REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF KANSAS

REPORTER:

SARA R. STRATTON

Advance Sheets, Volume 317, No. 5
Opinions filed in September – December 2023

"Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals" (USPS 007-480) are published every month except February, June, August, and October by the State of Kansas, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598. Periodical postage paid at Topeka, Kansas. POSTMASTER: Send address changes to "Advance Sheets of the Kansas Supreme Court and Kansas Court of Appeals," State Law Librarian, Kansas Judicial Center, 301 West 10th, Topeka, Kansas 66612-1598.

JUSTICES AND OFFICERS OF THE KANSAS SUPREME COURT

———

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HON. MARLA J. LUCKERT ..... Topeka

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HON. DAN BILES ..... Shawnee
HON. CALEB STEGALL ..... Lawrence
HON. EVELYN Z. WILSON ..... Smith Center
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IN THE SUPREME COURT OF THE STATE OF KANSAS

Corrected Administrative Order

2023-RL-080

RE: Kansas Child Support Guidelines Effective January 1, 2024

Effective January 1, 2024, the attached Kansas Child Support Guidelines are adopted and are to be used as a basis for establishing and reviewing child support orders in the district courts of Kansas.

This order supersedes Administrative Order No. 307, dated October 9, 2019, which adopted new Kansas Child Support Guidelines effective January 1, 2020.

This corrected order supersedes the November 29, 2023, order of the same number.

Dated this 8th day of December 2023. This order is effective January 1, 2024.

FOR THE COURT

MARLA LUCKERT
Chief Justice

The Kansas Child Support Guidelines, effective January 1, 2024, are available online on the Kansas Judicial Branch website at:
https://www.kscourts.org/Rules-Orders/Orders/Admin-Orders/2023-RL-080

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2023-RL-070

Order Adopting Supreme Court Rule 160 and Rescinding 2023-RL-018

Effective the date of this order, the court adopts the attached new Supreme Court Rule 160 and rescinds Administrative Order 2023-RL-018, Order Continuing Temporary Rules on Media and Public Access to Court-Initiated Livestreams.

Dated this 26th day of September 2023.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 160

BROADCASTING OR RECORDING A COURT PROCEEDING FOR PUBLIC ACCESS

(a) **Applicability**. This rule applies to a district court when providing public access to a court proceeding by live broadcasting or by recording the proceeding by any electronic means or method. But this rule does not apply to the following:

(1) a court electronically recording a proceeding under Rule 360 as part of the court record;

(2) a member of the media broadcasting or recording in a court facility as permitted by Rule 1001; and

(3) a nonmedia person using an electronic device in a courtroom as permitted by Rule 1002.

(b) **Permissive Broadcast or Recording; Preservation.** If a court proceeding is open to the public, the court may do one or more of the following:

(1) broadcast the proceeding live, including by livestreaming over the internet or in a closed-circuit feed;

(2) record the proceeding; and

(3) preserve any recording of the proceeding.

(c) **Protecting Integrity of Court Proceeding**. A court should broadcast or record a court proceeding in a manner that protects the integrity of the proceeding. The court may consider any aspect of the broadcasting or recording process that could affect the administration of justice, including whether the process would be inconsistent with the parties' rights and whether the broadcasting or recording activity would unduly distract the parties.

(d) **Additional Means of Public Access.** The following provisions apply if a broadcast or recording is not the only means for the public to access a court proceeding that is open to the public:

(1) the court has no duty to stop the proceeding if the broadcast or recording fails for any reason unless the failure impacts the court record; and

(2) a party may move the court to prevent public access through a broadcast or recording due to sensitive subject matter or other good cause.

(e) **Only Means of Public Access.** The following provisions apply if a broadcast is the only means for the public to access a court proceeding that is open to the public:

(1) the court must stop the proceeding if the broadcast fails for any reason and must not resume the proceeding until the court either restores the broadcast or provides another means for the public to access the proceeding; and

(2) if a party requests to limit public access, the court must comply with applicable law regarding closing a court proceeding, including K.S.A. 60-2617.

(f) **Initiating and Terminating Broadcast or Recording**. A court must capture the entire proceeding when broadcasting or recording a court proceeding. The court should start the broadcast or recording prior to beginning the proceeding and should continue the broadcast or recording until after terminating the proceeding.

(g) **Protecting Privileged Attorney-Client Communications.**

(1) **Attorney's Responsibility.** An attorney has the ultimate responsibility to prevent privileged attorney-client communications from being broadcast or recorded. The attorney should silence the microphone and be aware of camera angles that could disclose written or oral communications between the attorney and client.

(2) **Court's Discretion.** A court should consider taking steps to prevent the broadcasting or recording of privileged attorney-client communications. The court is not required to erase or otherwise change any recording of a privileged communication, but the court may do so on motion of a party.

IN THE SUPREME COURT OF THE STATE OF KANSAS

Administrative Order

2023-RL-069

Rules Relating to Continuing Judicial Education

The court amends the attached Supreme Court Rule 501, effective the date of this order.

Dated this 18th day of September 2023.

FOR THE COURT

MARLA LUCKERT
Chief Justice

Rule 501

CONTINUING JUDICIAL EDUCATION FOR APPELLATE AND DISTRICT JUDGES

(a) **Applicability**. This rule applies to each active Supreme Court justice, Court of Appeals judge, district judge, district magistrate judge, and retired justice or judge who is acting under a senior judge contract in Kansas. A retired justice or judge who is not acting under a senior judge contract but who serves as a judge pro tem. or hearing officer must meet the requirements under the Rules Relating to Continuing Legal Education rather than the requirements under this rule.

(b) **Administration.** The Supreme Court through the Office of Judicial Administration regulates and administers Kansas continuing judicial education. Subject to approval by the Supreme Court, the Office of Judicial Administration will develop any necessary forms.

(c) **Definitions.** The following definitions apply in this rule.

(1) **"Compliance period"** means the period of one year beginning July 1 and ending June 30.

(2) **"Continuing judicial education" or "CJE"** means a judicial education program, course, or activity designed to maintain and improve a justice's or judge's professional competence.

(3) **"OJA"** means the Kansas Supreme Court's Office of Judicial Administration.

(d) **Education Requirement**. A justice or judge must earn a minimum of 13 CJE credit hours each compliance period. Of the 13 credit hours, at least 2 credit hours must be judicial ethics. A justice or judge can apply CJE credit hours earned from January 1, 2023 through June 30, 2023, to the compliance period starting July 1, 2023, and ending June 30, 2024.

(e) **Carryover Credit Hours**. A justice or judge who completes more than the minimum education requirement in subsection (d) may carry over up to six unused general CJE credit hours to the next compliance period. A justice or judge may carry over judicial ethics credit hours as general CJE credit hours but not as judicial ethics credit hours. The justice or judge must satisfy the following requirements:

(1) report the carryover credit hours in the annual compliance report required under subsection (m) for the compliance period in which the justice or judge earned the credit hours; and
(2) designate the credit hours as carryover credit hours.

(f) **Credit Calculation**. A justice or judge can earn one credit hour for each 50 minutes of attendance and one-half credit hour for each 25 minutes of attendance at instructional activities of an approved program.

(g) **Approval Not Required.** A justice or judge can earn general CJE credit hours at a program OJA has approved for Kansas continuing legal education. The justice or judge does not need to seek OJA approval of the program for CJE.

(h) **Presumptive Approval.** As provided in this subsection, a justice or judge can earn credit hours for attendance at a program OJA has not previously approved. The justice or judge does not need written notice of accreditation from OJA before using attendance at the program to satisfy the education requirement under subsection (d).
(1) **General CJE.** A justice or judge can earn general CJE credit hours at a continuing judicial or legal education program sponsored by OJA or one of the following organizations:
(A) National Judicial College;
(B) American Bar Association;
(C) American Academy of Judicial Education;
(D) National Council of Juvenile and Family Court Judges;
(E) American Judicature Society;
(F) Institute for Court Management;
(G) National Courts and Sciences Institute;
(H) American Parole and Probation Association;
(I) Office of Juvenile Justice and Delinquency Prevention, United States Department of Justice;
(J) National Drug Court Institute;
(K) National Association of Drug Court Professionals;
(L) National Center for State Courts;
(M) National Association of Women Judges;
(N) American Judges Association;
(O) Association of American Family and Conciliation Courts;
(P) any Kansas Inn of Court; and
(Q) any state continuing legal education accrediting organization other than the Kansas Continuing Legal Education Board.
(2) **Judicial Ethics.** A justice or judge can earn judicial ethics credit hours at a judicial ethics program sponsored by OJA or one of the following organizations:

(A) National Judicial College;
(B) American Academy of Judicial Education;
(C) National Council of Juvenile and Family Court Judges;
(D) American Judicature Society;
(E) National Center for State Courts;
(F) National Association of Women Judges;
(G) American Judges Association; and
(H) Association of American Family and Conciliation Courts.

(i) **Prior Approval Required.** If a program is not approved for Kansas continuing legal education or presumptively approved under subsection (h), OJA must approve the program before a justice or judge can use attendance at the program to satisfy the education requirement under subsection (d). When approving a program, OJA will designate the number of general CJE and judicial ethics credit hours a justice or judge can earn by attending the program.

(j) **Form.** A justice or judge must use a form provided by OJA to request approval of a program not sponsored by OJA or approved for Kansas continuing legal education.

(1) **Presumptively Approved.** If the program is presumptively approved under subsection (h), the justice or judge may submit the request at the same time the justice or judge submits the annual compliance report required under subsection (m).

(2) **Prior Approval Necessary.** If the program is not presumptively approved under subsection (h), the justice or judge must submit the request no later than 30 days before the program. The justice or judge cannot use attendance at the program to satisfy the education requirement under subsection (d) until the justice or judge receives notice of accreditation from OJA.

(k) **Teaching Credit Hours**. A justice or judge can earn up to five CJE credit hours for each 50 minutes spent teaching an approved continuing judicial or legal education program. In calculating the number of credit hours to award, OJA will consider time spent in preparation and teaching. A justice or judge cannot carry over credit hours earned for teaching.

(l) **Legislative Service**. Upon a written request submitted to OJA, a part-time judge as defined by the Kansas Code of Judicial Conduct serving in the Kansas Legislature will receive a reduction of 6.5 of the 11 general CJE credit hours required for the compliance period in which the judge serves in the Legislature.

(m) **Annual Compliance Report.** Each justice or judge must submit an annual report of compliance with this rule on a form provided by OJA. The justice or judge must submit the report to OJA no later

than September 1 following the compliance period in which the justice or judge earned the credit hours.

(n) **Waiver; Extension of Time.** OJA may grant a waiver of the requirements of this rule or an extension of time to complete the education requirement under subsection (d) because of hardship, disability, or other good cause. A justice or judge must submit a written request for waiver or extension to OJA prior to September 1 following the compliance period for which the justice or judge is requesting the waiver or extension.

[**History:** Prior Rule 501 repealed effective May 25, 2010; Rule effective May 26, 2010; Rule adopted effective January 1, 2013; Am. effective December 31, 2020; Am. effective September 18, 2023.]

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PETITIONS FOR REVIEW OF DECISIONS OF THE COURT OF APPEALS
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TITLE	DOCKET NUMBER	DISPOSITION	DATE	REPORTED BELOW
Aql v. Peterson	125,038	Denied	10/25/2023	Unpublished
Benchmark Property Remodeling v. Grandmothers, Inc.	124,160	Granted	10/20/2023	Unpublished
Dean v. State	124,885	Denied	10/24/2023	Unpublished
Decavele v. Winbury Operating	125,651	Granted	10/20/2023	Unpublished
In re Adoption of H.S.	125,946	Denied	12/06/2023	Unpublished
In re Adoption of R.H.	125,525	Denied	12/06/2023	Unpublished
In re Estate of Ballou	125,433	Denied	12/14/2023	Unpublished
Laney v. Carolco Service, Inc.	125,204	Denied	10/25/2023	Unpublished
Mog v. St. Francis Episcopal Boys' Home of Salina Kansas	125,456	Denied	12/06/2023	Unpublished
Shelby Development v. Shawnee County, Kansas	125,299	Denied	12/06/2023	Unpublished
State v. Degand	125,120	Denied	10/25/2023	63 Kan. App. 2d 457
State v. Dishner	124,597	Denied	12/06/2023	Unpublished
State v. Entsminger	124,800	Denied	12/06/2023	Unpublished
State v. Garcia-Oregel	125,536	Denied	10/25/2023	Unpublished
State v. Hormell	124,252	Denied	10/24/2023	Unpublished
State v. Hunter	125,385	Denied	12/07/2023	Unpublished
State v. Jacobson	124,861	Granted	12/05/2023	Unpublished
State v. Lamia-Beck	124,433	Granted	10/20/2023	Unpublished
State v. Moeller	124,611	Granted	10/20/2023	Unpublished
State v. Money	124,268	Denied	10/24/2023	Unpublished
State v. Moore	124,610	Granted	10/20/2023	Unpublished
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State v. Patton	124,987	Denied	12/06/2023	Unpublished
State v. Ray	124,784	Denied	12/06/2023	Unpublished
State v. Spilman	124,775	Denied	10/24/2023	63 Kan. App. 2d 550
State v. Stohs	124,314	Granted	12/07/2023	63 Kan. App. 2d 500
State v. Stubbs	125,003	Granted	10/23/2023	Unpublished
State v. Union	121,643	Granted	10/23/2023	Unpublished
State v. Wilson	124,759	Granted	10/20/2023	Unpublished
State v. Yohn	124,830	Denied	10/24/2023	Unpublished
Williams-Davidson v. Lui	124,946	Granted	10/20/2023	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.
Kansas Fire and Safety Equipment v. City of Topeka.....418

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

Statute Provides Party Must Exhaust Administrative Remedies before Appealing Relocation Benefits and Assistance to District Court. A party must exhaust their administrative remedies under K.S.A. 58-3509(a) before appealing a hearing examiner's ruling on the issue of relocation benefits and assistance to the district court. The failure to exhaust such administrative remedies deprives the district court of subject matter jurisdiction.
Kansas Fire and Safety Equipment v. City of Topeka.....418

APPEAL AND ERROR:

Alternative-Means Issue Review—Appellate Court Review. When reviewing an alternative-means issue, the appellate court first considers whether the district court presented an alternative-means crime to the jury. To determine that, the reviewing court looks to the relevant statute's language and structure to decide whether the Legislature meant to list distinct alternatives for an element of the crime. If alternative means were not presented, the error inquiry ends. *State v. Jordan*.....628*

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.
State v. Redick 146

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Court's Decision to Order Competency Evaluation—Appellate Review. An appellate court reviews a district court's decision to order an evaluation under K.S.A. 2020 Supp. 22-3429 for abuse of discretion. *State v. Mitchell*.....792*

District Court's Review of Workability of Restitution Plan—Appellate Review. An appellate court reviews a district court's decision on the workability of a restitution plan for an abuse of discretion. The party asserting error has the burden of showing an abuse of discretion. *State v. Taylor*.....364

Failure to Meet Burden of Production—Remand not Appropriate Remedy. When a party fails to meet its burden of production and persuasion, remand is not generally an appropriate remedy. *Granados v. Wilson*.....34

Invited Error Doctrine—Application. The invited error doctrine does not bar an appellant from raising an issue on appeal when he or she merely acceded to—but did not affirmatively request—the error. The doctrine applies only when a defendant actively pursues and induces the court to make the error. *State v. Smith*.....130

Issue Waived if Not Preserved by Petition for Review. Without application of a permissive exception for plain error, a party waives an issue not preserved by a petition for review. *Quinn v. State*.....624*

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. *State v. Campbell*.....511

New Claims Cannot Be Raised on Appeal. A defendant cannot raise new claims for the first time on appeal unless an exception applies. *Shelton-Jenkins v. State*.....141

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. *State v. Slusser*.....174

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

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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—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

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

— **Order of Disbarment**. Attorney charged in a formal complaint by the Disciplinary Administrator, with violations of KRPC 1.15 (safekeeping property) and

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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

— -- Attorney, under temporary suspension for possession of methamphetamine, voluntarily surrenders his license to practice law, pending three docketed complaints in the Office of the Disciplinary Administrator. The Supreme Court accepts Farchmin's surrender of his Kansas law license, disbars him pursuant to Rule 230(b), and revokes his license and privilege to practice law in Kansas.
In re Farchmin 622*

—— Attorney voluntarily surrendered his license to practice law in Kansas while complaints were pending regarding multiple violations of the Kansas Rules of Professional Conduct, including KRPC 1.3, 1.4, 1.16, 5.5, 8.1, 8.4 and Rules 210 and 231. *In re Long* 667*

—— Attorney voluntarily surrendered his license to practice law in Kansas while complaints were pending regarding multiple violations of the Kansas Rules of Professional Conduct. The Supreme Court directs that this order be published in the Kansas Reports, that the costs herein be assessed to Leon, and that Leon comply with Supreme Court Rule 231.
In re Leon 614*

— **Order of Reinstatement**. Attorney petitioned for reinstatement of his license to practice law in Kansas after a two-year suspension in 2013. Following a reinstatement hearing, attorney is reinstated, subject to a term of three years of supervised probation. *In re Galloway* 87

—— Attorney petitioned for reinstatement of his license to practice law in Kanas following his disbarment in 2014. A hearing panel of the Kansas Board for Discipline of Attorneys conducted a hearing and recommended that Chavez' petition for reinstatement be granted. The Supreme Court agrees, grants, and reinstates Chavez' license to practice law, following his ompliance with registration and reinstatement fees.
In re Chavez 613*

—— Attorney under suspension for 180 days from April 2023, seeks reinstatement under Rule 232(b). The Supreme Court grants Eland's request for reinstatement following his compliance with reinstatement and registration fees. *In re Eland* 666*

—— 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

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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

—— 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

—— The Supreme Court disciplined Morton of Colorado Springs, Colorado, by published censure for violations of the Kansas Rules of Professional Conduct. The violations involved Morton's failure to inform Colorado attorney admissions authorities about her pending Kansas disciplinary complaint and from information she provided Kansas and Colorado attorney admissions authorities about her employment history.
In re Morton 724*

— **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

— **Six-Month Suspension, Stayed Pending Successful Completion of Three-year Period of Probation**. Attorney found by hearing panel to have violated KRPC 1.1, 1.3, and 1.4. The Supreme Court found that respondent's misconduct was neither intentional nor knowing and held that a suspension of six months is an appropriate discipline, stayed pending successful completion of a three-year period of probation. *In re Sedgwick* …. 826*

— **Three-month Suspension, Stayed Pending Successful Completion of Two-year Period of Probation**. Respondent is suspended for three months from the practice of law in Kansas, which is stayed pending successful completion of two-year period of probation for violations of KRPC 3.4(c), 4.4(a), 8.4(a), (d), and (g). *In re Barnds*.....378

CIVIL PROCEDURE:

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

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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

Allegation of Future Injury Can Satisfy Injury Component—Allegation of Constitutional Interest and Threat of Prosecution. An allegation of future injury can satisfy the injury-in-fact component in a pre-enforcement challenge if there is a threatened impending, probable injury. Plaintiffs need not expose themselves to liability or prosecution before suing to challenge the basis for the threat. Rather, plaintiffs can satisfy the injury-in-fact component when they allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.
League of Women Voters of Kansas v. Schwab 805*

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

Two-Part Standing Test in Kansas—Cognizable Injury and Causal Connection between Injury and Conduct. Under Kansas' traditional, two-part standing test, a party must demonstrate they have suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct. A party establishes a cognizable injury—i.e., an injury in fact—when they suffer some actual or threatened injury as a result of the challenged conduct. *League of Women Voters of Kansas v. Schwab* 805*

CONSTITUTIONAL LAW:

Legislature Criminalizes Constitutionally Unprotected Speech—Unclear to Confer Standing to Plaintiff Challenging Law. When the Legislature criminalizes speech and does not—within the elements of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law. *League of Women Voters of Kansas v. Schwab* 805*

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

State May Regulate Content of Speech Based on Content if Not Constitutionally Protected. The State may validly regulate the content of speech based on content that is not constitutionally protected, such as obscenity, incitement, defamation, fighting words, speech integral to criminal conduct, true threats, speech presenting some grave and imminent threat the government has the power to prevent, child pornography, and fraud.
League of Women Voters of Kansas v. Schwab 805*

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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

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

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jeopardy violation when convicted on multiple counts arising from damage by fire to separate apartments, each with a person inside.
State v. Buchanan 443

Aggravated Criminal Sodomy—Statutory Requirements. The crime of aggravated criminal sodomy pursuant to K.S.A. 2022 Supp. 21-5504(b)(3)(A) requires the State to prove beyond a reasonable doubt that (1) sodomy occurred; (2) the victim did not consent; and (3) the victim was overcome by force or fear. *State v. Pepper* 770*

Alternative-Means Crime—Court Gives Jury Instructions with Statutory Alternatives for Element of the Crime. The term "alternative-means crime" refers to a crime which can be committed in more than one way. The Legislature creates an alternative-means crime by enacting criminal statutes which list distinct alternatives for an element of the crime. And the district court presents the jury with an alternative-means crime by giving jury instructions that incorporate more than one of the distinct statutory alternatives for an element of the crime. Presenting the jury with an alternative-means crime can raise questions about whether the jury unanimously agreed on the means supporting its guilty verdict. And Kansas criminal defendants have a statutory right to a unanimous verdict. *State v. Jordan* 628*

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

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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

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

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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 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

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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

District Court's Order for Consecutive Sentences—Appellate Review. The lack of a lengthy explanation by a district court ordering a defendant to serve sentences consecutively does not imply an impermissible basis for that decision constituting an abuse of discretion. *State v. Goens*.....616*

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 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

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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

Jail Time Credit Allowed for All Time Incarcerated While Case Pending Disposition. A defendant is entitled to jail time credit against his or her sentence for all time spent incarcerated while the defendant's case was pending disposition. The contrary holding of *Campbell v. State*, 223 Kan. 528, 528-31, 575 P.2d 524 (1978), is overruled. *State v. Hopkins* 652*

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

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

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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

No Alternative Means of Committing Fleeing and Eluding in Statute. K.S.A. 2019 Supp. 8-1568(b)(2) does not set forth alternative means of committing fleeing and eluding by attempting to elude capture for any felony. The statute's plain language shows the distinct material element of fleeing and eluding under subsection (b)(2) is evading capture for any felony and the specific underlying felony is merely a description of a material element or factual circumstance which may prove the crime.
State v. Jordan.....628*

Options Within a Means vs. Alternative Means. In contrast, when criminal statutes and jury instructions incorporating them merely describe a material element or the factual circumstances in which a material element may be proven, the Legislature has created options within a means, not alternative means. Options within a means describe secondary matters that do not state additional and distinct ways of committing the crime. Thus, such options do not trigger statutory jury unanimity protections.
State v. Jordan.....628*

Overcome by Force or Fear Language—Same Meaning. "Overcome by force or fear" has the same meaning in our aggravated criminal sodomy statute as it has in our rape statute. *State v. Pepper* 770*

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

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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. 21-6604(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

— **Life Sentence**. For purposes of K.S.A. 2022 Supp. 21-6819(b), a life sentence cannot be either a base or a nonbase sentence.
State v. Mitchell 792*

— **Life Sentence Not Converted to Grid Sentence under Statute**. Nothing in the plain language of K.S.A. 2022 Supp. 21-6620(b)(2) converts a life sentence into a grid sentence. *State v. Mitchell* 792*

— **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

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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

— **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

Sentencing to Imprisonment as Condition of Probation—Claimant is Considered Imprisoned under Statute. When a claimant is wrongfully convicted of a felony crime and sentenced to jail time under K.S.A. 2022 Supp. 21-6603(g)—which permits a sentencing court to impose up to 60 days "imprisonment" in county jail as a condition of probation in felony cases—the claimant is "imprisoned" for the purposes of K.S.A. 2022 Supp. 60-5004(c)(1)(A). *In re Wrongful Conviction of Baumgarner*.....662*

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

Subject Matter Jurisdiction Conferred by Kansas Constitution to District Courts—Three Requirements to Invoke Jurisdiction. In criminal cases, the Kansas Constitution confers subject matter jurisdiction on district courts. But jurisdiction is acquired in a criminal case upon the filing or amendment of a complaint, indictment, or information. Put another way, while the Kansas Constitution bestows subject matter jurisdiction on the district courts, the State must still properly invoke that jurisdiction through a charging document. To properly invoke jurisdiction, the charging document must satisfy three requirements. It must (1) show the case has been filed in the correct court; (2) show the court has territorial jurisdiction over

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the crime; and (3) allege facts that, if proved beyond reasonable doubt, would constitute a crime under Kansas law. *State v. Jordan* 628*

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

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

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

Untimely Motion to Withdraw Plea—Burden to Show Excusable Neglect. An untimely motion to withdraw a plea is procedurally barred when the defendant does not meet the burden to show excusable neglect. *State v. Ward*..... 822*

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

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

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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:

Evidentiary Challenge Raised Before Trial—Timely and Specific Objection Required at Trial to Preserve for Appellate Review. Even when an evidentiary challenge is raised and ruled on before trial, a party must also make a timely and specific objection at trial to preserve the challenge for appellate review under K.S.A. 60-404. *State v. Jordan* 628*

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

K.S.A. 60-405 Provides Method for Proffering Record for Appellate Review. Following a district court's ruling that evidence will not be admitted, the plain language of K.S.A. 60-405 provides that a district court may approve of various forms and methods of proffering a record for purposes of appellate review of that district court ruling. *State v. Pepper*.....770*

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

Proffer of Evidence—Proponent Must Indicate Substance of Expected Evidence. If the district court does not approve an alternative form of proffer, the proponent of excluded evidence must indicate the substance of the expected evidence by questions indicating the desired answers.
State v. Pepper 770*

GARNISHMENT:

Appeal from Garnishment Award—Appellate Review. On appeal from a garnishment award, an appellate court conducts a mixed review of law

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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

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

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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

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 Under the Influence Violation—Statutory Right to Consult Attorney after Evidentiary Breath Test. K.S.A. 8-1001(c)(1) is not ambiguous. Under it, persons have a statutory right to consult an attorney after administration of an evidentiary breath test. In order to properly invoke the right to post-evidentiary breath test counsel, the plain language of the statute requires the person to make that request after administration of the evidentiary breath test, distinguishing *Dumler v. Kansas Dept. of Revenue*, 302 Kan. 420, 354 P.3d 519 (2015). *State v. Kerrigan*.....683*

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

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

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

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

OPEN RECORDS ACT:

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

PARENT AND CHILD:

Determination of Best Interests of Child by District Court—Appellate Review. Weighing conflicting presumptions and determining the best interests of a child involve judgment calls for the district court; thus, an appellate court reviews the district court's decisions for an abuse of discretion. A judicial action constitutes an abuse of discretion if it is arbitrary, fanciful, or unreasonable, if it is based on an error of law, or if substantial competent evidence does not support a finding of fact on which the exercise of discretion is based. The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion.
In re Parentage of R.R.....691*

Kansas Parentage Act—Recognizes Claims of Parentage. The Kansas Parentage Act, K.S.A. 2022 Supp. 23-2201 et seq., recognizes claims of parentage based on genetics, adoption, and other circumstances giving rise to statutory presumptions of parentage. *In re Parentage of R.R.*.....691*

— Shifting Burden of Proof on Parties Alleging Paternity Through Statutory Presumption. The Kansas Parentage Act imposes shifting burdens of proof on parties seeking to establish paternity through a statutory

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presumption. If the party alleging paternity establishes an initial presumption of paternity, the burden shifts to the other party to rebut that presumption. If the presumption is rebutted, the party alleging paternity bears the burden of going forward with the evidence by a preponderance of the evidence. When competing presumptions exist, the court must decide parentage based on the presumption yielding the weightier considerations of policy and logic, including the best interests of the child.
In re Parentage of R.R 691*

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 must show an injury in fact; absent that injury, courts lack authority to entertain the party's claim. In this respect, standing is both a requirement for a

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

— **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

Interpretation of Statutes—Appellate Review. We review issues of statutory interpretation de novo, meaning we give no deference to the conclusions reached by the district court or the Court of Appeals resulting from their interpretation of the statute. *State v. Kerrigan* 683*

— **Legislative Intent—Appellate Review**. When interpreting statutes, our purpose is to discern legislative intent and, to do so, we begin by looking to the plain language of the statute. If the language of the statute is plain and unambiguous, an appellate court will not speculate about the legislative intent behind that clear language and will not read something into the statute that is not readily found in its words. Only if the language of the statute is unclear or ambiguous do we turn to canons of statutory construction, consult

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legislative history, or consider other background information to ascertain legislative intent. *State v. Kerrigan* 683*

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

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

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

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

TAXATION:

By Failing to Remit Sales Taxes, a Retailer Does Not Exert Unauthorized Control under K.S.A. 21-5801. For purposes of K.S.A. 2022 Supp. 21-5801, a retailer does not exert unauthorized control over collected sales taxes by failing to remit them at the time mandated by K.S.A. 79-3607. *State v. Ruiz* 669*

Collected Sales Taxes not Remitted by Retailers are Not a Debt under section 16 of Kansas Constitution Bill of Rights. Collected, unremitted sales taxes do not qualify as a "debt" between retailers and the Kansas Department of Revenue within the meaning of section 16 of the Kansas Constitution Bill of Rights. *State v. Ruiz*.....669*

Kansas Department of Revenue Not an Owner of Unremitted Sales Taxes Collected by Retailers Under Kansas Retailers' Sales Tax Act. The Kansas Department of Revenue does not have an "interest" in unremitted sales taxes collected by retailers under the Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., and is thus not an "owner" of those unremitted taxes for purposes of K.S.A. 2022 Supp. 21-5801. *State v. Ruiz*.....669*

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Statutory Remedies under Kansas Retailers' Sales Tax Act for Retailer's Violation of Duties to Collect and Pay Sales Tax. The Kansas Retailers' Sales Tax Act imposes statutory duties upon retailers with respect to the collection and payment of sales taxes. K.S.A. 79-3615 provides the State a self-contained set of remedies for a retailer's violation of those statutory duties. *State v. Ruiz*.....669*

TORTS:

Damages Not Recoverable in Defamation Case unless Injury to Reputation Established by Evidence. Unless injury to reputation is established by the evidence in a defamation cause of action, no other damages are recoverable. *Marcus v. Swanson*.....752*

Defamation Claims—Requirememt of Evidence of Reputational Harm. Evidence of reputational harm is required in defamation claims. Speculation about reputational harm is not sufficient. *Marcus v. Swanson* 752*

— Reputational Harm May be Shown by Reasonable Inferences. Reputational harm may be shown by reasonable inferences, but these reasonable inferences must be tethered to a fact in the world, whether it be declining revenue, decreased professional opportunities, or some other indicator of reputational harm that is unique to the case at hand.
Marcus v. Swanson.....752*

Defamation Per Se and Presumed Damages—Abolished in Defamation Causes of Action in Kansas. Defamation per se and presumed damages have been abolished in state defamation causes of action in Kansas.
Marcus v. Swanson.....752*

Elements of Defamation. The elements of defamation include false and defamatory words, communicated to a third person, which result in harm to the reputation of the person defamed. *Marcus v. Swanson* 752*

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

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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

Defendant's Competence to Stand Trial—Burden of Proof. A party who raises a claim concerning a criminal defendant's competence to stand trial bears the burden of proving that claim by a preponderance of the evidence. State v. Mitchell.....792*

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 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

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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 Give Accomplice Instruction**. Failure to give an accomplice instruction sua sponte will not generally constitute clear error if the defendant's guilt is plain, or if the district court provided another instruction which adequately cautioned the jury about the weight to be accorded testimonial evidence. *State v. Goens*.....616*

— **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

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

— **Lesser Included Offense Instruction—Determination Whether Factually Appropriate**. To determine whether a lesser included offense instruction is factually appropriate, a court must consider whether 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. *State v. Lowe*.....713*

— **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

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— **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

— **Error of District Court if Fail to Sua Sponte Give Lesser Included Instruction if Legally and Factually Appropriate**. A district court commits instructional error by failing to sua sponte give a lesser included offense instruction that is both legally and factually appropriate. On appeal, to obtain reversal of a conviction based on that error, a defendant who has failed to request the instruction bears the burden to firmly convince the reviewing court the jury would have reached a different verdict had that instructional error not occurred. *State v. Lowe* 713*

— **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

Presumption of Competency to Stand Trial. Courts presume a criminal defendant is competent to stand trial. *State v. Mitchell* 792*

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

Prosecutors Have Broad Latitude. Prosecutors have broad latitude in crafting their closing arguments and drawing reasonable inferences from the evidence. Stating an opinion about a witness' credibility falls outside the bounds of proper argument, but discussing the legitimate factors a jury may consider in assessing credibility does not. One legitimate factor for the jury

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to consider in assessing witness credibility is whether a witness has motive to be dishonest. *State v. Jordan*.....628*

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

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

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

Bar Docket No. 14646

In the Matter of BART ANDREW CHAVEZ,
Petitioner.
(534 P.3d 974)

ORDER OF REINSTATEMENT

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

On December 16, 2014, the court accepted Chavez' voluntary surrender of his license and disbarred Chavez from the practice of law in Kansas. *In re Chavez*, 301 Kan. 87, 339 P.3d 392 (2014).

On August 25, 2022, Chavez filed a petition for reinstatement of his law license under Supreme Court Rule 232 (2022 Kan. S. Ct. R. at 293). 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 June 13, 2023, a hearing panel of the Kansas Board for Discipline of Attorneys conducted a hearing on Chavez' petition for reinstatement. The court has since received the record of the reinstatement proceedings and the hearing panel's Reinstatement Final Hearing Report. In that report, the hearing panel recommends that the court grant Chavez' petition for reinstatement.

Upon careful review of the record, the court agrees with the hearing panel's recommendation, grants Chavez' petition, and reinstates Chavez' Kansas law license.

The court orders Chavez 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 Chavez' completion of these conditions, OJA must add Chavez' 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 Chavez.

Dated this 5th day of September 2023.

Bar Docket No. 15221

In the Matter of DAVID P. LEON, *Respondent.*

(535 P.3d 216)

ORDER OF DISBARMENT

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

This court admitted David P. Leon to the practice of law in Kansas on April 23, 1993. On December 10, 2021, the court indefinitely suspended Leon's law license upon finding he violated various rules of professional conduct. *In re Leon*, 314 Kan. 419, 499 P.3d 467 (2021).

On August 29, 2023, Leon's request to voluntarily surrender his license was submitted to the Office of Judicial Administration under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). At the time, Leon faced a hearing before the Kansas Board for Discipline of Attorneys on a formal complaint filed by the Disciplinary Administrator. That complaint alleged Leon had violated Kansas Rules of Professional Conduct 1.1 (2023 Kan. S. Ct. R. at 327) (competence), 1.3 (2023 Kan. S. Ct. R. at 331) (diligence), 1.4 (2023 Kan. S. Ct. R. at 332) (communication), 1.5 (2023 Kan. S. Ct. R. at 333) (fees), 1.7 (2023 Kan. S. Ct. R. at 342) (conflict of interest: current clients), 1.15 (2023 Kan. S. Ct. R. at 372) (safekeeping property), 1.16 (2023 Kan. S. Ct. R. at 377) (declining or terminating representation), 3.1 (2023 Kan. S. Ct. R. at 389) (meritorious claims and contentions), 8.1 (2023 Kan. S. Ct. R. at 431) (disciplinary matters), 8.4 (2023 Kan. S. Ct. R. at 433) (misconduct), Supreme Court Rule 206(o) (2023 Kan. S. Ct. R. at 260) (change of contact or registration information), Supreme Court Rule 210 (2023 Kan. S. Ct. R. at 263) (duty to respond), and Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292) (notice to clients following suspension).

This court accepts Leon's surrender of his Kansas law license, disbars Leon pursuant to Rule 230(b), and revokes Leon's license and privilege to practice law in Kansas.

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

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

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

Dated this 25th day of September 2023.

No. 124,972

STATE OF KANSAS, *Appellee,* v. RICHARD ALAN GOENS, *Appellant.*

(535 P.3d 1116)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions—Failure to Give Accomplice Instruction.* Failure to give an accomplice instruction sua sponte will not generally constitute clear error if the defendant's guilt is plain, or if the district court provided another instruction which adequately cautioned the jury about the weight to be accorded testimonial evidence.

2. CRIMINAL LAW—*District Court's Order for Consecutive Sentences—Appellate Review.* The lack of a lengthy explanation by a district court ordering a defendant to serve sentences consecutively does not imply an impermissible basis for that decision constituting an abuse of discretion.

Appeal from Riley district court; GRANT D. BANNISTER, judge. Oral argument held May 17, 2023. Opinion filed September 29, 2023. Affirmed.

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

David Lowden, deputy county attorney, argued the cause, and *Barry R. Wilkerson*, county attorney, and *Kris W. Kobach*, attorney general, were with him on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: In November 2019, Richard Alan Goens shot and killed Tanner Zamecnik during a drug deal gone wrong. Goens and his accomplices approached the victim intending to either buy or steal $600-700 worth of marijuana. The accomplices testified that the plan was to rob the victim; however, Goens testified at trial and maintains through his appeal that he only ever intended to purchase the marijuana. Given the two substantive issues on appeal, a more detailed recitation of the facts is unnecessary.

At trial, a jury convicted Goens of felony murder, attempted aggravated robbery, criminal discharge of a firearm, aggravated battery, aggravated assault, and possession of marijuana with intent to distribute. The court sentenced Goens to a hard 25 for the

felony murder conviction and a grid-based sentence of 142 months for the rest of the charges, to be served consecutively.

Goens directly appealed to this court raising two issues. First, at trial Goens did not request, and the district court did not give, a credibility instruction specific to accomplice testimony. Goens argues that inconsistencies and changes in the details of the accomplices' stories over time—along with the fact that the accomplices were testifying as part of a plea agreement—renders the district court's failure to give a credibility instruction relating to their testimony as "clear error." As a result, Goens asks that his convictions be reversed. Second, Goens claims the district court abused its discretion in ordering Goens' to serve his sentences consecutively. We disagree and affirm both Goens' convictions and his sentences.

DISCUSSION

The trial court did not commit clear error by not providing the jury with a cautionary instruction regarding the credibility of accomplice testimony.

When a party fails to object to a jury instruction before the district court, an appellate court reviews the instruction to determine if it was clearly erroneous. K.S.A. 2022 Supp. 22-3414(3). The party claiming clear error has the burden to show both error and prejudice. *State v. Crosby*, 312 Kan. 630, 639, 479 P.3d 167 (2021). "The failure then to give an instruction on accomplice testimony when none is requested requires reversal only if 'clear error' occurred." *State v. DePriest*, 258 Kan. 596, 605, 907 P.2d 868 (1995). In this instance, we focus our analysis on the prejudice prong.

The "failure to give an instruction is clearly erroneous only if the appellate court reaches a firm conviction that, had the instruction been given, there was a real possibility the jury would have returned a different verdict." *State v. Buehler-May*, 279 Kan. 371, 384, 110 P.3d 425 (2005). To determine whether prejudicial error occurred in the failure to give an accomplice instruction, courts generally "look to the extent and importance of the accomplice testimony, as well as any corroborating testimony." 279 Kan. at 384. Given this, the failure to give an accomplice instruction sua

sponte will not generally constitute clear error if the defendant's guilt is plain, or if the district court provided another instruction which adequately cautioned the jury about the weight to be accorded testimonial evidence. See 279 Kan. at 385 (quoting *State v. Crume*, 271 Kan. 87, 94-95, 22 P.3d 1057 [2001]).

