "A person acts 'recklessly' or is 'reckless' when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." K.S.A. 2022 Supp. 21-5202(j).

Thus, the primary difference between knowing aggravated battery and reckless aggravated battery would be the defendant's degree of awareness that their actions will cause some degree of bodily harm. *State v. Trefethen,* No. 119,981, 2021 WL 1433246, at *6 (Kan. App.) (unpublished opinion), *rev. denied* 314 Kan. 859 (2021).

The State argues the evidence shows that Couch acted knowingly because he entered the home with the knife and used it to gain control and threaten H.D. And the panel agreed, holding the evidence "reflects an unquestionable awareness of the conduct undertaken and its attendant results" and that Couch "must have known that the infliction of great bodily harm was reasonably certain." *Couch*, 2022 WL 3570874, at *8.

But as Couch argues, there is at least some evidence that Couch acted recklessly rather than knowingly. While Couch may have held the knife to H.D.'s throat, there was no evidence that he swiped or jabbed at H.D. Indeed, H.D. testified she cut her hands when she grabbed at the knife. And Couch's stream of expletives upon realizing H.D. had been cut suggests surprise at H.D.'s injuries. This evidence would support a finding that Couch consciously disregarded a substantial and unjustifiable risk that he

would cause H.D. bodily harm. See *State v. Logue*, No. 123,432, 2022 WL 2188028, at *4 (Kan. App. 2022) (unpublished opinion), *rev. denied* 317 Kan. ___ (March 30, 2023) (finding sufficient evidence to support defendant's conviction for reckless aggravated battery when defendant pulled out a knife during an argument and victim was cut during physical struggle with defendant).

Thus, instructions on reckless aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(2)(A) and (b)(2)(B) were factually appropriate, and the district court erred in failing to give them.

D. *The Instructional Error Does Not Amount to Clear Error*

Having concluded the district court erred in failing to instruct the jury on the lesser-included offenses of aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A), we must now consider whether that error requires reversal. Because Couch did not properly preserve his instructional challenge, he bears the burden to firmly convince us the jury would have reached a different verdict had the instructional error not occurred. *Berkstresser*, 316 Kan. at 605.

Based on the evidence at trial, it is *possible* that the jury could have reasonably convicted Couch of one of the lesser-included versions of aggravated battery. This conclusion holds especially true for those versions of aggravated battery requiring lesser degrees of bodily harm. See *Williams*, 295 Kan. at 523 (Whether a victim has suffered great bodily harm or mere bodily harm is a question of fact for the jury to decide.).

But it is not enough that a rational jury *could* have convicted Couch of a lesser degree of aggravated battery—Couch must show the jury *would* have convicted him of the lesser offense if given the chance. See *Berkstresser*, 316 Kan. at 605. But the evidence here does not support his claim. Couch forced his way into H.D.'s home with a knife, shoved her against the kitchen sink, and held a knife to her neck to gain control over her. During the struggle, H.D. received deep cuts on her hands, causing blood loss and requiring sutures. And Couch himself told an officer, he "cut the fucking dog shit out of her, blood everywhere."

As we have noted, in explaining why the lesser-included instructions were not factually appropriate, the Court of Appeals actually explained why the evidence would more likely support a conviction for aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(A). While this is not a relevant consideration for determining whether a lesser-included instruction is factually appropriate, it is a relevant consideration in determining harmlessness. And we agree with the panel that the evidence would more likely support a conviction of the charged offense. H.D.'s injuries were more severe than ones she would likely have sustained from simple battery. See *Robinson*, 306 Kan. at 1027. And Couch's conduct overall reflects an awareness that bodily harm was reasonably certain to result, even if he did not foresee the specific type of harm. See *Hobbs*, 301 Kan. at 211 (accused need not have foreseen specific harm that resulted as along as he or she acted while knowing any great bodily harm was reasonably certain to result).

In sum, the Court of Appeals erred in concluding that instructions on the lesser-included versions of aggravated battery under K.S.A. 2018 Supp. 21-5413(b)(1)(B), (b)(1)(C), (b)(2)(A), and (b)(2)(B) were not factually appropriate. Even so, we affirm the judgment of the Court of Appeals because this instructional error does not require reversal. See *State v. Brown*, 314 Kan. 292, 306, 498 P.3d 167 (2021) (affirming the Court of Appeals judgment as right, although on different grounds).

IV. *Cumulative Error Did Not Deprive Couch of a Fair Trial*

Finally, Couch asserts the denial of his request to proceed pro se, the insufficient evidence to support his aggravated kidnapping conviction, and the aggravated battery instructional error cumulatively deprived him of a fair trial. We disagree.

A. *Standard of Review and Relevant Legal Framework*

In conducting cumulative error review, "an appellate court aggregates all errors, even if they are individually reversible or individually harmless." *State v. Taylor*, 314 Kan. 166, 173, 496 P.3d 526 (2021).

"The test for cumulative error is whether the errors substantially prejudiced the defendant and denied the defendant a fair trial given the totality of the circumstances. In making the assessment, an appellate court examines the errors in context, considers how the district court judge addressed the errors, reviews the nature and number of errors and whether they are connected, and weighs the strength of the evidence. If any of the errors being aggregated are constitutional, the constitutional harmless error test of *Chapman* [*v. California*, 386 U.S. 18] applies, and the party benefitting from the errors must establish beyond a reasonable doubt that the cumulative effect of the errors did not affect the outcome. Where, as here, the State benefitted from the errors, it has the burden of establishing the errors were harmless. [Citations omitted.]" *State v. Thomas*, 311 Kan. 905, 914, 468 P.3d 323 (2020).

The Court of Appeals found there were no errors and thus concluded Couch had no right to relief based on cumulative error. *Couch*, 2022 WL 3570874, at *9; see *State v. Lemmie*, 311 Kan. 439, 455, 462 P.3d 161 (2020) (if no error, or only single error, doctrine of cumulative error does not apply).

But we have identified two errors: insufficient evidence to support Couch's aggravated kidnapping conviction and the district court's failure to instruct on lesser-included versions of aggravated battery. And a conviction based on insufficient evidence is an error of constitutional magnitude. See *State v. Barker*, 18 Kan. App. 2d 292, 295-96, 851 P.2d 394 (1993) ("A conviction based upon insufficient evidence is *a fortiori* in violation of a defendant's due process rights."). Thus, the harmlessness test from *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), applies. Under that standard, we may declare the errors harmless if we are convinced beyond a reasonable doubt that they did not affect the outcome of the trial in light of the entire record. *State v. Ward*, 292 Kan. 541, 568-69, 256 P.3d 801 (2011) (citing *Chapman*, 386 U.S. 18).

B. *Even in the Aggregate, the Two Identified Trial Errors Did Not Deprive Couch of a Fair Trial*

Before addressing whether these two errors cumulatively require reversal, we pause to note an as-yet-unaddressed issue in applying the cumulative error doctrine under Kansas law. Kansas courts have often included unpreserved instructional errors that do not amount to clear error in cumulative error analyses. See, e.g., *State v. Williams*, 308 Kan. 1439, 1462-63, 430 P.3d 448 (2018);

State v. Seba, 305 Kan. 185, 215-16, 380 P.3d 209 (2016). But we have never squarely addressed whether it is appropriate to do so, and we recognize the potential for disagreement on this point. See *State v. Logan*, No. 123,151, 2022 WL 1592702, at *5 (Kan. App. 2022) (unpublished opinion) (Atcheson, J., concurring) (disagreeing with majority decision's exclusion of unpreserved instructional error from cumulative error analysis). Nevertheless, for the purposes of our decision today, we assume, without deciding, that such errors may properly be included in a cumulative error analysis.

The aggregate effect of the two errors we have identified did not deprive Couch of a fair trial. The two errors were not interrelated. One was a failure of proof on the State's part to sustain a conviction for aggravated kidnapping. The other was an instructional error related to Couch's aggravated battery conviction. Further, the insufficiency of the evidence to sustain Couch's aggravated kidnapping conviction is not the type of error which would render his trial unfair. See *Burks v. United States*, 437 U.S. 1, 15-16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978) (explaining reversal for insufficient evidence results from failure of proof on part of the State after being given a fair opportunity to prove the defendant's guilt, while reversal for trial error "is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect"). Thus, the prejudicial effect of these errors is no greater when considered together than when the errors are viewed in isolation.

CONCLUSION

We affirm the Court of Appeals judgment on three of the four issues Couch raised. First, as to Couch's Sixth Amendment claim, we agree with the panel that the district court lawfully denied Couch's motion to proceed pro se. Substantial competent evidence supports the district court's fact-findings about Couch's disruptive pretrial behavior, and that behavior provided a valid basis for denying his right to represent himself at trial.

Second, as to the instructional-error claim, we agree that the panel erred by holding that the lesser-included-offense instructions for aggravated battery were factually inappropriate. But we affirm the panel's judgment because the error was harmless.