We have previously held that it is not clear error for a district court to fail to give an unrequested accomplice credibility instruction when the court has given a general credibility instruction. See, e.g., *Buehler-May*, 279 Kan. at 385; *State v. Simmons*, 282 Kan. 728, 734-35, 148 P.3d 525 (2006); *State v. Todd*, 299 Kan. 263, 271, 323 P.3d 829 (2014). This is because judicial determinations concerning the necessity of an accomplice credibility instruction are steeped with an understanding that most jurors have common sense. See *State v. Miller*, 83 Kan. 410, 412, 111 P. 437 (1910) ("Without such an instruction a jury of ordinary intelligence would naturally receive with caution the testimony of a confessed accomplice."), *rev'd on reh'g on other grounds* 84 Kan. 667, 114 P. 855 (1911); *State v. Parrish*, 205 Kan. 178, 186, 468 P.2d 143 (1970) ("The necessity for many of these tautological instructions is losing force when a case is being considered by our present enlightened jurors.").

The language of the instruction at issue comes from PIK Crim. 4th 51.090 (2020 Supp.):

> "An accomplice witness is one who testifies that (he) (she) was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice."

Rather than giving this instruction, the district court gave the following general credibility instruction as part of jury instruction No. 2:

> "It is for you to determine the weight and credit to be given [to] the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified."

Goens argues that because nearly all the evidence presented at trial was in the form of witness testimony, "the importance of the accomplice testimony" is too great in this case for a court to not have required an accomplice credibility instruction. This is not the correct framing of the question. Rather, we consider whether

"no juror of average intelligence could have heard their testimony and accompanied cross-examination without realizing that their credibility was at issue" and whether the accomplices were "properly subjected to thorough and detailed cross-examination." *State v. Simmons*, 282 Kan. 728, 741, 148 P.3d 525 (2006).

In this case, the jury was clearly aware of and properly instructed on the possible credibility issues concerning the accomplice testimony. Defense counsel went so far as to highlight these issues in closing argument—asking the jury to recognize that "[t]he source of this information . . . are the two . . . co-defendants," and that the codefendants "entered pleas to lesser charges to reduce their time," and that "in looking out for their own interests agree to this lesser charge and agree to testify against" Goens.

The record makes it clear that the jury was well informed about the possible mixed motives at play during the accomplice testimony. The instruction Goens now argues should have been given would not have added materially to the jury's understanding of these issues. As such, we find no clear error.

The trial court did not abuse its discretion by ordering Goens to serve his sentences consecutively.

In most cases, "'it is within the trial court's sound discretion to determine whether a sentence should run concurrent with or consecutive to another sentence.'" *State v. Baker*, 297 Kan. 482, 484, 301 P.3d 706 (2013). "In fact, this principle of a judge's discretion is so entrenched that the legislature determined a defendant cannot raise the issue of whether imposing consecutive sentences is an abuse of discretion if the sentence is imposed under the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 et seq." *State v. Mosher*, 299 Kan. 1, 2-3, 319 P.3d 1253 (2014). However, appellate courts can review consecutive sentences if one of the sentences is for an off-grid crime because the resulting controlling sentence is not entirely a presumptive sentence. *State v. Young*, 313 Kan. 724, 731-32, 490 P.3d 1183 (2021). "'[A] life sentence for an off-grid crime is not considered a "presumptive sentence" under the KSGA.'" *Baker*, 297 Kan. at 484. Because Goens' sentence for felony murder is classified as an off-grid crime, the

KSGA does not preclude our review. See *State v. Brune*, 307 Kan. 370, 371, 409 P.3d 862 (2018).

The standard for determining whether a district court abused its discretion is whether

"judicial action (1) is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law, i.e., if the discretion is guided by an erroneous legal conclusion; or (3) is based on an error of fact, i.e., if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based." *Baker*, 297 Kan. at 484.

Goens has the burden to prove the trial court abused its discretion. To sustain his burden, he must show that no reasonable person would have taken the trial court's view.

Neither our statutes nor our caselaw set definitive criteria for when a district court should order sentences to be served concurrently or consecutively. See *State v. Darrah*, 309 Kan. 1222, 1227, 442 P.3d 1049 (2019). The State argued throughout trial and at sentencing that consecutive sentences were warranted because Goens was the mastermind and gunman, he lacked remorse, he failed to take responsibility for his actions, and he repeatedly lied on the stand at trial. Goens argues that he was punished for exercising his constitutional rights and demanding a fair trial. Goens claims that he took responsibility for his actions by pleading guilty to possession with intent to distribute.

While the district court's overall summary of its reasons for ordering Goens' sentences to run consecutive was sparse, the judge explicitly stated that Goens was not being punished for exercising his constitutional rights. Instead, the district court stated that it was ordering Goens' sentences to run consecutive based on the "primary consideration" that these events constituted several different events rather than one occurrence. Because of that, there were several opportunities for Goens to abandon the plan, but Goens never did. This along with "other" considerations were the basis for the district court's decision.

The lack of a lengthy explanation does not constitute an abuse of discretion. See *State v. Frecks*, 294 Kan. 738, 742, 280 P.3d 217 (2012) ("While it is certainly the better practice for the district court to include an explanation of its reasons when it imposes consecutive life sentences, a sentencing judge's failure to engage in a lengthy colloquy does not amount to an abuse of discretion. Here, the sentencing judge did

provide minimal justification for the decision to impose the life sentences consecutively. Reasonable people may disagree as to whether the sentences should have been imposed consecutively or concurrently; however, under the facts of this case, it was not an abuse of discretion to impose the life sentences consecutively.").

In arguing that the district court acted reasonably, the State cites two cases which help to provide context for when other district courts have ordered consecutive sentences. See *State v. Ross*, 295 Kan. 1126, 1138-39, 289 P.3d 76 (2012) (court considered the suffering of the victim, defendant's lack of compassion, and the extent of harm to the victim's family); *Mosher*, 299 Kan. at 3-4 (court considered the amount of planning and effort that went into the murder and how it could have been avoided).

Our own review of the caselaw turns up other such instances. See *Darrah*, 309 Kan. at 1227-28 (court made no specific findings of fact, but acted reasonably because defendant was central to the conspiracy and acted as a leader in the commission of the crimes); *Baker*, 297 Kan. at 484-85 (brutality of the murder on an innocent baby was not offset by a showing of remorse, acceptance of responsibility, or a decision to enter a plea); *State v. Wilson*, 301 Kan. 403, 406-07, 343 P.3d 102 (2015) (defendant's shooting and/or attempted shooting of his five neighbors was unprovoked); *Brune*, 307 Kan. at 371 (considering evidence of planning, the egregiousness and brutality of the murder, the lack of legitimate provocation, lack of responsibility); *State v. Horn*, 302 Kan. 255, 257, 352 P.3d 549 (2015) (defendant's decision to murder a child who could be a witness against him was especially heinous and the defendant had a lack of regard for others' safety by setting an apartment building on fire).

We recognize that Goens' actions may be less egregious than many of the cases in which the court has upheld a district court's decision to order sentences be served consecutively. But simply not being the worst of the worst does not require the lower court to order his sentences to run concurrent. Because Goens has failed to meet his burden to show that no reasonable person would have ordered his sentences be served consecutively, we affirm the district court.

Affirmed.

Bar Docket No. 24465

In the Matter of DOUGLAS CHARLES FARCHMIN, *Respondent.*

(535 P.3d 1121)

ORDER OF DISBARMENT

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

On April 30, 2010, the court admitted Douglas Charles Farchmin to the practice of law in Kansas.

On May 9, 2022, the court temporarily suspended Farchmin's law license under Supreme Court Rule 219(g)(2) (2022 Kan. S. Ct. R. at 274). That temporary suspension resulted from Farchmin's entry into a diversion agreement for charges of possession of methamphetamine, a severity level 5 felony in violation of K.S.A. 2022 Supp. 21-5706; possession of marijuana, a class B misdemeanor in violation of K.S.A. 2022 Supp. 21-5706; and possession of drug paraphernalia, a class B misdemeanor in violation of K.S.A. 2022 Supp. 21-5709. See Rule 219(a)(1) (defining "conviction" under that rule to include entry into a diversion agreement). Farchmin's license remains suspended.

On August 29, 2023, Farchmin's request to voluntarily surrender his license was submitted to the Office of Judicial Administration under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). At that time, Farchmin faced three docketed complaints in the Office of the Disciplinary Administrator.

The court accepts Farchmin's surrender of his Kansas law license, disbars Farchmin pursuant to Rule 230(b), and revokes Farchmin's license and privilege to practice law in Kansas.

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

The court notes that under Rule 230(b)(1)(C), any pending board proceeding or case terminates effective the date of this

order. The Disciplinary Administrator may direct an investigator to complete a pending investigation to preserve evidence.

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

Dated this 3rd day of October 2023.

No. 124,674

ROBERT QUINN, *Appellant*, v. STATE OF KANSAS, *Appellee*.

(537 P.3d 94)

SYLLABUS BY THE COURT

APPEAL AND ERROR—*Issue Waived if Not Preserved by Petition for Review.* Without application of a permissive exception for plain error, a party waives an issue not preserved by a petition for review.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 640, 522 P.3d 282 (2022). Appeal from Wyandotte District Court; AARON T. ROBERTS, judge. Submitted without oral argument September 15, 2023. Opinion filed October 20, 2023. Judgment of the Court of Appeals affirming the district court is vacated as to the issues subject to review. Judgment of the district court is affirmed.

Rosie M. Quinn, of Rosie M. Quinn Attorney LLC, of Kansas City, was on the brief for appellant.

Kayla Roehler, deputy district attorney, *Mark A. Dupree Sr.*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

LUCKERT, C.J.: Robert Quinn appeals a district court judge's summary denial of his motion for relief under K.S.A. 2020 Supp. 60-1507 and the judge's refusal to appoint him counsel. A Court of Appeals panel affirmed the district court, holding that Quinn filed the motion too late for it to be considered and that his claim is precluded under res judicata principles. Quinn did not seek review of the panel's res judicata holding. That failure means the Court of Appeals res judicata holding is not before us to review and the Court of Appeals decision that Quinn's arguments are precluded is unchallenged. We thus affirm the Court of Appeals. The Court of Appeals decision to affirm Quinn's convictions based on res judicata principles thus stands. We vacate the remaining portions of the Court of Appeals decision.

FACTS AND PROCEDURAL HISTORY

Over a decade ago, a jury convicted Robert Quinn of one count of rape, and a district court judge sentenced him to 272

months in prison. The Court of Appeals affirmed his conviction and sentence. *State v. Quinn*, No. 109,321, 2015 WL 423, 653 (Kan. App.) (unpublished opinion), *rev. denied* 302 Kan. 1019 (2015). The clerk of the appellate court issued a mandate on August 25, 2015.

About five years later, Quinn filed a pro se motion under K.S.A. 2020 Supp. 60-1507. The motion, filed in Wyandotte District Court, asserted (1) his trial counsel did not adequately probe the alleged victim's veracity and (2) the alleged victim lied. He included a letter requesting appointment of counsel. The district court decided Quinn's motion could be summarily denied without appointment of counsel because Quinn did not show that manifest injustice excused the untimely filing. The district judge relied on the one-year time limitation in K.S.A. 2020 Supp. 60-1507(f) for motions seeking postjudgment relief in criminal cases and found that Quinn did not file his motion until several years after that deadline had passed.

Quinn's current appellate counsel entered an appearance for Quinn and timely appealed the district court judge's summary dismissal of Quinn's motion. She later filed a motion with the clerk of the appellate courts to recall the mandate in his underlying direct appeal (Appeal No. 109,321), arguing the mandate failed to meet usual and customary procedures because it did not recite the denial of and date of denial of the petition for review, did not have the court seal affixed, and did not certify the copy of the Court of Appeals decision. The Court of Appeals granted the motion and issued a corrected mandate on April 19, 2022. *Quinn v. State*, 62 Kan. App. 2d 640, 641, 522 P.3d 282 (2022).

Noting the corrected mandate, in Quinn's appellate brief his counsel argued the district court judge's decision should be reversed because "[i]t was manifestly unjust for the district court to summarily dismiss Quinn's case as untimely without appointing Quinn an attorney." Quinn's counsel asserted in the alternative that Quinn's motion under K.S.A. 2020 Supp. 60-1507 was timely filed because the date that started the one-year clock was the date of the 2022 corrected mandate, not the date of the procedurally deficient mandate issued in 2015. The State responded to Quinn's substantive points about when the limitation period began to run.

It also argued Quinn's issues were precluded under the doctrine of res judicata.

The Court of Appeals rejected Quinn's arguments. It concluded that Quinn was not entitled to counsel, he did not show that manifest injustice excused his untimely 60-1507 motion, the corrected mandate did not restart the one-year time limitation, and res judicata precluded consideration of Quinn's claims. 62 Kan. App. 2d at 642-53.

Quinn petitioned for discretionary review, asking this court to review the Court of Appeals' rulings on the timeliness of his filing and manifest injustice. Quinn did not ask this court to review the panel's conclusion that his claims were precluded under res judicata principles.

We granted review and have jurisdiction under K.S.A. 20-3018(b) (providing for petition for review of Court of Appeals decisions) and K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions).

ANALYSIS

The outcome of our decision is dictated by Quinn's failure to seek review of the Court of Appeals' holding that his motion is precluded under the doctrine of res judicata. *Quinn*, 62 Kan. App. 2d at 652-53. Absent application of a permissive exception for plain error, a party waives an issue not preserved by a petition for review. *State v. Valdiviezo-Martinez*, 313 Kan. 614, 624, 486 P.3d 1256 (2021) (nonjurisdictional issues waived if review not sought); Supreme Court Rule 8.03(b)(6)(C)(i) (2023 Kan. S. Ct. R. at 56) ("The Supreme Court will not consider issues not raised before the Court of Appeals or issues not presented or fairly included in the petition for review, cross-petition, or conditional cross-petition.").

The Court of Appeals panel's res judicata holding, reached under well-settled Kansas law, favored the State. 62 Kan. App. 2d at 652-53 (citing *State v. Kingsley*, 299 Kan. 896, 901, 326 P.3d 1083 [2014]; *Drach v. Bruce*, 281 Kan. 1058, Syl. ¶ 14, 136 P.3d 390 [2006]; *Woods v. State*, 52 Kan. App. 2d 958, Syl. ¶ 1, 379 P.3d 1134 [2016]); cf. *Kansas Fire and Safety Equipment v. City of Topeka*, 317 Kan. 418, 425, 531 P.3d 504 (2023). Noting that

Quinn raised ineffective assistance of counsel claims in his earlier appeal, it held Quinn had the opportunity then to argue the ineffective assistance of counsel claims he now raises. He also could have argued the alleged victim lied. His failure to make those arguments in his earlier appeal erected a res judicata bar to him now doing so. 62 Kan. App. 2d at 652-53. Another procedural bar to his argument then arises from Quinn not taking issue with the Court of Appeals res judicata holding in his petition for review. That failure means the issue is not before us.

Having reviewed the Court of Appeals' analysis, we see no basis under Rule 8.03(b)(6)(C) to review the res judicata holding. The district court's decision to deny Quinn's motion for relief thus stands affirmed under the Court of Appeals' holding that Quinn's motion "fails based on res judicata." 62 Kan. App. 2d at 653.

Because that ruling on res judicata grounds disposes of the appeal, we need not decide the rest of Quinn's issues or address the Court of Appeal's alternative holding that Quinn's filing under K.S.A. 2020 Supp. 60-1507 was untimely. Anything we would say would be dicta as it would be unnecessary to the resolution of the case. We thus decline to address Quinn's remaining issues. We vacate those portions of the Court of Appeals decision that do not to relate to its res judicata holding, and those vacated portions have no precedential value. See *Building Erection Svcs. Co. v. Walton Construction Co.*, 312 Kan. 432, 443, 475 P.3d 1231 (2020) (declining to address issues discussed by Court of Appeals because doing so would be dicta and vacating part of Court of Appeals decision not addressed in this court's decision).

Judgment of the Court of Appeals affirming the district court is vacated as to the issues subject to review. Judgment of the district court is affirmed.

No. 124,724

STATE OF KANSAS, *Appellee*, v. BRANDON KEITH JORDAN, *Appellant.*

(537 P.3d 443)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Alternative-Means Crime—Court Gives Jury Instructions with Statutory Alternatives for Element of the Crime.* The term "alternative-means crime" refers to a crime which can be committed in more than one way. The Legislature creates an alternative-means crime by enacting criminal statutes which list distinct alternatives for an element of the crime. And the district court presents the jury with an alternative-means crime by giving jury instructions that incorporate more than one of the distinct statutory alternatives for an element of the crime. Presenting the jury with an alternative-means crime can raise questions about whether the jury unanimously agreed on the means supporting its guilty verdict. And Kansas criminal defendants have a statutory right to a unanimous verdict.

2. SAME—*Options Within a Means vs. Alternative Means.* In contrast, when criminal statutes and jury instructions incorporating them merely describe a material element or the factual circumstances in which a material element may be proven, the Legislature has created options within a means, not alternative means. Options within a means describe secondary matters that do not state additional and distinct ways of committing the crime. Thus, such options do not trigger statutory jury unanimity protections.

3. APPEAL AND ERROR—*Alternative-Means Issue Review—Appellate Court Review.* When reviewing an alternative-means issue, the appellate court first considers whether the district court presented an alternative-means crime to the jury. To determine that, the reviewing court looks to the relevant statute's language and structure to decide whether the Legislature meant to list distinct alternatives for an element of the crime. If alternative means were not presented, the error inquiry ends.

4. CRIMINAL LAW—*No Alternative Means of Committing Fleeing and Eluding in Statute.* K.S.A. 2019 Supp. 8-1568(b)(2) does not set forth alternative means of committing fleeing and eluding by attempting to elude capture for any felony. The statute's plain language shows the distinct material element of fleeing and eluding under subsection (b)(2) is evading capture for any felony and the specific underlying felony is merely a description of a material element or factual circumstance which may prove the crime.

5. SAME—*Subject Matter Jurisdiction Conferred by Kansas Constitution to District Courts—Three Requirements to Invoke Jurisdiction.* In criminal cases, the Kansas Constitution confers subject matter jurisdiction on district courts. But jurisdiction is acquired in a criminal case upon the filing or

amendment of a complaint, indictment, or information. Put another way, while the Kansas Constitution bestows subject matter jurisdiction on the district courts, the State must still properly invoke that jurisdiction through a charging document. To properly invoke jurisdiction, the charging document must satisfy three requirements. It must (1) show the case has been filed in the correct court; (2) show the court has territorial jurisdiction over the crime; and (3) allege facts that, if proved beyond reasonable doubt, would constitute a crime under Kansas law.

6. EVIDENCE—*Evidentiary Challenge Raised Before Trial—Timely and Specific Objection Required at Trial to Preserve for Appellate Review.* Even when an evidentiary challenge is raised and ruled on before trial, a party must also make a timely and specific objection at trial to preserve the challenge for appellate review under K.S.A. 60-404.

7. TRIAL—*Prosecutors Have Broad Latitude*. Prosecutors have broad latitude in crafting their closing arguments and drawing reasonable inferences from the evidence. Stating an opinion about a witness' credibility falls outside the bounds of proper argument, but discussing the legitimate factors a jury may consider in assessing credibility does not. One legitimate factor for the jury to consider in assessing witness credibility is whether a witness has motive to be dishonest.

Appeal from Shawnee District Court; NANCY E. PARRISH, judge. Oral argument held May 18, 2023. Opinion filed October 20, 2023. Affirmed.

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

Jodi Litfin, deputy district attorney, argued the cause, and *Kris W. Kobach*, attorney general, was with her on the brief for appellee.

The opinion of the court was delivered by

WALL, J.: After a law enforcement officer responded to a bank where Brandon Keith Jordan was trying to pass a fraudulent check, Jordan led the officer on a high-speed chase that ended in a fatal car crash. Jordan was convicted of several crimes, including felony murder based on the underlying inherently dangerous felony of fleeing or attempting to elude a police officer.

In this direct appeal, Jordan raises six claims of error. First and foremost, he contends that his convictions for felony murder and fleeing and eluding a police officer are tainted by an alternative-means error. Alternative means is a term we have adopted to describe a single offense that can be committed in more than one

way. Alternative-means issues arise when the statute and jury instructions incorporating that statute list distinct alternatives for an element of the crime. Presenting an alternative-means crime to the jury can raise questions about whether jurors unanimously agreed on the means supporting their guilty verdict. But when a statute and any jury instruction incorporating that statute merely describe a material element of a crime or a factual circumstance that would prove the crime, such descriptions are "options within a means," not alternative means. Options within a means do not create distinct alternatives for an element of the crime and thus do not raise jury unanimity concerns.

Jordan argues the jury instructions on his fleeing-and-eluding charge created an alternative-means crime by listing more than one felony for which he was attempting to elude capture. But we hold that the underlying felony for which a defendant is attempting to elude capture under K.S.A. 2019 Supp. 8-1568(b)(2) is merely an option within a means and Jordan failed to establish error.

Second, Jordan claims the district court lost subject matter jurisdiction when the State substituted a grand jury indictment for a pending criminal complaint. But the indictment was sufficient to invoke the district court's jurisdiction under our established precedent, and the substitution of the indictment did not deprive the court of jurisdiction.

Third, in the alternative to his jurisdictional challenge, Jordan argues the substitution of the indictment deprived him of due process of law. But the indictment gave Jordan adequate notice of the charges and a meaningful opportunity to defend against them. Thus, the substitution procedure complied with Jordan's due process rights.

Fourth, Jordan argues that the statements he made to police should not have been admitted as evidence at trial because they were involuntary. But Jordan failed to lodge a timely and specific objection to this evidence at trial as required by K.S.A. 60-404. Jordan's failure to do so precludes appellate review of the issue.

Fifth, Jordan contends the prosecutor erred during closing argument by telling the jury that a State's witness had no motive to

be untruthful. But the record confirms that the prosecutor's comment was tied to the evidence and made during a broader discussion of legitimate factors bearing on a witness' credibility. Thus, the statement fell just within the bounds of proper argument.

Finally, Jordan argues the cumulative impact of these trial errors deprived him of a fair trial. But the cumulative-error doctrine does not apply because Jordan failed to establish any error. For these reasons, we affirm the judgment of the district court.

FACTS AND PROCEDURAL BACKGROUND

On October 30, 2019, Jordan went to Fidelity State Bank in Topeka. Claiming he was Christopher Tabor, Jordan picked up a debit card linked to an account he had recently opened in Tabor's name. Jordan also deposited in part and cashed in part a check made out to Tabor, endorsing the check in Tabor's name. The check was fraudulent.

On November 7, 2019, Jordan pulled up to the drive-through of a different Fidelity State Bank location in Topeka. Shelley Cunningham was riding in the front passenger seat. Jordan tried to pass another check made out to Tabor. But the bank had flagged the account as fraudulent. So employees called 911 and tried to stall Jordan.

Lieutenant Michael Marnach with the Kansas Highway Patrol heard the call from dispatch. He responded to the scene, pulling up behind Jordan. Lieutenant Marnach was in uniform and driving a marked patrol vehicle. Jordan noticed Lieutenant Marnach in the rearview mirror and told Cunningham there was a police officer behind them. Jordan left the bank, turning onto Gage Boulevard. Lieutenant Marnach followed.

Jordan accelerated as he drove down Gage Boulevard, weaving in and out of traffic. Jordan then turned right onto a residential street. As Lieutenant Marnach turned onto the same street, he activated his lights and sirens. After following Jordan for about a block and a half, Lieutenant Marnach looked at his speedometer and saw he was going over 70 miles per hour. Jordan eventually ran a stop sign and broadsided an SUV. The SUV's driver, Dennis Affolter, later died of injuries he sustained in the crash.

At the scene of the accident, Jordan told two officers from the Topeka Police Department that he was Christopher Tabor. And he continued to identify himself as Tabor even after he and Cunningham were transported to the hospital. Eventually, officers determined Jordan's real identity. While in the hospital, Jordan told law enforcement he fled because he feared going back to jail.

Law enforcement searched the car Jordan had been driving. They found a laptop, a credit card in Tabor's name, a notebook containing what law enforcement believed to be bank account and routing numbers, a container with methamphetamine, and a pipe with marijuana. The laptop had software that enabled users to alter checks.

A reconstruction of the accident determined that Jordan was going about 86 miles per hour in a 35-mile-per-hour zone when he struck the driver's side of the SUV. The SUV was going about 30 miles per hour.

The State filed a criminal complaint charging Jordan with several offenses. But about a week later, a grand jury indicted Jordan of one count of first-degree felony murder, one count of fleeing and eluding, two counts of interference with law enforcement, two counts of forgery, one count of identity theft, one count of driving with a suspended license, and one count of reckless driving. The district court granted the State's motion to substitute the grand jury indictment and dismissed the complaint.

At trial, Cunningham testified that Jordan started speeding up right after leaving the bank's drive-through. She remembered that Jordan said he was not going to stop. She also remembered asking him to stop. But she could not recall whether she made that request before or after Jordan said he was not going to stop.

Jordan testified in his own defense. Jordan admitted that on the day of the crash, he was at the bank trying to pass a check written out to Tabor. He had been waiting in the bank drive-through for an unusually long time and was afraid someone may have called the police. When he saw Lieutenant Marnach's patrol vehicle, Jordan decided to leave.

Jordan admitted he was driving "pretty fast" down Gage Boulevard because he wanted to get away from the bank. But he said he did not see a police vehicle pursuing him. Jordan testified

the windows of the car were up and the radio was on, so he never heard any sirens.

Jordan explained that he was wearing only his reading glasses at the time, even though he needs bifocals. As he approached the intersection where the crash occurred, he thought he saw lights in the rearview mirror. He asked Cunningham if there were lights behind them, and she confirmed there were. He was squinting and looking in the rearview mirror when he heard Cunningham yell, "look out," and then he hit the SUV.

Jordan thought he was going 55 to 60 miles per hour before the accident. He denied telling Cunningham he was not going to stop. But he admitted using the name Christopher Tabor several times after the accident.

The jury convicted Jordan on all counts. The district court sentenced Jordan to a controlling term of life imprisonment without the possibility of parole for 25 years.

Jordan directly appeals his convictions to our court. Jurisdiction is proper. K.S.A. 2022 Supp. 22-3601(b)(3)-(4) (life sentence and off-grid crimes appeal directly to Supreme Court).

ANALYSIS

As noted, Jordan raises six issues on appeal. We address these issues in the order presented in his briefing.

I. *Jordan's Felony-Murder and Fleeing-and-Eluding Convictions Are Not Tainted by an Alternative-Means Error*

Jordan argues his convictions for felony murder and fleeing and eluding must be reversed due to an alternative-means error. Jordan was charged with, and the jury was instructed on, committing felony fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b)(1) (committing certain acts during police pursuit) *and* K.S.A. 2019 Supp. 8-1568(b)(2) (attempting to elude capture for any felony). We have held that these two subsections create alternate means of committing the offense. See *State v. Davis*, 312 Kan. 259, 266, 474 P.3d 722 (2020) (fleeing-and-eluding statute sets out alternative means in subsections [b][1] and [b][2]). The fleeing-and-eluding charge also served as the inherently dangerous felony supporting Jordan's felony-murder charge. See K.S.A.

2019 Supp. 21-5402(c)(1)(R). Thus, both Jordan's felony-murder charge and his fleeing-and-eluding charge were alternative-means crimes. See 312 Kan. at 262 (felony murder is alternative-means crime if based on alternative means of fleeing and eluding).

But the focus of Jordan's argument is not on the alternate means of committing felony fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b)(1) and subsection (b)(2). Instead, he claims there is yet another alternative-means issue within K.S.A. 2019 Supp. 8-1568(b)(2). Jordan argues the district court's instructions presented the jury with alternative means of committing fleeing and eluding under subsection (b)(2) by listing two underlying felonies for which he was attempting to elude capture—forgery and identity theft. And he claims there was insufficient evidence to support a conviction for one of those alleged means—identity theft.

To resolve this issue, we first identify additional facts relevant to our analysis. Then, we determine whether the district court presented the jury with an alternative means crime. To do that, we interpret K.S.A. 2019 Supp. 8-1568(b)(2) to decide whether the Legislature intended to create an alternative means crime. Through that analysis, we conclude that subsection (b)(2) merely creates options within a means. And because Jordan fails to meet this threshold inquiry, we need not address the additional steps of an alternative-means error analysis.

A. *Relevant Facts*

The jury was instructed that to establish the crime of felony murder, the State must prove beyond a reasonable doubt that Jordan killed Affolter and the killing was done while Jordan was committing fleeing and eluding.

The elements instructions on fleeing and eluding incorporated elements of fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b)(1)(C) (engaging in reckless driving during police pursuit), K.S.A. 2019 Supp. 8-1568(b)(1)(D) (involved in motor vehicle accident during police pursuit), and K.S.A. 2019 Supp. 8-1568(b)(2) (attempting to elude capture for any felony). For purposes of subsection (b)(2), the instruction specifically alleged that

Jordan was attempting to elude capture for "forgery and/or identity theft":

"Brandon Jordan is charged in Count 3 with fleeing or attempting to elude a police officer. Mr. Jordan pleads not guilty.

"To establish this charge, each of the following claims must be proved:

"1. Brandon Jordan was driving a motor vehicle.

"2. Brandon Jordan was given a visual or audible signal by a police officer to bring the motor vehicle to a stop.

"3. Brandon Jordan willfully failed to or refused to bring the motor vehicle to a stop for, or otherwise fled or attempted to elude, a pursuing police vehicle.

"4. The police officer's vehicle, from which the signal to stop was given, was appropriately marked showing it to be an official police vehicle.

"5. *Brandon Jordan was engaged in reckless driving and/or was involved in a motor vehicle accident and/or attempted to elude capture for forgery and/or identity theft.*

"6. This act occurred on or about the 7th day of November, 2019, in Shawnee County, Kansas." (Emphasis added.)

The district court also gave separate instructions on the elements of forgery and identity theft. See K.S.A. 2019 Supp. 21-5823(a)(2); K.S.A. 2019 Supp. 21-6107(a)(1).

The jury convicted Jordan of felony murder, fleeing and eluding, forgery, identity theft, and reckless driving, among other offenses.

B. *Standard of Review and Relevant Legal Framework*

The term "alternative-means crime" refers to a crime which can be committed in more than one way. *State v. Rucker*, 309 Kan. 1090, 1094, 441 P.3d 1053 (2019). The Legislature creates an alternative-means crime by enacting criminal statutes which list distinct alternatives for an element of the crime. See *State v. Brown*, 295 Kan. 181, 199-200, 284 P.3d 977 (2012). And the district court presents the jury with an alternative-means crime by giving jury instructions that incorporate more than one of the distinct statutory alternatives for an element of the crime. *State v. Sasser*, 305 Kan. 1231, 1239, 391 P.3d 698 (2017). Presenting the jury with

an alternative-means crime can raise questions about whether the jury unanimously agreed on the means supporting its guilty verdict. See *Brown*, 295 Kan. at 188. And Kansas criminal defendants have a statutory right to a unanimous verdict. See K.S.A. 22-3421 and K.S.A. 22-3423(1)(d); *State v. Thomas*, 302 Kan. 440, 448, 353 P.3d 1134 (2015) ("In Kansas, a criminal defendant has a statutory right to a unanimous jury verdict.").

In contrast, when criminal statutes merely "describ[e] a material element" or "the factual circumstances in which a material element may be proven," the Legislature has created options within a means, not alternative means. *Brown*, 295 Kan. at 194, 196-97. Options within a means describe secondary matters that "do not state additional and distinct ways of committing the crime." 295 Kan. at 196. Thus, such options do not trigger statutory jury-unanimity protections, even when included in the jury instructions. 295 Kan. at 197, 200.

When analyzing alternative-means claims, the first consideration is whether the district court presented an alternative-means crime to the jury. See *Brown*, 295 Kan. at 193. To determine that, the reviewing court looks to the relevant statute's language and structure to decide whether the Legislature meant to list distinct alternatives for an element of the crime. "Issues of statutory interpretation and construction, including issues of whether a statute creates alternative means, raise questions of law," and our review is unlimited. 295 Kan. at 193-94.

If alternative means were not presented, the error inquiry ends. 295 Kan. at 200. In other words, we move on to consider the sufficiency of the evidence supporting each means only when the district court has presented an alternative-means crime to the jury. See *State v. Butler*, 307 Kan. 831, 841, 416 P.3d 116 (2018).

C. *Specifying the Underlying Felonies for Fleeing and Eluding Under K.S.A. 2019 Supp. 8-1568(b)(2) Creates Options Within a Means, Not Alternative Means*

As noted, Jordan does not focus his argument on the alternative means of committing fleeing and eluding created by K.S.A. 2019 Supp. 8-1568(b)(1) and (b)(2). In fact, Jordan acknowledges the sufficiency of the evidence supporting a conviction for fleeing

and eluding under subsection (b)(1). And Jordan does not dispute that the State presented sufficient evidence that he committed fleeing and eluding under subsection (b)(2) by attempting to evade capture for forgery.

Instead, Jordan argues that the district court presented an additional alternative-means crime to the jury by identifying more than one felony for which he was attempting to elude capture under K.S.A. 2019 Supp. 8-1568(b)(2)—forgery and identity theft. And Jordan argues alternative-means error exists because the State offered insufficient evidence for one of those alleged means—attempting to elude capture for identity theft.

To prevail, Jordan must first show that the district court presented the jury with an alternative-means crime by listing different underlying felonies for fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b)(2). See *Davis*, 312 Kan. at 265 (touchstone of the inquiry is whether Legislature intended to create alternative means of committing the offense).

If, on the other hand, the district court presented the jury with options within a means, then no alternative-means error exists, and the inquiry ends there. In that scenario, the State need not prove that Jordan tried to elude capture for both forgery and identity theft. It is sufficient to prove that Jordan tried to elude capture for forgery alone. See *Brown*, 295 Kan. at 197-98; *State v. Brooks*, 298 Kan. 672, 677, 317 P.3d 54 (2014). Jordan does not challenge the sufficiency of the evidence showing that he tried to elude capture for forgery under K.S.A. 2019 Supp. 8-1568(b)(2). Thus, if K.S.A. 2019 Supp. 8-1568(b)(2) creates options within a means, this conclusion disposes of Jordan's claim.

Turning to K.S.A. 2019 Supp. 8-1568(b)(2), we must decide whether the Legislature intended to "'list alternative distinct, material elements of a crime'" or, instead, to merely "'describe a material element or to describe the factual circumstances in which a material element may be proven.'" *Davis*, 312 Kan. at 265 (quoting *Brown*, 295 Kan. at 194, 196-97). To discern legislative intent, we look to the statute's plain language. *Bruce v. Kelly*, 316 Kan. 218, 224, 514 P.3d 1007 (2022). The focus of our analysis is the statute, not the jury instructions, because "only the language of a

statute can create alternative means for a crime." *State v. Cottrell*, 310 Kan. 150, 160, 445 P.3d 1132 (2019).

K.S.A. 2019 Supp. 8-1568(b)(2) provides:

"Any driver of a motor vehicle who willfully fails or refuses to bring such driver's vehicle to a stop, or who otherwise flees or attempts to elude a pursuing police vehicle or police bicycle, when given visual or audible signal to bring the vehicle to a stop, and who . . . *is attempting to elude capture for the commission of any felony*, shall be guilty as provided in subsection (c)(2)." (Emphasis added.)

"'Typically . . . a legislature will signal its intent to state alternative means through structure, separating alternatives into distinct subsections of the same statute.'" *Davis*, 312 Kan. at 265. Here, K.S.A. 2019 Supp. 8-1568(b)(2) does not list any underlying felonies which could support a conviction, let alone list them in separate subsections.

Instead, the statute's plain language criminalizes eluding capture for "any felony." The use of the indefinite adjective "any," without further elaboration or clarification anywhere in the statute, suggests the specific felony for which one is attempting to elude capture is immaterial. See Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/any (defining the adjective "any" as "one or some indiscriminately of whatever kind"); American Heritage Online Dictionary, https://www.ahdictionary.com/word/search.html?q=any (defining the adjective "any" as "[o]ne or some; no matter which"). Another statute in Kansas' criminal code does define a "felony" to include any "crime punishable by death or by imprisonment in any state correctional institution or a crime which is defined as a felony by law." K.S.A. 2022 Supp. 21-5102(a). But this definition does little to narrow the list of possible offenses for which one can elude capture under K.S.A. 2019 Supp. 8-1568(b)(2). Together, this plain language suggests that the precise felony or felonies from which a defendant attempted to elude capture is a secondary matter that does not create an alternative-means offense. See *Brown*, 295 Kan. 181, Syl. ¶ 10 (definitional statutory language that merely elaborates on elements rather than defining the subject crime signals a secondary matter that does not raise an alternative-means issue).

Moreover, the nature of the conduct criminalized under K.S.A. 2019 Supp. 8-1568(b)(2) does not change depending on the underlying felony. The primary conduct that distinguishes the means under subsection (b)(2) from the means under subsection (b)(1) is eluding or "evading capture" for any felony. See *Davis*, 312 Kan. at 266 (finding material difference between fleeing and eluding under K.S.A. 2019 Supp. 8-1568[b][1] and [b][2] because subsection [b][1] criminalizes "dangerous driving" while subsection [b][2] criminalizes "evading capture"). And the character of that conduct remains the same whether an offender is attempting to evade capture for one felony (such as forgery) or another (such as identity theft). This further supports our conclusion that the specific felony for which the defendant is attempting to evade capture merely describes a factual circumstance proving the element of attempting to elude capture for a felony.

Rather than focusing on the statutory language, Jordan focuses on the jury instructions. He claims that by specifying certain underlying felonies, the fleeing and eluding instructions created alternative means of committing the crime under K.S.A. 2019 Supp. 8-1568(b)(2). For support, he relies on *Sasser*, where we described the unique character of alternative-means error:

> "An alternative means error is not just about sufficiency of the evidence. It is a jury unanimity error injected into a trial through the confluence of the instructions given to the jury and the lack of evidence to support one or more means of committing the crime as set out in the instructions. This circumstance generates uncertainty about the verdict because, absent sufficient evidence that the defendant employed each one of the means submitted to the jury, it is possible jurors 'may have based their finding[s] of guilt on an invalid ground.'" 305 Kan. at 1236.

Jordan believes *Sasser* suggests that jury instructions can create jury-unanimity issues independent of the relevant statute. But he misreads the decision. *Sasser* merely explained the unique nature of alternative-means errors—they are jury-unanimity problems created by the confluence of insufficient evidence and instructional error. See 305 Kan. at 1237 (an alternative-means error "can only occur when the lack of evidence is combined with overbroad language in the jury instructions"); see also *Brown*, 295 Kan. at 226 (Moritz, J., concurring) ("In analyzing alternative means cases, we blend concepts of sufficiency of the evidence . . . with instructional error ").

The jury instructions are the mechanism by which a statutory alternative-means offense is presented to the jury. And an alternative-means issue can arise only if the jury instructions incorporate more than one statutory means for committing a crime. But it is the statute, and not the instructions, that creates those alternative means. "[A] jury instruction that lists descriptions of how a material element might be satisfied does not, on its own, create alternative means. To hold otherwise would permit a jury instruction to override legislative intent and effectively revise the criminal code." *Cottrell*, 310 Kan. at 160; see also *Brown*, 295 Kan. at 200 (even if included in a jury instruction, options within a means do not raise a sufficiency issue that requires a court to examine whether the option is supported by evidence).