Third, as for cumulative error, we agree that the doctrine applies. But we hold that the cumulative effect of the trial errors does not require reversal.

But we reverse the Court of Appeals judgment affirming Couch's conviction for aggravated kidnapping under K.S.A. 2018 Supp. 21-5413(a)(2) and (b). There was insufficient evidence to establish all the elements of aggravated kidnapping, as defined in the jury instructions, beyond reasonable doubt. And because Couch's conviction for aggravated kidnapping was designated his primary offense for sentencing purposes, we remand the case for resentencing of Couch's other convictions. K.S.A. 2022 Supp. 21-6819(b)(5).

Judgment of the Court of Appeals is affirmed in part and reversed in part on the issues subject to review. Judgment of the district court is affirmed in part and reversed in part on the issues subject to review, and the case is remanded with directions.

* * *

STEGALL, J., dissenting: Decades ago, our court decided that the Legislature could not have intended all or most rapes to also result in an aggravated kidnapping conviction. This arose out of a recognition that factually, it is likely impossible to commit a rape without simultaneously "confining" the victim to "facilitate" the rape. Apparently, the court was alarmed by the possibility of multiple convictions arising out of one occurrence. See *State v. Butler*, 317 Kan. 605, 612, 533 P.3d 1022 (2023) ("[A]t its core, the [*Buggs*] test appears to be designed to inoculate against multiplicity."). To avoid this outcome, we concluded Kansas' "kidnapping statute is not reasonably intended to cover movements and confinements which are slight and 'merely incidental' to the commission of an underlying lesser crime." *State v. Buggs*, 219 Kan. 203, 215, 547 P.2d 720 (1976).

The problem is that such convictions (rape and aggravated kidnapping for confining the victim to facilitate the rape) do not

violate our more recent and well-developed multiplicity doctrine. This is because they contain different elements—so convictions for both offenses arising out of the same conduct would not violate the same elements test for determining whether convictions are multiplicitous. See *State v. Schoonover*, 281 Kan. 453, Syl. ¶ 12, 133 P.3d 48 (2006). Because the Legislature has crafted different elements in defining these offenses—and those elements are clearly satisfied here—I would overrule *Buggs* and affirm Couch's convictions for aggravated kidnapping and rape.

In Kansas, kidnapping is any "taking or confining of any person, accomplished by force, threat or deception, with the intent to hold such person . . . to facilitate flight or the commission of any crime." K.S.A. 2022 Supp. 21-5408. The *Buggs* court construed the term "facilitate" to mean the "taking or confining" must not be "slight, inconsequential [or] merely incidental to the other crime . . . [and] not . . . of a kind inherent in the nature of the other crime," "something more than just to make more convenient," but rather something having "significant bearing on making the commission of the crime 'easier.'" 219 Kan. 203, Syl. ¶¶ 9-10. And our court relies on this rule today to overturn Couch's conviction for aggravated kidnapping. *Couch*, 317 Kan. at 589.

Not only is the *Buggs* rule untenable as a species of our multiplicity doctrine, it fails as a matter of ordinary statutory interpretation. The *Buggs* court never conducted a plain language analysis of the kidnapping statute and never found it to be ambiguous. Its analysis of the word "facilitate" in our kidnapping statute thus falls well short of our more recent and rigorous approach to statutory interpretation—one requiring we begin with the legislative intent as expressed through the plain language of the statute and only turn to other tools of construction after first determining the statutory language is unclear or ambiguous. See, e.g., *In re Estate of Taylor*, 312 Kan. 678, 681, 479 P.3d 476 (2021); *State v. Thompson*, 287 Kan. 238, 243, 200 P.3d 22 (2009) ("When the language of a statute is plain and unambiguous, the court must give effect to that language, rather than determine what the law should or should not be."). In doing so, we "'giv[e] common words their ordinary meaning.'" *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023).

Instead of simply asking what the plain meaning of "facilitate" was in our kidnapping statute, the *Buggs* court considered a variety of other sources including: (1) the common-law definition of kidnapping; (2) caselaw from other states; (3) former iterations of the Kansas kidnapping statute; (4) the current statute's legislative history and Judicial Council notes; and (5) the statute's corresponding elements in the Model Penal Code. 219 Kan. at 209-13.

In my view, the *Buggs* court improperly departed from the plain language of the statute to construe the statute in a way it believed would avoid potentially multiplicitous convictions for rape and kidnapping. But I find the statutory language of the aggravated kidnapping statute to be plain and unambiguous. An aggravated kidnapping conviction requires a showing that the defendant "confined" the victim by force "to facilitate the commission" of a crime. Confinement is accomplished by "restraining someone." Confinement, Black's Law Dictionary 373 (11th ed. 2019). "Facilitate" is defined as "mak[ing] the occurrence of (something) easier; to render less difficult," and in the context of criminal law, it is to render "the commission of (a crime) easier." Facilitate, Black's Law Dictionary 734-35 (11th ed. 2019). Giving these words their ordinary meaning—as again, we must under our well-established rules of statutory construction—there is no doubt that by pinning the victim down on the bed or holding her at knifepoint to rape her, a defendant can be said to be "restraining someone" "to make the commission of a rape easier." These actions align with the plain language of the aggravated kidnapping statute, i.e., confining the victim by force to facilitate a crime. And whether the commission of one crime (in this case rape) will almost always result in the commission of a second crime (aggravated kidnapping) should not be a judicial consideration when evaluating the plain language of a statute.

And as already pointed out, there is no multiplicity concern under this plain language approach. We apply the same-elements test to questions of multiplicity as first announced in *Schoonover*, 281 Kan. 453, Syl. ¶ 12. The same-elements test is used to determine whether multiple convictions arising from the same course of conduct violate § 10 of the Kansas Constitution Bill of Rights. It asks "whether each offense requires proof of an element not

necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous and do not constitute a double jeopardy violation." 281 Kan. 453, Syl. ¶ 12.

To determine whether an aggravated kidnapping conviction would be multiplicitous with rape or aggravated criminal sodomy, then, we look to the elements of each offense and determine if each requires proof of an element not necessary to prove the other offense. 281 Kan. 453, Syl. ¶ 12; see *State v. George*, 311 Kan. 693, 699, 466 P.3d 469 (2020).

First, the jury was instructed that to be guilty of aggravated kidnapping, Couch must have confined H.D. by force to facilitate the commission of any crime. K.S.A. 2018 Supp. 21-5408(a)(2) and (b). Aggravated criminal sodomy is "sodomy with a victim who does not consent" "[w]hen the victim is overcome by force or fear." K.S.A. 2022 Supp. 21-5504(b)(3)(A). And lastly, rape is "[k]nowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse . . . [w]hen the victim is overcome by force or fear." K.S.A. 2022 Supp. 21-5503(a)(1)(A). Because each of these offenses contain elements independent of the other, the convictions are not multiplicitous.

The majority here and in *Butler*, 317 Kan. at 612, acknowledge that *Buggs*' approach to multiplicity appears "out of step" with the same-elements test, yet it continues to apply it by invoking the doctrine of stare decisis. It is true that once we have established a particular point of law we generally will follow that point of law in subsequent cases where the same legal issue is raised. But we are not inexorably bound by our own precedents. *Herington v. City of Wichita*, 314 Kan. 447, 457, 500 P.3d 1168 (2021). We may depart from them if we are clearly convinced that the rule 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).

Stare decisis is weak when the precedent has proven difficult to apply. See *State v. Hoeck*, 284 Kan. 441, 463, 163 P.3d 252 (2007) ("[S]tare decisis . . . should not constrain a court from disapproving its own holdings 'when governing decisions are unworkable.'"); *State v. Marsh*, 278 Kan. 520, 579, 102 P.3d 445

(2004) (McFarland, C.J., dissenting) (departure from the rule of stare decisis may be justified when "the decision sought to be overturned has proven to be intolerable simply in defying practical 'workability'") (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-55, 112 S. Ct. 2791, 120 L. Ed. 2d 674 [1992]), *rev'd on other grounds* 548 U.S. 163, 126 S. Ct. 2516, 165 L. Ed. 2d 429 (2006).

And indeed, the *Buggs* rule has proven ambiguous and difficult to apply. See, e.g., *State v. Fisher*, 257 Kan. 65, 77, 891 P.2d 1065 (1995) (discussing at length many previous kidnapping cases while attempting to conform to *Buggs* when the facts presented a close call); *State v. Olsman*, 58 Kan. App. 2d 638, 665, 473 P.3d 937 (2020) (Warner, J., dissenting) (describing how the *Buggs* standard is "difficult to apply"); *State v. Richard*, No. 88,893, 2004 WL 556747, at *4 (Kan. App. 2004) (unpublished opinion) ("This is a difficult and complex problem. If one were to attempt to explain to the layperson what the crime of kidnapping consists of in this state, one might be greeted with a blank stare. It is very difficult to define kidnapping. Theoretically, in this state, a movement of 10 feet, if done for the right reason, can constitute kidnapping. On the other hand, a movement of 10 miles, if done for other reasons, would not constitute kidnapping. The conundrum of defining kidnapping is a never ending one, and it is very difficult in this particular case.").