In sum, we hold that the district court did not present an alternative-means crime to the jury by listing more than one felony in the elements instruction for K.S.A. 2019 Supp. 8-1568(b)(2). Granted, the district court did present alternative means of committing the offense of fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b) by instructing the jury on the means set forth in both subsection (b)(1) and (b)(2). But Jordan does not dispute that the State presented sufficient evidence to support his conviction for fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b)(1) both by engaging in reckless driving and by being involved in a motor vehicle accident during a police pursuit—both being options within a means under this subsection of the statute. *State v. Castleberry*, 301 Kan. 170, 184-85, 339 P.3d 795 (2014) (acts listed in K.S.A. 2009 Supp. 8-1568[b][1] are options within a means, not alternative means).

Jordan also concedes that the State presented sufficient evidence that he was attempting to evade capture for forgery under K.S.A. 2019 Supp. 8-1568(b)(2). Our review of the record confirms that Jordan's concession is well-founded.

Jordan's claim of error rests only on the sufficiency of the evidence showing he was also attempting to evade capture for identity theft. But as noted, the district court presented the jury with options within a means by listing more than one felony in the relevant instructions for K.S.A. 2019 Supp. 8-1568(b)(2). Thus, the State was not required to present sufficient evidence that Jordan was also trying to elude capture for identity theft. See *Brooks*, 298 Kan. at 677 (lack of evidence supporting one option within a means does not require reversal).

We reject Jordan's claim of alternative-means error and affirm his convictions for felony murder and felony fleeing and eluding.

II. *The District Court Did Not Lose Subject Matter Jurisdiction over Jordan's Case when It Allowed the State to Substitute an Indictment for the Complaint*

Jordan next argues the district court lost subject matter jurisdiction when it granted the State's motion to substitute a grand jury indictment for a pending complaint.

The State originally filed a complaint charging Jordan with first-degree felony murder, fleeing and eluding, interference with law enforcement, driving while suspended, and reckless driving. But about a week later, while the complaint was pending, a grand jury returned an indictment charging Jordan with all the crimes listed in the complaint along with two new counts of forgery and one new count of identity theft.

The State quickly moved to substitute the indictment for the complaint. In its motion, the State argued that K.S.A. 22-3201—which provides that a prosecution in the district court will be upon complaint, indictment, or information—does not prohibit the substitution of a grand jury indictment for a complaint. At a motion hearing, Jordan objected to the substitution, arguing the State was incorrectly interpreting the statute and the substitution deprived him of due process of law. The district court granted the State's motion, reasoning that the substitution aligned with caselaw allowing the State to refile charges after an earlier dismissal. The court then dismissed the original complaint.

Jordan now argues that the district court lost jurisdiction over his case when it allowed the State to substitute the indictment for the complaint. He contends that a district court acquires jurisdiction over a criminal case only if the State charges a crime in accordance with Kansas law. And he claims that his prosecution was not in accordance with Kansas law because no statute expressly permits the substitution of an indictment.

A. *Standard of Review and Relevant Legal Framework*

"The question of whether subject matter jurisdiction exists is one of law subject to unlimited review on appeal." *State v. Dunn*, 304 Kan. 773, 784, 375 P.3d 332 (2016). Subject matter jurisdiction can be

raised at any time, including for the first time on appeal. *Miller v. Preisser*, 295 Kan. 356, 382, 284 P.3d 290 (2012). Thus, this issue is properly before us, even though Jordan did not raise the jurisdictional challenge below.

In criminal cases, the Kansas Constitution confers subject matter jurisdiction on district courts. *State v. Aguirre*, 313 Kan. 189, 224, 485 P.3d 576 (2021). But "'jurisdiction is acquired in a criminal case upon the filing or amendment of a complaint, indictment, or information.'" *State v. Samuel*, 309 Kan. 155, 157, 432 P.3d 666 (2019). Put another way, while the Kansas Constitution bestows subject matter jurisdiction on the district courts, the State must still properly invoke that jurisdiction through a charging document. See *Dunn*, 304 Kan. at 812 ("If the charging document is instead statutorily insufficient, then the State has failed to properly *invoke* the subject matter jurisdiction of the court The problem is not a substantive absence of jurisdiction; it is a procedural failure to demonstrate its existence.").

In *Dunn*, we held that a charging document must meet three requirements. It must (1) show the case has been filed in the correct court; (2) show the court has territorial jurisdiction over the crime; and (3) allege facts that, if proved beyond reasonable doubt, would constitute a crime under Kansas law. 304 Kan. 773, Syl. ¶ 2.

B. *The Indictment Was Sufficient to Invoke the District Court's Jurisdiction*

The grand jury indictment satisfies *Dunn*'s requirements for invoking the Shawnee County District Court's subject matter jurisdiction. The indictment established that the district court, rather than a municipal court, was the proper forum for prosecution. See K.S.A. 22-2601 (except as otherwise provided, district court has exclusive jurisdiction over felonies and other criminal cases arising under state statute). And it alleged that Jordan committed the crimes in Shawnee County, where the indictment was filed. See K.S.A. 22-2602 (prosecution must be in county where the crime was committed); see also Kan. Const. Bill of Rights, § 10 (accused entitled to "a speedy public trial by an impartial jury of the county

or district in which the offense is alleged to have been committed"). Finally, the indictment alleged facts that, if proven, would establish Jordan committed crimes recognized in Kansas. 304 Kan. at 811-12 (charging document is sufficient if "it has alleged facts that would establish the defendant's commission of a crime recognized in Kansas").

C. *Substitution of the Indictment Did Not Deprive the District Court of Jurisdiction*

Granted, Jordan does not dispute that the indictment was sufficient to invoke the district court's jurisdiction when viewed in isolation. Instead, he suggests the district court lost jurisdiction when it allowed the State to substitute the indictment for the complaint. Jordan argues the district court only has jurisdiction over criminal cases that are prosecuted in accordance with state statute and Kansas statute does not authorize substitution of an indictment for the original complaint.

Jordan notes that Kansas statutes make clear that a complaint, indictment, or information is necessary to *initiate* a criminal prosecution. See K.S.A. 22-3201(a) ("Prosecutions in the district court shall be upon complaint, indictment or information."); K.S.A. 22-2301 ("Unless otherwise provided by law, a prosecution shall be commenced by filing a complaint with a magistrate."); K.S.A. 22-2303 ("When an indictment is returned, as provided by K.S.A. 22-3011, and amendments thereto, a prosecution shall be deemed to have been begun."). And he is correct that these same statutes do not explicitly authorize the substitution of one charging document for another. But, as the State observes, these statutes do not prohibit substitution either. Rather, the statutes are silent on this procedure. And statutory silence is not akin to statutory prohibition.

Moreover, substituting an indictment in place of the original complaint aligns with our precedent addressing charging documents. As noted, the indictment satisfied *Dunn*'s requirements for properly invoking the district court's subject matter jurisdiction. See 304 Kan. 773, Syl. ¶ 2.

We have also held that the dismissal of a complaint (either at the State's request or because of a failure to show probable cause

at a preliminary hearing) does not bar the State from initiating another prosecution on the same charges. See *State v. Harris*, 266 Kan. 610, 614, 975 P.2d 227 (1999) ("A discharge from custody at the end of a preliminary examination is not a bar to another prosecution on the same charges."); *State v. Rowland*, 172 Kan. 224, 227-28, 239 P.2d 949 (1952) ("[T]his court long ago decided that the entering of a *nolle prosequi* with consent of the trial court did not prejudice a fresh prosecution on a new information charging the identical offense set forth in the prior information."). Here, the order of actions was simply reversed—the indictment was filed before the complaint was dismissed. But neither Kansas statute nor our caselaw suggests the sequencing of these events is of any jurisdictional significance.

Faced with a similar challenge in *People v. Huynh*, 98 P.3d 907, 910 (Colo. App. 2004), the Colorado Court of Appeals held that substitution of an indictment did not deprive the district court of subject matter jurisdiction. There, a grand jury returned an indictment after the State had filed a complaint, and the trial court granted the State leave to dismiss the complaint. Like Jordan, the defendant in *Huynh* argued that his convictions must be reversed because they were obtained under an indictment which did not confer jurisdiction upon the trial court. But the Colorado Court of Appeals rejected his argument. It reasoned that Colorado's rules of criminal procedure "neither explicitly allow nor prohibit the filing of an indictment while a previously filed complaint or information is still pending." 98 P.3d at 910. And under Colorado law, a grand jury indictment may be filed after a court has dismissed an information for lack of probable cause at a preliminary hearing. Thus, the Colorado Court of Appeals concluded that there was "no reason why a grand jury indictment cannot be substituted for a pending complaint or information." 98 P.3d at 910.

Like Colorado, Kansas' rules of criminal procedure neither explicitly allow nor prohibit the filing of an indictment while a complaint is pending. And our precedent allows the State to file an indictment after a previous criminal complaint has been dismissed (either at the State's request or because of a failure to show probable cause at a preliminary hearing). We find the rationale in *Huynh* persuasive.

Even so, Jordan argues that K.S.A. 22-2601 prohibited the substitution of the indictment for the complaint in his case. That jurisdictional statute provides: "Except as provided in K.S.A. 12-4104, and amendments thereto, the district court shall have exclusive jurisdiction to try all cases of felony and other *criminal cases arising under the statutes of the state of Kansas*." (Emphasis added.) K.S.A. 22-2601. Jordan interprets the italicized statutory language to mean that district courts have jurisdiction over criminal cases only if they are charged in accordance with Kansas' statutory rules of criminal procedure, and he argues that those rules do not expressly authorize a district court to substitute an indictment for a pending complaint.

But Jordan's interpretation of K.S.A. 22-2601 is flawed. The statutory language central to his argument ("criminal cases arising under the statutes of the state of Kansas") does not refer to how a criminal case is charged. Rather, it refers to those substantive crimes defined in the criminal code. When read in its entirety, it is apparent the Legislature intended K.S.A. 22-2601 to differentiate the subject matter jurisdiction of district courts from municipal courts. And this interpretation is bolstered by the statute's reference to K.S.A. 12-4104, which grants municipal courts jurisdiction to hear cases involving violations of a city ordinance. See *Kelly*, 316 Kan. at 224 (even when statute's language is clear, courts must still consider various provision *in pari materia* to reconcile and bring those provisions into harmony). Thus, K.S.A. 22-2601 does not support Jordan's argument. And we hold that the district court retained jurisdiction over Jordan's case after it substituted the indictment for the complaint.

III. *Substitution of the Indictment Did Not Violate Jordan's Due Process Rights*

Alternatively, Jordan argues the district court violated his due process rights by substituting the grand jury indictment.

"[W]hether a defendant's due process rights are violated is a question of law over which this court exercises de novo review." *State v. Turner*, 300 Kan. 662, 675-76, 333 P.3d 155 (2014). The Fifth and Fourteenth Amendments to the United States Constitution provide every criminal defendant with the right to due process before they can be deprived of life, liberty, or property. *Dunn*, 304 Kan. at 814. And we have "long recognized that a criminal defendant has a right under

the Sixth Amendment to notice of the charge or charges pursued by the State." 304 Kan. at 814. Likewise, "[s]ection 10 of the Kansas Constitution Bill of Rights contains its own requirement that a criminal defendant be informed of the charges against him or her." 304 Kan. at 814. A charging document meets these constitutional standards for due process and notice if "the defendant has an opportunity to meet and answer the State's evidence and prevent double jeopardy." 304 Kan. at 815.

In other words, due process entitles Jordan to adequate notice of the charges against him and an opportunity to defend against those charges. See *State v. Juarez*, 312 Kan. 22, 24, 470 P.3d 1271 (2020) ("'The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."'"); *Dunn*, 304 Kan. 814-15. The grand jury indictment and the district court's substitution of the indictment for the pending complaint satisfied these due process requirements.

The grand jury returned its indictment on November 21, 2019, a week after the State had filed the original complaint. On November 25, 2019, the State moved to substitute the indictment for the complaint. On December 20, 2019, the district court granted the State's motion. Jordan's trial began almost two years later in August 2021.

Jordan has failed to show that the substitution of the indictment deprived him of adequate notice of the charges or a meaningful opportunity to defend against them. The substitution of the indictment did deprive Jordan of the opportunity to participate in a preliminary hearing. But we have held that the purpose of a preliminary examination is to determine the existence of probable cause. *State v. Knighten*, 260 Kan. 47, 56, 917 P.2d 1324 (1996). "Once a grand jury has handed down an indictment, a determination of probable cause has been made and a preliminary hearing is no longer necessary." 260 Kan. at 56; see *State v. Green*, 260 Kan. 471, 473, 920 P.2d 414 (1996). And because the right to a preliminary hearing is purely statutory, it does not implicate due process. *Knighten*, 260 Kan. at 55.

IV. *Jordan Did Not Preserve His Challenge to the Admission of His Statements to Police*

Jordan claims the statements he made to police were involuntary and the district court erred by admitting a recording of those statements

at trial. While Jordan challenges the voluntariness of his statements on appeal, he did not file a pretrial motion to suppress those statements. Instead, the State brought the issue to the district court's attention by filing a "Notice of Intent to Offer Statements of the Defendant," and the district court held a *Jackson v. Denno* hearing in response to that notice. See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). After the hearing, the district court ruled that Jordan's statements were voluntary under the totality of the circumstances.

Jordan claims that he preserved his challenge to the voluntariness of his statements to police by litigating the issue pretrial. But K.S.A. 60-404 requires a party to make a timely and specific objection to the evidence at trial to preserve the issue for appellate review. See *State v. Keys*, 315 Kan. 690, 711, 510 P.3d 706 (2022) ("K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge absent a timely and specific objection made on the record."). And pretrial litigation of the evidentiary issue alone fails to satisfy this legislative mandate. See *State v. Ballou*, 310 Kan. 591, 613, 448 P.3d 479 (2019) (a pretrial objection alone is not timely under K.S.A. 60-404 because the ruling is subject to change).

Jordan failed to object to the admission of his statements at trial. The failure to satisfy K.S.A. 60-404's contemporaneous-objection rule precludes our review of Jordan's issue. See *State v. Hollingsworth*, 289 Kan. 1250, 1256-57, 221 P.3d 1122 (2009) (defendant failed to preserve challenge to voluntariness of statements to police when defendant made no timely and specific objection at trial, even though *Jackson v. Denno* hearing had been held).

V. *The Prosecutor Did Not Commit Error During Closing Argument by Commenting on the Credibility of a State's Witness*

Next, Jordan claims the prosecutor committed error during closing argument by telling the jury that Cunningham told the truth.

During the rebuttal portion of her closing argument, the prosecutor discussed Cunningham's testimony. She identified portions of Cunningham's testimony that might be more susceptible to critique under legitimate factors bearing on the witness' credibility. The prosecutor then distinguished those statements from Cunningham's testimony that Jordan said he was not going to stop for the pursuing officers. The prosecutor argued that this testimony

mirrored prior statements Cunningham had made to police. The prosecutor then asked what motive Cunningham had to be untruthful about that testimony and suggested Cunningham had none:

"I want to discuss Shelley Cunningham and her testimony a bit. She may have minimized her relationship with the Defendant or her involvement with drugs located in the car, or her involvement with the forgery and the identity theft, but think about what she said about the pursuit and the crash. She testified that she told the Defendant to stop, and he said he wasn't going to stop. She told Trooper Taylor at the hospital the same thing. And then she told Detective Kinnett, in December of '19 when she was interviewed the exact same thing. After telling the Defendant to stop the car, he said, 'I'm not going to stop.' That fact never changed. Ask yourself, what motivation does Ms. Cunningham have to not be truthful about that particular fact? *I submit to you that there's absolutely no reason. What did she have to gain from that?*" (Emphasis added.)

Jordan challenges the italicized comments, arguing the remarks improperly vouched for the witness.

A. *Standard of Review and Relevant Legal Framework*

To determine whether prosecutorial error occurred, we consider whether the challenged prosecutorial acts "fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." *State v. Sherman*, 305 Kan. 88, 109, 378 P.3d 1060 (2016). If error is found, we then determine whether the error prejudiced the defendant's right to a fair trial. 305 Kan. at 109.

While prosecutors have broad latitude in crafting their arguments and drawing reasonable inferences from the evidence, we have repeatedly held that telling the jury that a witness told the truth falls outside that broad latitude. *State v. Hachmeister*, 311 Kan. 504, 519, 464 P.3d 947 (2020); *State v. Hirsh*, 310 Kan. 321, 342, 446 P.3d 472 (2019). Even so, our caselaw distinguishes between arguments expressing an opinion about a witness' credibility and arguments discussing legitimate factors a jury may consider in assessing credibility. *Hachmeister*, 311 Kan. at 519; *State v. Anderson*, 308 Kan. 1251, 1261, 427 P.3d 847 (2018). The former falls outside the bounds of proper argument while the latter does not. *Hachmeister*, 311 Kan. at 519.

One legitimate factor for the jury to consider in assessing witness credibility is a witness' motive to be dishonest. *State v. Ortega*, 300 Kan. 761, 777, 335 P.3d 93 (2014). Thus, we have approved of a prosecutor's use of rhetorical questions to encourage the jury to consider whether a witness has any motive to be untruthful. 300 Kan. at 777. Likewise, "[p]rosecutors may comment on a witness' lack of motivation to be untruthful but must base these comments on the evidence and reasonable inferences from the evidence without stating their own personal opinion concerning the witness' credibility." *Hachmeister*, 311 Kan. at 519.

B. *The Prosecutor's Comments Fall Just Within the Bounds of Proper Argument*

The prosecutor's rhetorical question inviting jurors to consider what motive Cunningham had to be untruthful fell within the bounds of proper argument. See *Ortega*, 300 Kan. at 777. But the prosecutor did not stop there. She then answered her own rhetorical question: "I submit to you that there's absolutely no reason."

In *State v. Sprague*, 303 Kan. 418, 362 P.3d 828 (2015), we held that a prosecutor erred by making a similar comment. There, the prosecutor expressed her opinion about the victim and two witnesses' motive to lie, arguing:

"'Because Kandi Sprague may have spent more time on the internet, and many people do, doesn't justify her death, that she may not have been the parent that some people may have wanted her to be in that timeframe, doesn't justify her death. Steven Peacock and Jennifer Helm, you are not asked to judge whether they are good people or bad people, whether you like them or don't like them. *But I submit they don't have any motive in coming in here and testifying*.'" 303 Kan. at 428.

We held that the italicized comment was improper because "whether or not the State was improperly bolstering the credibility of its witnesses, the prosecutor was commenting on facts outside of the evidence and was injecting her personal opinion regarding witnesses' motives." 303 Kan. at 429.

When viewed in isolation, the prosecutor's comment that "there's absolutely no reason" for Cunningham to be untruthful looks like the type of argument we disapproved of in *Sprague*. But we do not consider a prosecutor's comment in isolation because

"context matters." *State v. Blansett*, 309 Kan. 401, 412-13, 435 P.3d 1136 (2019). "Often the line between permissible and impermissible argument is context dependent." *State v. Martinez*, 311 Kan. 919, 923, 468 P.3d 319 (2020). Such is the case here.

In *Sprague*, the prosecutor did not discuss how the jury should assess witness credibility. Instead, the prosecutor asked jurors not to let their personal judgments about the victim and witnesses influence their verdict. The prosecutor's subsequent comment about the witnesses' motives to be honest were neither tied to the evidence nor made within a broader discussion about factors bearing on the credibility of a witness.

But here, the prosecutor made the challenged statement while explaining how the jury should assess Cunningham's credibility. She suggested that portions of Cunningham's testimony might be less credible than others. Specifically, the prosecutor suggested that Cunningham had motive to be less than forthright when the testimony reflected poorly on her character or reputation. For instance, the prosecutor suggested that Cunningham may have had motive to minimize her relationship with Jordan or her drug use. The prosecutor contrasted that testimony with Cunningham's testimony that Jordan said he was not going to stop for the police. The prosecutor noted that testimony had no bearing on Cunningham's character or reputation and mirrored her prior statements to police. And through rhetorical questions, the prosecutor encouraged the jury to consider what potential motives, if any, Cunningham could have to be untruthful on this point. In short, the prosecutor's statement suggesting Cunningham had no motive to lie was made within a larger discussion about legitimate factors bearing on witness credibility and how those factors related to the trial evidence.

"A prosecutor who speculates about witness motives walks a fine line between 'explaining to juries what they should look for in assessing witness credibility,' and 'improperly bolstering the credibility of its witnesses' by 'injecting [his or] her personal opinion regarding witnesses' motives.' [Citations omitted.]" *Anderson*, 308 Kan. at 1261. And here, the prosecutor "teetered on that fine line" by suggesting that Cunningham had no motive to be untruthful. 308 Kan. at 1261. But by tying her comment to the evidence

and to legitimate factors bearing on witness credibility, her argument fell just within the wide latitude afforded prosecutors in closing argument, even if by only the slightest margin. See *Hachmeister*, 311 Kan. at 519 (prosecutor's comments that witnesses had "no skin in the game" or "agenda" were not erroneous because they were based on reasonable inferences drawn from the evidence). We hold that the prosecutor's statement did not constitute error.

VI. *The Cumulative-Error Doctrine Does Not Apply*

Finally, Jordan argues cumulative error deprived him of a fair trial. But the cumulative-error doctrine does not apply here because Jordan has failed to establish any trial errors. *State v. Lowry*, 317 Kan. 89, 100, 524 P.3d 416 (2023).

CONCLUSION

Jordan has failed to establish any of his six claims of error. While both his felony-murder charge and his fleeing-and-eluding charge were alternative-means crimes, his charge of fleeing and eluding under K.S.A. 2019 Supp. 8-1568(b)(2) was not. The substitution of the grand jury indictment for the complaint did not deprive the district court of subject matter jurisdiction or violate Jordan's due process rights. Jordan failed to preserve his challenge to the voluntariness of his statements to police by lodging a timely and specific objection to the admission of that evidence at trial. The prosecutor's statement that Cunningham had no motive to lie fell just within the bounds of proper argument because she tied her comment to the evidence and legitimate factors bearing on a witness' credibility. And the cumulative error doctrine does not apply because Jordan failed to show any trial error. We thus affirm Jordan's convictions and sentence.

Judgment of the district court is affirmed.

No. 124,851

STATE OF KANSAS, *Appellee*, v. MARK HOPKINS II, *Appellant*.

(537 P.3d 845)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Jail Time Credit Allowed for All Time Incarcerated While Case Pending Disposition.* A defendant is entitled to jail time credit against his or her sentence for all time spent incarcerated while the defendant's case was pending disposition. The contrary holding of *Campbell v. State*, 223 Kan. 528, 528-31, 575 P.2d 524 (1978), is overruled.

Appeal from Cherokee District Court; ROBERT J. FLEMING, judge. Submitted without oral argument February 3, 2023. Opinion filed October 20, 2023. Affirmed in part, reversed in part, and remanded with directions.

Debra J. Wilson, of Capital Appeals and Conflicts Office, was on the briefs for appellant.

Natalie Chalmers, assistant solicitor general, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

STEGALL, J.: Mark Hopkins II was sentenced to life imprisonment without the possibility of parole for 50 years after being convicted of murdering two people in 2020. He spent 572 days in jail awaiting sentencing. At sentencing, the district court denied Hopkins credit against his sentence for the time spent in jail based on this court's precedent which has, until now, required the sentencing judge to only award a defendant credit for time spent in custody "solely" on the charge for which he or she is being sentenced. See, e.g., *State v. Smith*, 309 Kan. 977, 981, 441 P.3d 1041 (2019); *State v. Harper*, 275 Kan. 888, 890, 69 P.3d 1105 (2003); *Campbell v. State*, 223 Kan. 528, 528-31, 575 P.2d 524 (1978). Because history demonstrates confusion, difficulty, and inconsistency in the application of this court-made rule over the last 45 years, we have no difficulty revisiting and revising this rule to reflect the plain language of the statute. As such, today we hold that the award of credit under K.S.A. 2022 Supp. 21-6615(a) is not limited to time spent "solely" in custody for the charge for which the defendant is being sentenced.

FACTS

In June 2020, Hopkins and a codefendant met up with two individuals in rural Cherokee County, Kansas. The two victims believed they were meeting to obtain methamphetamine from Hopkins; however, Hopkins thought the victims were acting as law enforcement informants against him. So, Hopkins decided to kill the two. He zip-tied a flashlight to the barrel of his 9 mm rifle and shot each of them in the head. Hopkins and the codefendant left the scene in separate vehicles, and Hopkins fled to Oklahoma. Oklahoma law enforcement apprehended Hopkins after locating him asleep in his car. Hopkins eventually confessed to committing the murders.

Hopkins waived extradition, was served with the arrest warrant, and was then held without bond in the Cherokee County Jail. While he was in jail, the State filed a motion to revoke probation in a prior theft case from 2018. This motion remained pending until its eventual dismissal as part of a plea agreement in the murder case.

In May 2021, Hopkins escaped from the Cherokee County Jail. He remained at large for four days before being captured. Upon his return to jail, the State filed two new charges against Hopkins relating to the escape from custody.

In November 2021, Hopkins entered a plea bargain with the State. Hopkins agreed to plead guilty to two counts of premeditated first-degree murder and the State agreed to withdraw the pending Motion to Revoke Probation in the theft case; dismiss the escape charges in Cherokee County; and dismiss an additional pending Labette County case.

Before sentencing, Hopkins filed a motion for durational departure sentences, requesting that the court impose sentences of 25 to life. The motion was accompanied by information about Hopkins' background and a psychological evaluation. The motion contained lengthy descriptions of Hopkins' troubled, dysfunctional, and abusive childhood, his abuse of a dizzying array of drugs and substances beginning at a young age, and his struggles with ADHD and other developmental disorders.

In further support of that motion, Hopkins presented the testimony of Dr. Robert McCaffrey—a New York-based neuropsychologist—at sentencing in December 2021. Dr. McCaffrey did not evaluate or test Hopkins; he merely reviewed his records. Dr. McCaffrey testified that in his long experience he had never encountered an individual that has used the variety and the extent of substances Hopkins abused; noting

that beginning substance abuse at an early age would disrupt normal neuropsychological cognitive functions. Of particular concern to Dr. McCaffrey was Hopkins' use of aerosols ("huffing"), testifying that adolescents who regularly abuse aerosols "are referred to as having swiss cheese brains" because it "is very, very toxic."

Based on Hopkins' history, Dr. McCaffrey opined that he could anticipate Hopkins' executive functioning being impaired. But Dr. McCaffrey also agreed that several of the red flags he observed in Hopkins' record—including the disordered family life and long-term substance abuse—were common in society, and made clear that he was "absolutely not" opining that Hopkins was incapable of premeditating murder.

The State then presented victim impact statements from family members, which included testimony about one of the victim's three children being left without their father.

The district court considered and denied Hopkins' departure motion, explaining:

"I cannot and I do not find substantial and compelling reasons which would justify a departure. While it's true that 18 months following the commission of two acts of premeditated murder Mr. Hopkins did accept responsibility and plead guilty and agreed to testify against his co-defendant. But that standing alone is not sufficient in my judgment for me to find substantial and compelling reasons to depart. It just doesn't meet the threshold. I agree that Mr. Hopkins' childhood and background has been tragic. I would state from my years of experience that common thread tends to run against most people who commit premeditated first degree murder. He has a sad criminal history. By my count he has 22 convictions during the past 13 years on 16 separate dates, 17 of them are misdemeanors, four are felonies, one is a person felony, aggravated battery in 2016. All but one occurred in this judicial district. I think it's a stretch for me to find that his desire to work to support his family and his desire to by his example be a deterrent to his younger family members is a—it's just based on speculation from where I see it. Furthermore I don't—I'm confused by Dr. McCaffrey's testimony. He said he's got a swiss cheese brain. I'm not sure I know what that means. I'm not a neuropsychologist. But these things he testified to—well, and his testimony was all speculative because he didn't examine Mr. Hopkins. He didn't do an evaluation. But he says that he's got red flags toward a negative outcome. And then he says those red flags still exist. His guardrails are gone. His guardrail, his final guardrail was his grandfather who died in 2014. He's still subject to impulsive behavior without any guardrail to restrain him. That tends to support that if given parole at an early age he may be subject to commission of another crime like this."

Though the State requested that the sentences run consecutive, the court sentenced Hopkins to the hard 50 on count 1 and sentenced count

2 to run concurrent, expressing a desire to give Hopkins a "degree of hope" that he could be released at 80 years old.

The parties then turned to discussing jail time credit. After the following exchange, the district court declined to grant Hopkins any credit:

"[THE STATE]: Your Honor, for purposes of the journal entry with regard to any credit we note that the defendant also had a pending other case and probation violation. I don't believe that our plea agreement contemplated any credit for time served.

"THE COURT: That was my understanding. Is that correct? My understanding he had cases pending in this county and in Labette County and he had a revocation somewhere. . . . I did not contemplate granting him credit for time served to date unless by law he's entitled to it.

"[DEFENSE COUNSEL]: I think for some of the time he's in custody he had two cases he was under. One was dismissed in November. Our hopes at that time—

"THE COURT: Well according to the PSI he was taken into custody on June 16th, 2020, and then apparently released May 24th, 2021.

"[THE STATE]: Oh, he wasn't released, Judge. He escaped.

"THE COURT: Oh, he escaped. Okay. So that's 358 days. Then taken into custody again May 28th, 2021 to date. 214 days.

"[DEFENSE COUNSEL]: We'd ask that time be applied to this case.

"THE COURT: Unless by law I must grant that I'm denying it.

"[THE STATE]: We don't believe that he is.

"THE COURT: I don't think so either. All right."

Hopkins filed a timely notice of appeal to this court.

DISCUSSION

Hopkins is entitled to jail time credit against his sentence.

Since 1978 we have held that the language in K.S.A. 2022 Supp. 21-6615(a) requires the sentencing judge to award a defendant credit for all time spent in custody "solely" on the charge for which the defendant is being sentenced while awaiting disposition of his or her case, and that a defendant is not entitled to credit for time "'which he has spent in jail upon other, distinct, and wholly unrelated charges.'" *Smith*, 309 Kan. at 981; *Campbell*, 223 Kan. 528, Syl. ¶ 2.

But the statute does not say that. Rather, K.S.A. 2022 Supp. 21-6615(a) provides:

"In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. Such date shall be established to reflect and shall be computed as an allowance for the time which the defendant has spent incarcerated pending the disposition of the defendant's case."

It is not obvious that "the time which the defendant has spent incarcerated pending the disposition of the defendant's case" should be interpreted in any way other than straightforwardly giving jail time credit for every day the defendant spent incarcerated during the "disposition of the defendant's case." And yet our cases have insisted on a confusing court-made rule requiring judges to make factual determinations about whether the incarceration was "solely" a result of the crime of conviction. An undertaking that has proved difficult and confusing to apply.

That said, we acknowledge 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. *McCullough v. Wilson*, 308 Kan. 1025, 1036, 426 P.3d 494 (2018). Yet we are not inexorably bound by our own precedents and 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. 308 Kan. at 1036. We are not constrained to follow precedent when "'governing decisions are unworkable or are badly reasoned.'" *State v. Sims*, 308 Kan. 1488, 1504, 431 P.3d 288 (2018). Moreover, even when there is controlling precedent, we must still exercise plenary review over questions of statutory interpretation. *Harper*, 275 Kan. at 891.

In this instance, we are convinced that more good than harm will come from a departure from our jail time credit precedent. Though the rule first announced in *Campbell*—that a defendant is entitled to credit for all time spent in custody "solely" on the charge for which he is being sentenced—was an attempt to clarify the language of K.S.A. 2022 Supp. 21-6615(a), more than four

decades of subsequent experience has revealed that this rule is unworkable and inconsistently applied.

Not only is the rule unworkable, more fundamentally it is not a proper plain language reading of the statutory language. Today we reject the *Campbell* rule in favor of interpreting the statute as it is written, i.e., as requiring the sentencing court to give a defendant "an allowance for the time which the defendant has spent incarcerated pending the disposition of the defendant's case." K.S.A. 2022 Supp. 21-6615(a). Under the obvious and plain meaning of the words chosen by the Legislature, a defendant shall be awarded jail time credit for *all* time spent in custody pending the disposition of his or her case. Not only does this have the cardinal virtue of reading statutory language in a common and straightforward way, it is also a more practical and workable standard. Indeed, most of the time, these two features naturally occur hand-in-hand. This is because—despite some instances of poor or ambiguous drafting—most statutes set forth the intent of the Legislature in plain ordinary English. See, e.g., *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021) (The plain language used by the Legislature is the polestar in statutory interpretation as it informs the court of the legislative intent in enacting the statute.). Courts neglecting this principle may be tempted to inject unnecessary complexity into an otherwise ordinary expression of Legislative intent.

Reviewing a few jail time credit cases demonstrates the confusion the *Campbell* rule has caused. In *State v. Prebble*, 37 Kan. App. 2d 327, 152 P.3d 1245 (2007), Prebble was held in the McPherson County Jail pending disposition of a felony case in that district, though he also had an outstanding felony charge in Rice County as well as a detainer in McPherson County. After he was convicted, Prebble requested credit for the 231 days he had spent in the McPherson County Jail. When the district court learned about the Rice County detainer, it denied Prebble's request for jail time credit, stating: "'[T]he law in Kansas is simply if you're held under more than one charge from different counties, that it is not to be credited '" 37 Kan. App. 2d at 328. Before the Court of Appeals, the panel acknowledged that "[c]onfusion arises" when a defendant "is incarcerated for more than one case

at the same time, especially when the separate cases are pending in more than one district." 37 Kan. App. 2d at 329. However, the panel determined that Prebble was entitled to credit after finding "[t]he time Prebble served in the McPherson County jail was solely on account of the charges pending against him in McPherson County." 37 Kan. App. 2d at 331.

In *State v. Taylor*, 24 Kan. App. 2d 80, 941 P.2d 954 (1997), Taylor was charged in Harvey, Reno, and Sedgwick Counties with indecent liberties with a child (all involving the same child). Taylor was sentenced to prison in the Harvey and Reno County cases and was then transferred to Sedgwick County. The panel held the time Taylor had spent in jail in Harvey or Reno County could not be applied to the Sedgwick County sentence because he had not been held in the other counties solely on account of the Sedgwick County charge. However, Taylor was "clearly" entitled to credit in the Reno and Harvey County cases for the time he was incarcerated in those respective jails despite the pending Sedgwick County charge. 24 Kan. App. 2d at 83. The panel held that a "defendant incarcerated on account of multiple criminal charges filed in separate counties should receive jail time credit only against the sentence for the charges filed in the county in which he or she is held." 24 Kan. App. 2d 80, Syl. ¶ 2.

In *Campbell*, a warrant was issued for Campbell in Reno County for burglary and theft charges. Before the warrant was executed, however, Campbell was arrested in Barton County on unrelated drug charges. Campbell was held in Barton County until sentencing in that case, and he received jail time credit for the time spent in the Barton County Jail despite the pending Reno County charges. After sentencing, he was transported to Reno County to face the pending drug charges. The Reno County District Court declined to give him any jail time credit for time spent in the Barton County Jail, and this court affirmed that decision, explaining: "Though burglary and theft charges, and a charge of violation of probation, were pending against him in Reno County, he was not held in custody in Barton County solely or as a direct result of those charges." 223 Kan. at 531. In other words, this court found it proper for the Barton County District Court to give Campbell jail time credit for the time he spent in that jail, even though he

had pending charges outstanding that were filed even before his Barton County arrest.

These cases show that though the rule we formulated in *Campbell* required credit be given only for the time a defendant spent in custody "solely" on the charge for which he or she was being sentenced, in practice, defendants were often awarded credit even if they had other charges pending—so it cannot be accurate to say that they were "solely" in custody on account of the charge for which they were sentenced. See, e.g., *Campbell*, 223 Kan. at 531 (credit given despite outstanding charges pending); *Taylor*, 24 Kan. App. 2d at 83 (same). Other defendants were not so fortunate. See, e.g., *State v. Richardson*, 46 Kan. App. 2d 801, 803, 264 P.3d 1048 (2011) (defendant not entitled to 375 days' credit because the time was served on other charges); *State v. Wheeler*, 24 Kan. App. 2d 616, 617, 619-20, 949 P.2d 634 (1997) (prior to being charged and transferred to Sedgwick County Jail, defendant was held for 200 days in Johnson County Jail; court declined to give 200 day credit since defendant "was not in Johnson County solely on the Sedgwick County charges").

This is not a compelling case for the application of stare decisis. See *State v. Sherman*, 305 Kan. 88, 108, 378 P.3d 1060 (2016) (recognizing stare decisis is more strongly favored in cases involving property and contract rights, where reliance interests are involved). In fact, our plain language interpretation should "bolster the justice system and serve both prosecutors and defendants," because it will result in a much more straightforward and mechanical application in cases where a defendant has been in custody pending sentencing. 305 Kan. at 108.

The State's argument in the present case rests fully upon the prior rule—that Hopkins is not entitled to credit because he had other cases pending against him while he was in jail. Under our former interpretation of K.S.A. 2022 Supp. 21-6615(a), we would have had to closely evaluate each of the other charges against Hopkins to figure out how much credit, if any, could be awarded. However, applying our updated rule is a much easier endeavor; we simply conclude that because Hopkins spent 572 days in jail while his case was pending, Hopkins must be awarded 572 days in jail time credit against his hard 50 sentences.

The district court did not abuse its discretion when it denied Hopkins' motion for a downward departure sentence.

K.S.A. 2022 Supp. 21-6620 provides a defendant convicted of premeditated first-degree murder shall be sentenced to a hard 50 under K.S.A. 2022 Supp. 21-6623, unless based upon a review of mitigating circumstances, the court finds substantial and compelling reasons to impose a departure sentence to life without parole for 25 years. K.S.A. 2022 Supp. 21-6620(c)(1)-(2). To be substantial, it must be "something that is real, not imagined, and of substance, not ephemeral." *State v. Morley*, 312 Kan. 702, Syl. ¶ 3, 479 P.3d 928 (2021). To be compelling, it must be a reason that "'forces a court—by the case's facts—to abandon the status quo and venture beyond the presumptive sentence.'" *State v. Grable*, 314 Kan. 337, 345, 498 P.3d 737 (2021).

A defendant preserves denial of a departure sentence for our review by moving for a departure at the district court and offering evidence in support, giving the district court a fair opportunity to rule on the merits. We examine a district court's ruling on a departure motion for abuse of discretion. A district court abuses its discretion if its decision is arbitrary or unreasonable, based on a legal error, or based on a factual error. Hopkins, as the party asserting error, has the burden of establishing an abuse of discretion. *State v. Boswell*, 314 Kan. 408, 413-14, 499 P.3d 1122 (2021).

As mitigating factors supporting his departure motion, Hopkins argued that he had accepted responsibility by pleading guilty and that he had "grown up hopeless" as shown by the evidence of his troubled upbringing. The district court acknowledged each factor advanced by Hopkins but concluded that these did not rise to the level of "substantial and compelling reasons" needed to impose a lesser sentence. The district court remained concerned about the serious nature of Hopkins' offenses, Dr. McCaffrey's testimony about Hopkins' impulsive behavior which may continue to be at issue if given parole at an early age, and the suffering of his victims' families.

Hopkins asserts the district court committed an error of law in denying his departure motion, because though K.S.A. 2022 Supp. 21-6620(c)(1)(A) requires a "review of mitigating circumstances," the district court instead impermissibly weighed aggravating circumstances against mitigating circumstances.

But on review, we conclude the district court did not engage in any weighing of the aggravating and mitigating circumstances as Hopkins suggests. Rather, it discussed Hopkins' downward durational departure motion and evaluated the justifications Hopkins provided for that departure. The record demonstrates that the district court was performing a comprehensive analysis of the attendant circumstances when denying departure, and the court was merely pointing out that the mitigating circumstances offered by Hopkins seemed to be of minimal concern given the other attendant circumstances. See *Grable*, 314 Kan. at 345. The court simply found that none of the factors presented by Hopkins were convincing.

The district court did not abuse its discretion in denying Hopkins' motion, as the district court did not commit an error of law or fact and Hopkins has not met his burden of establishing that no reasonable judge would have rejected his requested departure sentence.

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

No. 125,552

In the Matter of the Wrongful Conviction of DAMEON BAUMGARNER.

(537 P.3d 92)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Sentencing to Imprisonment as Condition of Probation—Claimant is Considered Imprisoned under Statute.* When a claimant is wrongfully convicted of a felony crime and sentenced to jail time under K.S.A. 2022 Supp. 21-6603(g)—which permits a sentencing court to impose up to 60 days "imprisonment" in county jail as a condition of probation in felony cases—the claimant is "imprisoned" for the purposes of K.S.A. 2022 Supp. 60-5004(c)(1)(A).

Appeal from Sumner District Court; GATEN T. WOOD, judge. Oral argument held May 15, 2023. Opinion filed October 20, 2023. Reversed and remanded with directions.

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

Kurtis K. Wiard, assistant solicitor general, argued the cause, and *Kris W. Kobach*, attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

STEGALL, J.: Dameon Baumgarner was convicted of unlawfully possessing a firearm and sentenced to a 10-month prison term, which was suspended in lieu of a 60-day sentence in county jail and 18 months of probation. After he was released from jail, the Court of Appeals reversed his conviction and vacated his sentence. Baumgarner then sought compensation, alleging a wrongful conviction under K.S.A. 2022 Supp. 60-5004. To be eligible for such a civil recovery, Baumgarner first must establish that he was "convicted of a felony crime and subsequently imprisoned." K.S.A. 2022 Supp. 60-5004(c)(l)(A).

The district court dismissed Baumgarner's claim, reasoning that Baumgarner had not been "imprisoned" since he was not confined in a facility operated by the Kansas Department of Corrections (KDOC). Today we reverse the decision of the district court and conclude that Baumgarner was "imprisoned" for the purposes of the wrongful conviction compensation statute because his sentence was controlled by K.S.A. 2022 Supp. 21-6603(g), which

contemplates 60 days "imprisonment" in a county jail as a condition of probation in felony cases.

FACTS

A jury convicted Baumgarner of one count of unlawful possession of a firearm under K.S.A. 2019 Supp. 21-6301(a)(13), which prohibits the possession of a firearm "by a person who is or has been a mentally ill person subject to involuntary commitment for care and treatment." As supporting evidence, the State introduced a 2015 district court order adjudicating Baumgarner to be a mentally ill person.

The sentencing court imposed a 10-month prison term, which was suspended in lieu of a 60-day sentence in county jail and 18 months of probation. Baumgarner also received 12 months of postrelease supervision. The conviction was also a violation of his probation in a prior case, which resulted in Baumgarner serving an additional, consecutive six-month jail term. In total, Baumgarner spent approximately eight months in the Sumner County Jail.

On appeal, the Court of Appeals reversed his conviction and vacated his sentence after finding the 2015 court order insufficient to prove Baumgarner is or has been a mentally ill person subject to involuntary commitment. *State v. Baumgarner*, 59 Kan. App. 2d 330, 340-42, 481 P.3d 170 (2021). Baumgarner then initiated the current civil action under K.S.A. 2022 Supp. 60-5004(a)-(c)(1), which provides that a "person convicted and subsequently imprisoned" for a crime they did not commit "may bring an action in the district court seeking damages from the state" if the claimant can establish, by a preponderance of the evidence:

"(A) The claimant was convicted of a felony crime and subsequently imprisoned;

"(B) the claimant's judgment of conviction was reversed or vacated and either the charges were dismissed or on retrial the claimant was found to be not guilty;

"(C) the claimant did not commit the crime or crimes for which the claimant was convicted and was not an accessory or accomplice to the acts that were the basis of the conviction and resulted in a reversal or vacation of the judgment of conviction, dismissal of the charges or finding of not guilty on retrial; and

"(D) the claimant did not commit or suborn perjury, fabricate evidence, or by the claimant's own conduct cause or bring about the conviction. Neither a confession

nor admission later found to be false or a guilty plea shall constitute committing or suborning perjury, fabricating evidence or causing or bringing about the conviction under this subsection."

The State moved to dismiss, arguing that because Baumgarner was confined in a county jail rather than a facility run by the KDOC, he was never "imprisoned." The district court agreed, determining that the use of the term "imprisoned" in K.S.A. 2022 Supp. 60-5004 referred only to imprisonment in a state correctional institution. As such, the court granted the State's motion to dismiss because Baumgarner was never physically placed in the custody of the KDOC.

Baumgarner timely filed a direct appeal of the district court's decision to this court. See K.S.A. 2022 Supp. 60-5004(l) ("The decision of the district court may be appealed directly to the supreme court pursuant to the code of civil procedure.")

DISCUSSION

We exercise unlimited review in determining whether a district court erred by granting a motion to dismiss for failure to state a claim. We likewise exercise unlimited review in evaluating the district court's interpretation of K.S.A. 2022 Supp. 60-5004, as it requires interpretation of a statute. *In re M.M.*, 312 Kan. 872, 873-74, 482 P.3d 583 (2021).

The parties advance two distinct interpretations of the word "imprisoned" as it is used in K.S.A. 2022 Supp. 60-5004(c)(1)(A). The State argues a technical definition of "imprisoned" requiring confinement in a facility operated by the KDOC, while Baumgarner relies on a broader ordinary meaning definition of the word that could include any kind of confinement. But we do not need to engage the parties' arguments because the plain language of the statute governing Baumgarner's sentence explicitly tells us that Baumgarner was indeed "imprisoned" as a matter of law.

K.S.A. 2022 Supp. 21-6603(g) permits a defendant to receive up to 60 days "imprisonment" in a county jail as a condition of probation in felony cases. That statute defines "probation" as "a procedure under which a defendant, convicted of a crime, is released by the court after imposition of sentence, *without imprisonment except as provided in felony cases* In felony cases,

the court may include confinement in a county jail not to exceed 60 days." (Emphases added.) K.S.A. 2022 Supp. 21-6603(g).

This statutory language plainly shows that time served in a county jail as a condition of probation in felony cases constitutes "imprisonment." This is exactly what happened to Baumgarner, and we therefore conclude Baumgarner was "imprisoned" as a matter of law during his 60 days in the Sumner County Jail. Given this, he meets the threshold requirement in K.S.A. 2022 Supp. 60-5004(c)(1)(A) that the claimant must have been "convicted of a felony crime and subsequently imprisoned."

The parties also argue over Baumgarner's status—imprisoned or not imprisoned—during the additional six months he served in the county jail as a result of the revocation of his probation in a prior case. The lower court relied on the same rationale described above to rule Baumgarner was not imprisoned for those six months either. Here again, we need not consider the precise legal ruling made by the district court—i.e., that Baumgarner was not "imprisoned" during the six-month probation revocation term because he was only confined in jail. Whereas above, we reversed the district court on slightly different grounds, in this instance, we find the district court's conclusion was correct, but for the wrong reason. Because even if the felony conviction was a "but-for" cause of the probation revocation, the time served (whether imprisoned or not) cannot be said to have been time served on the underlying wrongful conviction. Given this, the maximum amount of time for which Baumgarner could potentially recover under the wrongful conviction compensation statute is for the 60 days he was imprisoned in the county jail as a condition of the felony probation.

Reversed and remanded for further proceedings consistent with this opinion.

No. 125,879

In the Matter of KENNETH J. ELAND, *Petitioner.*

(537 P.3d 852)

ORDER OF REINSTATEMENT

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

On April 28, 2023, this court suspended for 180 days the Kansas law license of Kenneth J. Eland. The court directed that Eland could seek reinstatement by compliance with Supreme Court Rule 232(b) (2023 Kan. S. Ct. R. at 293) and that Rule 232(d) applies in that a reinstatement hearing is not required. *In re Eland*, 317 Kan. 315, 333, 528 P.3d 983 (2023).

On October 27, 2023, Eland filed a petition for reinstatement under Rule 232(b). As required under Rule 232(c) and (d)(1), the Office of the Disciplinary Administrator (ODA) certified that Eland fully complied with his obligations under Rule 232(b)(1)(A)-(D), and that considering the gravity of Eland's misconduct leading to the suspension, the ODA believes sufficient time has elapsed to justify the court's reconsideration of the suspension.

The court grants Eland's petition and reinstates his Kansas law license.

The court orders Eland to pay all required reinstatement and registration fees to the Office of Judicial Administration (OJA) and to complete any continuing legal education requirements under Supreme Court Rule 812 (2023 Kan. S. Ct. R. at 609). The court directs that once OJA confirms Eland's satisfaction of these conditions, OJA must add Eland'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 Eland.

Wall, J., not participating.

Dated this 8th day of November 2023.

Bar Docket No. 13564

In the Matter of GARY W. LONG II, *Respondent.*

(537 P.3d 853)

ORDER OF DISBARMENT

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

In 1988, this court admitted Gary W. Long II to the practice of law in Kansas. On June 17, 2022, the court indefinitely suspended Long's law license upon finding he violated various rules of professional conduct. *In re Long*, 315 Kan. 842, 511 P.3d 952 (2022).

On October 17, 2023, Long's request to voluntarily surrender his license was submitted to the Office of Judicial Administration under Supreme Court Rule 230(a) (2023 Kan. S. Ct. R. at 290). At the time, Long faced a hearing before the Kansas Board for Discipline of Attorneys on a formal complaint filed by the Disciplinary Administrator. That complaint alleged Long had violated Kansas Rules of Professional Conduct 1.3 (2023 Kan. S. Ct. R. at 331) (diligence), 1.4 (2023 Kan. S. Ct. R. at 332) (communication), 1.16 (2023 Kan. S. Ct. R. at 377) (terminating representation), 5.5 (2023 Kan. S. Ct. R. at 411) (unauthorized practice of law), 8.1 (2023 Kan. S. Ct. R. at 431) (disciplinary matter), 8.4 (2023 Kan. S. Ct. R. at 433) (misconduct), Supreme Court Rule 210 (2023 Kan. S. Ct. R. at 263) (duty to timely respond), and Supreme Court Rule 231 (2023 Kan. S. Ct. R. at 292) (notice to clients, opposing counsel, and courts following suspension).

This court accepts Long's surrender of his Kansas law license, disbars Long pursuant to Rule 230(b), and revokes Long's license and privilege to practice law in Kansas.

The court further orders the Office of Judicial Administration to strike the name of Gary W. Long II from the roll of attorneys licensed to practice law in Kansas effective the date of this order.

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

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

Dated this 8th day of November 2023.

State v. Ruiz

No. 123,260

STATE OF KANSAS, *Appellant*, v. MARIA ACADIA RUIZ, *Appellee*.

(538 P.3d 828)

SYLLABUS BY THE COURT

1. TAXATION—*Kansas Department of Revenue Not an Owner of Unremitted Sales Taxes Collected by Retailers Under Kansas Retailers' Sales Tax Act*. The Kansas Department of Revenue does not have an "interest" in unremitted sales taxes collected by retailers under the Kansas Retailers' Sales Tax Act, K.S.A. 79-3601 et seq., and is thus not an "owner" of those unremitted taxes for purposes of K.S.A. 2022 Supp. 21-5801.

2. SAME—*By Failing to Remit Sales Taxes, a Retailer Does Not Exert Unauthorized Control under K.S.A. 21-5801*. For purposes of K.S.A. 2022 Supp. 21-5801, a retailer does not exert unauthorized control over collected sales taxes by failing to remit them at the time mandated by K.S.A. 79-3607.

3. SAME—*Statutory Remedies under Kansas Retailers' Sales Tax Act for Retailer's Violation of Duties to Collect and Pay Sales Tax*. The Kansas Retailers' Sales Tax Act imposes statutory duties upon retailers with respect to the collection and payment of sales taxes. K.S.A. 79-3615 provides the State a self-contained set of remedies for a retailer's violation of those statutory duties.

4. SAME—*Collected Sales Taxes not Remitted by Retailers are Not a Debt under section 16 of Kansas Constitution Bill of Rights*. Collected, unremitted sales taxes do not qualify as a "debt" between retailers and the Kansas Department of Revenue within the meaning of section 16 of the Kansas Constitution Bill of Rights.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 8, 2022. Appeal from Ford District Court; LAURA H. LEWIS, judge. Oral argument held December 14, 2022. Opinion filed November 17, 2023. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

Jodi Litfin, assistant solicitor general, argued the cause, and *Kristafer R. Ailslieger*, deputy solicitor general, *Stacy Edwards*, deputy attorney general, *Rebecca Silvermintz*, assistant attorney general, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with her on the briefs for appellant.

Patrick H. Dunn, of Kansas Appellate Defender Office, argued the cause and was on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: After Maria Acadia Ruiz failed to remit almost $50,000 in sales taxes she collected while operating her business, the State charged her with one count each of felony theft and violation of the Kansas Retailers' Sales Tax Act. On Ruiz' motion after preliminary hearing, the district court dismissed the felony theft charge as multiplicitous. A panel of the Court of Appeals reversed that decision, holding that the two charges were not multiplicitous and that the State presented sufficient evidence to bind Ruiz over on the felony theft charge.

Ruiz petitioned this court for review, which we granted. After oral arguments, we ordered the parties to submit additional briefing, which they did. We conclude that the State's theory of felony theft is insufficient as a matter of law on these facts. Here, the State is not an "owner" of the taxes for purposes of our felony theft statute, so Ruiz did not exercise "unauthorized control" over them. Rather, the taxes she owed to the State constitute a specific, legislatively created liability. Finally, the opening phrase of the Kansas Retailers' Sales Tax Act's criminal penalty provision, and the potential civil penalties throughout the entire statutory section, convey legislative intent to confine the applicable criminal ramifications to those set forth in the Act. We thus affirm the district court's dismissal of Ruiz' felony theft charge and reverse the panel's ruling on the same point, although on different grounds.

FACTS AND PROCEDURAL HISTORY

According to evidence presented at the preliminary hearing before the district magistrate judge, Ruiz started a business in 2014 called Ruiz Enterprise LLC. As the business' sole member-manager, Ruiz ran a restaurant called the Inn Pancake House in Dodge City, Kansas. Between August 2015 and December 2016, Ruiz' business filed sales tax returns without paying any sales tax—a total of $50,774.06 over the period—although Ruiz subsequently paid $1,500 to bring the total down to $49,274.06. Rather than paying the collected taxes to the state, Ruiz spent the money on routine business expenses because her business "fell on hard times."

Ruiz' business closed in 2017. Since then, Ruiz has made no payments toward the $49,274.06 still outstanding.

The State ultimately charged Ruiz with one count of violating the Kansas Retailers' Sales Tax Act (Tax Act), and one count of felony theft. Ruiz moved to dismiss the felony theft charge, arguing the charge impermissibly "attempts to expand the tax act." After the parties argued the motion at preliminary hearing, the district magistrate judge denied the motion, concluding "that the specific and general crime [doctrine] does not apply to this case, that there are two separate crimes that were committed and that she could be prosecuted on both." The magistrate also found sufficient evidence to bind Ruiz over on felony theft.

Ruiz appealed to the district court, the appropriate procedure when the magistrate judge is a lay person. K.S.A. 2019 Supp. 22-3609a(1). After a hearing, at which the State discussed the general/specific offense doctrine set out in K.S.A. 2019 Supp. 21-5109(d), the district court dismissed the felony theft charge on multiplicity grounds. Although the court wrote that it "'does not find a need to address the parties' additional arguments of general vs. specific statutory analysis or the Rule of Lenity,'" it still discussed aspects of the parties' general vs. specific arguments. *State v. Ruiz*, No. 123,260, 2022 WL 1051898, at *2 (Kan. App. 2022) (unpublished opinion).

After the district court denied the State's subsequent motion to reconsider, the State moved to dismiss the Tax Act violation charge without prejudice, which the district court did. The State then appealed.

A panel of the Court of Appeals declined to address the general/specific offense statute (K.S.A. 2022 Supp. 21-5109[d]), or the doctrine itself, because the district court "explicitly declined to make a finding on the general versus specific statute rule." *Ruiz*, 2022 WL 1051898, at *4. The panel instead suggested the parties raise the issue on remand. 2022 WL 1051898, at *4. The panel also rejected the district court's multiplicity analysis. 2022 WL 1051898, at *3. Finally, the panel concluded that the State presented sufficient evidence for the court to bind Ruiz over on felony theft. 2022 WL 1051898, at *5.

Ruiz petitioned this court for review, which we granted. After the parties presented oral arguments to this court, we ordered them

to submit additional briefing on four questions we raised sua sponte. First, is a pretrial motion to dismiss on multiplicity grounds premature? Second, is a claim for relief under K.S.A. 2022 Supp. 21-5109(d) (statutory codification of the general/specific doctrine) premature? Third, what have other states' appellate courts said about whether a person may be convicted of both a failure to pay a tax imposed and theft when interpreting statutes similar to ours? Finally, does imprisonment for the crimes charged here violate section 16 of the Kansas Constitution Bill of Rights? The parties submitted thorough briefs on these questions, clearing the way for our analysis. E.g., *City of Wichita v. Trotter*, 316 Kan. 310, 322, 514 P.3d 1050 (2022) (when an appellate court sua sponte raises an issue, counsel should be afforded a fair opportunity to brief the new issue).

ANALYSIS

At their core, all of Ruiz' challenges—whether predicated on multiplicity, the general/specific offense doctrine codified by K.S.A. 2022 Supp. 21-5109(d), the self-contained nature of the Tax Act, the sufficiency of the evidence, or the definition of "owner" for purposes of our theft statute, K.S.A. 2022 Supp. 21-5801(a) and (b)(2)—center on the asserted legal incompatibility between statutory theft and a statutory Tax Act violation. We thus consider her claims collectively as presenting a question of statutory construction.

We review issues of statutory construction de novo. E.g., *State v. George*, 311 Kan. 693, 696, 466 P.3d 469 (2020). Our framework is well known:

"'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, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity.'

"An apparently clear statute may nevertheless manifest ambiguity when applied to the particular facts of a case. [Citations omitted.]" *State v. Scheuerman*, 314 Kan. 583, 587, 502 P.3d 502, *cert. denied* 143 S. Ct. 403 (2022).

Thus, K.S.A. 2022 Supp. 21-5109 provides our starting point:

"(a) When the same conduct of a defendant may establish the commission of more than one crime under the laws of this state, the defendant may be prosecuted for each of such crimes. . . .

. . . .

"(d) Unless otherwise provided by law, when crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct, the defendant:

(1) May not be convicted of the two crimes based upon the same conduct; and

(2) shall be sentenced according to the terms of the more specific crime."

We next turn to the statutory definitions of the crimes charged: a Tax Act violation and felony theft. K.S.A. 79-3615, in relevant part, sets forth criminal penalties for applicable violations of the Tax Act:

"(h) *In addition to all other penalties provided by this section*, any person who willfully fails to make a return or to pay any tax imposed under the Kansas retailers' sales tax act, or who makes a false or fraudulent return, or fails to keep any books or records prescribed by this act, or who willfully violates any regulations of the secretary of revenue, for the enforcement and administration of this act, or who aids and abets another in attempting to evade the payment of any tax imposed by this act, or who violates any other provision of this act, shall, upon conviction thereof, be *fined* not less than $500, nor more than $10,000, or be *imprisoned* in the county jail not less than one month, nor more than six months, or be both so fined and imprisoned, in the discretion of the court." (Emphases added.)

K.S.A. 2022 Supp. 21-5801, in relevant part, defines theft:

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

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

. . . .

"(b) Theft of:

. . . .

(2) property or services of the value of at least $25,000 but less than $100,000 is a severity level 7, nonperson felony." (Emphases added.)

Central to its theft charge, the State alleges that Ruiz exerted unauthorized control over $49,274.06 in collected sales taxes by intentionally failing to remit those funds with an intent to permanently deprive the State—the funds' owner—of their possession, use, or benefit. While this legal theory at first sounds plausible, a detailed examination of the elements reveals its infirmities.

K.S.A. 2022 Supp. 21-5111(s) broadly defines "owner" as "a person who has *any interest* in property," (emphasis added) and K.S.A. 2022 Supp. 21-5111(t) clarifies that the Kansas Department of Revenue—as a government agency—is a "person." K.S.A. 2022 Supp. 21-5111(w) defines "property" as "anything of value, tangible or intangible, real or personal."

While it may at first appear the amount of sales tax collected by a retailer would constitute an "interest" in "property," the State has no immediate right to that specific amount, any more than it has an immediate right to the *retailer's* property in general. The tax "property" exists, if at all, only as a liability on a balance sheet to be paid on a statutorily mandated date. The retailer may deposit all the funds in her own bank account, and the State has no right even to question the bank account's balance, let alone attempt to do anything with the collective amount—whether it is payment for the pancakes or for the sales tax on the pancakes. No law prevents the funds from being commingled or even spent before the taxes become due.

So what, if any, "interest" does the State have in collected, unpaid sales taxes? After all, while a balance sheet liability may have "value" as an accounting construct—and so qualifies as "property" under the broad definition of the Kansas Criminal Code—its inherently unrealized nature undercuts the notion that the State has an "interest" in it under our theft statute. The answer to this question also necessarily casts doubt on whether—and at what point—a retailer exercises "unauthorized" control over sales taxes. To better understand these problems, we take a step back to consider the duties imposed on retailers by our tax statutes.

K.S.A. 79-3603 establishes a tax on the sale of various goods and the provision of various services "[f]or the privilege of engaging in the business of selling tangible personal property at retail in this state or rendering or furnishing any of the services taxable

under this act." K.S.A. 79-3604 then details a retailer's obligations under the Tax Act:

"The tax levied under the Kansas retailers' sales tax act shall be paid by the consumer or user to the retailer and it shall be the *duty of each and every retailer in this state to collect from the consumer or user, the full amount of the tax imposed* or an amount equal as nearly as possible or practicable to the average equivalent thereof. Such tax shall be a debt from the consumer or user to the retailer, when so added to the original purchase price, and shall be recoverable at law in the same manner as other debts . . . .

. . . .

"Whenever the director of taxation determines that in the retail sale of any tangible personal property or services because of the nature of the operation of the business including the turnover of independent contractors, the lack of a place of business in which to display a registration certificate or keep records, the lack of adequate records or because such retailers are minors or transients there is a likelihood that the state will lose tax funds due to the difficulty of policing such business operations, *it shall be the duty of the vendor to such person to collect the full amount of the tax imposed by this act and to make a return and payment of the tax* to the director of taxation in like manner as that provided for the making of returns and the payment of taxes by retailers under the provisions of this act. The director shall notify the vendor or vendors to such retailer of the duty to collect and make a return and payment of the tax.

"In the event the full amount of the tax provided by this act is not paid to the retailer by the consumer or user, the director of taxation may proceed directly against the consumer or user to collect the full amount of the tax due on the retail sale." (Emphases added.)

K.S.A. 79-3607 imposes additional duties upon retailers, including filing returns. K.S.A. 79-3607(a) clarifies that "[t]he retailer shall, at the time of making such return, pay to the director the amount of tax herein imposed," although it also empowers the director of taxation to "extend the time for making returns and paying the tax required by this act for any period not to exceed 60 days under such rules and regulations as the secretary of revenue may prescribe." K.S.A. 79-3617 establishes a procedure for the collection of delinquent taxes, which includes the issuance of a warrant and the initiation of court proceedings. Finally, K.S.A. 79-3615 sets forth a plethora of interest and penalties that may be added to the tax assessments for various violations of the Tax Act, along with ways the interest and penalties may be waived, reduced, abated, or refunded.

Thus, the ultimate destiny of sales taxes—whether or not collected by a retailer—rests with the State, by statute. But this is different from the State having an "interest" in the collected sales taxes for purposes of the Kansas Criminal Code. We have previously recognized that "owners" may commit theft by stealing their own property from those to whom a special, superior *possessory* interest has been granted. E.g., *State v. Etape*, 237 Kan. 380, 383, 699 P.2d 532 (1985) ("one who has a mechanic's lien on property has a superior possessory interest as against the general owner, and if the general owner takes the property without permission and without satisfying the lien he may be guilty of theft provided it is done with a felonious intent to deprive the lienholder of his rights"); *State v. Coburn*, 220 Kan. 750, 756, 556 P.2d 382 (1976) (in a theft case when multiple parties claimed ownership over tangible property, court held that a consideration of which party "'had a greater right to possession'" "comport[ed] with our statutory definition of an owner as one who has 'any interest in property'").

"Under ordinary circumstances a person cannot commit a larceny by taking possession of his own property, but, if the general owner has transferred a special interest or ownership to another, one taking the possession of the property from the other, with the intent to deprive him of his rights and interest, may be guilty of larceny." *State v. Hubbard*, 126 Kan. 129, 131, 266 P. 939 (1928).

But the tax statutes do not grant KDOR a superior *possessory* right—and thus an interest—in the collected sales taxes. Instead, they grant KDOR the authority to proceed against a delinquent taxpayer for the collection of those taxes in various ways, including the imposition of statutory penalties. In other words, our Tax Act does not grant the State an ownership interest in a retailer's general accounts; it merely imposes on the retailer the duty to pay the State the taxes it owes—a duty reinforced by statutory penalties and other enforcement mechanisms *specific* to the Tax Act.

Further, nothing in our tax statutes either imposes a fiduciary duty upon retailers in favor of the State or requires a retailer to set aside collected sales taxes in a trust or separate account, as some jurisdictions do. For example, in *Kibbey v. State*, 733 N.E.2d 991, 995 n.4 (Ind. Ct. App. 2000), the tax statute specifically stated the retail taxes were held from the time of collection "'in trust for the state,'" giving the State an explicit, and immediate, interest in the

collected funds. Likewise, in *State v. Kennedy*, 130 N.C. App. 399, 402, 503 S.E.2d 133 (1998), *aff'd* 350 N.C. 87, 511 S.E.2d 305 (1999), the sales tax collected was statutorily required to be held by the retailer "as trustee for and on account of the State . . . ." And while the Texas Court of Appeals in *Davis v. State*, 904 S.W.2d 946, 953 (Tex. Ct. App. 1995), found an implicit agency relationship creating a fiduciary duty to the state in those segregated tax dollars, we find no such implication in our tax act. Instead, our statutes leave retailers free to comingle collected sales taxes with the rest of their general funds. Thus, as long as the retailer collects the appropriate tax from purchasers and is able to pay the required amount of sales taxes from *some* source at the time the payment is due, it fulfills its statutory obligations under K.S.A. 79-3604 and K.S.A. 79-3607(a). We do not read these statutes to grant the State constructive ownership over a retailer's accounts just because the Tax Act confers upon retailers a duty to remit collected taxes. Instead, the Tax Act provides enforcement mechanisms for the State to collect on the amount owed to it by retailers if they fail to remit payment at the time they make a return, as Ruiz did.

Of the cases cited by the parties in response to our request for supplemental briefing, two stand out as particularly persuasive. First, in *State v. Marcotte*, 418 A.2d 1118, 1119 (Me. 1980), the Supreme Judicial Court of Maine considered whether an individual could be charged both with failure to remit sales taxes and with theft by misapplication of property. Noting the concern voiced in comments to the theft by misapplication of property statute that its subject matter "'lies close to the border between criminality and mere civil failure to perform a contractual obligation,'" 418 A.2d at 1119, the court concluded that, under the theft by misapplication of property statute:

> "[I]f there exists no agreement or legal obligation to make payment from the property obtained or its proceeds or from property to be reserved in equivalent amount, there can be no criminal liability. This requirement is similar in nature to a fiduciary or trust relationship.
>
> "The question then becomes whether 36 M.R.S.A. ss 1751-2113, dealing with sales and use taxes, require a retailer to reserve funds for payment to the state, such that his intentional or reckless failure to pay sales tax which is due and owing constitutes theft within the meaning of section 358 [i.e., by misapplication

of property]. We hold that there is no such duty and that consequently no criminal liability exists under section 358 in this case." *Marcotte*, 418 A.2d at 1121.

Marcotte then distinguished a pair of cases from Indiana and Pennsylvania, both of which required the retailer to set aside collected taxes as a form of trust fund that belonged to the state. 418 A.2d at 1122 (citing *State v. Gates*, 394 N.E.2d 247 [Ind. Ct. App. 1979], and *Commonwealth v. Shafer*, 414 Pa. 613, 616-17, 202 A.2d 308 [1964]). Like Kansas, Maine's retail sales tax statute at the time neither contained any such requirement nor created a fiduciary relationship between the retailer and the state.

Finally, *Marcotte* disposed of the prosecution's backup argument: that even if the failure to remit sales tax did not constitute theft by misapplication of property, it still qualified under the more general theft statute. *Marcotte*, 418 A.2d at 1122. As the court wrote:

"Consequently, the state would prove 'Theft by Unauthorized Taking' under 17-A M.R.S.A. s 353. The conduct alleged in the indictment, however, involved no 'unauthorized control over the property of another.' Under title 36, the retailer is authorized to exercise control over and comingle sales tax receipts. Thus, we conclude, as to the facts alleged in this case, that the result is no different under either section 353 or section 358." *Marcotte*, 418 A.2d at 1122.

As in *Marcotte*, Ruiz was under no duty to segregate collected sales taxes and could pay the State what she owed out of any source available to her. Her failure to remit the collected taxes along with her returns did not transform her control over the funds into "unauthorized" control because the State *had* no authorization to give. When considering the specific dollars collected, the State did not own those funds initially and did not later acquire ownership of them. Accordingly, Ruiz' failure to remit collected sales taxes does not satisfy the elements of K.S.A. 2022 Supp. 21-5801(a) and (b) as a matter of law.

Instead, the Tax Act establishes remedies available to the State—a specific set of remedies unique to sales taxes. This brings us to the second persuasive case cited by the parties. In *State v. Larson*, the Supreme Court of Minnesota considered whether a retailer who failed to remit sales taxes it collected on automobile lease buyouts could be charged with failure to pay over state funds when another statute specifically penalized failure to remit sales

taxes. After noting that the statute for failure to pay over state funds—and its predecessors—really addressed "embezzlement of public funds by anyone who has access to such funds," the court held that a prosecution under that statute for "[d]iverting sales tax funds"—which was criminalized in a separate statute—would "pervert[] legislative intent." *State v. Larson*, 605 N.W.2d 706, 716 (Minn. 2000). While noting that "as a general matter prosecutors may choose to prosecute under any statute that covers the prohibited activity," the court held the general rule inapplicable:

"This, however, is not an instance where we encounter overlapping criminal provisions. The legislature, in drafting chapter 297A and including a criminal enforcement mechanism, intended non-remittance of sales tax to be covered by what is now section 289A.63. Instead of allowing 609.445, a felony statute, to act as the enforcement mechanism for collecting and remitting sales tax funds, the 1967 legislature drafted a criminal penalty provision for failure to turn over sales tax funds and made the penalty a misdemeanor." *Larson*, 605 N.W.2d at 717.

Larson reinforces another point stressed by Ruiz: that our Tax Act limits criminal liability to the penalties set forth in K.S.A. 79-3615, as shown by the use of the phrase, "In addition to all other penalties provided by *this section* " (Emphasis added.) Other cases cited by the parties reinforce the importance of this language. See, e.g., *Kennedy*, 130 N.C. App. at 402 (sales tax code did not provide exclusive remedy for prosecution when it proclaimed that its penalties were "'in addition to other penalties provided by law'"); *State v. Pescatore*, 213 N.J. Super. 22, 26-29, 516 A.2d 261 (1986) (rejecting claim that sales tax statute was self-contained because the statute's penalties were "'in addition to any other penalties herein or elsewhere prescribed'"), *aff'd* 105 N.J. 441, 522 A.2d 440 (1987); *Shafer*, 414 Pa. at 623 ("'the criminal offenses and penalties therefor prescribed by [the Sales Tax Act] shall be in addition to any criminal offenses prescribed by the general laws of this Commonwealth'"). Through its focus on what is provided in "this section," the plain language of K.S.A. 79-3615(h) provides more evidence the Legislature intended to preclude the State from prosecuting retailers for not remitting sales tax under our felony theft statute.

But we pause to highlight the limits of our opinion today. We do not construe the phrase, "In addition to all other penalties provided by this section"—or similar language—to reflect universally a legislative intent to limit criminal liability to a specific section. Such a construction would contradict the broad discretion given to prosecutors under K.S.A. 2022 Supp. 21-5109(a). We only conclude that the limiting, introductory phrase of "by this section" further supports the Legislature's intent that the State is *not* the "owner" of sales taxes collected by retailers until those taxes are paid to the State, and that a retailer does not exert "unauthorized control" over those taxes by failing to pay them to the State at the time mandated by K.S.A. 79-3607.

We note a prior Court of Appeals panel's implication—in dicta—that the State is an owner of sales tax collected by a retailer. *State v. Parsons*, 11 Kan. App. 2d 220, 221, 720 P.2d 671 (1986) ("the sales tax did not belong *exclusively* to the State of Kansas"; further rationalizing that a retailer has an "interest" in collected sales tax because it is required to pay a percentage of its gross receipts to the State as a privilege tax [emphasis added]). We now clarify that a retailer's duties to collect sales tax from purchasers under K.S.A. 79-3604 and to pay those collected amounts to the State under K.S.A. 79-3607 at a set time do not make the State the "owner" of those funds under the meaning of K.S.A. 2022 Supp. 21-5111(s).

Because the State did not own the sales taxes collected by Ruiz, her failure to pay them at the statutorily mandated time did not constitute the exertion of unauthorized control, as required for a felony theft prosecution. Consequently, the State's attempt to prosecute her for felony theft fails as a matter of law. The district court thus correctly dismissed Ruiz' felony theft charge, although we reach this conclusion by a different analytical pathway.

Before concluding, we address three final issues. First, though we asked the parties to brief whether a multiplicity analysis is premature, we leave that question unresolved for now. Under these facts, a charge for felony theft does not lie. Left with one viable charge—criminal violation of the Tax Act—multiplicity does not arise.

Second, a claim here for dismissal under the version of the general/specific offense doctrine codified in K.S.A. 2022 Supp. 21-5109(d)—whether or not premature before trial—likewise is inapplicable. Although we conclude a theft prosecution for Ruiz' alleged Tax Act violation is contrary to legislative intent, our rationale lies outside the general/specific offense doctrine. See *State v. Williams*, 250 Kan. 730, 829 P.2d 892 (1992); *State v. Wilcox*, 245 Kan. 76, 775 P.2d 177 (1989). See also 2010 Final Report to the Kansas Legislature, Vol. I, Kansas Criminal Code Recodification Commission, approved Dec. 16, 2009, Appendix A, p. 8 (citing *Williams* as an example of the rule being codified). Contra *State v. Euler*, 314 Kan. 391, 396, 499 P.3d 448 (2021) (disapproving the judicially created general/specific offense doctrine; noting—in a modified opinion—that the defendant *may* have had a statutory claim under K.S.A. 2020 Supp. 21-5109[d] but failed to preserve it).

Finally, we also asked the parties to brief the issue of whether imprisonment for the crimes charged here violates section 16 of the Kansas Constitution Bill of Rights, which prohibits imprisonment for "debt, except in cases of fraud." Although we have concluded that a prosecution for theft cannot lie on these facts, we must still consider whether section 16 condones imprisonment for a Tax Act violation. See K.S.A. 79-3615(h) (listing, among other potential penalties, "imprison[ment] in the county jail [for] not less than one month, nor more than six months"). Because we view a retailer's obligations under the Tax Act as specific statutory duties, sales taxes collected by a retailer necessarily fall outside the meaning of "debts" as we have historically understood it—at least, as between the retailer and the Department of Revenue. K.S.A. 79-3604 ("Such tax shall be a debt from the consumer or user to the retailer."). E.g., *Burnett v. Trimmell*, 103 Kan. 130, 134, 173 P. 6 (1918) ("[P]enalty is not for failure to pay a debt, but for failure to do the thing expressly enjoined by the statute in reference to preparing a list of creditors."); *In re Wheeler*, 34 Kan. 96, 99, 8 P. 276 (1885); *State v. Krumroy*, 22 Kan. App. 2d 794, 798-99, 923 P.2d 1044 (1996). We have consistently viewed "debts"—for purposes of section 16 of the Kansas Constitution Bill of Rights—as arising upon *contracts*, express or implied.

State v. Jones, 242 Kan. 385, 389-90, 748 P.2d 839 (1988); *Wheeler*, 34 Kan. at 100. Ruiz has made no serious argument or constitutional analysis suggesting our caselaw is wrong. Consequently, the Legislature's criminalization of a retailer's failure to remit sales tax does not violate section 16's proscription on imprisonment for "debt." Cf. *People v. Buffalo Confectionery Co.*, 78 Ill. 2d 447, 462, 401 N.E.2d 546 (1980) (Illinois use tax statute made retailers debtors of the state, therefore prohibiting prosecution for theft when a retailer failed to remit taxes).

CONCLUSION

We affirm the district court's dismissal of the felony theft charge on different grounds and reverse the Court of Appeals panel's decision on that point.

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

No. 123,862

STATE OF KANSAS, *Appellee*, v. THOMAS JAMES KERRIGAN, *Appellant*.

(538 P.3d 852)

SYLLABUS BY THE COURT

1. STATUTES—*Interpretation of Statutes—Appellate Review*. We review issues of statutory interpretation de novo, meaning we give no deference to the conclusions reached by the district court or the Court of Appeals resulting from their interpretation of the statute.

2. SAME—*Interpretation of Statutes—Legislative Intent—Appellate Review*. When interpreting statutes, our purpose is to discern legislative intent and, to do so, we begin by looking to the plain language of the statute. If the language of the statute is plain and unambiguous, an appellate court will not speculate about the legislative intent behind that clear language and will not read something into the statute that is not readily found in its words. Only if the language of the statute is unclear or ambiguous do we turn to canons of statutory construction, consult legislative history, or consider other background information to ascertain legislative intent.

3. MOTOR VEHICLES—*Driving Under the Influence Violation—Statutory Right to Consult Attorney after Evidentiary Breath Test*. K.S.A. 8-1001(c)(1) is not ambiguous. Under it, persons have a statutory right to consult an attorney after administration of an evidentiary breath test. In order to properly invoke the right to post-evidentiary breath test counsel, the plain language of the statute requires the person to make that request after administration of the evidentiary breath test, distinguishing *Dumler v. Kansas Dept. of Revenue*, 302 Kan. 420, 354 P.3d 519 (2015).

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 28, 2022. Appeal from Riley District Court; KENDRA S. LEWISON, judge. Oral argument held May 17, 2023. Opinion filed November 17, 2023. Judgment of the Court of Appeals reversing the district court is reversed. Judgment of the district court is affirmed.

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

Jeremiah L. Platt, of Clark & Platt, Chtd., of Manhattan, argued the cause, and *Barry A. Clark*, of the same firm, was on the brief for appellant.