We also take into consideration whether the rule "'is subject to a kind of reliance that would lend a special hardship to the consequences of overruling,'" because "[s]tare decisis is especially compelling when reliance interests are involved." *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 615, 214 P.3d 676 (2009) (McFarland, C.J., dissenting); *State v. Sims*, 308 Kan. 1488, 1504, 431 P.3d 288 (2018). Here, no reliance interest is at stake.

Most significantly, the statutory language at issue is plain and unambiguous. We have repeatedly recognized that the Legislature, not the courts, is the primary policy-making branch of government and that it is not within our power to rewrite statutes to satisfy our policy preferences. See, e.g., *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 170, 473 P.3d 869 (2020) ("'[Q]uestions

of public policy are for legislative and not judicial determination, and where the legislature does so declare, and there is no constitutional impediment, the question of the wisdom, justice, or expediency of the legislation is for that body and not for the courts.'"); *Fisher v. DeCarvalho*, 298 Kan. 482, 498, 314 P.3d 214 (2013) ("'"[T]he court cannot delete vital provisions or supply vital omissions in a statute"' . . . no matter how ludicrous an appellate court may find a legislative enactment to be, the court is not free to completely rewrite the statute to make the law conform to what the court believes it should be."). This approach is fundamental to our basic respect for the constitutionally mandated separation of powers between our three branches of government. See *Glaze v. J.K. Williams*, 309 Kan. 562, 567-68, 439 P.3d 920 (2019) (explaining this court's efforts "to introduce more discipline into our

frequent tasks of statutory interpretation" which requires the court to "deliberately" stick to a "disciplined path . . . because it advances embedded values of judicial restraint and modesty and preserves respect for separation of powers and institutional competency").

In my view, vindicating these principles far outweighs continued adherence to a wrongly decided and badly reasoned precedent. See *Sims*, 308 Kan. at 1503-04. Especially when there are no real reliance interests at stake and the precedent has proven difficult and cumbersome to apply. As such, I would abandon the *Buggs* rule. I dissent from the majority's decision to reverse Couch's aggravated kidnapping conviction and instead, would affirm all of the convictions.

LUCKERT, C.J., and WILSON, J., join the foregoing dissenting opinion.

No. 123,742

STATE OF KANSAS, *Appellee*, v. RICHARD CHANTEZ BUTLER, *Appellant.*

(533 P.3d 1022)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Conviction of Taking or Confining Someone with Intent to Facilitate Commission of Another Crime—Appellate Review—Application of Three-Part Test of* State v. Buggs. When a defendant is convicted of taking or confining someone with the intent to facilitate the commission of another crime under K.S.A. 2022 Supp. 21-5408(a)(2), the three-part test set out in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), applies. Under that test, an appellate court will vacate the conviction if: (1) the confinement is slight, inconsequential, and merely incidental to the other crime; (2) the confinement is inherent in the nature of the other crime; or (3) the confinement did not make commission of the other crime substantially easier or substantially lessen the risk of detection.

2. SAME—State v. Buggs *Three-Part Test Applicable Only to Conviction under K.S.A. 2022 Supp. 21-5408(a)(2).* The three-part test set out in *State v. Buggs*, 219 Kan. 203, 547 P.2d 720 (1976), applies only when the defendant is convicted of taking or confining a person with the intent to facilitate the commission of another crime under K.S.A. 2022 Supp. 21-5408(a)(2). The test does not apply when the defendant is convicted of taking or confining a person with the intent to inflict bodily injury or to terrorize the victim or another under K.S.A. 2022 Supp. 21-5408(a)(3).

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 26, 2022. Appeal from Atchison District Court; ROBERT J. BEDNAR, judge. Oral argument held March 30, 2023. Opinion filed August 11, 2023. Judgment of the Court of Appeals reversing the district court on the issue subject to review is reversed. Judgment of the district court is affirmed.

Carol Longenecker Schmidt, of Adrian & Pankratz, P.A., of Newton, argued the cause and was on the briefs for appellant.

Natalie Chalmers, assistant solicitor general, argued the cause, and *Sherri L. Becker*, county attorney, and *Derek Schmidt*, attorney general, were with her on the briefs for appellee.