The opinion of the court was delivered by

STANDRIDGE, J.: After a bench trial on stipulated facts, a district court convicted Thomas Kerrigan of driving under the influence. Before trial, Kerrigan moved to suppress the results of an evidentiary breath test (EBT) based on a violation of his statutory right to counsel under K.S.A. 2019 Supp. 8-1001(c)(1). In support, Kerrigan claimed he invoked his right to counsel at least two times before the EBT, which law enforcement failed to honor after the EBT. The district court denied the motion, finding the statute required Kerrigan to invoke the right to counsel after the EBT. A divided Court of Appeals panel reversed, holding that a pre-EBT assertion of the post-EBT statutory right to counsel is a valid invocation of the post-EBT right under K.S.A. 2019 Supp. 8-1001(c)(1). *State v. Kerrigan*, No. 123,862, 2022 WL 15528601 (Kan. App. 2022) (unpublished opinion). The State petitioned for review. We reverse the panel majority and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are undisputed. Kansas Highway Patrol Captain Scott Walker stopped Thomas Kerrigan for a traffic infraction. Kerrigan admitted he had been drinking but did not say how much. After admitting he had been drinking, Kerrigan said—in substance—that he did not want to talk anymore and wanted to call his attorney. Captain Walker denied Kerrigan's request to call his attorney and afterwards administered two cognitive sobriety tests and a preliminary breath test (PBT).

Kerrigan failed the PBT, so Captain Walker arrested him for driving under the influence and advised him of his constitutional rights to remain silent and to speak to an attorney. See *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Captain Walker confiscated Kerrigan's cell phone.

Before asking Kerrigan to submit to an EBT, Captain Walker provided Kerrigan with the statutorily mandated implied consent advisory, which is required before law enforcement can administer the EBT. It requires law enforcement to provide oral and written notice that the driver has "no right to consult with an attorney regarding whether to submit to testing, but, after the completion of the testing, the person may request and has the right to consult with an attorney and may secure additional testing." K.S.A. 8-

1001(c)(1). At this point, Kerrigan says he repeated his request to call an attorney, which Captain Walker again denied. Kerrigan submitted to the EBT, which measured his blood alcohol concentration above the legal driving limit. Kerrigan did not renew his request to call an attorney after the EBT and Captain Walker did not offer him an opportunity to make the call.

The State charged Kerrigan with operating a motor vehicle with a blood alcohol concentration (BAC) of .08 or higher within three hours of driving, or in the alternative, driving while under the influence of alcohol to a degree that rendered him incapable of safely driving in violation of K.S.A. 2019 Supp. 8-1567(a). Relying on our decision in *Dumler v. Kansas Dept. of Revenue*, 302 Kan. 420, 354 P.3d 519 (2015), Kerrigan moved to suppress the EBT results because he was deprived of his statutory right to counsel after he submitted to the EBT—a right he says he validly invoked before the test. The district court granted his motion, in part.

The State moved to reconsider, arguing the 2018 amendments to K.S.A. 8-1001 legislatively superseded *Dumler*. The State noted that both the original and amended versions of the statute confer a post-EBT right to counsel. But under the new language in the amended statute, the State claims the post-EBT right to counsel can be invoked only after the test has been administered. In other words, a pre-EBT request for counsel is not enough to invoke the post-EBT right. Kerrigan opposed reconsideration, arguing amendments to the statute did not alter *Dumler*'s analysis. The district court agreed with the State and reversed its suppression ruling.

Kerrigan waived his right to a jury trial and agreed to a bench trial on stipulated facts. The district court found Kerrigan (1) guilty of driving under the influence of alcohol with a BAC greater than .08 and (2) not guilty of driving under the influence to a degree rendering him incapable of safely driving.

A Court of Appeals panel majority reversed the district court, finding the amended statutory language was ambiguous as to the timing of a post-EBT request for counsel. Applying the rule of lenity, the majority held the amended statute permits the post-EBT right to counsel to be invoked either before or after the EBT. The

majority remanded the case, finding suppression appropriate. *Kerrigan*, 2022 WL 15528601, at *8-9. Judge Kathryn Gardner dissented, arguing the Legislature amended the statute as a response to *Dumler*, the amended statute was not ambiguous, and the plain language favored the State's interpretation. 2022 WL 15528601, at *9-11.

We granted the State's petition for review. Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petition for review of Court of Appeals decision); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decision upon petition for review).

STANDARD OF REVIEW

The narrow issue before us is whether the 2018 amendment to K.S.A. 8-1001 limits a person's right to post-EBT counsel to only those requests made by the person after the EBT. This issue requires us to interpret K.S.A. 8-1001. We review issues of statutory interpretation de novo, meaning we give no deference to the conclusions reached by the district court or the Court of Appeals resulting from their interpretation of the statute. *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020). When interpreting statutes, our purpose is to discern legislative intent. To do so, we begin by looking to the plain language of the statute. *Jarvis*, 312 Kan. at 159. If the language of the statute is plain and unambiguous, an appellate court will not speculate about legislative intent and will not read something into the statute not readily found in its words. *State v. Moler*, 316 Kan. 565, 571, 519 P.3d 794 (2022) (quoting *State v. Betts*, 316 Kan. 191, 514 P.3d 341 [2022]). We use the canons of statutory construction, consult legislative history, or consider other background information to ascertain legislative intent only if the language of the statute is unclear or ambiguous. *Jarvis*, 312 Kan. at 159.

ANALYSIS

Under Kansas law, drivers have a statutory right to consult an attorney after administration of an EBT. *Dumler*, 302 Kan. at 424.

When we decided *Dumler*, the relevant part of the mandatory notice provision to Kansas' implied consent law stated that before a test is administered:

"[T]he person shall be given oral and written notice that . . . there is no constitutional right to consult with an attorney regarding whether to submit to testing" and . . . "after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing." K.S.A. 2009 Supp. 8-1001(k)(3), (k)(10).

On review, we found that nothing in the statute restricted when a person must request counsel; instead, the statute restricted only when the person may consult an attorney. *Dumler*, 302 Kan. at 426. Thus, we held a person may invoke the post-EBT right to consult an attorney before administration of the EBT. 302 Kan. at 426.

The Legislature amended and modified the statute in 2018. The relevant language—now in subsection (c)(1)—states that when requesting a test:

"[T]he person shall be given oral and written notice that . . . [t]here is no right to consult with an attorney regarding whether to submit to testing, but, after the completion of the testing, the person *may request and* has the right to consult with an attorney and may secure additional testing." (Emphasis added.) K.S.A. 8-1001(c)(1).

The difference in the relevant language between the prior version and the amended version of the statute is three added words, italicized in the excerpt above. Distinguishing the holding in *Dumler* because it was based on the prior version of the statute, the district court held the new statutory language requires a request for counsel be made after the EBT in order to properly invoke the post-EBT right to counsel. Kerrigan appealed.

The panel majority framed the issue as whether the amended statute "required Kerrigan to request counsel after the [EBT] was administered, and then have that request disregarded, in order to be entitled to suppression of his [EBT] results at trial." *Kerrigan*, 2022 WL 15528601, at *4. The majority's analysis touched on various arguments before concluding that the amended statute requires pre-EBT requests for post-EBT counsel to be honored. 2022 WL 15528601, at *9. But the analytical path relied on by the majority to reach this conclusion is unclear.

The panel stated the "plain language" of the amended statute "reflects that a person has the right to be told that they may request an attorney after [an EBT] has been administered, but the language does not convey that an earlier request should not be honored." 2022 WL 15528601, at *8. This statement shows the panel's analysis is not based on the statute's plain language, but on speculative and unspecified exceptions to the restrictions expressed in the plain language of the statute. Under the panel majority's analysis, a statute cannot confer a specified right without affirmatively eliminating all unspecified rights. Perhaps realizing this flaw in its analysis, the majority later acknowledged the amended language "is perhaps ambiguous," in which case the rule of lenity required the court to interpret the statute in favor of the defendant. 2022 WL 15528601, at *9.

In dissent, Judge Gardner concluded the amended statute is not ambiguous, and the rule of lenity is inapplicable. 2022 WL 15528601, at *11 (Gardner, J., dissenting). She would hold the "statute speaks both to when the person may request counsel and to when the officer must honor that request—'after the completion of the testing.'" 2022 WL 15528601, at *10.

Our interpretation of the plain language of the amended statute aligns with Judge Gardner's. To that end, we hold the amended statute requires a person to make a request for counsel *after* administration of the EBT to properly invoke the post-EBT right to counsel. Although the only relevant difference between the prior version and the amended version of the statute is adding three words, the substance and placement of these three words expressly impose a new timing restriction on a request for post-EBT counsel. Applying basic rules of grammar, the plain language of the amended statute clearly and unambiguously expresses this restriction: the introductory clause "after the completion of the testing" refers to and modifies the main clause following the introduction, that is, when "the person may request and has the right to consult with an attorney." K.S.A. 8-1001(c)(1).

Before concluding, we distinguish our holding today from *Dumler*. The legal issue presented in both cases is the same: whether K.S.A. 8-1001 limits a person's right to post-EBT counsel to only those requests made by the person after completion of the

EBT. In *Dumler*, we applied the 2009 version of the statute and found nothing in it to suggest the Legislature intended to restrict the timing of when a person could request post-EBT counsel. Thus, we held the 2009 version of the statute permitted a person to invoke the right to post-EBT counsel either before or after the EBT. 302 Kan. at 426. Although we analyze the same legal issue here, the amended version of the statute applies.

Unlike its predecessor, the amended statute expressly includes language reflecting the Legislature's intent to honor only those requests for counsel made after administration of the EBT. K.S.A. 8-1001(c)(1). Although the facts and legal issue presented are the same in both cases, the holdings are different because the statutes differ. So we do not overrule *Dumler*, but recognize its holding is limited to cases when the issue was presented under the prior version of the statute.

Finally, we note several questions were asked at the suppression hearing about potential confusion between (1) the *statutory* right to speak to an attorney upon request after the administration of the EBT and (2) the *constitutional* right to speak to an attorney upon request after law enforcement provides the *Miranda* advisory. Although the parties appear to agree that Captain Walker first provided Kerrigan with a *Miranda* advisory informing him of his constitutional right to counsel and then provided him with the informed consent advisory informing him of his statutory right to post-EBT counsel, Kerrigan relied solely on the statutory right to post-EBT counsel under K.S.A. 8-1001(c)(1) to support his motion to suppress. Both the district court and the Court of Appeals made their decisions based on interpretation of the statutory right to post-EBT counsel. And the State's petition for review challenges the panel's statutory interpretation. Thus, the constitutional right to speak to an attorney upon request after a *Miranda* advisory is not at issue here and we express no opinion on the merits of such an argument.

CONCLUSION

K.S.A. 8-1001(c)(1) is not ambiguous. For a person to properly invoke the statutory right to post-EBT counsel, the plain

language of the amended statute requires the person to make a request for counsel after administration of the EBT.

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

* * *

ROSEN, J., dissenting: I dissent from the majority's opinion. I agree K.S.A. 8-1001(c)(1) is not ambiguous. It tells us that an officer, when requesting a breath test, must give oral and written notice that "[t]here is no right to consult with an attorney regarding whether to submit to testing, but, after the completion of the testing, the person may request and has the right to consult with an attorney and may secure additional testing." I read this to require that an officer, before administering a breath test, tell a person (1) they cannot consult with an attorney about whether to submit to testing; (2) they can request an attorney after testing; (3) they have a right to consult with an attorney after testing; and (4) they can secure additional testing. I do not see anything else in this language.

The majority reads the statute differently. It concludes that in requiring an officer to tell a person they may, after testing, request an attorney, the statute also says that any pretest request to invoke the posttest right to an attorney is ineffective and may be ignored.

I don't buy it. If the Legislature wanted to convey that a person has no right to, pretest, request an attorney, it could have said so, as it did regarding a pretest right to an attorney. The statute directs an officer to tell a person they have a posttest right to an attorney, but not pretest right to an attorney. In contrast, it directs an officer to inform a person they may, posttesting, request an attorney, but it *does not* direct an officer to inform a person they may not, pretesting, request an attorney.

Because I would take the statute as it is instead of reading into it permission for officers to ignore requests for counsel, I dissent.

LUCKERT, C.J., joins the foregoing dissenting opinion.

No. 123,833

In the Matter of the PARENTAGE OF R.R.

(538 P.3d 838)

SYLLABUS BY THE COURT

1. PARENT AND CHILD—*Kansas Parentage Act—Recognizes Claims of Parentage*. The Kansas Parentage Act, K.S.A. 2022 Supp. 23-2201 et seq., recognizes claims of parentage based on genetics, adoption, and other circumstances giving rise to statutory presumptions of parentage.

2. SAME—*Kansas Parentage Act— Shifting Burden of Proof on Parties Alleging Paternity Through Statutory Presumption*. The Kansas Parentage Act imposes shifting burdens of proof on parties seeking to establish paternity through a statutory presumption. If the party alleging paternity establishes an initial presumption of paternity, the burden shifts to the other party to rebut that presumption. If the presumption is rebutted, the party alleging paternity bears the burden of going forward with the evidence by a preponderance of the evidence. When competing presumptions exist, the court must decide parentage based on the presumption yielding the weightier considerations of policy and logic, including the best interests of the child.

3. SAME—*Determination of Best Interests of Child by District Court—Appellate Review*. Weighing conflicting presumptions and determining the best interests of a child involve judgment calls for the district court; thus, an appellate court reviews the district court's decisions for an abuse of discretion. A judicial action constitutes an abuse of discretion if it is arbitrary, fanciful, or unreasonable, if it is based on an error of law, or if substantial competent evidence does not support a finding of fact on which the exercise of discretion is based. The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion.

Review of the judgment of the Court of Appeals in an unpublished opinion filed October 14, 2022. Appeal from Barton District Court; STEVEN E. JOHNSON, judge. Oral argument held May 16, 2023. Opinion filed November 22, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Jeffrey N. Lowe, of Penner Lowe Law Group, LLC, of Wichita, argued the cause, and *Candice Y. Farha*, of the same firm, was with him on the briefs for appellant T.T.

Tish Morrical, of Hampton & Royce, L.C., of Salina, argued the cause, and was on the brief for appellee T.R.

The opinion of the court was delivered by

STANDRIDGE, J.: The Kansas Parentage Act (KPA), K.S.A. 2022 Supp. 23-2201 et seq., recognizes claims of parentage based on genetics, adoption, and other circumstances giving rise to statutory presumptions of parentage. When competing presumptions exist, the KPA directs the court to decide parentage based on the presumption yielding "the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 2022 Supp. 23-2208(c).

This case involves such competing presumptions of paternity. T.T. filed an action seeking paternity rights to his biological son, R.R., who was conceived and born to Mother during her marriage to T.R. In reaching its decision, the district court weighed the competing presumptions of paternity, considered the totality of the circumstances, and held T.R. had the weightier presumption and R.R.'s best interests would be served by naming T.R. the legal father. A Court of Appeals panel affirmed the district court's decision. *In re Parentage of R.R.*, No. 123,833, 2022 WL 7813894 (Kan. App. 2022) (unpublished opinion).

On review, T.T. argues the district court misapplied the KPA by giving too much weight to the marital presumption without giving equal weight to the biological presumption, thus holding him to a higher burden of proof than statutorily required. He also argues the district court had an unconscious bias against him that led it to improperly weigh the best interests of the child factors set forth in *Greer v. Greer*, 50 Kan. App. 2d 180, 195-96, 324 P.3d 310 (2014).

After careful review of the entire record, we conclude the district court did not assign greater weight to the marital presumption and made its decision based on the appropriate consideration of applicable policy and logic, including the best interests of the child, as required by the KPA. We further conclude that the district court's best interest findings are supported by substantial competent evidence. As a result, we affirm the panel's decision upholding the district court's ruling in favor of T.R.

FACTS

Mother and T.R. had a son in October 2015. They married in May 2017. In March 2019, while still married to T.R., Mother

gave birth to R.R. T.R. was present for R.R.'s birth and signed the birth certificate.

But Mother was romantically involved with T.T. when R.R. was conceived. T.T. took a paternity test when R.R. was around three months old. The test results established a 99.9% probability that T.T. was R.R.'s biological father.

In November 2019, T.T. filed a paternity action in the district court, requesting a declaration of paternity and shared legal custody of R.R. The district court later granted T.R.'s motion to intervene in the paternity action. While the case was pending, T.R. filed for divorce and Mother moved in with T.T.

In September 2020, when R.R. was 18 months old, the parties appeared before the district court for a hearing on the paternity case. At that time, T.R. and Mother were still separated but their divorce was not finalized. They shared residential custody of R.R. and his older brother (Brother). Mother lived with T.T., but they had no current plans to marry.

Highly summarized, the evidence presented at the hearing established that R.R. referred to both T.T. and T.R. as "'Dada.'" They each had a positive, father-son relationship with R.R., loved R.R. deeply, and would do anything for him. T.T. and T.R. each had stable housing and employment. Both men had supportive family members who lived nearby, saw R.R. regularly, and viewed R.R. as an integral part of their families. The evidence showed that T.T., T.R., and their families would continue to love R.R. and wanted to be part of his life regardless of the district court's decision. Neither T.T. nor T.R. would object to R.R. continuing a relationship with whomever was not named the legal father.

At the hearing, T.T.'s arguments focused on his relationship with R.R. since learning he was R.R.'s biological father, his current relationship with Mother, and his claims that he would have been more involved in R.R.'s life earlier had he been given the opportunity. T.T. pushed for the paternity test as soon as Mother acknowledged he might be R.R.'s father. After the test results confirmed he was R.R.'s father, T.T. gave Mother money to help support R.R. and expressed a desire to be in his life. When R.R. was around three months old, T.T. began semi-regular visits with him, which later included overnight, weekend, and week-long visits.

T.T. was persistent about seeing R.R. at every opportunity and took care of him whenever Mother would allow it. After Mother moved in with him, T.T. began spending more time with R.R. At the time of the hearing, T.T. and Mother had custody of R.R. and Brother every other week.

Mother testified in support of T.T.'s petition. Mother agreed T.T. had always wanted to be involved in R.R.'s life, noting he had provided financial and other support since learning he was R.R.'s biological father. Mother said T.T. had a good relationship with Brother and treated him like a son. If T.T. were named the legal father, Mother did not believe it would affect R.R.'s bond with Brother. Mother admitted she had earlier wanted T.R. to be R.R.'s legal father and had opposed T.T.'s desire to change R.R.'s last name. Mother said she had done so because she was trying to salvage her marriage, but she now supported T.T. being named the legal father and changing R.R.'s last name.

In response to T.T.'s petition, T.R. provided evidence that he had acted as R.R.'s primary father for the first several months of his life and had supported R.R. since even before his birth. T.R.'s feelings for R.R. did not change after learning he was not R.R.'s biological father. T.R.'s family also did not feel any differently about R.R., and they still considered R.R. to be T.R.'s son. At the hearing, T.R. highlighted R.R.'s close relationship with Brother. Several witnesses testified R.R. and Brother had a strong bond and a special relationship; the witnesses described the relationship as best friends who did everything together. T.R. believed the boys' relationship would suffer if T.T. were named the legal father because they would have different custody arrangements and different last names.

After hearing this testimony and considering photos, text messages, receipts, and other exhibits in support of the parties' respective positions, the district court denied T.T.'s paternity petition and declared T.R. the legal father of R.R. Recognizing the competing presumptions of paternity under K.S.A. 2022 Supp. 23-2208(a), the district court applied the factors used to consider the best interests of the child in paternity cases set forth in *Greer*. The court made detailed findings on the relevant *Greer* factors and determined they weighed in favor of T.R. In reaching its decision, the

court relied primarily on T.R.'s longer and more consistent relationship with R.R. and R.R.'s close relationship with Brother. The court concluded it would be in R.R.'s best interest to have the same legal parents as Brother.

T.T. moved to alter or amend the district court's decision. He claimed the court had given too much deference and weight to T.R.'s presumptions of paternity and did not meaningfully consider his biological connection to R.R. and the stable family environment he and Mother provided. T.T. also argued the court improperly weighed the *Greer* factors, alleging the court's factual findings defied logic and lacked support. After considering the parties' written and oral arguments, the district court denied T.T.'s motion.

The Court of Appeals affirmed the district court's decision. The panel held, in relevant part, that the district court made no legal or factual errors in weighing the parties' competing presumptions of paternity under the KPA and in applying the *Greer* best interest factors. See *In re Parentage of R.R.*, 2022 WL 7813894, at *3-11.

We granted T.T.'s petition for review on these issues. 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

T.T. claims two errors: (1) The district court erroneously applied the KPA burden- shifting provisions governing parental presumptions and (2) the district court abused its discretion in balancing the *Greer* factors to determine parentage. We address each claim in turn.

1. *The KPA provisions governing parental presumptions*

Whether the district court applied the correct legal standard raises a question of law over which appellate courts exercise unlimited review. *Harrison v. Tauheed*, 292 Kan. 663, 672, 256 P.3d 851 (2011). Resolution of this issue involves interpretation of the KPA, which also presents a question of law subject to unlimited

appellate review. See *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

Other than proceedings under the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., the KPA governs all proceedings relating to the parentage of a child. K.S.A. 2022 Supp. 23-2201(b). The purpose of the KPA is to provide for the "equal, beneficial treatment of children." *In re Marriage of Ross*, 245 Kan. 591, 597, 783 P.2d 331 (1989). The KPA defines a "parent and child relationship" as "the legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations." K.S.A. 2022 Supp. 23-2205. The parent and child relationship includes the father and child relationship and "extends equally to every child and to every parent, regardless of the marital status of the parents." K.S.A. 2022 Supp. 23-2205; K.S.A. 2022 Supp. 23-2206.

In addition to the biological and adoptive relationships explicitly recognized under K.S.A. 2022 Supp. 23-2205, a father and child relationship may be established by other circumstances set forth in the KPA. See K.S.A. 2022 Supp. 23-2207(b) (A father and child relationship "may be established under this act or, in the absence of a final judgment establishing paternity, by a voluntary acknowledgment of paternity meeting the requirements of K.S.A. 2022 Supp. 23-2204."); *Frazier v. Goudschaal*, 296 Kan. 730, 746, 295 P.3d 542 (2013) ("[T]he parental relationship for a father can be legally established under the KPA without the father actually being a biological or adoptive parent."). The KPA lists six possible bases for the presumption of paternity that can apply to establish a father and child relationship. K.S.A. 2022 Supp. 23-2208(a). Summarized, these presumptions are:

(1) The man and the child's mother were married when the child was conceived or born.

(2) Before the child's birth, the man and the child's mother attempted to marry but the marriage was void or voidable.

(3) After the child's birth, the man and the child's mother attempted to marry but the marriage was void or voidable and (a) the man acknowledged paternity in writing, (b) the man consented to his name on the birth certificate,

or (c) the man is obligated to support the child under written voluntary promise or by court order.

(4) The man notoriously or in writing recognizes paternity of the child, including but not limited to a voluntary acknowledgment of paternity.

(5) Genetic test results indicate a probability of 97% or greater that the man is the father of the child.

(6) The man has a duty to support the child under an order of support regardless of whether the man has ever been married to the child's mother.

The KPA imposes shifting burdens of proof on parties seeking to establish the existence of a father and child relationship through one of these presumptions.

First, the party alleging the existence of a father and child relationship bears the burden to prove an initial presumption of paternity. *In re M.F.*, 312 Kan. 322, 341-42, 475 P.3d 642 (2020).

Second, if the party alleging the existence of a father and child relationship succeeds in establishing a presumption, then the burden shifts to the other party to rebut that presumption. The other party may rebut the presumption of a legal father and child relationship by presenting

- clear and convincing evidence disproving the basis for the presumption,
- a court decree establishing paternity of the child by another man, or
- a conflicting presumption. K.S.A. 2022 Supp. 23-2208(b).

Third, "[i]f a presumption is rebutted, the party alleging the existence of a father and child relationship shall have the burden of going forward with the evidence" by a preponderance of the evidence. K.S.A. 2022 Supp. 23-2208(b); see *In re M.F.*, 312 Kan. at 341-42 (noting the burden at this step is preponderance of the evidence).

Fourth, if two or more conflicting presumptions arise, "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control." K.S.A. 2022 Supp. 23-2208(c).

T.T. argues the district court misapplied this KPA burden-shifting framework. Specifically, he asserts the court erred by beginning its K.S.A. 2022 Supp. 23-2208(c) conflicting presumptions analysis with T.R.'s marital presumption and then imposing on T.T. the burden to present compelling evidence to overcome that presumption. We are not persuaded by T.T.'s argument.

At the beginning of its Memorandum Decision, the district court made paternity presumption findings based on the facts and the agreement of the parties:

"All the parties recognize that the Petitioner, [T.T.], has a presumption pursuant to a DNA test obtained from a private source with the consent of the Mother prior to the filing of this action. The parties also agree that the presumptive father, [T.R.], has a valid presumption of paternity pursuant to his marriage to the Mother at the time of conception and birth, but currently has a divorce proceeding pending. Further, [T.R.] is the named father on the child's birth certificate.

"Neither the Mother or the presumptive father, [T.R.], have challenged the validity of the DNA test. The Court at pretrial, and prior to the commencement of this hearing indicated to the parties that it believed that it was the Court's obligation to proceed as outlined in the case of [*Greer v. Greer*], 50 Kan. App. 2d 180, 324 P.3d 310 (2014)."

The court's findings, to which the parties agreed, resolved the first two steps of the KPA's burden-shifting framework. *First*, T.T., as the party seeking to prove the existence of a parent-child relationship, successfully proved an initial presumption of paternity under K.S.A. 2022 Supp. 23-2208(a)(5) by providing genetic test results showing a 99.99% probability that R.R. is his biological child. *Second*, T.R. rebutted T.T.'s biological presumption of paternity by presenting evidence of two competing presumptions: (1) he was married to the child's mother when the child was conceived and born, K.S.A. 2022 Supp. 23-2208(a)(1); and (2) he notoriously recognized his paternity of the child by consenting to his name as father on the child's birth certificate, K.S.A. 2022 Supp. 23-2208(a)(4).

Having determined the parties successfully carried their respective burdens at the first and second steps, the court began its legal analysis at the third and fourth steps of the framework, which shifted the burden back to T.T. These steps imposed on T.T. "the burden of going forward with the evidence" to prove by a preponderance of the evidence that the biological presumption is

"founded on the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 2022 Supp. 23-2208(b) and (c); *In re M.F.*, 312 Kan. at 341-42. The district court used the factors set forth in *Greer*, 50 Kan. App. 2d at 195-96, to balance the competing considerations.

T.T. argues the district court misapplied the KPA by starting its *Greer* competing-presumptions analysis with the marital presumption instead of the biological presumption. T.T. points to several statements in the district court's opinion to support his argument:

- "[I]t is the Court's belief that [T.R.] is currently the legal father of the child."
- "[T]he Court is of the opinion that no evidence presented at the hearing would compel the Court to believe that it is in the best interest of the child to undo the current legal status of [T.R.] as the child's father despite the biology of the child."
- "[T]he Court adopts [the marital] presumption as not being overcome by any of the evidence presented by [T.T.] in regards to the best interest of the child."

T.T. claims these statements demonstrate the district court started its *Greer* competing-presumptions analysis with the marital presumption, which he argues improperly imposed on him the burden to overcome T.R.'s marital presumption. To the extent these and other statements support a finding that the district court started its *Greer* competing-presumptions analysis with the marital presumption, we find the court's analysis consistent with the KPA burden-shifting framework. As discussed above, the third and fourth steps of the framework—the point at which the court is required to weigh competing presumptions—imposed on T.T. (as the party alleging the existence of a father and child relationship) "the burden of going forward with the evidence" to prove the biological presumption is "founded on the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 2022 Supp. 23-2208(b) and (c); *In re M.F.*, 312 Kan. at 341-42. Thus, to the extent that it did so, the district court properly

imposed on T.T. the burden to overcome T.R.'s marital presumption when it weighed competing interests under K.S.A. 2022 Supp. 23-2208(c). T.T.'s argument claiming otherwise has no merit.

2. *Weighing competing presumptions under* Greer

T.T. argues the district court erred in weighing the *Greer* factors to resolve the competing paternity presumptions. In *Greer*, a Court of Appeals panel set forth a non-exclusive list of factors to consider in resolving competing parental presumptions under K.S.A. 2013 Supp. 23-2208(c). The factors basically are a compilation of considerations taken into account by courts across the country making decisions about the best interests of the child in paternity cases. *Greer*, 50 Kan. App. 2d at 195-96. The panel acknowledged its analysis was one of first impression in Kansas and compiled the factors "to provide future guidance when courts are faced with competing presumptions." 50 Kan. App. 2d at 193.

The *Greer* panel noted that a best-interests analysis is "incredibly fact-specific and rarely limited to a narrow number of factors," and recognized that "courts weighing two or more conflicting presumptions may consider a wide array of nonexclusive factors when deciding which presumption serves the child's best interests." 50 Kan. App. 2d at 196. The panel cited 10 factors that courts traditionally have used to consider the best interests of the child in paternity cases:

"(1) whether the child thinks the presumed father is his or her father and has a relationship with him; (2) the nature of the relationship between the presumed father and child and whether the presumed father wants to continue to provide a father-child relationship; (3) the nature of the relationship between the alleged father and the child and whether the alleged father wants to establish a relationship and provide for the child's needs; (4) the possible emotional impact of establishing biological paternity; (5) whether a negative result regarding paternity in the presumed father would leave the child without a legal father; (6) the nature of the mother's relationships with the presumed and alleged fathers; (7) the motives of the party raising the paternity action; (8) the harm to the child, or medical need in identifying the biological father; (9) the relationship between the child and any siblings from either the presumed or alleged father; and (10) whether there have been previous opportunities to raise the issue of paternity." *Greer*, 50 Kan. App. 2d at 195 (citing 1 Elrod and Buchele, Kansas Family Law § 7.15 [1999]).

The panel also referenced several additional factors that may be considered:

"'Time may be a major factor' in determining best interests, as well as 'the notoriety of the child's situation in the community,' the stability of the home in which the child will reside, the child's uncertainty regarding the paternity issue, 'and any other factors that will maximize the child's opportunities for a successful life.'" *Greer*, 50 Kan. App. 2d at 195 (quoting 1 Elrod and Buchele, Kansas Family Law § 7.15 [1999 & Supp. 2013]).

Although it has been almost a decade since the Court of Appeals issued its *Greer* opinion adopting the best interests of the child factors as the primary legal analysis used to weigh competing paternity presumptions under K.S.A. 2013 Supp. 23-2208(c), no party has ever asked this court to adopt it. In fact, the parties here do not ask us to adopt the *Greer* factors. Nor do they challenge the district court's decision to apply the *Greer* factors to weigh competing paternity presumptions. Instead, T.T. argues the district court erred in *weighing* the *Greer* factors to resolve the competing paternity presumptions.

Because the parties argued the *Greer* factors to the district court, the district court used the *Greer* factors to weigh and resolve competing paternity presumptions, and T.T. frames his issue on review as one of error by the district court in weighing the *Greer* factors, we will use the *Greer* factors to decide whether the district court abused its discretion in weighing them. But we do so without adopting them or assessing whether they should be considered the proper legal standard for the court to determine "the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child." K.S.A. 2022 Supp. 23-2208(c).

Weighing conflicting presumptions and determining the best interests of a child involve judgment calls for the district court, which hears the evidence directly. We review these decisions only for an abuse of discretion. See *State, ex rel. Secretary, DCF v. M.R.B.*, 313 Kan. 855, 861-62, 491 P.3d 652 (2021). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable, i.e., if no reasonable person would agree with the district court's judgment; (2) it is based on an error of law; or (3) substantial competent evidence does not support a finding

of fact on which the exercise of discretion is based. 313 Kan. at 861-62; *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). The party asserting the district court abused its discretion bears the burden of showing such abuse of discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017).

T.T. argues the district court abused its discretion by arbitrarily and unreasonably weighing the competing presumptions based on unconscious bias, prejudice, and personal preference rather than substantial competent evidence. We construe T.T.'s argument to allege an abuse of discretion under both the first and third options. Under the first option, he alleges the district court's decision finding T.R.'s presumptions weightier than T.T.'s presumption is arbitrary, fanciful, and unreasonable. Under the third option, he alleges substantial competent evidence does not support the factual findings relied on by the district court in assessing the *Greer* factors. We address T.T.'s allegations in reverse order.

a. *Substantial competent evidence*

Substantial competent evidence refers to legal and relevant evidence a reasonable person could accept as being adequate to support a conclusion. *Geer v. Eby*, 309 Kan. 182, 190, 432 P.3d 1001 (2019). T.T. suggests that—in the context of weighing and deciding competing parental presumptions—clear and convincing evidence is required to satisfy the substantial competent evidence standard.

T.T.'s suggestion conflates the language in the statutes. See K.S.A. 2022 Supp. 23-2208(b) ("A presumption under this section may be rebutted only by clear and convincing evidence, by a court decree establishing paternity of the child by another man or as provided in subsection [c]."); K.S.A. 2022 Supp. 23-2208(c) ("If two or more presumptions under this section arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic, including the best interests of the child, shall control."). Subsection (b) provides that one way to rebut the initial presumption of paternity is by clear and convincing evidence. But subsection (c)—the provision addressing conflicting presumptions—does not mention clear and

convincing evidence. By including the clear and convincing language in subsection (b) and not in subsection (c), the Legislature implicitly declared that clear and convincing evidence is not required to resolve competing statutory presumptions. See *In re M.F.*, 312 Kan. at 341-42 ("The ultimate burden placed on the party seeking recognition of the relationship can be discharged by a preponderance of the evidence, as a 'clear and convincing evidence' standard is not specified in the way it is on rebuttal of the initial presumption."). Thus, T.T. had the ultimate burden to establish, by a preponderance of the evidence, that his biological presumption was founded on the weightier considerations of policy and logic, including the best interests of the child. The district court made findings on the *Greer* factors to determine whether T.T. met his burden.

As discussed, we review the district court's *Greer* factor findings for substantial competent evidence. See *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015). The court's findings on each factor are summarized below. Although the factors refer to both a "presumed" father and an "alleged" father, the district court appeared to consider both T.R. and T.T. presumed fathers.

1. *Whether the child thinks the presumed father is his or her father and has a relationship with him*: The district court found R.R.'s concept of "father" was limited due to his young age, but he called both T.R. and T.T. "'Dada'" and had a relationship with both men. The court found this factor weighed in favor of T.R. because he had been "far more the committed father to this point" but agreed T.T. would have been just as committed if given the opportunity.

2. *The nature of the relationship between the presumed father and child and whether the presumed father wants to continue to provide a father-child relationship*: The court found this factor favored T.R. because he had "far more of a father/son relationship than [T.T.]," noting that T.T.'s relationship with R.R. was based on Mother's decisions. The court concluded that "the natural relationship, at this time, of father/child lies with [T.R.]."

3. *The nature of the relationship between the alleged father and the child and whether the alleged father wants to establish a relationship and provide for the child's needs*: The court found both T.R. and T.T. wanted to continue their relationships with R.R. and provide for his needs. The court appeared to weigh this factor in T.R.'s favor, finding that he had been providing for R.R. his entire life. The court did note that T.T. also would have done so had he been given the opportunity.

4. *The possible emotional impact of establishing biological paternity*: The court expressed a belief this factor would have "very little impact" due to R.R.'s age but found taking away T.R.'s father relationship and giving it to T.T. would not improve R.R.'s situation or be in his best interests.

5. *Whether a negative result regarding paternity in the presumed father would leave the child without a legal father*: This factor did not apply here.

6. *The nature of the mother's relationships with the presumed and alleged fathers*: The district court found this factor favored T.R. due to the certainty of Mother's relationship with him. Although Mother and T.R. were in the process of divorcing, they would continue to co-parent Brother. The court noted Mother had initially supported T.R. being named R.R.'s father, but later supported T.T.'s desire to seek legal paternity after her relationship with T.T. became more serious. The court found the possibility of Mother and T.T. having additional children together in the future did not outweigh the certainty of Mother's relationship with T.R.

7. *The motives of the party raising the paternity action*: The court found T.T. had "no sinister motives" and assigned no weight to this factor.

8. *The harm to the child, or medical need in identifying the biological father*: The court noted T.T. already had been identified as the biological father and found this factor had no bearing on R.R.'s best interests.

9. *The relationship between the child and any siblings from either the presumed or alleged father*: The court found maintaining full brotherhood between R.R. and Brother weighed in T.R.'s favor.

10. *Whether there have been previous opportunities to raise the issue of paternity*: The court found T.T. timely filed his petition and assigned no weight to this factor.

The district court also referenced the additional factors in *Greer* that may be considered in determining the best interests of a child, including "the notoriety of the child's situation in the community, the stability of the home in which the child will reside, the child's uncertainty regarding the paternity issue and any other factors that will maximize the child's opportunity for success in life." The court found that while both T.R. and T.T. had "the ability to provide opportunities for a successful life," the totality of the circumstances weighed in T.R.'s favor.

T.T. agrees that the district court properly weighed factor 9—R.R.'s relationship with Brother—in T.R.'s favor. But he claims substantial competent evidence does not support the district court's findings in favor of T.R. with respect to the other factors.

Specifically, he argues the evidence supports a finding of neutrality with respect to factors 1, 2, 3, and 6 and a finding in favor of him with respect to factors 4, 8, and the additional factors.

To the extent T.T.'s arguments ask this court to reweigh the evidence, we must decline this invitation. See *In re B.D.-Y.*, 286 Kan. 686, 705, 187 P.3d 594 (2008). And contrary to T.T.'s remaining arguments, we find substantial competent evidence supports the district court's findings that factors 1, 2, 3, and 6 weigh in T.R.'s favor, given the nature and length of T.R.'s relationship with R.R. and the certainty of T.R.'s relationship with Mother. Even if we were to find that T.T. had introduced equally compelling evidence relating to each of these factors, we may not disturb district court findings supported by substantial competent evidence. See *Peterson*, 302 Kan. at 106.

T.T.'s arguments alleging a lack of substantial competent evidence to support factor 4 (the possible emotional impact of establishing biological paternity) and factor 8 (the harm or medical need in identifying the biological father) fare no better. As discussed, the district court found that establishing biological paternity would have little emotional effect on R.R. given his age and that it would not be in R.R.'s best interests to remove T.R.'s status as father in favor of T.T. The court also noted T.T. already had been identified as the biological father, so the "harm or medical need" factor carried little weight in its decision.

T.T. contends the district court erred in assigning minimal weight to these factors and in limiting its analysis to R.R.'s age at the time of the hearing. T.T. claims the court should have relied on these factors to give more weight to his biological connection with R.R. and focused on how biological paternity can impact a child throughout his or her life. For support, T.T. cites research on the emotional impact of establishing biological paternity and the harm that may result when a child is cut off from a biological parent.

But as noted by the panel, T.T. did not present this research to the district court, so the court made no factual findings related to this evidence. As a result, T.T.'s arguments lack support in the record. See *State v. Hutto*, 313 Kan. 741, 746, 490 P.3d 43 (2021) (Appellate courts are courts of review and are unable to make fact

findings.); *Smith v. Printup*, 254 Kan. 315, 353, 866 P.2d 985 (1993) (assertions in appellate brief are not sufficient to satisfy inadequacies in record on appeal).

T.T.'s arguments regarding factors 4 and 8 are further undermined by the reality that these factors assume the biological father has not yet been identified. Factor 4 relates to the "possible emotional impact of *establishing* biological paternity," while factor 8 addresses the "harm to the child, or medical need in *identifying* the biological father." (Emphasis added.) *Greer*, 50 Kan. App. 2d at 195. The district court appeared to place little weight on these factors because genetic testing already had identified and established T.T. as the biological father. And T.T.'s suggestion that R.R. would suffer harm if he were cut off from a biological parent lacks support in the record. T.T. and his family testified they intend to remain in R.R.'s life regardless of the district court's paternity decision. In addition, T.R. testified that if named the legal father, he would not object to R.R. continuing a relationship with T.T.

Under these circumstances—where the biological father was known and present in the child's life—there is substantial competent evidence supporting the district court's findings that factors 4 and 8 carried little, if any, weight.

Finally, T.T. alleges a lack of substantial competent evidence to support the district court's finding that the additional *Greer* factors weighed in T.R.'s favor. T.T. claims the community knows he is R.R.'s biological father, his home is as stable as T.R.'s home, and he and his extended family have an equally strong bond with R.R. as T.R. and his family do. T.T. contends the district court failed to explain how finding in T.R.'s favor would affect R.R.'s uncertainty over the paternity issue or maximize R.R.'s opportunity for success in life. It is worth noting the district court made no specific findings on each of these factors and did not rely on them significantly in making its decision. Instead, the court generally mentioned the factors and concluded that the totality of the circumstances weighed more in favor of T.R. given how long he had been parenting R.R. In any event, T.T.'s arguments invite this court to reweigh the evidence, which we cannot do. See *In re B.D.-Y.*, 286 Kan. at 705.

In sum, we conclude substantial competent evidence supports the findings made by the district court as it weighed and decided the competing parental presumptions presented here.

b. *Unconscious bias, prejudice, and personal preference*

T.T. argues the district court abused its discretion by arbitrarily and unreasonably weighing the competing parental presumptions based on unconscious bias, prejudice, and personal preference. To demonstrate this alleged bias, T.T. points to several statements in the district court's opinion which he claims show the court was predisposed to give more deference to the marital presumption of legitimacy than to his biological connection to R.R., regardless of the evidence presented at the hearing:

- "[I]t is the Court's belief that [T.R.] is currently the legal father of the child."
- "[T]he Court is of the opinion that no evidence presented at the hearing would compel the Court to believe that it is in the best interest of the child to undo the current legal status of [T.R.] as the child's father despite the biology of the child."
- "It has been this Court's experience, personal and observed, after being involved in many adoptions and other cases similar to this, that the biology is probably the most insignificant factor regarding a relationship of a parent and child that there is. It is the commitment that truly counts."
- "[S]everal courts, including those in Kansas have applied a presumption of legitimacy of a child born in wedlock as being one of the strongest presumptions known to the law."
- "[T]he Court adopts that presumption as not being overcome by any of the evidence presented by [T.T.] in regards to the best interest of the child."

The district court's comments, when read in isolation, could give an impression of bias against T.T. But when the opinion is

read in its entirety, it reflects the court properly based its ruling on the *Greer* factors, not on a preferential view of the marital presumption. The district court correctly recognized T.R.'s presumption was first in time because he was married to Mother when R.R. was conceived and born and that T.T., as the party later seeking to establish paternity, bore the burden of "going forward with the evidence." See K.S.A. 2022 Supp. 23-2208(b). The district court also properly cited current Kansas law on the presumption of legitimacy. See *In re M.F.*, 312 Kan. at 340 (citing *Bariuan v. Bariuan*, 186 Kan. 605, Syl. ¶ 3, 352 P.2d 29 [1960]) (The "ancient presumption of the legitimacy of a child born in wedlock is one of the strongest presumptions known to the law."). And the district court's comment about biology being an insignificant factor was not made in reference to T.T.'s biological connection to R.R. Instead, the comment related to the court's belief in "the assertions of [T.R.] and his family that the biology of the child does not matter to them."

Throughout its opinion, the district court referenced the parties' competing presumptions of paternity and addressed its obligation to proceed as outlined in *Greer* and its duty to consider the *Greer* factors in determining R.R.'s best interests. Significantly, the court expressly denied relying on the presumption of legitimacy in making its decision:

> "The last consideration that the Court is going to address, and would like to make clear that whether or not it is a valid consideration, the Court would make the decision of legal paternity to [T.R.] without it. The *Farbo vs. Greer* [c]ourt discusses the fact that several courts, including those in Kansas have applied a presumption of legitimacy of a child born in wedlock as being one of the strongest presumptions known to the law. In reviewing the case, the Court is not certain as to the Court of Appeals positions regarding the legitimacy of this presumption at this time. In reading *Farbo v. Greer*, the Court believes that it still exists despite the clear right of biological father to attack the presumption in consideration of the child's best interest. The Court just wishes to note that this presumption, if it is still accepted as the common law of our State, does weigh in favor of [T.R.] and the Court adopts that presumption as not being overcome by any of the evidence presented by [T.T.] in regards to the best interest of the child. *Again, the Court wants to emphasize that it would have made the same decision regardless of the application of this presumption based upon the best interest of the child and the factors set out above.*" (Emphasis added.)

And in denying T.T.'s motion to alter or amend, the district court judge again reiterated his decision was based on the *Greer* best-interest factors and denied he was influenced by any bias against T.T. or in favor of T.R.:

- "Certainly, I gave [T.T.] the full benefit of his presumption. It was never a ruling that his presumption couldn't overcome the presumption of [T.R.]. It was totally a question of which presumption was weightier for the best interest of the child."

- "I did bring up the presumption of legitimacy, and I made it clear in my opinion, I want to make it clear now that my decision was made in favor of [T.R.] without the presumption of paternity—or legitimacy. I think from the *Greer* case that the presumption of legitimacy is still a valid factor to be considered by the court, but I want to make it clear that, even if it's not, my decision would have been the same as to the best interest of the child without that presumption of legitimacy."

- "For all practical purposes, [T.R.] is the father of the child legitimately unless this court changed that. He's on the birth certificate. He was married to the mother at the time of the child's birth, and I certainly have given [T.T.] the full opportunity to present his case to the court as to why it would be in the best interest to accept his presumption of paternity pursuant to biology, and I also considered the relationship that he developed with the child through basically the consent of the mother and weighed all of that against the presumption of [T.R.] and the relationship that he has developed with the child."

- "In this case, we have two fathers that want to be the father. They both have a presumption that is valid. I weighed the best interest of the child against the—I guess in light of those presumptions and made the decision that is in the best interest of the child that [T.R.] continue to be the father."

- "I had to apply all the factors and make a decision based on those factors, and certainly several of those factors are weighed against [T.T.], but I gave him a full benefit of a full hearing and the decision is made totally on the best interest of the child, and everything that's unfair to [T.T.] would be equally unfair to [T.R.] if I had made the decision in [T.T.]'s favor."

- "But I also want to make it clear that my opinion is not based on [T.T. having an affair with Mother]. It's not based on bias toward [T.T.] as a result of that. I'm still looking, as required in *Greer*, at what's the best interest of the child moving forward."

- "I completely indicated when I brought [T.T.'s affair with Mother] up that I put no weight on that. I actually think the law probably would allow me to, but I put no weight on that. I put no weight on the fact that he was an interloper into an existing relationship. I read some cases that are kind of old bring that up, bring that exact point up, but I'm not using any of that in my decision here today. I'm taking totally the best interest of the child moving forward. I didn't give any more weight to the paper than I gave to the biology. I totally looked at the best interest of the child from this point forward based under all the circumstances."

Based on a comprehensive and careful review of the record, we conclude the district court properly weighed the parties' competing presumptions of paternity—without bias or prejudice—by following the KPA's statutory scheme and the guidance set forth in *Greer*.

Conclusion

The evidence presented at the hearing left the district court with an impossible decision. T.T. and T.R. were both good fathers who loved R.R. and wanted to be in his life. Both would provide R.R. with a stable and supportive home. Substantial competent ev-

idence supports the district court's conclusion that T.R.'s presumption of paternity is based on "the weightier considerations of policy and logic, including the best interests of the child." See K.S.A. 2022 Supp. 23-2208(c). As a result, we cannot say that the district court abused its discretion in making its decision.

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

* * *

STEGALL, J., dissenting: Today's decision begins, "[t]he Kansas Parentage Act (KPA), K.S.A. 2022 Supp. 23-2201 et seq., recognizes claims of parentage based on genetics, adoption, and other circumstances giving rise to statutory presumptions of parentage." 317 Kan. 691, 692, 538 P.3d 838 (2023). As I have previously explained in a series of parentage cases, this is contrary to the plain language of the statute and turns policies established by our Legislature upside-down.

Over the past several years, a majority of this court has conjured the idea of a "presumption of parentage," injected it into Kansas statutes, and then acted as though it was there all along. But no matter how many times the majority repeats the phrase and uses it to subvert the plain language of the Kansas Parentage Act, it still doesn't appear in our law—either in letter or spirit. "There is simply no such thing as a presumption of parenthood in Kansas law. There is only a presumption of *paternity* or *maternity*." *In re Adoption of T.M.M.H.*, 307 Kan. 902, 932, 416 P.3d 999 (2018) (Stegall, J., concurring and dissenting).

Our court's habitual ignoring of the distinction between parenthood or parentage (a legal determination) on the one hand, and paternity or maternity (a factual determination grounded in biological reality), on the other, is the root of the problem. "Forgotten" by today's majority "is the clear statutory statement that the parent-child relationship is exclusively defined as the 'legal relationship existing between a child and the child's *biological or adoptive* parents.'" 307 Kan. at 933 (Stegall, J., concurring and dissenting) (quoting K.S.A. 2016 Supp. 23-2205). "The ordinary meaning of the words chosen by our Legislature establishes that

the presumptions of paternity in the KPA are aimed at determining whether a biological relationship exists." 307 Kan. at 930 (Stegall, J., concurring and dissenting). "[U]nder any accepted mode of statutory interpretation, the notion that the plain language of the Kansas Parentage Act means that a person not biologically related to a child can 'become' a biological parent is untenable." *In re M.F.*, 312 Kan. 322, 354, 475 P.3d 642 (2020) (Stegall, J., dissenting); *In re W.L.*, 312 Kan. 367, 385, 475 P.3d 338 (2020) (Stegall, J., dissenting) (same). But once more, this is the road the majority chooses to travel today.

I would instead reverse course on this court's misguided interpretations of the Kansas Parentage Act, reverse the judgment of the district court, and remand this matter for further proceedings under a proper understanding of the statute.

WILSON, J., joins the foregoing dissenting opinion.

No. 123,723

STATE OF KANSAS, *Appellee*, v. MELISSA C. LOWE, *Appellant.*

(538 P.3d 1094)

SYLLABUS BY THE COURT

1. TRIAL—*Jury Instructions—Lesser Included Offense Instruction—Determination Whether Factually Appropriate*. To determine whether a lesser included offense instruction is factually appropriate, a court must consider whether 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.

2. SAME—*Lesser Included Offense Instruction—Error of District Court if Fail to Sua Sponte Give Lesser Included Instruction if Legally and Factually Appropriate*. A district court commits instructional error by failing to sua sponte give a lesser included offense instruction that is both legally and factually appropriate. On appeal, to obtain reversal of a conviction based on that error, a defendant who has failed to request the instruction bears the burden to firmly convince the reviewing court the jury would have reached a different verdict had that instructional error not occurred.

Review of the judgment of the Court of Appeals in an unpublished opinion filed November 23, 2022. Appeal from Sedgwick District Court; STEPHEN J. TERNES, judge. Oral argument held September 15, 2023. Opinion filed December 1, 2023. Judgment of the Court of Appeals affirming the district court is affirmed on the issue subject to review. Judgment of the district court is affirmed.

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

Lance J. Gillett, assistant district attorney, argued the cause, and *Noelle Relph*, legal intern, *Marc Bennett*, district attorney, and *Derek Schmidt*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

BILES, J.: Melissa Lowe seeks review of a Court of Appeals decision affirming her felony conviction for aggravated assault with a deadly weapon after an incident involving her ex-husband's girlfriend. See *State v. Lowe*, No. 123,723, 2022 WL 17172123, at *3-4 (Kan. App. 2022) (unpublished opinion). Lowe argues the district court should have instructed a jury on simple assault, a misdemeanor, as a lesser included offense. We agree with her on

that, but this ultimately does not end the matter in her favor because we also hold this failure did not amount to clear error—the required standard. See K.S.A. 2022 Supp. 22-3414(3) ("No party may assign as error the giving or failure to give an instruction, including a lesser included crime instruction, . . . unless the instruction or the failure to give an instruction is clearly erroneous."). Thus, we must affirm her conviction despite our disagreement with the panel's analysis. See *State v. McCroy*, 313 Kan. 531, 539, 486 P.3d 618 (2021) (affirming Court of Appeals' decision as right for the wrong reason).

FACTUAL AND PROCEDURAL BACKGROUND

Lowe and her ex-husband were in a custody dispute involving their two teenage daughters that created animosity between Lowe, her ex-husband, and his girlfriend, Mary Logsden. Lowe and her ex-husband shared custody of their daughter A.L., while their other daughter, E.L., lived with Lowe.

On June 30, 2019, Lowe dropped A.L. off at Plagens Park in Haysville for her softball game. Lowe and E.L. went shopping. Logsden and her daughter K.M. watched A.L. play. After the game, Logsden, A.L., and K.M. walked to the parking lot where Lowe waited with E.L. to pick up A.L. At trial, Logsden claimed Lowe "completely stared me down." Lowe told investigators Logsden called her "a fucking bitch."

After A.L. got into Lowe's car, Logsden and her daughter walked away as Logsden pulled a wagon loaded with softball gear through the gravel parking lot. Logsden said she heard tires spinning and saw Lowe's vehicle approaching. According to Logsden and K.M., it came "[v]ery close" in a way that "if [Logsden] had a belt on that day, it would have scraped [the] car." Logsden called the police.

The State charged Lowe with aggravated assault with a deadly weapon, for her use of the car. At trial various eyewitnesses testified, and Lowe's statements to investigators were introduced as evidence through a detective who interviewed her.

Logsden testified the "car was coming at" her, estimating the vehicle was travelling 5-10 miles per hour and going faster than cars typically drive through the lot. She acknowledged animosity

due to the custody case but denied provoking Lowe. She rejected defense counsel's assertion she struck or punched the car.

K.M. offered similar testimony: "So we were just walking. I was right behind my mom I hear tires spin and a car came by my mom really close to my mom." K.M. said the car "just like swerved over and then took off, and I just heard tires spinning both times." Her mom touched the automobile, "like trying to push herself away from it because it was that close. She didn't want to get hit."

An eyewitness, Brandon Burleson, testified he was behind Logsden and K.M. as Lowe left the parking lot. He testified the car "tried to hit the group of people that was walking." He told the jury: "[T]he car swerved. Then it got back over and went out of the parking lot; so I mean, there was plenty of room for that not to have happened." He agreed "[i]t was a visible deviation" from her path to drive toward Logsden and said that the vehicle was going "a little bit faster than a parking lot should have been." He thought he saw Lowe laughing as she drove by.

A.L. testified she was "pretty sure like there was something going on I just remember my mom saying something and then her swerving." She added, "[Lowe] just kind of swerved toward[] [Logsden]. It was kind of close, but then after that [I] just heard [Logsden] hit the car." During cross-examination, A.L. acknowledged Logsden said something to Lowe, but was unsure what was said. She also agreed she was on her phone answering snapchats when the incident occurred.

E.L. testified that when A.L. came out with Logsden and K.M., "[m]y mom lifted up the front seat of the driver's side to let my sister in the back. [Logsden] said some choice words to my mother"—"something about a fat F'ing cow." She said her mother did not seem upset by the comment; "She laughed about it." But she also said her mom texted her dad later in the day that "it was not okay to call her that in front of her children." E.L. testified Logsden flipped off her mother. She acknowledged the car's tires spun in the gravel, but explained, "it's just my mom's car is fast." She said she could see the car's speedometer from where she was sitting and said "[i]t wouldn't have gone over like 15." She also said she did not think the car was close to hitting Logsden,

and she disagreed with the characterization that if Logsden were wearing a belt, it would have scratched the car. She said she saw nothing out of the ordinary, like someone chasing after the car or yelling for them to stop, after passing by Logsden.

Detective Justin Hehnke, who interviewed Lowe, testified she admitted her car's tires spun in the gravel but claimed this happened because it was a new car she was still getting used to. She denied driving toward Logsden, saying she drove straight out of the parking lot. She also claimed Logsden "had stepped out about two or three feet in the direction of her car and hit her car with her hand." Lowe acknowledged Logsden's language upset her, and "she ended up eventually sending a text message to her ex-husband stating that she didn't appreciate [Logsden] making comments in front of the girls like that." She also admitted she flipped off Logsden while she was leaving the parking lot.

During a jury instruction conference, Lowe's counsel did not object to the State's proposed instruction on aggravated assault or request simple assault as a lesser included offense of the charged crime. The aggravated assault instruction given to the jury read:

> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant knowingly placed [Logsden] in reasonable apprehension of immediate bodily harm.
>
> "2. The defendant did so with a deadly weapon.
>
> "3. This act occurred on or about the 30th day of June, 2019 in Sedgwick County, Kansas.
>
> "No bodily contact is necessary.
>
> "A deadly weapon is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury. An object can be a deadly weapon if the user intended to convince a person that it is a deadly weapon and that person reasonably believed it to be a deadly weapon."

During closing arguments, Lowe's attorney did not dispute whether the car qualified as a deadly weapon. Instead, the defense centered on whose version of the incident was true—more specifically, whether Lowe had swerved at Logsden. The jury found Lowe guilty of aggravated assault. The district court sentenced her

to an underlying sentence of 12 months but granted her 24 months' probation.

Lowe appealed, arguing insufficient evidence supported her conviction, and that the district court clearly erred by omitting an unrequested jury instruction on a lesser included crime of simple assault. The panel rejected both challenges. *Lowe*, 2022 WL 17172123, at *1.

She petitioned this court to review the instructional issue, which we granted. She did not seek review on her evidence sufficiency argument, so that much is settled. See Supreme Court Rule 8.03(i)(1) (2023 Kan. S. Ct. R. at 59). Jurisdiction is proper. See K.S.A. 20-3018(b) (providing for petitions for review of Court of Appeals decision); K.S.A. 60-2101(b) (Supreme Court has jurisdiction to review Court of Appeals decisions upon petition for review).

ANALYSIS

On the lesser included crime instructional issue, the panel sided with the State's argument that the omitted instruction was factually inappropriate. The panel noted the only evidence at trial showed an encounter between Lowe and Logsden while Lowe was in her car. It observed Lowe's defense "was not that she did not use a car, but that she did not commit an assault *at all*." *Lowe*, 2022 WL 17172123, at *4. It interpreted her defense to mean she did not commit a crime because she simply drove away, even if angrily, after Logsden allegedly insulted her. The panel concluded, based on the evidence, that Lowe either committed aggravated assault with a deadly weapon "or no crime at all." 2022 WL 17172123, at *4.

The State did not cross-petition for review of the panel's holding that a simple assault instruction was legally appropriate, so we consider first the panel's analysis of the unrequested instruction's factual appropriateness. See *State v. Berkstresser*, 316 Kan. 597, 601, 520 P.3d 718 (2022) ("The State chose not to dispute that an instruction for the misdemeanor crime would have been legally appropriate, so our focus is drawn to factual appropriateness."); Supreme Court Rule 8.03(b)(6)(C)(i) (2023 Kan. S. Ct. R. at 56) ("The Supreme Court will not consider . . . issues not presented or

fairly included in the petition for review."); cf. *State v. Nelson*, 224 Kan. 95, 97, 577 P.2d 1178 (1978) ("A simple assault is a lesser included offense of aggravated assault with a deadly weapon.").

Standard of review

"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. Our review for factual appropriateness is de novo. *State v. Love*, 305 Kan. 716, 736, 387 P.3d 820 (2017).

The omitted instruction was factually appropriate.

Under K.S.A. 2022 Supp. 22-3414(3), a lesser included offense instruction is factually appropriate so long as "some evidence . . . would reasonably justify a conviction of some lesser included crime." It is a trial court's duty to evaluate the evidence and provide an instruction when appropriate. "This duty to instruct applies even if the evidence is weak or inconclusive." *State v. Roberts*, 314 Kan. 835, 852, 503 P.3d 227 (2022). "Providing lesser included offense instructions allows a jury to consider the full range of possible verdicts supported by the evidence." 314 Kan. at 852.

The State charged Lowe with aggravated assault under K.S.A. 2018 Supp. 21-5412(b)(1). That subsection defines this crime as "assault, as defined in subsection (a), committed . . . [w]ith a deadly weapon." Subsection (a) defines assault as "knowingly placing another person in reasonable apprehension of immediate bodily harm." K.S.A. 2018 Supp. 21-5412(a).

Berkstresser presents an analogous question. It dealt with whether a misdemeanor fleeing or attempting to elude a police officer was a factually appropriate lesser included offense to the charged offense of felony fleeing or attempting to elude. *Berkstresser*, 316 Kan. at 603. The *Berkstresser* court recited the

five elements of the felony crime and noted "the first four elements standing alone constitute misdemeanor fleeing." 316 Kan. at 604. The fifth charged element was "'[t]he defendant engaged in reckless driving.'" 316 Kan. at 604. It then noted the *Berkstresser* panel below "looked to whether some evidence showed Berkstresser 'did *not* drive [recklessly].'" 316 Kan. at 604. But this court on review rejected that approach because doing so would extend the analysis "beyond deciding whether the evidence presented could satisfy the misdemeanor offense's statutory elements." 316 Kan. at 604. Ultimately, "the record contain[ed] ample support to reasonably justify a misdemeanor conviction" of the lesser crime. 316 Kan. at 604. The same is true here.

In Lowe's case, the only difference between aggravated assault and simple assault is the deadly weapon element, which is not statutorily defined. But our caselaw has filled that gap. In *State v. Hanks*, 236 Kan. 524, 694 P.2d 407 (1985), *superseded by statute on other grounds as stated in State v. Robinson*, 303 Kan. 11, 363 P.3d 875 (2015), the court interpreted the term by relying on the dictionary definition. 236 Kan. at 537 (citing Black's Law Dictionary 487 [4th ed. 1968]). The *Hanks* court held: "A deadly weapon is an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury." 236 Kan. at 537 (aggravated battery case; noting "[b]attery committed with a deadly weapon is aggravated battery"). This is a factual question, meaning the determination of whether Lowe's car constituted a deadly weapon under the circumstances was a jury question. See *State v. Whittington*, 260 Kan. 873, 878, 926 P.2d 237 (1996).

Admittedly, the test for determining whether something is a deadly weapon may present an objective or subjective component, depending on the crime. Compare 260 Kan. at 878 (aggravated battery; employing an objective test: "'an instrument which, from the manner in which it is used, is calculated or likely to produce death or serious bodily injury'"), with *State v. Deutscher*, 225 Kan. 265, 270-71, 589 P.2d 620 (1979) (aggravated assault; holding "an unloaded revolver which is pointed in such a manner as to communicate to the person threatened an apparent ability to fire a shot and thus do bodily harm is a deadly weapon within the meaning

expressed by the legislature in the assault statutes"); *State v. Graham*, 27 Kan. App. 2d 603, 606-07, 6 P.3d 928 (2000) (aggravated assault; noting a test is subjective under *Deutscher*). But that distinction would be immaterial here because Lowe does not contest the aggravated assault jury instruction.

We hold there was sufficient evidence to support Lowe's conviction for aggravated assault, which necessarily means an instruction on simple assault was factually appropriate—regardless of her defense theory. The jury should have been given the option of choosing between simple and aggravated assault, even if she did not request the lesser instruction. See *Roberts*, 314 Kan. at 852 (holding a trial court has a duty to provide a legally and factually appropriate instruction); *State v. Williams*, 303 Kan. 585, 599, 363 P.3d 1101 (2016) (holding that a lesser included offense instruction is not foreclosed even if it is inconsistent with either the evidence presented by the defense or the theory advanced by the defense).

The district court erred by omitting a simple assault instruction and the panel erred when holding: "There was no evidence presented to show that Lowe committed a simple assault, meaning an assault without the vehicle." *Lowe*, 2022 WL 17172123, at *4. The *Lowe* panel repeated the same mistake as the *Berkstresser* panel. *Berkstresser*, 316 Kan. at 604 (concluding the panel erred by holding a misdemeanor instruction was factually inappropriate because no evidence showed the defendant "'did *not* drive [recklessly],'" which was the element "that elevates the offense to a felony").

This error is not reversible.

The next question is whether the failure to give the unrequested instruction was reversible error under K.S.A. 2022 Supp. 22-3414(3). Lowe concedes she did not request a simple assault instruction or otherwise object to the district court's instructions. The clear error standard requires a reviewing court to decide whether it is firmly convinced the jury would have reached a different verdict had the error not occurred. We make that determination de novo based on the entire record, and Lowe bears the

burden to establish reversibility. See *State v. Bentley*, 317 Kan. 222, 242, 526 P.3d 1060 (2023).

Here, the jury rejected Lowe's version of events that denied swerving her car toward or close to Logsden. And depending on how it interpreted her intention, it was a question for the jury to determine whether her actions turned the car into a deadly weapon. But nothing in the record establishes the jury would have reached a different result, especially given the conflicting versions requiring multiple credibility determinations. In the end, the jury found the witnesses' accounts that Lowe swerved her car towards Logsden credible enough to find her guilty beyond a reasonable doubt, including testimony from a non-family eyewitness who agreed Lowe's car "tried to hit the group of people that was walking" by swerving her car towards them by making "a visible deviation" from her path before getting back over and leaving the parking lot and emphasizing "there was plenty of room for that not to have happened."

Based on the evidence in this record, we are not firmly convinced the jury would have reached a different verdict had the district court given a simple assault instruction.

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

* * *

STEGALL, J., dissenting: The facts of this case resemble a classic "roll up"—often portrayed in popular culture as a slow vehicle roll next to a group of people intended, variously, to bully, intimidate, or impress. See Urban Dictionary, https://www.urbandictionary.com/define.php?term=rolled+up+on (defining "rolled up on" as pulling up next to someone in a vehicle "in order to intimidate"); see also *United States v. Bowra*, No. CR 16-161, 2018 WL 1244521, at *7 (W.D. Pa. 2018) (unpublished opinion) (law enforcement testimony about the common practice, when surveillance is not possible, of using a "'marked police car'" to "'roll up on'" suspects to "'ID them and see what's going on'"); *Dazed and Confused* (Universal Pictures 1993) ("Alright, alright, alright.").

Bad blood gave rise to flaring tempers between an ex-wife (the defendant) and her ex-husband's current girlfriend. Those tempers turned into an argument and name-calling in the parking lot following a girls' softball game. As she left, the defendant "rolled up" on the girlfriend—steering her car close enough that multiple people testified the victim slapped or hit the car in retort. The defendant then sped away amidst a flurry of shouts and raised fingers. Not anyone's finest moment, certainly. Unacceptable behavior in a civilized society, yes. But was it assault *with a deadly weapon*? That is the question.

And this is the question the jury was never given a chance to fairly consider. Here, I agree with the majority that a lesser-included instruction for simple assault should have been given. 317 Kan. at 713-14, 720. The jury was told the issue was all or nothing—either the defendant assaulted the victim with a deadly weapon or the defendant did nothing wrong. For this reason, I disagree with the majority's consideration of reversibility—that is, was the failure to give the jury a middle option clear error?

In weighing this crucial question, appellate judges are tasked to decide whether we are firmly convinced that had the lesser included instruction been given, the result would have been different. 317 Kan. at 720. But nowhere in our caselaw are we given guidance on how, precisely, we are to undertake that task. Are appellate judges to place themselves in the jury box? It would seem not, as this may require an exercise in appellate fact-finding. I am left instead to simply consider the law's explicit description of the jury function more generally.

The American jury system entrusts jurors with a more nuanced role than mere algorithmic guilt-or-innocence determinations. Indeed, while the jury function is often short-handed as "fact-finding," this description too often elides and disguises the jury's humanizing impact on mechanical applications of the law. Juries represent the deliberative sense of one's neighbors and peers. They establish and enforce community standards and norms of behavior that cannot always be cleanly captured by legal doctrines, elements of crimes, and black letter law. "Juries provide a buffer between government and the individual. They humanize the law." Dann, *Free the Jury*, Litigation, at 5 (Fall 1996). Juries

"make available the commonsense judgment of the community" which can both set behavioral boundaries for members of the community and "guard against the exercise of arbitrary power" in the hands of more formal actors in the judicial drama. *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); see also 1 Holdsworth, A History of English Law 349 (3d ed. 1922) (The jury system grounds "rules of law to the touchstone of contemporary common sense."). Most long-time observers of juries in action understand that very often, "juries feel, 'There, but for the grace of God, go I.'" Ericsson, *Raising Skeletons and Objections Deposition Defense Strategy*, Brief, at 40 (Spring 1986). And here, by failing to give the jury the option of simple assault, the trial court deprived the defendant of her right to the "benefit of the . . . judgment of the community." *Lockhart v. McCree*, 476 U.S. 162, 175, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

With this critical function in mind, I must consider my own long experience with Kansas juries and how they faithfully execute this duty. And so doing, I am left with the strong feeling that most Kansas jurors would—considering the totality of the record—have opted to convict the defendant of simple assault if given that option. Most Kansas jurors would see the defendant's behavior as worthy of criminal sanction but would not have "made a felony case" of it. Weighing all of this, I am firmly convinced that had an instruction for simple assault been given, the result would have been different. I would reverse the defendant's conviction and remand for a new trial.

LUCKERT, C.J., and WALL, J., join the foregoing dissent.

No. 125,621

In the Matter of TARISHAWN D.D. MORTON, *Respondent*.

(538 P.3d 1073)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Published censure.*

Original proceeding in discipline. Oral argument held September 13, 2023. Opinion filed December 1, 2023. Published censure.

Gayle B. Larkin, Disciplinary Administrator, argued the cause and was on the brief for the petitioner.

Tarishawn D.D. Morton, respondent, argued the cause and was on the brief pro se.

PER CURIAM: This is an attorney-discipline proceeding against the respondent, Tarishawn D.D. Morton, of Colorado Springs, Colorado. Morton received her license to practice law in Kansas in July 2016.

On June 16, 2022, the Disciplinary Administrator's office filed a formal complaint against Morton alleging violations of the Kansas Rules of Professional Conduct (KRPC). Morton answered the formal complaint on July 15, 2022.

On August 23, 2022, Morton appeared pro se at the complaint hearing before a panel of the Kansas Board for Discipline of Attorneys. After the hearing, the panel determined that Morton had violated KRPC 7.1(a) (communication concerning a lawyer's services) (2023 Kan. S. Ct. R. at 423), KRPC 8.1 (bar admission and disciplinary matters) (2023 Kan. S. Ct. R. at 431), KRPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) (2023 Kan. S. Ct. R. at 433), and KRPC 8.4(g) (conduct that adversely reflects on the lawyer's fitness to practice law) (2023 Kan. S. Ct. R. at 433). The panel set forth its factual findings, legal conclusions, and recommended discipline in a final hearing report. The relevant portions of that report are set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

"*Findings of Fact*

"The hearing panel finds the following facts, by clear and convincing evidence:

"8. The respondent is a Colorado resident. She has not passed the Colorado bar examination, but scored high enough on the Uniform Bar Examination in Colorado to apply for and obtain a Kansas license to practice law under Supreme Court Rule 709A, and she was admitted on July 8, 2016. Respondent lives in Colorado and rents an office in Overland Park, Kansas, with a mail drop and a conference room for use on those occasions when she travels to Kansas. According to respondent's testimony, she has never lived in Kansas, and has visited the Kansas office approximately ten times in connection with her practice.

"*Website*

"9. In November 2020, Brandan Davies of Roth Davies, LLC, discovered that the respondent had copied significant portions of content from his firm's website and pasted that content onto her website, www.attorneytmorton.com. In at least one place, the respondent included Roth Davies' name and telephone number on her website.

"10. As a result of the respondent's actions, when the term 'Roth Davies' was included in an Internet search, the respondent's website appeared in the results.

"11. On November 17, 2020, Mr. Davies sent the respondent a letter by certified mail and an email message, asking the respondent to remove the Roth Davies content from her website. The initial email provided:

'It has come to my attention that over 20% of your website (https://www.attorneytmorton.com/) is a direct copy or ever-so-slightly altered content from our law firm's website. In fact, some of our firm's name and telephone number is [*sic*] currently on your site due to the poorly executed copy paste job. We have spent a lot of time and money in [*sic*] developing our site and copying the site has affected our search rankings adversely. Kindly remove any [*sic*] of the duplicate content from your site. Our website company will be running a report Friday to check your site for duplicate content.'

The respondent did not respond to Mr. Davies' communications. A week later, Mr. Davies again demanded that the respondent remove the duplicate content by email message. Again, the respondent did not respond to Mr. Davies' communication. Respondent asserts that she did not receive Mr. Davies' communications.

"12. On January 11, 2021, Mr. Davies filed a complaint against the respondent with the Office of the Disciplinary Administrator, after which respondent deactivated her website.

"13. As of July, 2021, it was discovered that the respondent had reactivated her former website, though it has now been substantially reduced to address the issues discussed below.

"14. The 2020-2021 website contained the following intentional misrepresentations by the respondent:

The website contained copied substantial portions of the Roth Davies website, including a number of references to the firm of Roth Davies, that firm's telephone number,

areas of expertise, and courts where the firm practices, as well as several case law summaries developed by Roth Davies, making it appear that the work was the product of respondent's labors and expertise. It is unknown what and how many clients (if any) were misled into believing there was some identity between respondent and Roth Davies, and how many clients (if any) were deterred from proceeding further after seeing the confusion between the two firms;

On the website, the respondent identified herself as an experienced attorney practicing in the areas of criminal defense, sex crimes, and personal injury. However, the respondent had limited experience practicing law. In fact, according to the respondent's 2019 Colorado 'on-motion' bar application and according to the respondent's supplemental response to the complaint and Kansas bar application, the respondent worked full-time for El Pueblo Boys and Girls Ranch and practiced law during the evenings and weekends; and

On the website, the respondent made it appear that she was a member of the Johnson County Bar Association (JCBA), the Kansas Bar Association (KBA), and the American Bar Association (ABA). The respondent's statements regarding her memberships with bar associations were false.

i. The respondent has not been a member of the JCBA since 2017.

ii. The respondent was a complimentary member of the KBA immediately after her admission in 2016. However, when her free membership expired on June 30, 2017, she did not join the KBA.

iii. The respondent has been a member of the ABA, off and on, during her six-year career. But, in 2020, when the website was live, the respondent was not a member of the ABA. The respondent has not been a member of any section of the ABA since 2018.

iv. Contrary to the information the respondent included on her website, in response to question 6 on the respondent's 2019 'on-motion' Colorado bar application, the respondent stated that she had never been a member of a bar association.

On the website, the respondent stated that she received an A/V rating from the Martindale-Hubbell attorney-rating service. Respondent has not received an A/V rating from Martindale-Hubbell.

The website claimed respondent was experienced in criminal cases, whereas in her response to the complaint, she admitted she had no criminal cases in November, 2020, and had handled only one before that.

"*Kansas Bar Application*

"15. On March 2, 2016, the respondent applied to take the Kansas bar examination. The application form required the respondent to disclose ten years of employment history. Because the respondent filed her Kansas bar application on March 2, 2016, she

was required to disclose her employment history from March 2, 2006, through March 2, 2016.

"16. The respondent's employment history included on her Kansas bar application varied from the employment history reported on the Colorado bar applications discussed below. Most importantly, on the respondent's Kansas bar application, the respondent failed to disclose her employment with the Boys and Girls Club. As a result, when considering the respondent's bar application, the Board of Law Examiners in Kansas was unaware, and unable to inquire to determine, that she had been terminated from her employment with Boys and Girls Club for misconduct.

"17. The panel concludes that, despite her protestations to the contrary, respondent intentionally omitted, in her Kansas bar application, reference to her erstwhile employment with the Boys and Girls Club, as she managed to recall and list her employment with the temporary agency which placed her at the Boys and Girls Club, with its dates immediately prior to her actual employment with the Boys & Girls Club, while omitting that later employment. This intentional misrepresentation kept the Kansas Board of Law Examiners from checking into that employment, which likely would have led to the disclosure of respondent's fraud during that employment, discussed below.

"18. In addition to failing to disclose her employment with the Boys and Girls Club on the Kansas bar application, the respondent also failed to disclose employment with Colorado State University-Pueblo and Crystal Specialties, Inc.

"19. In her Kansas bar application, respondent stated 'none' in response to the question whether she had ever received any licenses, when in fact, she had been licensed as a special education director and as a temporary teacher.

"*Boys and Girls Club*

"20. Respondent was employed by the Boys and Girls Club of Colorado first as an independent contractor through a temporary agency, and then on September 10, 2007 as a permanent employee. Her position at Boys and Girls Club was Controller, at an annual salary of $35,000.

"21. In December, 2007, respondent went to her supervisor at Boys and Girls Club, James Sullivan (the Executive Director) and presented him for his signature a Boys and Girls Club check for $3,000.00, which respondent had prepared for delivery to Sam's Club, a supplier to the Boys and Girls Club. Mr. Sullivan signed the check and returned it to respondent.

"22. The respondent then went to Sam's Club and cashed the $3,000 check at Sam's Club which was issued as a payment of the Boys and Girls Club's bill with Sam's Club. Respondent had Sam's Club apply $2,617.18 to the Boys & Girls Club bill, and spent the remaining $382.82 on personal items. Further, the respondent used the Boys and Girls Club tax-exempt account information to avoid paying sales tax on the personal items she purchased from Sam's Club. To

date, respondent has never reimbursed the Boys and Girls Club the $382.82 which she spent on personal items.

"23. While a police report was filed in connection with this theft, respondent was never charged or convicted.

"24. On three occasions during her employment with the Boys and Girls Club, as the Controller, the respondent paid herself her full-time salary as well as wages claimed as hourly employment. She overpaid herself a total of $4,038.35 by this method. To date, the respondent has not reimbursed the Boys and Girls Club the $4,038.35 that she overpaid herself. Respondent was never charged for nor convicted of this theft.

"25. Respondent was terminated from her employment at Boys & Girls Club on December 26, 2007. She took her personnel file with her when she left, and when she returned the file upon demand of her former employer, some documents were missing.

"26. Again, had respondent's employment with Boys and Girls Club been disclosed on her application for the Kansas bar, these facts may well have been discovered, which likely would have had a detrimental effect on the decision of the Board of Law Examiners.

"*Colorado Bar Applications*

"27. In 2014, 2015, and 2019, the respondent filed a total of four bar applications with the State of Colorado. On each of the applications, the respondent disclosed her prior employment with the Boys and Girls Club (which she failed to disclose in her Kansas bar application, showing she was aware and recalled it). While the respondent indicated that she was disciplined and left the position involuntarily, she inaccurately explained that she left the position voluntarily and was disciplined only after she voluntarily resigned. She stated that she was investigated for mishandling money. She stated that she 'hired an attorney, out of fear and to protect [her] rights, [and the attorney] found out that nothing ever came of [the] matter.'

"28. On her 2019 Colorado 'on-motion' bar application, the respondent listed Debbie Uhl, registration clerk for the Kansas Office of Judicial Administration, and the Honorable David Hauber, Johnson County District Court Judge, as supervisors of her solo practice. While the respondent was never employed by Judge Hauber or the Office of Judicial Administration, respondent's exhibit A shows that a Colorado official asked the respondent to provide the name and contact information of a third[-]party individual, such as a judge or other professional colleague who could confirm her solo practice. The respondent provided the names of Judge Hauber and Debbie Uhl in response.

"29. While her 2019 Colorado 'on-motion' bar application was pending, the complaint which gave rise to this case was filed against the respondent. The respondent failed to notify the Colorado admissions authorities that the complaint

was filed against her, as required by the statement of verification portion of the bar application.

"30. On her 2019 Colorado 'on-motion' bar application, the respondent stated that she had never been a member of a bar association. However, the respondent was a member of the Johnson County Bar Association and the Kansas Bar Association from 2016 to 2017 and the respondent was also previously a member of the American Bar Association.