The opinion of the court was delivered by

WALL, J.: Under Kansas law, a person who confines someone with the intent to facilitate the commission of another crime has committed a kidnapping. K.S.A. 2022 Supp. 21-5408(a)(2). But

some crimes, such as rape and robbery, by their nature may involve the confinement of a victim. Thus, nearly a half-century ago, we fashioned a three-part test to ensure that a defendant is not convicted of two crimes for identical conduct in these circumstances. *State v. Buggs*, 219 Kan. 203, Syl. ¶ 10, 547 P.2d 720 (1976). Under the *Buggs* test, a conviction cannot stand if the confinement was "incidental to" or "inherent in the nature of" the other crime, or if the confinement did not make commission of the other crime "substantially easier" or "substantially lessen[ ] the risk of detection." 219 Kan. 203, Syl. ¶ 10.

Today, we consider the reach of that test. We reject the view, adopted by the panel of the Court of Appeals below and pressed by Richard Chantez Butler, that the test applies to kidnappings, like Butler's, committed with the intent to inflict bodily harm or terrorize a person. See K.S.A. 2022 Supp. 21-5408(a)(3). Instead, we reaffirm what we held two decades ago: the test set out in *Buggs* applies "only to a determination of whether a taking or confinement was to facilitate the commission of another crime." *State v. Burden,* 275 Kan. 934, Syl. ¶ 3, 69 P.3d 1120 (2003). And so we reverse the decision of the Court of Appeals panel vacating Butler's conviction for aggravated kidnapping.

FACTS AND PROCEDURAL BACKGROUND

The question before us is about Butler's aggravated-kidnapping conviction, but the crimes here go well beyond that offense. Butler was sentenced to more than 45 years in prison after being convicted of aggravated kidnapping and 14 other crimes, including 3 counts of rape and 2 counts of aggravated criminal sodomy, all against the same victim. The panel below carefully described the events underlying those convictions. See *State v. Butler*, No. 123,742, 2022 WL 3692866, at *1-5 (Kan. App. 2022) (unpublished opinion).

Butler raised several issues before the Court of Appeals. Most of those issues are not before us because the panel ruled against Butler and he did not seek, or we did not grant, review of those holdings. But the panel agreed with Butler that insufficient evidence supported his aggravated-kidnapping conviction under the

three-part test our court set out nearly 50 years ago in *Buggs*. *Butler*, 2022 WL 3692866, at *12-13. In the panel's view, Butler's confinement of the victim could not support a standalone aggravated-kidnapping conviction because the confinement "was incidental to the crimes of rape and aggravated sodomy," "was inherent to the crimes," and "had no significance independent of those crimes." 2022 WL 3692866, at *11. The panel vacated Butler's conviction, noting that its decision would not affect Butler's total sentence, which was based on consecutive sentences for two counts of rape and one count of aggravated criminal sodomy.

The State appeals. It argues that under our precedent, the *Buggs* test applies only when the State alleges the defendant took or confined a person with the intent to facilitate the commission of a crime. See *Burden*, 275 Kan. 934, Syl. ¶ 3. The State says that its sole theory at trial was that Butler had confined the victim with the intent to inflict bodily harm or terrorize her. And it argues that, under *Burden*, the *Buggs* test does not apply to that type of kidnapping.

We held oral argument in the matter during our March 2023 docket. We have jurisdiction over the appeal. See K.S.A. 60-2101(b) (providing for Kansas Supreme Court review of Court of Appeals decisions).

ANALYSIS

Before the Court of Appeals, Butler argued that there was insufficient evidence to support his aggravated-kidnapping conviction. Ordinarily, when a defendant raises a sufficiency-of-the-evidence challenge, an appellate court decides whether—after reviewing the evidence in the light most favorable to the State—it is convinced that a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018). An aggravated kidnapping occurs when "bodily harm is inflicted upon the person kidnapped," so under the ordinary sufficiency-of-the-evidence standard, an appellate court would decide whether the State had proved all the elements of a kidnapping plus the added element of bodily

harm. K.S.A. 2022 Supp. 21-5408(b). And it would make that determination without reweighing evidence, resolving evidentiary conflicts, or reassessing witness credibility. 307 Kan. at 668.