"31. Finally, on the Kansas bar application, the respondent disclosed that she worked as a special education director for El Pueblo Boys and Girls Ranch, a mental health and substance abuse treatment facility for adolescents in Pueblo, Colorado; the respondent did not disclose that employment on her 2019 Colorado 'on-motion' bar application.

"*Conclusions of Law*

"32. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 7.1, 8.1, and 8.4(c) and (g), as detailed below.

"KRPC 7.1(a)

"33. KRPC 7.1(a) provides:

'A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.'

"34. The respondent violated KRPC 7.1 when she published a website containing materially false information, including masses of information copied from the Roth Davies website (leading searchers to land on her website when actually searching for Roth Davies), her bar association memberships, her alleged Martindale-Hubbell A/V rating, and her alleged experience, particularly in motorcycle and wrongful death cases. This was exacerbated when, having removed the website upon receipt of the complaint in this matter, she put the offending website back up within a few months thereafter. As such, the hearing panel concludes that the respondent violated KRPC 7.1(a).

"KRPC 8.1

"35. Rule 8.1 provides:

'An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.'

"36. In the present case, respondent intentionally failed to include her employment with the Boys and Girls Club, as well as her employment with Crystal Specialties and Colorado State University-Pueblo in her application for admission to the Kansas bar.

"37. Additionally, respondent failed to disclose a number of matters, and mis-stated a number of facts to the Colorado bar authorities in her several applications to that bar, including:

a. that she voluntarily quit her employment with Boys & Girls Club;

that she had not been a member of any bar associations; and

failing to disclose that the complaint had been filed in this matter before the Kansas State Board for Discipline of Attorneys.

"38. Therefore, the panel concludes that respondent violated Rule 8.1.

"KRPC 8.4(c)

"39. Rule 8.4(c) provides that it is professional misconduct for a lawyer to 'engage in conduct involving dishonesty, fraud, deceit or misrepresentation.'

"40. The panel concludes that the respondent engaged in conduct that involved dishonesty, fraud, deceit and misrepresentation when she:

a. Failed to disclose in her application to the Kansas bar authorities her employment with Boys & Girls Club;

Failed to disclose in her application to the Kansas bar authorities her defrauding of Boys and Girls Club of $382.82 at Sam's Club;

Failed to disclose in her application to the Kansas bar authorities her double-payment to herself of $4,038.35 as an employee of Boys and Girls Club, claiming both salary and hourly wages;

Included false information on her website, and then after receiving the complaint and taking it down, re-publishing that website, including information taken directly from the Roth Davies website, claiming bar association memberships, and claiming a rating of A/V from Martindale-Hubbell; respondent's website also falsely claimed that she was an 'experienced' lawyer, and could handle motorcycle cases and wrongful death cases, whereas she has

handled no such cases. Indeed, the website claimed respondent was experienced in criminal cases, whereas in her response to the complaint, she admitted she had no criminal cases in November, 2020, and only one before that;

Failed to disclose her employment with Crystal Specialties and Colorado State University-Pueblo;

Claimed to the Colorado bar that she had voluntarily quit her employment at Boys and Girls Club;

Failed to disclose to the Colorado bar that she had been a member of bar associations;

Failed to disclose to the Colorado bar that an ethics complaint had been filed against her in Kansas; and

Failed to disclose to the Colorado bar that she had been employed by El Pueblo.

"41. As such, the hearing panel concludes that the respondent violated KRPC 8.4(c).

"KRPC 8.4(g)

"42. Rule 8.4(g) provides that it is professional misconduct for a lawyer to 'engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.'

"43. The respondent engaged in conduct that adversely reflects on her fitness to practice law when she:

a. Failed to disclose her employment with Boys & Girls Club in her application to the Kansas bar authorities;

Failed to disclose her defrauding of Boys and Girls Club of $382.82 at Sam's Club in her application to the Kansas bar authorities;

Failed to disclose her double-payment of $4,038.35 as an employee of Boys and Girls Club, claiming both salary and hourly wages in her application to the Kansas bar authorities;

Included false information on her website, and then after receiving the complaint and taking it down, re-publishing that website, including information taken directly from the Roth Davies website, claiming bar association memberships, and claiming a rating of A/V from Martindale-Hubbell; respondent's website also falsely claimed that she was an 'experienced' lawyer, and could handle motorcycle cases and wrongful death cases, whereas she has handled no such cases. Indeed, the website claimed respondent was experienced in criminal cases, whereas in her answer to the complaint, she admitted she had no criminal cases in November, 2020, and only one before that;

Failed to disclose her employment with Crystal Specialties and Colorado State University-Pueblo;

Claimed to the Colorado bar that she had voluntarily quit her employment at Boys and Girls Club;

Failed to disclose to the Colorado bar that she had been a member of bar associations;

Failed to disclose to the Colorado bar that an ethics complaint had been filed against her in Kansas; and

Failed to disclose to the Colorado bar that she had been employed by El Pueblo.

"44. The hearing panel concludes that the respondent violated KRPC 8.4(g).

"*Probation Plan*

"45. On August 9, 2022, respondent timely submitted 'Respondent's Rule 227 Proposed Probation Plan.' The proposed plan does not suggest any supervision by any experienced lawyer. The panel finds the proposed plan to be very general and vague, with few specific promised corrections and activities.

"46. The panel recognizes that the 'court is generally reluctant to grant probation where the misconduct involves fraud or dishonesty because supervision, even the most diligent, often cannot effectively guard against dishonest acts.' *In re Stockwell*, 296 Kan. 860, 868, 295 P.3d 572 (2013); *In re O'Neill*, 285 Kan. 474, [481,] 172 P.3d 1179, (2007) ('[''']Dishonest conduct cannot be corrected by probation.[''']').

"47. Additionally, placing the respondent on probation is not in the best interests of the legal profession and the citizens of the State of Kansas. *In re Mason*, 308 Kan. 1105, 427 P.3d 40 (2018).

"48. Further, applying Rule 227, the panel finds that the respondent's proposed plan is not workable, substantial, or detailed, particularly given the remote nature of her practice, living in Colorado while maintaining a drop-box office in Overland Park. *In re Harrington*, 296 Kan. 380, 293 P.3d 686 (2013) (probation plan not adopted where it is not workable, substantial, and detailed); *In re Baker*, 296 Kan. 696, 294 P.3d 326 (2013) (same).

"49. The panel has found several instances of intentional misrepresentations and fraud on the part of the respondent. Accordingly, the hearing panel concludes that probation is not appropriate in this case and the respondent's plan is insufficient in any event.

"*Recommended Discipline*

"50. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar Association in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

a. *Duty Violated*. The respondent violated her duty to the bar and the public by all the misconduct enumerated above.

Mental State. The respondent intentionally violated her duty.

Injury. As a result of the respondent's misconduct, the respondent caused injury and harm to the justice system and the practice of law in this State.

"*Aggravating and Mitigating Factors*

"51. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

a. *Dishonest or Selfish Motive*. The respondent committed a number of acts of fraud and intentional misrepresentation. Accordingly, the hearing panel concludes that the respondent's misconduct was motivated by dishonesty.

b. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 7.1 (advertising); 8.1 (bar admissions); 8.4(c) (dishonesty, fraud, deceit, misrepresentation); and 8.4(g) (adversely reflects on lawyer's fitness). Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

c. *Refusal to Acknowledge Wrongful Nature of Conduct*. The respondent has refused to acknowledge any wrongdoing of any kind, and maintains denials and excuses, even when confronted with proof. Accordingly, the hearing panel concludes that the respondent refused to acknowledge the wrongful nature of her conduct.

"52. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present, though neither the Disciplinary Administrator nor the respondent argued for any.

a. *Absence of a Prior Disciplinary Record*. The respondent has not previously been disciplined.

b. *Inexperience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to the practice of law in 2016. Thus, the respondent is inexperienced in the practice of law.

"*Application of Standards*

"53. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentionally [*sic*] interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses;

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that serious adversely reflects on the lawyer's fitness to practice.

'5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

'5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.'

"*Recommendation of the Parties*

"54. The disciplinary administrator recommended that the respondent be disbarred. The respondent made no recommendation on discipline, other than to plead for the mercy of the panel.

"*Discussion*

"55. While the panel is concerned about the multiple acts of fraud, deceit and misrepresentation, particularly in her application which led to her becoming a member of the bar of this court, and some of which could be considered criminal, respondent was never charged or convicted.

"56. However, the panel does not find that respondent is guilty of the 'serious criminal conduct' required to justify a disbarment. See, e.g. *In re Richardson*, 268 Kan. 831, 833, 1 P.3d 328 (2000) (conviction of three felonies for fraud—disbarred); *In re Minneman*, 287 Kan. 477, 196 P.3d 1156 (2008) (federal conviction for income tax fraud—disbarred).

"57. Therefore, the panel concludes that indefinite suspension be imposed, with the condition that, upon her re-application for reinstatement, respondent submit a workable, substantial and detailed plan for returning to the practice with, at least, the following provisions:

a. Supervision by an experienced, specifically-named, senior Kansas lawyer, with regular monitoring of practice, advertising, and case handling, and regular reporting to the Disciplinary Administrator;

b. A detailed plan of office administration, client intake and communication, and regular attendance at the Kansas office of the respondent, to ensure that Kansas clients receive adequate communication and representation; and

C. Additional five hours of approved continuing legal education per year on office administration, law office management, and professional responsibility.

"*Recommendation of the Hearing Panel*

"58. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent be indefinitely suspended with the conditions listed above for readmission to the practice.

"Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

Once a disciplinary-hearing panel finds misconduct and recommends any discipline besides informal admonition (the least serious form of discipline under our rules), the matter proceeds to our court. See Supreme Court Rule 226(b) (2023 Kan. S. Ct. R. at 282). At that stage, the respondent and the Disciplinary Administrator may file "exceptions," which are formal objections to the hearing panel's factual findings or legal conclusions. See Supreme Court Rule 201(h) (2023 Kan. S. Ct. R. at 251) (defining "exception"). A party must file an exception to a factual finding or a legal conclusion to preserve the issue for our review. Supreme Court Rule 228(e)(1) (2023 Kan. S. Ct. R. at 288). If a party files no exceptions, then we consider that party to have admitted the factual findings and the legal conclusions in the final hearing report. Rule 228(g).

Whether or not the parties file exceptions or briefs, we hold oral argument in disciplinary cases. See Rule 228(i). Following several rounds of briefing not relevant to the issues here, we agreed to hold argument by videoconference. We did so in September 2023. Both parties appeared. Morton acknowledged making mistakes, and she expressed a desire to continue practicing law in Kansas. The Disciplinary Administrator continued to press for disbarment.

DISCUSSION

In many of the disciplinary cases we hear, neither the respondent nor the Disciplinary Administrator files exceptions. As a result, we often adopt the panel's findings of fact and its conclusions of law. See *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020) ("'When a respondent does not take exception to a finding it is deemed admitted.'").

In those cases, our task is to decide the appropriate discipline after considering the admitted rule violations, the respondent's state of mind, any resulting injury, and the existence of aggravating or mitigating factors. See, e.g., *In re Barnds*, 317 Kan. 378, 398, 404, 530 P.3d 711 (2023) (citing ABA Standards for Imposing Lawyer Sanctions).

But this case is more complicated. Morton filed exceptions to most of the panel's factual findings and all its legal conclusions. Thus, the panel's findings and conclusions are not deemed admitted. *In re Hodge*, 307 Kan. 170, 209-10, 407 P.3d 613 (2017). And we must determine whether attorney misconduct has been established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022). This requires us to examine the panel's findings and applicable professional-conduct rules in more detail.

Across her exceptions, briefing, and oral argument, Morton raises four main arguments. First, Morton contends that we lack subject-matter jurisdiction to discipline her for conduct related to her 2019 Colorado bar application. Second, Morton argues that the Disciplinary Administrator and the hearing panel violated her federal due-process rights. Third, Morton maintains that there is no clear and convincing evidence supporting the panel's conclusions that she violated KRPC 7.1, 8.1, and 8.4(c) and (g). Finally, Morton proposes that the appropriate discipline is probation or published censure if we uphold the rule violations.

We address these arguments in turn below. We conclude that our court has subject-matter jurisdiction to discipline Morton for conduct related to her 2019 Colorado bar application and that Morton inadequately briefed her due-process challenges. But we agree with Morton that the facts and law do not support many violations the panel found. We also agree with her that the discipline recommended by the Disciplinary Administrator (disbarment) and the hearing panel (indefinite suspension) is too severe. Giving due consideration to the violations supported by clear and convincing evidence, Morton's state of mind, the injury she caused, and the applicable aggravating and mitigating circumstances, we conclude that the appropriate discipline is a censure to be published in the Kansas Reports.

But before explaining our reasoning, we must briefly address the supplemental documents Morton filed the evening before oral argument. Those documents included a corrected opening brief, letters of support, and a list of continuing-legal-education courses that Morton had recently completed. Although we need not discuss the delays and motion practice leading up to oral argument, we twice denied Morton's request to file a corrected brief during that period. Further, under Rule 228(c), the record in an attorney-discipline proceeding before our court consists of the record before the hearing panel, the hearing transcript, and any exhibits a party offered for admission into evidence at the panel hearing. The rule contains no provision allowing a party to supplement the record with letters of support or other documents the panel did not consider. See Rule 228(e)(1) (2023 Kan. S. Ct. R. at 288). We do not suggest that supplementing a disciplinary-proceeding record is never warranted. But it was improper to do so without leave of the court and on the eve of oral argument. We decline to consider Morton's corrected brief and supplemental documents when resolving the issues before us.

I. *The Kansas Supreme Court Has Subject-Matter Jurisdiction to Discipline an Attorney Licensed in Kansas for Misrepresentations Made While Seeking Bar Admission in Another Jurisdiction*

Morton first insists that our court lacks subject-matter jurisdiction to discipline her for statements made on her 2019 Colorado bar application. The hearing panel found that Morton misrepresented facts on that application and that she failed to inform Colorado admissions authorities of the pending disciplinary case against her in Kansas. The panel relied on those facts to conclude that Morton violated KRPC 8.1 and 8.4(c) and (g). But Morton contends that only the Colorado Supreme Court has the authority to investigate and sanction her for that conduct.

We disagree. Article 3, § 1 of the Kansas Constitution vests the Kansas Supreme Court with authority to administer the judicial department of Kansas government and to exercise judicial power. This power includes maintaining high standards for the

practice of law and disciplining those who fail to meet such standards. *In re Crandall*, 308 Kan. 1526, 1538, 430 P.3d 902 (2018). Thus, under Supreme Court Rule 202(b), attorneys admitted to practice law in Kansas are "subject to the jurisdiction of the Kansas Supreme Court and the Board [for Discipline of Attorneys]." (2023 Kan. S. Ct. R. at 253). And KRPC 8.5, which provides that a Kansas lawyer "is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere," specifically contemplates subject-matter jurisdiction even if the lawyer is practicing outside Kansas. (2023 Kan. S. Ct. R. at 434). Our precedent likewise confirms that subject-matter jurisdiction exists even when the misconduct occurs outside Kansas. See *In re Crandall*, 308 Kan. at 1539-40 ("[M]isconduct in another jurisdiction 'still reflects on the ability of that lawyer to practice' in the licensing jurisdiction.") (quoting Rotunda & Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 8.5-1, at 1433 [2017]). Thus, we have subject-matter jurisdiction to consider whether Morton's out-of-state conduct—including statements and omissions in her Colorado bar application—violated Kansas' professional-conduct rules.

II. *Morton Has Not Established That Her Federal Due-Process Rights Were Violated During the Proceedings Before the Hearing Panel*

Morton next argues that her federal due-process rights were violated during the panel proceedings in five ways. See *In re Harrington*, 305 Kan. 643, 657, 385 P.3d 905 (2016) ("[T]he Due Process Clause of the United States Constitution applies to lawyer disciplinary proceedings."). We conclude that Morton has not adequately briefed any of the issues, so we decline to resolve them on the merits. See *In re Bishop*, 285 Kan. 1097, 1106, 179 P.3d 1096 (2008) ("[T]he general rule [is] that an issue not briefed on appeal is deemed waived or abandoned."); *In re Coggs*, 270 Kan. 381, 396, 14 P.3d 1123 (2000) ("We, therefore, decline to consider the two issues raised but not briefed."). We briefly explain why below.

Morton first argues that the panel violated her federal due-process rights when it denied her motion to continue the formal

hearing. Morton had asked for the continuance so she could subpoena records from the Boys & Girls Club and Sam's Club. To establish a procedural due-process violation, Morton would need to show that she was denied a specific procedural protection to which she was entitled. See *In re Landrith*, 280 Kan. 619, 640, 124 P.3d 467 (2005). To decide the procedural protections that must accompany the deprivation of a particular property right, we weigh several factors:

"(1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the State's interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail." 280 Kan. at 640 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 [1976]).

Moreover, respondents in disciplinary proceedings have the burden to show that they were prejudiced by any failure in the proceedings. See Supreme Court Rule 239(b) (2023 Kan. S. Ct. R. at 312) (deviation from disciplinary procedures not grounds for reversal unless it causes prejudice). Morton simply asserts a federal due-process violation without addressing any of this applicable framework. See, e.g., 280 Kan. at 640 (applying procedural due-process framework to disciplinary-panel proceeding).

Morton next argues that the Disciplinary Administrator violated her due-process rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by objecting to a continuance and by failing to request and obtain exculpatory evidence on her behalf. Morton does not explain why *Brady* applies to a disciplinary proceeding (*Brady* is a criminal-law rule), why the Disciplinary Administrator had a duty to obtain evidence on Morton's behalf, or why the materials she sought were exculpatory.

Morton then argues that the admission of Boys & Girls Club payroll records and a receipt from Sam's Club violated the rules of evidence. See Supreme Court Rule 222(e)(1) (2023 Kan. S. Ct. R. at 277) (disciplinary hearing is governed by the Kansas rules of evidence). But Morton did not object to the admission of these exhibits. See K.S.A. 60-404; *State v. Sharp*, 289 Kan. 72, 100, 210 P.3d 590 (2009) ("'As a general rule, a party must make a timely

and specific objection to the admission of evidence in order to preserve the issue for appeal.'"). And she merely asserts, without explaining, that the admission of the evidence violated K.S.A. 2022 Supp. 60-245a(b) (a civil-procedure statute governing the subpoena of nonparty business records) and K.S.A. 2022 Supp. 60-460(m) (an evidence statute that provides a hearsay exception to business entries).

Morton then argues that the Disciplinary Administrator "failed in her duties to investigate." But Morton does not explain the source of these duties. Nor does she explain their substance.

Finally, Morton argues that the panel erred by refusing to admit Exhibits I and J that she offered at trial. Those exhibits consist of email exchanges between Morton, the Disciplinary Administrator, Morton's former Boys & Girls Club supervisor, and the Boys & Girls Club's attorney. Morton vaguely asserts that the content of these exchanges conflicts with the supervisor's testimony at the panel hearing. But she does not explain how her argument implicates due process. Nor does she explain the alleged inconsistencies or how the exhibits are material or probative.

These failings preclude meaningful review of Morton's due process claims.

III. *Clear and Convincing Evidence Supports Only Some of the KRPC Violations Found by the Hearing Panel*

In a disciplinary proceeding, we consider the evidence, the hearing panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, what discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. at 147; see Rule 226(a)(1)(A) (2023 Kan. S. Ct. R. at 281). Clear and convincing evidence is "evidence that causes the factfinder to believe that 'the truth of the facts asserted is highly probable.'" 315 Kan. at 147. "'In making this determination, the court does not weigh conflicting evidence, assess witness credibility, or redetermine questions of fact. If a disputed finding is supported by clear and convincing evidence, it will not be disturbed.'" *In re Ayesh*, 313 Kan. 441, 464, 485 P.3d 1155 (2021).

In its final hearing report, the panel determined that Morton had violated KRPC 7.1(a) (communication concerning a lawyer's services), KRPC 8.1 (bar admission and disciplinary matters), KRPC 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and KRPC 8.4(g) (conduct that adversely reflects on the lawyer's fitness to practice law). Morton denies violating any rule. The Disciplinary Administrator contends that clear and convincing evidence supports each rule violation. But it concedes that the panel erred by applying KRPC 8.4(c) and (g) to conduct occurring before Morton was licensed in Kansas. We address each rule in turn.

A. *Clear and Convincing Evidence Does Not Support the Panel's Conclusion That Morton Violated KRPC 7.1 by Posting Certain Content on Her Professional Website*

Under KRPC 7.1, a lawyer "shall not make a false or misleading communication about the lawyer or the lawyer's services." (2023 Kan. S. Ct. R. at 423). A communication is "false or misleading" if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." KRPC 7.1(a) (2023 Kan. S. Ct. R. at 423). The panel concluded that Morton violated KRPC 7.1 by publishing "a website containing materially false information, including masses of information copied from the Roth Davies website, . . . her bar association memberships, her alleged Martindale-Hubbell A/V rating, and her alleged experience, particularly in motorcycle and wrongful death cases." In the panel's view, Morton had intentionally represented material facts, and her rule violations were exacerbated when, "having removed the website upon receipt of the complaint in this matter, she put the offending website back up within a few months."

More context is required before evaluating the panel's findings. The record reveals that the Disciplinary Administrator first took issue with the November 2020 version of Morton's website—Davies had attached screenshots of the page to his complaint, and the

Disciplinary Administrator introduced them as evidence at the panel hearing. The November 2020 website included a logo for a

Martindale-Hubbell A/V rating, the Roth Davies material, the bar association logos, and statements about Morton's experience and practice areas. At that time, the Disciplinary Administrator raised concerns only about the Roth Davies' material and the Martindale-Hubbell logo. When Morton received the complaint, she promptly deactivated her website.

In July 2021, the Disciplinary Administrator conducted a follow-up investigation and found that Morton had reactivated her website. It was only then that the office began to object to the other aspects of Morton's website. And, importantly, the July 2021 version had addressed the Administrator's earlier concerns: Morton had deleted the Martindale-Hubbell A/V rating logo and the Roth Davies material (a fact that belies the panel's conclusion that Morton "exacerbated" the violations by reactivating her website).

Given that context, it is useful to separate our discussion of KRPC 7.1 violations into two categories. We first examine the November 2020 website and determine whether clear and convincing evidence supports the panel's finding that the website contained "intentional misrepresentations" related to the Martindale-Hubbell logo and the Roth Davies material and, if so, whether such findings support a KRPC 7.1 violation. Then we ask the same questions for the July 2021 website containing Morton's bar membership, her experience, and her practice areas.

1. *Clear and Convincing Evidence Does Not Support the Panel's Conclusion That the Content of Morton's November 2020 Website Violated KRPC 7.1*

Clear and convincing evidence does not support the panel's finding that the use of the Martindale-Hubbell A/V Preeminent was an "intentional misrepresentation." There is no dispute that Morton had not received that rating. But the record shows only that the logo was on the website for some time until a complaint was filed, that Morton promptly removed it, and that she did not republish it on her July 2021 website. The Disciplinary Administrator argues that we should infer that Morton knowingly violated the rule simply because she controlled the contents of her website. But we cannot agree. No evidence suggests that Morton's use of

the logo was intentional, as the panel found, rather than inadvertent or negligent. And the Disciplinary Administrator has not argued that lawyers are strictly liable for a KRPC 7.1 violation or that a lawyer may violate the rule by way of ordinary negligence. We therefore reject the panel's conclusion.

Nor do we agree that Morton's use of the Roth Davies material violated KRPC 7.1. That rule prohibits a lawyer only from making "a false or misleading communication *about the lawyer or the lawyer's services*." (Emphasis added.) (2023 Kan. S. Ct. R. at 423). But Morton's inclusion of the Roth Davies material—whether inadvertent or intentional—was not a communication about Morton or her services. Instead, it consisted of summaries of Kansas and federal caselaw, a question-and-answer section about Kansas domestic-violence law, and an explanation of the criminal-trial process. Perhaps Morton's use of the materials violates a different rule of professional conduct (a possibility we address, in part, below), but KRPC 7.1 is simply inapplicable under these facts. We therefore conclude that the November 2020 version of Morton's website fails to support any KRPC 7.1 violations.

2. *Clear and Convincing Evidence Does Not Support the Panel's Conclusion That the Content of Morton's July 2021 Website Violated KRPC 7.1*

Morton's July 2021 website is the basis for the remaining violations. Because the panel's final hearing report lacks important details, additional context is again needed. Under the heading titled, "Associations," Morton included the logo of the Johnson County Bar Association, Kansas Bar Association, and American Bar Association. Her website also used the word "experienced" several times: it said that "you need an experienced Johnson County, Kansas attorney;" that "Attorney T. Morton has the experience necessary to determine if you are being treated fairly;" that "experience counts;" and that Morton was "experienced legal counsel you can trust." Finally, Morton listed her practice areas as "criminal defense" and "personal injury," and she listed several types of cases within those areas: "sex crimes, child pornography/sexual exploitation, Jessica's law" and "auto accident, motorcycle accidents, wrongful death, serious injuries." The panel

found that these communications were intentional misrepresentations about her bar membership, her experience, and her practice.

We disagree with the panel. First, a misrepresentation must be "material" to be false or misleading under KRPC 7.1(a). (2023 Kan. S. Ct. R. at 423). Although Morton's membership in each of the bar associations had lapsed, she had been affiliated with each previously, and her website did not expressly say that she was a current member. So the evidence does not clearly and convincingly establish that any misrepresentation of fact was "material." Second, while an attorney's assertion of "experience" may be a material misrepresentation in some cases, that is not the case here. Morton's claims to be "experienced legal counsel" and to "ha[ve] the experience necessary to determine if you are being treated fairly" are not demonstrably false under the record before us. Finally, it is not improper for an attorney to state the areas he or she is willing to practice in or to state the types of cases he or she will accept. Indeed, KRPC 7.4(a) specifically allows a lawyer to "communicate the fact that the lawyer does or does not practice in particular fields of law." (2023 Kan. S. Ct. R. at 429). Nothing in the record shows that Morton claimed to be a specialist in a particular field of law, or that she claimed to have experience handling particular types of cases. She simply listed types of cases she would accept. Thus, clear and convincing evidence does not support the panel's conclusion that the July 2021 website violated KRPC 7.1.

B. *Clear and Convincing Evidence Supports the Panel's Conclusion That Morton Violated KRPC 8.1 by Omitting Material Employment Information on Her 2016 Kansas and 2019 Colorado Bar Applications and by Failing to Disclose to Colorado Attorney-Admissions Authorities That She Was Facing a Disciplinary Complaint in Kansas*

KRPC 8.1 prohibits "[a]n applicant for admission to the bar, or a lawyer in connection with a bar admission application" from "knowingly mak[ing] a false statement of material fact" or "fail[ing] to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail[ing] to respond to a lawful demand for information from an admissions or disciplinary authority." (2023 Kan. S. Ct. R. at 431). The panel concluded that Morton had violated that rule when she (1) "intentionally failed to include her

employment with the Boys and Girls Club, as well as her employment with Crystal Specialties and Colorado State University-Pueblo" in her Kansas bar application; (2) stated in "her several applications" to the Colorado bar that she had "voluntarily quit her employment with Boys & Girls Club" and "had not been a member of any bar associations"; and (3) had failed to disclose this disciplinary case to the Colorado attorney-admissions authorities. We address these violations in order, noting that neither the panel nor the parties have addressed how each alleged violation fits into each subsection of KRPC 8.1.

First, we mostly agree with the panel's conclusion about Morton's failure to disclose prior employment on her Kansas bar application. Question 22 of the Kansas bar application required Morton to disclose 10 years of employment history. Morton filed her application in March 2016, meaning that she needed to disclose all employment dating back to March 2006. Morton was an employee of the Boys & Girls Club in late 2007, so she needed to disclose that employment. That omission was material because Morton's supervisor testified that she was fired for misconduct, and "employment misconduct" is one of the factors considered when establishing character and fitness qualification for the Kansas bar. Supreme Court Rule 712(d)(3) (2023 Kan. S. Ct. R. at 574). And because Morton had listed her Boys & Girls Club employment on her earlier Colorado bar applications, it is reasonable to infer that she intentionally omitted it from her Kansas application. Even so, we disagree that there is evidence in the record suggesting that Morton's failure to disclose her employment with Crystal Specialties or Colorado State University-Pueblo was material, so those omissions do not support the violation.

Second, the panel relied on statements from Morton's "several" Colorado bar applications, but it should have relied only on Morton's 2019 Colorado bar application. KRPC 8.1 applies to a Kansas "lawyer" or "[a]n applicant for admission" to the Kansas bar, and Morton was neither before 2016. (2023 Kan. S. Ct. R. at 431). But we agree that clear and convincing evidence supports the panel's conclusion that Morton's statement on her 2019 Colorado application that she voluntarily quit her Boys & Girls Club position was a false statement of material fact. Based on her supervisor's testimony, clear and convincing evidence supports the panel's finding that the Boys & Girls

Club terminated Morton for misconduct, meaning that Morton misrepresented the resolution of her employment relationship. And because misconduct in employment is one of the factors considered when establishing character and fitness qualification for the Colorado bar, it is reasonable to infer that Morton intended to cover up the grounds for her termination. See Colorado Court Rules, C.R.C.P. 208.1(6)(c) (2023).

However, we disagree with the panel that Morton's statement about her prior bar membership supports a violation of KRPC 8.1. True, although Morton stated on her 2019 Colorado bar application that she had not been a member of any bar associations, Morton had been a member of the Johnson County Bar Association and the Kansas Bar Association from 2016 to 2017 and of the American Bar Association from 2013 to 2018. But nothing in the record suggests that Morton's statement was material to her bar application. And she was not a member of those associations at the time her application was submitted to Colorado authorities.

Finally, we agree with the panel that Morton violated KRPC 8.1 by failing to disclose her Kansas disciplinary complaint to the Colorado attorney-admissions authorities while her 2019 Colorado bar application was pending. That application asked if the applicant was the subject of any complaints or disciplinary or grievance actions. Morton answered no, which was accurate when she submitted the application in June 2019. But when she submitted the application, Morton acknowledged that she had a continuing obligation to timely update the information on the application until she was admitted to practice in Colorado. And she acknowledged that an amendment was considered timely when made "no later than 10 days after any occurrence that would change, or render incomplete, any answer on" her application. As a result, when Morton learned of the pending Kansas complaint against her in February 2021, she needed to timely update her Colorado bar application, which was still pending. Her failure to do so was a material omission.

C. *Clear and Convincing Evidence Supports Some Violations of KRPC 8.4(c) and (g), but the Panel's Findings Concerning Conduct Occurring Before Morton Was Licensed in Kansas Do Not Support a Violation of KRPC 8.4*

KRPC 8.4 defines professional misconduct. Under KRPC 8.4(c), it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." (2023 Kan. S. Ct. R. at 433). And under KRPC 8.4(g), it is professional misconduct for a lawyer to "engage in . . . conduct that adversely reflects on the lawyer's fitness to practice law." (2023 Kan. S. Ct. R. at 433). The panel concluded that Morton had violated these provisions in numerous ways. And it relied on the same findings to support violations of both subsections of KRPC 8.4.

But there is a problem with many of the panel's conclusions. KRPC 8.4 expressly applies only to "a lawyer," and much of the conduct the panel relied on concerns Morton's Kansas bar application, meaning it occurred before Morton was admitted to the bar. As the Disciplinary Administrator concedes, KRPC 8.4 does not apply to that conduct. Thus, Morton's failure to disclose facts on her Kansas bar application about her employment at the Boys & Girls Club, Crystal Specialties, and Colorado State University-Pueblo cannot support a violation of KRPC 8.4.

Several of the remaining violations involve the statements or omissions on her Colorado bar application that we discussed above. Although the panel did not specify whether it found violations based on Morton's earlier Colorado bar applications, KRPC 8.4 applies only to statements or omissions made on Morton's 2019 Colorado application, since she was not a lawyer when she submitted the earlier applications.

We agree with the panel that clear and convincing evidence supports a KRPC 8.4 violation for Morton's statement that she "voluntarily" quit her employment with the Boys & Girls Club. Her supervisor's testimony clearly and convincingly supports the panel's finding that Morton was fired for misconduct. Morton's statement involves a material misrepresentation and adversely reflects on her fitness to practice law. We also agree that clear and convincing evidence supports a KRPC 8.4 violation for Morton's failure to disclose her Kansas disciplinary complaint to Colorado attorney-admissions authorities while her Colorado bar application remained pending. The record shows that Morton acknowledged that she had a continuing obligation to update the information on the application until she was admitted to practice in

Colorado. Her failure to disclose the complaint is a material misrepresentation or deceitful, and it adversely reflects on her fitness to practice law.

But we disagree with the panel that other statements and omissions in her 2019 Colorado bar application support KRPC 8.4 violations. We have already discussed Morton's statement that she had not been a member of any bar associations. The record contains no evidence suggesting that Morton's statement was material to her bar application, so clear and convincing evidence does not support a conclusion that she made a material misrepresentation or that her statement adversely reflects on her fitness to practice law. Nor do we believe clear and convincing evidence supports the panel's conclusion that Morton violated KRPC 8.4(c) and (g) because she "[f]ailed to disclose to the Colorado bar that she had been employed by El Pueblo." To the contrary, the first item listed in the employment-history section of Morton's 2019 Colorado application was her position as principal at El Pueblo.

Finally, the panel relied on the contents of Morton's website to conclude that Morton had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation under KRPC 8.4(c) and in conduct that adversely reflected on her fitness to practice law under KRPC 8.4(g). We have already addressed most of the content on Morton's website. We determined that there was no clear and convincing evidence showing that Morton's use of the Martindale-Hubbell A/V Preeminent was anything other than inadvertent or, at most, negligent. We also determined that Morton's use of the three bar-association logos was not a material misrepresentation, that her use of "experienced" was not demonstrably false, and that listing case types and practice areas was unobjectionable under the facts here. Because the record shows that any misrepresentations related to this content were either immaterial or (at most) negligent, we do not believe clear and convincing evidence shows that Morton engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation under KRPC 8.4(c). See *In re Pyle*, 283 Kan. 807, 827, 156 P.3d 1231 (2007) (clear and convincing evidence did not support KRPC 8.4[c] violation when incorrect statement reflected "mistake rather than malevolence"); see also Black's Law Dictionary 1198 (11th ed. 2019) (defining

"misrepresentation" as the "act . . . of making a false or misleading assertion about something, *usu. with the intent to deceive*" [emphasis added]). And for that same reason, we also conclude Morton did not engage in conduct that adversely reflects on her fitness to practice law under KRPC 8.4(g).

But we have not yet discussed Morton's use of the Roth Davies material because we concluded that such content did not represent a communication about Morton or her services under KRPC 7.1. KRPC 8.4 contains no such limitation, so we agree with the panel that it may sometimes apply when a lawyer misappropriates materials for a professional website. But the record before us contains no evidence showing that Morton's use of the Roth Davies material was anything more than inadvertent or negligent. Thus, we "discern mistake rather than malevolence," and cannot agree that clear and convincing evidence establishes that Morton engaged in conduct that involved dishonesty, fraud, deceit, or misrepresentation under KRPC 8.4(c) or that adversely reflects on her fitness to practice law under KRPC 8.4(g). *In re Pyle*, 283 Kan. at 827.

IV. *The Appropriate Discipline Is Published Censure*

We have evaluated the hearing panel's conclusions on Morton's rule violations. We determined that Morton violated KRPC 8.1 by failing to disclose her Boys & Girls Club employment on her Kansas bar application, by materially misrepresenting the termination of her Boys & Girls Club employment on her 2019 Colorado bar application, and by failing to inform the Colorado attorney-admissions authorities of a pending Kansas disciplinary complaint. We determined that this same conduct violated KRPC 8.4(c) and (g). But we rejected many of the rule violations the panel found, including all violations of KRPC 7.1 and KRPC 8.4 that arose from the content of Morton's website, violations of KRPC 8.1 and KRPC 8.4 that arose from immaterial omissions of employment and bar-membership history, and all violations of KRPC 8.4 that arose from conduct before Morton had been admitted to the bar.

The remaining question is the appropriate discipline. We generally look to the American Bar Association Standards for Imposing Lawyer Sanctions to aid in determining discipline. That framework considers "four factors in determining punishment: (1) the ethical duty violated by the lawyer; (2) the lawyer's mental state; (3) the actual or potential injury resulting from the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors." *In re Hodge*, 307 Kan. at 231.

The panel considered these same factors. It determined that Morton had violated the KRPC in numerous ways. It found that Morton's violations were intentional and had "caused injury and harm to the justice system and the practice of law" in Kansas. The panel also found that Morton's misconduct was aggravated by a dishonest or selfish motive, by her commission of multiple offenses, and by her refusal to acknowledge the wrongful nature of her conduct. But it did find that her misconduct was mitigated by a lack of prior disciplinary record and by her inexperience in the practice of law. Based on these considerations, the panel recommended an indefinite suspension with various conditions for reinstatement. The Disciplinary Administrator recommends we disbar Morton from the practice of law. Morton recommends either censure or probation.

While we agree with the panel that Morton engaged in intentional rule violations, we have concluded that clear and convincing evidence supports only a few of the rule violations the panel found. The record also lacks evidence of concrete or specific harm, and the Disciplinary Administrator has never alleged that Morton injured a client. And we question the weight the panel assigned some of the aggravating factors. We agree that Morton at times acted with a dishonest motive. And while we also agree that Morton committed multiple violations, that aggravating factor warrants much less weight since we determined that most of the violations involving misrepresentations are not supported by clear and convincing evidence. Moreover, in our view, the panel's finding that Morton had refused to acknowledge the wrongful nature of her conduct is not supported by clear and convincing evidence. The panel failed to identify specific instances of Morton's failure to take responsibility, and the finding threatens to punish Morton

for exercising her rights in an adversarial proceeding. The record shows that Morton promptly addressed the Disciplinary Administrator's objections to her website, and at oral argument, Morton acknowledged mistakes and evinced a commitment to future compliance. On the other hand, we agree with the mitigating circumstances the panel found.

"In any given case, this court is not bound by the recommendations from the hearing panel or the Disciplinary Administrator. 'Each disciplinary sanction is based on the specific facts and circumstances of the violations and the aggravating and mitigating circumstances presented in the case.' 'Because each case is unique, past sanctions provide little guidance.' [Citations omitted.]" *In re Hodge*, 307 Kan. at 230. Having considered the facts here, a majority of this court holds that published censure is the appropriate discipline. We base this determination on ABA Standards 5.13 (reprimand generally appropriate when lawyer knowingly engages in conduct that involves dishonesty, fraud, deceit, or misrepresentation that causes injury or potential injury). See *In re Spencer*, 317 Kan. 70, 86, 524 P.3d 57 (2023) (published censure appropriate sanction for lawyer who committed "a misdemeanor that involved dishonesty, fraud, deceit, or misrepresentation which adversely reflected on his fitness to practice law but did not seriously adversely reflect on his fitness to practice law"). A minority of the court would impose more severe discipline.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Tarishawn D.D. Morton is disciplined by published censure to be published in accordance with Supreme Court Rule 225(a)(5) (2023 Kan. S. Ct. R. at 281) for violating KRPC 8.1, 8.4(c) and (g).

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.

No. 122,400

ELYSIA A. MARCUS, *Appellee*, v. ERIC SWANSON, M.D., *Appellant*, v. ELYSIA A. MARCUS, *Appellee*.

(539 P.3d 605)

SYLLABUS BY THE COURT

1. TORTS—*Elements of Defamation*. The elements of defamation include false and defamatory words, communicated to a third person, which result in harm to the reputation of the person defamed.

2. SAME—*Defamation Claims—Requirememt of Evidence of Reputational Harm*. Evidence of reputational harm is required in defamation claims. Speculation about reputational harm is not sufficient.