But nearly five decades ago in *Buggs*, our court fashioned a test that applies when a defendant is convicted under a specific subsection of the kidnapping statute. 219 Kan. 203, Syl. ¶ 10. Under that subsection, a person commits a kidnapping by taking or confining someone with the intent "to facilitate flight or the commission of any crime." K.S.A. 2022 Supp. 21-5408(a)(2). Confinement, however, can be inherent in some charged crimes—a defendant who commits robbery by holding the victim at gunpoint, for example, may confine the victim. And as a result, an expansive reading of the kidnapping statute would allow the State to charge a person who has committed that type of crime with a kidnapping on top of the underlying crime. In other words, every defendant charged with a crime that necessarily involves confinement could also be charged with kidnapping for confining the victim with the intent to facilitate the underlying crime.

In *Buggs*, we rejected that expansive interpretation of the kidnapping statute. We determined that the Legislature had not intended the term "facilitate" to include confinements that are "slight and 'merely incidental' to the commission of an underlying lesser crime." 219 Kan. at 214-15. Thus, we developed a three-part test that applies when "a taking or confinement is alleged to have been done to facilitate the commission of another crime." 219 Kan. at 216. Under that test, an appellate court will vacate the kidnapping conviction if (1) the confinement is "slight, inconsequential and merely incidental to the other crime," (2) the confinement is "inherent in the nature of the other crime," or (3) the confinement did not make commission of the other crime "substantially easier" or "substantially lessen[ ] the risk of detection." 219 Kan. 203, Syl. ¶ 10.

Later in *Burden*, the court made clear that the *Buggs* test applies only when the State alleges that the victim was confined with the intent to facilitate the commission of another crime. *Burden* held that the test does *not* apply when the State alleges that the victim was confined with the intent "to inflict bodily injury or to terrorize the victim or another," the specific intent now codified in

subsection (a)(3) of the kidnapping statute. K.S.A. 2022 Supp. 21-5408(a)(3); 275 Kan. 934, Syl. ¶ 3. Instead, an appellate court reviewing a conviction based on that subsection of the kidnapping statute applies the ordinary sufficiency-of-the-evidence standard. 275 Kan. at 936, 945.

Here, Butler was charged under (a)(3), so under *Burden*, the panel below should have reviewed his conviction under the ordinary sufficiency-of-the-evidence standard. But the panel declined to do so. According to the panel's reading of the trial record, the State had tried to evade the extra protections set out in *Buggs* by ostensibly charging Butler under (a)(3) and then arguing at trial that Butler had confined the victim with the intent to facilitate the commission of another crime under (a)(2). In the panel's view, that practice obliged the appellate courts to apply the *Buggs* test. And when the panel did that, it held that Butler's confinement of the victim "was incidental to the crimes of rape and aggravated sodomy," "was inherent to the crimes," and "had no significance independent of those crimes." *Butler*, 2022 WL 3692866, at *11. Thus, the panel reversed Butler's conviction for aggravated kidnapping.

But the record belies the panel's repeated assertions that the State proceeded under subsection (a)(2) at trial. The original and amended complaints alleged that Butler had taken or confined the victim only with the intent "to inflict bodily injury on or to terrorize" her, the specific intent codified at (a)(3). The district court instructed the jury only on (a)(3)'s specific intent. And during closing arguments, the prosecutor argued for a conviction only under (a)(3). In sum, nothing in the trial record justifies the panel's departure from *Burden*, which held in no uncertain terms that the *Buggs* test does not apply to the type of kidnapping for which Butler was convicted.

Butler suggested for the first time at oral argument that we should overrule *Burden* because a charge under (a)(3) is the functional equivalent of a charge under (a)(2) and should therefore engender the same protections. But a request to overturn controlling precedent should be briefed, not raised for the first time during oral argument—an observation that applies equally to the State's suggestion during rebuttal that we should abandon the *Buggs* test

altogether. See *State v. Gallegos*, 313 Kan. 262, 277, 485 P.3d 622 (2021) (issues not adequately briefed are deemed waived or abandoned). In short, Butler has not offered an adequate basis to depart from our precedent in *Burden*.

Because *Burden* controls, we apply the ordinary sufficiency-of-the-evidence test when reviewing Butler's aggravated-kidnapping conviction. The State alleged a kidnapping under subsection (a)(3), so the State had to prove beyond reasonable doubt that Butler confined the victim with the intent "to inflict bodily injury or to terrorize the victim or another." And to secure a conviction for aggravated kidnapping, the State needed to prove all the elements of kidnapping under (a)(3) plus the added element that the defendant inflicted bodily harm. See K.S.A. 2022 Supp. 21-5408(b).

The victim testified extensively at trial. Viewed in the light most favorable to the State, her testimony established that Butler held her against her will in her home for several hours. Butler took her keys and phone to prevent her from escaping or calling for help. Butler held a knife to her throat, threatened her and her family, and choked her. Butler repeatedly raped and sodomized her. And she was only able to escape after Butler fell asleep. Based on this evidence, we hold that a rational fact-finder could have found beyond reasonable doubt that Butler confined the victim with the intent to inflict bodily injury or terrorize her and he, in fact, inflicted bodily injury during the kidnapping.

Finally, we note that the panel, without any prompting from the parties, suggested that an aggravated-kidnapping conviction was multiplicitous with Butler's other convictions in this case. Multiplicity is the charging of a single offense as more than one count on a charging document. *State v. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 (2009). That is a problem because it results in multiple punishments for a single offense, which violates the United States and Kansas Constitutions. 287 Kan. at 244. (multiplicitous convictions violate the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights).

According to the panel, the only evidence that could support Butler's aggravated-kidnapping conviction already supported his

other convictions. For example, as we noted above, Butler threatened the victim and her family while confining her. That evidence could support a finding under (a)(3) of the kidnapping statute that Butler had confined the victim with the intent to terrorize her. But the State also relied on that evidence to support Butler's conviction for criminal threat. See K.S.A. 2022 Supp. 21-5415(a)(1); K.S.A. 2022 Supp. 21-5408(a)(3). In the panel's view, relying on that evidence to support convictions for both criminal threat and aggravated kidnapping would "allow the State to improperly use Butler's same conduct to convict him of two separate crimes," rendering the convictions multiplicitous. 2022 WL 3692866, at *12.

But the panel's analysis is at odds with our established legal framework for analyzing multiplicity issues. Prior to 2006, when a defendant was convicted of violating multiple criminal statutes as part of the same course of conduct, we occasionally held that those convictions were multiplicitous when supported by a single wrongful act or single act of violence. See *State v. Garcia*, 272 Kan. 140, 146, 32 P.3d 188 (2001), *disapproved of by State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006). But this fact-intensive, "same evidence" test proved to be ambiguous and resulted in inconsistent and irreconcilable outcomes. *Schoonover*, 281 Kan. at 482.

Thus, ever since our 2006 decision in *Schoonover*, we have applied a bright-line, "same-elements" test when the multiplicity issue arises from unitary conduct resulting in multiple convictions of different statutes. 281 Kan. 453, Syl. ¶ 12. The test serves as a rule of statutory construction to discern whether the Legislature intended multiple offenses and multiple punishments for the same conduct. 281 Kan. at 498. Under that test, if one statute requires proof of an element unnecessary to prove the other offense, then the statutes do not define the same crime and are not multiplicitous. 281 Kan. at 498.

Here, aggravated kidnapping does not share all its elements with rape, criminal threat, or any of Butler's other crimes of conviction. So there is no multiplicity issue under the same-elements test established in *Schoonover*.

Which brings us to a final point. Both this court and litigants have discussed the *Buggs* test as a sufficiency-of-the-evidence

standard. See, e.g., *Burden*, 275 Kan. at 937, 944-45. But at its core, the test appears to be designed to inoculate against multiplicity—it aims to ensure that a defendant is not convicted of two crimes for the same conduct. As noted at oral argument, one could question whether *Buggs*' approach to multiplicity is out of step with the same-elements test we just described. That inconsistency could also raise questions about our continued adherence to *Buggs*. Indeed, the State asked us to overrule *Buggs* during its rebuttal argument.

While we acknowledge this potential tension between *Buggs* and *Schoonover*, we do not lightly disapprove of precedent. *In re N.E.*, 316 Kan. 391, 412, 516 P.3d 586 (2022). Our court decided *Buggs* nearly five decades ago. And under the principle of stare decisis, unless clearly convinced otherwise, "'points of law established by a court are generally followed by the same court . . . in later cases'" to promote stability in the legal system. 316 Kan. at 412. The continuing validity of *Buggs* is not an issue briefed by the parties. Nor did we agree to consider it when we granted review. And perhaps most importantly, we need not revisit *Buggs* to resolve this appeal. So we save that question for another day.

The judgment of the Court of Appeals reversing Butler's aggravated-kidnapping conviction is reversed. The district court's judgment is affirmed.

* * *

STEGALL, J., concurring: I concur in the judgment. See *State v. Couch*, 317 Kan. 566, 599-604, 533 P.3d 630 (2023) (Stegall, J., dissenting).

LUCKERT, C.J., and WILSON, J., join the foregoing concurring opinion.