3. SAME—*Defamation Claims—Reputational Harm May be Shown by Reasonable Inferences*. Reputational harm may be shown by reasonable inferences, but these reasonable inferences must be tethered to a fact in the world, whether it be declining revenue, decreased professional opportunities, or some other indicator of reputational harm that is unique to the case at hand.

4. SAME—*Defamation Per Se and Presumed Damages—Abolished in Defamation Causes of Action in Kansas*. Defamation per se and presumed damages have been abolished in state defamation causes of action in Kansas.

5. SAME—*Damages Not Recoverable in Defamation Case unless Injury to Reputation Established by Evidence*. Unless injury to reputation is established by the evidence in a defamation cause of action, no other damages are recoverable.

Review of the judgment of the Court of Appeals in an unpublished opinion filed August 19, 2022. Appeal from Johnson District Court; DAVID W. HAUBER, judge. Oral argument held March 29, 2023. Opinion filed December 8, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

Quentin M. Templeton, of Forbes Law Group, LLC, of Overland Park, argued the cause, and *Frankie J. Forbes* and *Russell J. Keller*, of the same firm, and *William J. Skepnek*, of The Skepnek Law Firm, P.A., of Lawrence, were with him on the briefs for appellant.

Matthew V. Bartle, of Bartle & Marcus LLC, of Kansas City, Missouri, argued the cause and was on the briefs for appellee.

The opinion of the court was delivered by

WILSON, J.: This is a defamation claim by a cosmetic surgeon against a former patient. The patient, Elysia A. Marcus, posted negative and false Yelp reviews after Dr. Eric Swanson performed a laser resurfacing procedure on her face. Finding in Swanson's favor, a jury determined the reviews harmed Swanson's reputation. The district court set aside the defamation judgment holding Swanson failed to show any actual damage to his reputation. A Court of Appeals panel majority affirmed the district court. We agree and affirm the panel majority and the district court.

FACTS AND PROCEDURAL BACKGROUND

Dr. Eric Swanson is a plastic surgeon specializing in cosmetic surgery. In April 2015, Elysia Marcus met with Swanson on the advice of a friend. In 2016, Swanson performed a cosmetic procedure on many areas of Marcus' face, at a cost of $2,500. Marcus was not satisfied with the results.

In May 2017, Marcus' husband, an attorney, reached out to another attorney who focused on medical negligence. This attorney sent Swanson a demand letter. After negotiations, the parties signed a written release with these provisions: Swanson would refund the $2,500 fee, the Marcuses would give up any legal claims against Swanson or his practice related to the procedure, and the Marcuses would not discuss the issue in the media.

In November 2017, Marcus posted two Yelp reviews, one on Swanson's personal page and one on the page of his business, the Swanson Center. The business review included a one-star rating out of a possible five stars. The parties agree the reviews contained false and defamatory statements.

Swanson learned about the posts in March 2018. Due to the nature of his business, he relies on online advertising and word-of-mouth recommendations from previous clients. Swanson routinely tracks his online reviews. Though signed under a false name, Swanson suspected Marcus authored the defamatory reviews. He hired an attorney and sent a demand letter to the Marcuses. The letter demanded that Marcus (1) pay Swanson $25,000; (2) acknowledge that she wrote the reviews; (3) apologize; and (4) take down the reviews. The letter said Swanson would sue if Marcus failed to meet these demands.

Shortly after, Marcus petitioned for declaratory judgment in the District Court of Johnson County. She asked the district court to determine the parties' rights and obligations under the release. Swanson filed an answer and raised three counterclaims: (1) breach of contract, (2) libel, and particularly libel per se, and (3) tortious interference with a prospective business advantage. The third claim was later dismissed.

Three witnesses testified at trial: Marcus, Swanson, and Nicole Hart Neufeld, one of Swanson's former patients. Swanson explained that he believed the posts hurt his reputation, but that he did not lose any business or professional opportunities following the Yelp reviews and that he could not quantify how many potential clients were affected. Similarly, Neufeld testified that she saw the reviews and was concerned they might cause potential clients to avoid Swanson. She was a satisfied client and posted a review to offset Marcus'. She continued to recommend Swanson's services to her friends after reading the reviews.

Following the close of evidence, Marcus moved for judgment as a matter of law on both claims. As for defamation, Marcus' counsel argued "there's been literally zero evidence of any damages whatsoever." The court denied the motion as to the breach of contract claim but took the motion concerning the defamation claim under advisement and said Marcus could renew the motion after the verdict.

The jury found that Marcus breached the release agreement and awarded Swanson $2,500 in damages. Next, the jury concluded Marcus' Yelp reviews were defamatory, the reviews damaged Swanson's reputation, and Swanson should be awarded $15,000 in damages. The jury also found that punitive damages should be awarded after finding "Marcus acted in a willful or malicious manner."

Marcus filed a renewed motion for judgment as a matter of law. She argued there was no evidence the Yelp reviews injured Swanson's reputation. In December 2019, the court granted the motion and set aside the jury's verdict on the defamation claim. Swanson filed a notice of appeal and Marcus cross-appealed.

A panel of the Kansas Court of Appeals issued a split opinion in August 2022. *Marcus v. Swanson*, No. 122,400, 2022 WL

3570349 (Kan. App. 2022) (unpublished opinion). The majority affirmed on both counts.

The majority pointed out that Kansas law requires a "tangible basis for inferring a real (rather than merely a presumed) diminution in reputation." *Marcus*, 2022 WL 3570349, at *6. After reviewing the trial testimony, the majority concluded there was no evidence to suggest reputational harm. Instead, any such harm was merely speculative. It concluded "[t]he fundamental problem for Dr. Swanson rests in the requirement he offer evidence of *some* actual damage to his reputation to establish a legally submissible claim for defamation." 2022 WL 3570349, at *8.

In her concurring and dissenting opinion, Judge Warner outlined various pieces of testimony from Swanson and Neufeld. She found the testimony sufficient to support a jury's finding of reputational damage, but noted the "evidence, without more, may have danced on the razor's edge of speculation." Yet Judge Warner argued that Marcus affected "Swanson's reputation in a real, measurable sense: *It reduced Dr. Swanson's Yelp star-rating from 5 to 3.5 stars*." 2022 WL 3570349, at *15. Accordingly, Judge Warner concluded the district court erred in determining no evidence supported the jury's conclusion that the Yelp posts injured Swanson's reputation.

We granted Swanson's petition for review.

ANALYSIS

Swanson raises two issues in his petition for review. First, Swanson argues that the district court and panel majority erred in finding there was insufficient evidence to establish reputational harm. Second, Swanson argues that he need not establish reputational harm because the jury found Marcus acted with malice and the common law doctrine of defamation per se means damages are presumed.

Defamation in Kansas

The law of defamation developed as part of the common law. "The elements of defamation include false and defamatory words, communicated to a third person, which result in harm to the reputation of the person defamed." *Hall v. Kansas Farm Bureau*, 274

Kan. 263, 276, 50 P.3d 495 (2002). Traditionally, defamation has two variants: libel, a written defamatory statement, and slander, an oral defamatory statement. *Gobin v. Globe Pub. Co.*, 232 Kan. 1, 5, 649 P.2d 1239 (1982) (*Gobin III*). Rather than viewing these as distinct causes of action, in Kansas "'[t]he tort of defamation includes both libel and slander.'" *Dominguez v. Davidson*, 266 Kan. 926, 930, 974 P.2d 112 (1999) (quoting *Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95, 102, 864 P.2d 744 [1993]).

Beyond the slander/libel distinction, the tort of defamation also traditionally included a distinction between defamation per se and defamation per quod. In *Karrigan v. Valentine*, 184 Kan. 783, 787, 339 P.2d 52 (1959), we explained:

"Words libelous *per se* are words which are defamatory in themselves and which intrinsically, by their very use, without innuendo and the aid of extrinsic proof, import injury and damage to the person concerning whom they were written. They are words from which, by the consent of mankind generally, damage follows as a natural consequence and from which malice is implied and damage is conclusively presumed to result. . . .

"Words libelous *per quod*, on the other hand, are words ordinarily not defamatory but which become actionable only when special damages are shown, that is, they are words the injurious character of which appears only in consequence of extrinsic facts. Thus, words not defamatory *per se*, may become actionable *per quod*, depending upon the facts and circumstances of the particular case, and this gives rise to the rule that in order to recover for a libel *per quod* special damage and injury must be alleged and proved."

In Kansas, defamation per se arose based on these statements: "(1) Imputation of a crime; (2) imputation of a loathsome disease (usually venereal); (3) imputation of a person's unfitness for his trade or profession; or (4) imputation that a woman is unchaste." *Kraisinger v. Liggett*, 3 Kan. App. 2d 235, 237, 592 P.2d 477 (1979).

Moreover, damages in defamation come in several forms.

"Defamation damages traditionally involve five subparts: (1) nominal damages ('a trivial sum of money awarded' when a plaintiff 'has not established that he is entitled to compensatory damages'), (2) general damages for harm to reputation (called 'general,' because they are generally anticipated, and hence do not need to be alleged), (3) damages for special harm (the 'loss of something having economic or pecuniary value,' such as loss of business), (4) damages for emotional

distress (and bodily harm resulting therefrom), and (5) punitive damages (to punish a defendant's outrageous conduct)." Sipe, *"Old Stinking, Old Nasty, Old Itchy Old Toad": Defamation Law, Warts and All (a Call for Reform)*, 41 Ind. L. Rev. 137, 152 (2008).

But the right of an individual to seek and obtain redress for defamation is not without limits. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (false statements from the media about a public official conducting their official duties were protected by the First Amendment unless the public official could prove the statement was made with actual malice); *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.").

Shortly after *Gertz*, we issued *Gobin v. Globe Pub. Co.*, 216 Kan. 223, 531 P.2d 76 (1975) (*Gobin I*). Gary Dean Gobin alleged a Dodge City newspaper, published by Globe Publishing Company, printed defamatory statements. Gobin was a hog farmer, and the newspaper printed an article and photos falsely representing that Gobin pleaded guilty to animal cruelty. In fact, Gobin was charged and convicted but he never *pleaded* guilty, and the criminal case was ultimately dismissed. After his civil trial, the jury awarded Gobin $100,000 in damages. Gobin had not asserted injury to reputation or emotional distress. Globe appealed, and we explained "[t]he controlling issue upon this appeal is whether damage to one's reputation is an essential ingredient in an action for defamation." 232 Kan. at 4.

Pertinent to the issues here, we held:

"*Gertz*, as we pointed out in *Gobin I*, effected an immediate change upon the rule in Kansas and in those other states which presumed damages upon the establishment of libel per se, and permitted recovery based upon that presumption. Damages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel." *Gobin III*, 232 Kan. at 5.

Further:

"We conclude that in this state, *damage to one's reputation is the essence and gravamen of an action for defamation*. Unless injury to reputation is shown, plaintiff has not estab-

lished a valid claim for defamation, by either libel or slander, under our law. It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander." (Emphasis added.) *Gobin III*, 232 Kan. at 6.

We have reiterated this holding in subsequent opinions. *Hall*, 274 Kan. at 276; *Moran v. State*, 267 Kan. 583, 599, 985 P.2d 127 (1999); *Knudsen v. Kansas Gas and Electric Co.*, 248 Kan. 469, 474, 807 P.2d 71 (1991).

With this context in mind, we now turn to Swanson's two issues.

Swanson Failed to Prove Injury to His Reputation

Swanson argues there was sufficient evidence to establish reputational harm, so the panel majority erred by affirming the district court's decision to grant Marcus' motion for judgment as a matter of law. We disagree with Swanson and agree with the panel majority. The district court's holding was correct. As a matter of law, Swanson failed to prove injury to his reputation.

Standard of Review

A motion for a directed verdict is now referred to as a motion for a judgment as a matter of law. This court's standard of review of a ruling on a motion for a judgment as a matter of law is the following:

"'When ruling on a motion for directed verdict, the trial court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought. Where reasonable minds could reach different conclusions based on the evidence, the motion must be denied. A similar analysis must be applied by an appellate court when reviewing the grant or denial of a motion for directed verdict.'" *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 202, 4 P.3d 1149 (2000) (quoting *Calver v. Hinson*, 267 Kan. 369, Syl. ¶ 1, 982 P.2d 970 [1999]).

We owe no deference to the district court's decision. *Siruta v. Siruta*, 301 Kan. 757, 766, 348 P.3d 549 (2015).

Discussion

As we explained in *Gobin III*, "damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law." 232 Kan. at 6. Injury to reputation is "to diminish the esteem, respect, goodwill or confidence in which the [claimant] is held, or to excite adverse, derogatory

or unpleasant feelings or opinions against him." *Moran*, 267 Kan. at 590. Reputational damage may be inferred so long as the inferences are reasonable. *Moran*, 267 Kan. at 590.

With these rules in mind, we turn to Swanson's claims of reputational harm. First, Swanson directs us to his 3.5 Yelp star rating as evidence that his reputation was harmed in the community. Neufeld testified the Swanson Center had 19 ratings on Yelp. Of these ratings, 18 were 5-star ratings, with Marcus' 1-star rating bringing the Swanson Center's overall rating to 3.5. Judge Warner suggests the 3.5-star rating was evidence that Swanson's reputation was affected "in a real [and] measurable sense." *Marcus*, 2022 WL 3570349, at *15.

We do not find this reasoning compelling. Proof of injury to reputation requires evidence to establish a causal relationship between the defamatory statements and the injury to Swanson's reputation. The defamatory statements at issue were the text of the Yelp post. These statements did not reduce the star rating. Rather, the 3.5-star rating was caused by Marcus' 1-star rating, which was mathematically aggregated with the other ratings to produce a numerical outcome. The 1-star rating itself was not defamatory because it was not a statement that may be true or false. It was an opinion. See *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269-70 (9th Cir. 2016) (Yelp star ratings are opinions). Put simply, the 3.5-star rating cannot establish reputational harm because the reduced rating was not caused by a defamatory statement. And even if we view the defamatory statements and the reduced star-rating as inseparable, Swanson has provided no evidence that the 3.5-star rating affected his reputation in the community. At most, Swanson testified that Yelp was important to potential customers and Neufeld worried the reviews might turn away future clients.

Swanson's second argument for reputational harm is that the content of the reviews deterred future patients. He testified:

"I am hoping that maybe as a result of this that review can finally be taken down. Because not only does it bother me, of course it does, every time I check it for myself, it does bother me, it affects my reputation, which I worked really hard to try to *rebuild*. And I think because of its exposure on Yelp, which is like a number one review site, I think a lot of people see it, and I am sure—I can't quantitate. I don't know how many people have seen it and then never see me as a patient.

But I have to think it is a lot. Just because this is just common knowledge. We all know that Yelp matters to businesses." (Emphasis added.)

Swanson here recognized his reputation had suffered for reasons unrelated to Marcus. Notably, Swanson had been publicly censured by the Kansas and Missouri medical boards, had been a defendant in 30 malpractice lawsuits, had been the subject of several negative articles in the media, and had received other negative reviews online. Even so, Swanson had worked hard to rebuild his reputation and believed it was excellent. In fact, Swanson testified that in the year following Marcus' Yelp reviews his revenue, profit, and patient count increased. He continued to be published in peer reviewed journals, serve as a peer reviewer, and receive invitations to speak at professional conferences.

The other witness, Neufeld, testified that she sought treatment from Swanson both before and after Marcus' Yelp review. Neufeld had done research on potential physicians before her first procedure. She had discovered one of the negative articles but found it sensational and decided to meet Swanson anyway. She then had her procedure and was pleased with the results. She also conducted research before her second procedure. During this process, she came across Marcus' review of the Swanson Center and described it to Swanson when they met during her consultation. She wanted him to know it was posted because it could hurt his practice. She was concerned about how *others* might perceive Swanson after reading the Yelp review. It did not stop her from seeking out his care. She thought her second procedure had a positive outcome and posted a positive Yelp review to offset Marcus'. Based on this testimony, Swanson argues it is a reasonable inference that prospective clients who were unfamiliar with Swanson's work would be deterred.

Marcus replies that Swanson could not identify a single patient that was dissuaded. We acknowledge that would be difficult to do because Swanson is unlikely to have contact with potential patients who may have been dissuaded, but even so, Kansas law requires some evidence of reputational harm.

Evidence of reputational harm cannot be speculative. In *Clark v. Time, Inc.*, a country club manager brought a defamation claim based on a negative review posted online. The post referred to the

manager as "Vlad the Impaler." The court dismissed the claim on summary judgment because, among other things, the plaintiff failed to prove reputational damage. Applying Kansas law, the court explained "plaintiff conceded . . . that he lost no business opportunities because of the article's publication." *Clark v. Time, Inc.*, 242 F. Supp. 3d 1194, 1217 (D. Kan. 2017). Moreover, plaintiff's argument "that his reputation has sustained damage because anyone who searches the internet for plaintiff's name will find the article is simply unsupported speculation." 242 F. Supp. 3d at 1217. The court noted the plaintiff "assumes that the reader will form a negative opinion about plaintiff after reading the article." 242 F. Supp. 3d at 1217. Both Swanson and Neufeld make similar assumptions.

In *Moran*, 267 Kan. 583, plaintiff was the former head of the University of Kansas Medical Center's Department of Cardiothoracic Surgery. Four KUMC administrators issued four communications, in newspapers or online, that criticized Moran and his stewardship of the heart transplant program. Moran filed a defamation claim, and the defendants moved for summary judgment. One issue was whether Moran suffered reputational harm. The district court granted summary judgment for the defendants, but this court reversed, despite the evidence for reputational harm being "unquestionably thin." 267 Kan. at 590. Moran's interrogatories revealed that, since the communications, he had received less interest in leading transplant programs at other hospitals and from academic journals. Also other publications stopped inviting him to submit articles. We explained:

"Moran's beliefs, as expressed in his answers to interrogatories, do not amount to much by themselves. In order to amount to anything, the inferences Moran would have us draw must be reasonable. In the circumstances, a decrease after publication of defendants' statements for requests for Moran's professional participation would seem to be the sort of detrimental consequence that might be expected from colleagues' defamatory statements about his professional conduct. Thus, it would be reasonable to infer a causal link between the decreased demand for his professional participation and the defendants' statements." 267 Kan. at 590-91.

The above passage shows that a reasonable inference must be tethered to a fact in the world, such as declining job or publication offers. From that fact, a reasonable inference can be made that

there was a causal link between the defamatory statement and reputational harm. Here, neither Swanson nor Neufeld ties their reputational damage testimony to any external fact. We cannot find causation because Swanson never directs us to an effect. Rather, the relevant testimony relies on speculative statements about possible states of affairs.

Not surprisingly, Swanson did not know of potential patients who saw the review and declined to seek his services. Neufeld was concerned that others might not hire Swanson but provided no testimony that she, or anyone else, had considered Swanson but was discouraged or deterred because of Marcus' false review. Rather than demonstrating harm, Swanson testified instead to stable or increasing business and professional opportunities. Based on the testimony, Swanson's inferences of harm are unsupported by fact. He falls far short of the "unquestionably thin" evidence showing reputational harm in *Moran.* Kansas law requires more. See *Zaid v. Boyd*, No. 22-1089-EFM, 2022 WL 4534633, at *9 (D. Kan. 2022) (unpublished opinion) (noting "there must be specific facts to support the inference of reputational damage, such as lost sales, lost profits, 'a decrease after publication of defendants' statements for requests for [plaintiff]'s professional participation,' or a decline in clients or revenue"). We conclude that Swanson's second argument for causal proof of reputational harm is unpersuasive because the harm is speculative.

Swanson's third attempt to establish reputational harm is based on his testimony that he was personally upset by the Yelp reviews and devoted substantial time and resources to have the reviews taken down. Swanson enlisted his staff in this task and even hired a consultant, ultimately spending hundreds of hours on the project. But the injuries to Swanson's feelings and pocketbook are not reputational injuries. See *Gobin III*, 232 Kan. at 7. Reputational injuries are relational. See *Gomez v. Hug*, 7 Kan. App. 2d 603, 611-12, 645 P.2d 916 (1982) (quoting Prosser, Law of Torts, p.737 [4th ed. 1971]) "In either form, defamation is an invasion of the interest in reputation and good name. This is a 'relational' interest since it involves the opinion which others in the community may have, or tend to have, of the plaintiff."). Though pecuniary

harm may be considered evidence of reputational damage, Swanson's economic injury was not caused by a third party's negative perception of him based on a reputational decline. Instead, the causal connection was from the false statements to his own mental anguish, not a damaged reputation. As Marcus persuasively argues, allowing this evidence to establish reputational harm would make any defamation claim actionable so long as the plaintiff spent time and money to counter the alleged defamatory statement.

Swanson makes other arguments. He first suggests the district court and majority panel erroneously required him to show "typical" defamation damages. Judge Warner levels a similar charge. *Marcus*, 2022 WL 3570349, at *15 (Warner, J., concurring in part and dissenting in part). The panel majority, however, correctly recognized the diversity of ways that defamation plaintiffs may prove reputational damage. *Marcus*, 2022 WL 3570349, at *11. The comparison to the facts of *Moran* and other cases does not seek to require such evidence, but to illustrate that Swanson did not marshal *any* evidence of reputational harm at trial. Along these lines, Swanson suggests the district court and the majority panel ignored controlling legal standards by reweighing evidence. But Marcus correctly points out that the issue is not a reweighing of evidence, but that there was no evidence to be reweighed.

Next, Swanson argues the district court and panel majority erred by focusing on Swanson's counsel's statements in closing argument. Swanson is correct that closing arguments are not evidence. *Wilson v. Williams*, 261 Kan. 703, 710, 933 P.2d 757 (1997). The panel majority discussed the closing argument, and the district court referenced the argument in its order granting judgment as a matter of law. *Marcus*, 2022 WL 3570349, at *7. Nonetheless, we conclude the panel was correct that the district court referenced the closing argument merely to illuminate the lack of evidence on reputational harm, rather than as a basis for its ruling. In fact, the panel specifically explains the district court's analysis of the closing argument "tends to confirm the evidentiary gap but does not in any legal way establish it." *Marcus*, 2022 WL 3570349, at *7. We see no error.

Finally, Swanson briefly suggests the district court usurped the jury's fact-finding role and therefore denied him his constitutional right to a trial by jury. He made a similar argument before the panel, which appropriately recognized that this argument is not a standalone claim under the Kansas Constitution Bill of Rights section 5, but is a reframing of the "reweighing the evidence" argument using constitutional language. *Marcus*, 2022 WL 3570349, at *8. So the panel was correct that Swanson's argument fails.

Accordingly, we affirm the district court and panel majority's rulings that Swanson failed to establish reputational harm caused by the defamatory statements.

Kansas Abolished Presumed Damages and Defamation Per Se

Swanson's second issue on appeal asserts he was not required to establish reputational harm because the jury found Marcus acted with malice and the common law doctrine of defamation per se means damages are presumed. Put another way, Swanson asks us to hold that a finding of actual malice would relieve a claimant of proving reputational harm. Marcus responds that we abolished defamation per se and presumed damages in *Gobin III*. We agree with Marcus.

Standard of Review

We have unlimited review over interpretation of our precedents. *Scott v. Hughes*, 294 Kan. 403, 412, 275 P.3d 890 (2012). Additionally, the core question here poses a question of common law, which is inherently a question of law over which we have unlimited review. See *Wilkinson v. Shoney's, Inc.*, 269 Kan. 194, 203, 4 P.3d 1149 (2000) ("Whether to adopt or recognize a new cause of action falling within the common law of tort or negligence is a question of law over which we have unlimited review.").

Discussion

Marcus and the panel majority suggest we abolished defamation per se in *Gobin III*. *Marcus*, 2022 WL 3570349, at *3. We released *Gobin III* eight years after *Gertz*, explaining, "'Damages

recoverable for defamation may no longer be presumed; they must be established by proof, *no matter what the character of the libel*. '" (Emphasis added.) *Gobin III*, 232 Kan. at 4. And "damage to one's reputation is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander, under our law." 232 Kan. at 6.

Swanson makes several arguments that we have not abolished presumed damages. First, he directs us to our discussion about whether other states required reputational harm before other damages could be recovered. From our reference to New York's law, he gleans: "[A]bsent proof of harm to reputation, a plaintiff may not recover damages for mental anguish on a claim of defamation unless plaintiff proves malice." 232 Kan. at 7.

The quotation Swanson relies on occurred in the context of a discussion of damage sequencing, which considers whether reputational injury must first be established before other damages are recoverable. After we concluded that injury to reputation was a requirement of any defamation action, we noted that Florida permitted plaintiffs to recover damages for mental anguish absent a showing of reputational harm. *Gobin III*, 232 Kan. at 6-7. We then observed that New York had a different rule. Next, we clarified that "[w]e agree with the New York rule that the plaintiff in an action for defamation must first offer proof of harm to reputation; any claim for mental anguish is 'parasitic,' and compensable only after damage to reputation has been established." 232 Kan. at 7; *Richie v. Paramount Pictures Corp*., 544 N.W. 2d 21, 30 (Minn. 1996) (citing *Gobin III* and explaining "courts in other jurisdictions have found that New York does have a reputational harm prerequisite in defamation cases").

In *Moran*, we quoted *Gertz* to elaborate:

"'We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there

need be no evidence which assigns an actual dollar value to the injury. '" 267 Kan. at 599 (quoting *Gertz,* 418 U.S. at 349-50).

In *Gobin III* we agreed with the sequencing of damages outlined in the New York rule but we also rejected the *Gertz* rule that reputational harm is not required if malice is shown. Thus our reference to the sequencing of damages—injury to reputation first, then other damages may follow—does not contradict *Gobin III*'s earlier statement that "[d]amages recoverable for defamation may no longer be presumed; they must be established by proof, no matter what the character of the libel." 232 Kan. at 5.

Second, Swanson argues that two post-*Gobin III* cases suggest malice may relieve a plaintiff from proof of reputation injury or damages. In *Turner v. Halliburton Co.,* 240 Kan. 1, 11, 722 P.2d 1106 (1986), we resolved the case and then explained "it is not necessary for us to consider the question of whether *Gobin [III]* requires actual proof of damage to reputation when the defendant is not a member of the news media." 240 Kan. at 11. In *Moran,* 267 Kan. at 593, we noted that "[h]aving determined that the district court erred in granting defendants' summary judgment, we do not reach the second issue raised of whether actual malice would relieve Moran of the burden of showing injury to reputation."

Swanson relies on these cases to argue that *Gobin III*'s abolition is not absolute, but our prior refusals to reach that issue means that we made no decision one way or another about the issue of absolute abolition. Put differently, *Gobin III*'s scope was not diminished in either *Turner* or *Moran*.

In fact, additional language from *Moran* supports Marcus' view. Perhaps because malice had not been alleged in *Gobin, Moran* first states: "This court has not squarely decided whether in Kansas any and all defamation plaintiffs must allege and prove actual damages rather than relying on the theory of presumed damages." *Moran,* 267 Kan. at 598. Regardless, *Moran* explained: "*Gertz* changed the law in Kansas. Damages recoverable for defamation, whether per se or not, could no longer be presumed but must be proven." 267 Kan. at 599. The latter statement supports the holding in *Gobin III*. And our most recent decision touching on the issue directly quotes *Moran*'s statement that defamation per se damages cannot be presumed. *Hall,* 274 Kan. at 276. We clarify

here that defamation per se and presumed damages have been abolished in all instances.

Our interpretation of *Gobin III* is consistent with the way other courts have interpreted it. See, e.g., *In re Rockhill Pain Specialists, P.A.*, 55 Kan. App. 2d 161, 185-86, 412 P.3d 1008 (2017); *Polson v. Davis*, 895 F.2d 705, 708 (10th Cir. 1990); *RX Savings, LLC v. Besch*, No. 19-2439-DDC-JPO, 2019 WL 6974959, at *3 (D. Kan. 2019) (unpublished opinion) (quoting *Gobin III*, 232 Kan. at 5); *Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.*, 434 S.W.3d 142, 146 n.9 (Tex. 2014); *Bierman v. Weier*, 826 N.W.2d 436, 456 n.8 (Iowa 2013); *MacDonald v. Riggs*, 166 P.3d 12, 18 n.20 (Ala. 2007). Academic commentary also suggests we completely abolished defamation per se in *Gobin III*. Seager, *Jackpot! Presumed Damages Gone Wild—and Unconstitutional*, 31-WTR Comm. Law. 1, 31 (2015).

We recognize *Gobin III* places us in the minority. See Krieger, *Defamation Per Se Cases Should Include Guaranteed Minimum Presumed Damage Awards to Private Plaintiffs*, 58 San Diego L. Rev. 641, 662-63 n.133 (2021) (outlining the 40 states allowing for some form of presumed damages for defamation per se); Seager, 31-WTR Comm. Law. at 31 ("A majority of states have retained the common-law doctrine of presumed damages for defamation per se."). But U.S. Supreme Court precedent does not prohibit Kansas from abolishing presumed damages and thus increasing the protection for defendants in a defamation action. See *Bierman*, 826 N.W.2d at 449 ("Iowa can make its defamation law more protective of defendants than the First Amendment requires.").

Because *Gobin III* abolished defamation per se and presumed damages, we reject Swanson's argument to the contrary. Swanson frames his argument as a dispute over the proper reading of *Gobin III*, but Marcus correctly notes that Swanson's argument includes an implicit call to change the law and allow for defamation per se when actual malice is shown. Swanson's argument, therefore, implicates stare decisis concerns.

"Stare decisis recognizes that once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in later cases when the same legal issue is raised." *In re Equalization Appeal of*

Walmart Stores, Inc., 316 Kan. 32, 62, 513 P.3d 457 (2022). "Stare decisis—while not a 'rigid inevitability'—serves as a 'prudent governor on the pace of legal change.'" *McCullough v. Wilson*, 308 Kan. 1025, 1035, 426 P.3d 494 (2018) (quoting *State v. Jordan*, 303 Kan. 1017, 1021, 370 P.3d 417 [2016]). The doctrine's application "'ensures stability and continuity—demonstrating a continuing legitimacy of judicial review.'" *Wilson*, 308 Kan. at 1035-36 (quoting *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 715, 89 P.3d 573 [2004]). Stare decisis considerations are particularly persuasive "in cases involving property and contract rights, where reliance interests are involved" and when "the legislature is free to alter a statute in response to court precedent with which it disagrees but declines to do so." *Crist*, 277 Kan. at 715 (reliance interests related to property and contract rights); *State v. Quested*, 302 Kan. 262, 278, 352 P.3d 553 (2015) (Legislature declining to alter).

"While 'stare decisis is not an inexorable command,' this court endeavors to adhere to the principle unless clearly convinced a rule of law established in its earlier cases 'was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.'" *State v. Hambright*, 310 Kan. 408, 416, 447 P.3d 972 (2019) (quoting *State v. Spencer Gifts, LLC*, 304 Kan. 755, 766, 374 P.3d 680 [2016]).

The majority below suggests that changing circumstances might warrant a reconsideration of *Gobin III*. *Marcus*, 2022 WL 3570349, at *10. It notes defamation law was created before the internet age. Indeed, the tort has a long history tracing back to English courts. See Hirth, *Laying to Rest the Ecclesiastical Presumption of Falsity: Why the Missouri Approved Instructions Should Include Falsity as an Element of Defamation*, 69 Mo. L. Rev. 529, 529 (2004) ("Continually modified by kings, ecclesiastical courts, state legislatures, and the United States Supreme Court, the modern law of defamation is a thicket of presumptions, privileges, and plaintiff-specific pleadings.").

But we also recognize the importance of stability. *Gobin III* has been the law for over 40 years and has become universally accepted as abolishing defamation per se and presumed damages

in Kansas. Today we reaffirm *Gobin III*'s holding and decline to upset the continuity that follows from its continued application. We are not convinced that *Gobin III* is no longer sound because of the internet, and we are not convinced that disturbing *Gobin III* would do more good than harm.

Other courts have disagreed. *W.J.A. v. D.A.*, 210 N.J. 229, 233, 43 A.3d 1148 (2012). But we find company with the New Mexico Supreme Court, which rejected a request to reimplement presumed damages in an internet era case, though the defamatory statement was not posted online. See *Smith v. Durden*, 276 P.3d 943, 943 (N.M. 2012) ("The issue before the Court is whether New Mexico requires a showing of injury to one's reputation to establish liability for defamation. We hold that it does, as injury to reputation is the very essence of the tort of defamation.").

In light of our holdings today, we need not reach Swanson's remaining arguments, which all depend on the availability of presumed damages or recoverable damages without proof of reputational injury.

CONCLUSION

Swanson failed to prove Marcus' defamatory statements injured his reputation. Consequently, he cannot show recoverable damages.

The judgment of the Court of Appeals affirming the district court is affirmed. The judgment of the district court is affirmed.

WALL, J., not participating.

No. 124,992

STATE OF KANSAS, *Appellee*, v. JOHN PEPPER, *Appellant*.

(539 P.3d 203)

SYLLABUS BY THE COURT

1. CRIMINAL LAW—*Aggravated Criminal Sodomy—Statutory Requirements*. The crime of aggravated criminal sodomy pursuant to K.S.A. 2022 Supp. 21-5504(b)(3)(A) requires the State to prove beyond a reasonable doubt that (1) sodomy occurred; (2) the victim did not consent; and (3) the victim was overcome by force or fear.

2. SAME—*Overcome by Force or Fear Language—Same Meaning*. "Overcome by force or fear" has the same meaning in our aggravated criminal sodomy statute as it has in our rape statute.

3. EVIDENCE—*K.S.A. 60-405 Provides Method for Proffering Record for Appellate Review*. Following a district court's ruling that evidence will not be admitted, the plain language of K.S.A. 60-405 provides that a district court may approve of various forms and methods of proffering a record for purposes of appellate review of that district court ruling.

4. SAME—*Proffer of Evidence—Proponent Must Indicate Substance of Expected Evidence*. If the district court does not approve an alternative form of proffer, the proponent of excluded evidence must indicate the substance of the expected evidence by questions indicating the desired answers.

Appeal from Sedgwick District Court; BRUCE C. BROWN, judge. Oral argument held May 15, 2023. Opinion filed December 8, 2023. Affirmed.

Laura Stratton, of Capital Appeals and Conflicts Office, argued the cause, and *Reid T. Nelson* and *Debra J. Wilson*, of the same office, were on the brief for appellant.

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

The opinion of the court was delivered by

WILSON, J.: A jury convicted John Pepper of felony murder with the predicate felony of aggravated criminal sodomy. On direct appeal, he asserts three district court errors: (1) evidence insufficiency, (2) erroneous exclusion of expert opinion, and (3) permission for one camera in the courtroom during trial and pretrial proceedings. On direct appeal, we affirm.

FACTS AND PROCEDURAL BACKGROUND

When Wichita Police Detective Dustin Noll arrived at the Wichita residence where he had been dispatched, he heard screams coming from inside where C.C. had just discovered her 72-year-old mother, R.G., lying dead on the kitchen floor and nude from the waist down. As Noll attempted lifesaving measures on R.G., backup law enforcement discovered Pepper in a nearby bedroom closet, sitting on the floor hugging his dog. The officers arrested him. Law enforcement also found a small knife in Pepper's pocket.

At trial, the State called numerous witnesses. Witnesses at the scene had noticed a lot of blood in R.G.'s mouth and heard bones cracking when starting CPR. Shortly after Pepper's arrest, forensic nursing coordinator Amy Mitchell collected numerous DNA samples from Pepper's mouth, penis, anus, and the area between his left index and pointer fingers.

Tina Peck, a sexual assault examination nurse who conducted a postmortem examination of R.G., took DNA samples from R.G.'s mouth, anus, and vagina. She noted bruising on R.G.'s genitals, which could have been caused by blunt force trauma from a finger or an erect penis. She testified the injuries could have resulted from either consensual or nonconsensual sex.

Dr. Jamie Oeberst, a coroner, conducted an autopsy. She noted bruising and scrapes around R.G.'s mouth on her left cheek, bruising and scrapes on the inside of R.G.'s lower lip, bruising on the inside of R.G.'s upper lip, bruising and a "superficial laceration" inside R.G.'s left cheek, scrapes near her left eye and left cheek, bruising on her tongue, multiple scalp bruises, and scrapes on the eyelids. There were also bruises and scrapes on R.G.'s arms, legs, chest, and back. Dr. Oeberst explained bruises require blood pressure and that chest compressions circulate blood, but only the bruises on the left side of R.G.'s chest could have been caused by chest compressions. Further, R.G.'s lumbar vertebra in her lower back had been fractured. The muscle surrounding the fracture had been torn, meaning "she had a significant injury in this area of her back." The injury could have been caused by twisting or a sharp flexion like bending forward, but Dr. Oeberst concluded the cause of the injury was unknown.

Dr. Oeberst also testified that R.G. had petechial hemorrhages, which are small hemorrhages in the eyes and face that can be caused by many things including smothering. But petechial hemorrhages may also be caused by the resuscitation efforts and therefore she could not definitively identify their cause. R.G.'s toxicology screen was negative for drugs and alcohol.

Based on these injuries, Dr. Oeberst testified that R.G.'s cause of death was a cardiac event caused by blunt force trauma. R.G. had a history of health issues including high blood pressure, an enlarged heart, atrial fibrillation, congestive heart failure, shortness of breath, lung disease, sarcoidosis, scarred lungs, and a prior pulmonary embolism. The blunt force trauma caused stress and pain that compromised these preexisting conditions. Dr. Oeberst testified that "but for the blunt force injuries, she wouldn't have died that day." She also noted that a potential, but not conclusive, cause of death was smothering based on R.G.'s mouth injuries and the petechial hemorrhages. These injuries suggested a hand could have been placed over R.G.'s mouth. R.G. had been intubated at the scene, and the intubation may have caused mouth injuries, but Dr. Oeberst had never seen an intubation cause injury on the insides of cheeks. R.G. also had several broken ribs, which Dr. Oeberst attributed to chest compressions.

Steve Hoofer, a DNA analyst, testified that Pepper could not be excluded from the DNA found in R.G.'s anus, though DNA results could not provide information on how the DNA sample was deposited. The substance on Pepper's left index finger was presumptively blood, and R.G. could not be excluded as a major contributor to the blood's DNA profile.

The neighbor who called 911 had known R.G. for nearly 20 years. During this time, she never saw R.G. with a boyfriend or male interest. She testified that R.G. had numerous health issues, used an inhaler, and did not drive. This neighbor also explained that she had seen Pepper a few times before, and that he began hanging around R.G.'s house for nearly a week before R.G.'s death.

R.G.'s best friend and landlord had known R.G. for 19 years. This close friend knew about R.G.'s health problems, noted that R.G. used a walking cane, and explained that she took R.G. out

for errands. She never met Pepper and was under the impression that R.G. was celibate.

C.C. testified that she met Pepper, who she knew as "HD," around a month and a half before R.G.'s death. C.C. had befriended Pepper shortly after he moved to Wichita from Colorado. When Pepper became homeless after being evicted from his residence, C.C. invited Pepper to stay at the home she shared with R.G. Initially, R.G. said the arrangement was fine. Pepper began sleeping inside, but at some point, R.G. told C.C. she wanted Pepper to leave. After that, Pepper slept in their yard with his belongings. R.G. stopped letting Pepper in and forced him to stay outside even during the hottest parts of the day.

C.C. explained that Pepper and R.G. never napped together, but she was then shown a transcript of her conversation with a detective in which she explained they napped together several times. C.C. explained that Pepper was not supposed to be inside the house without her. That said, Pepper never did anything to make her worry about him harming R.G. In fact, R.G. told C.C. to not throw Pepper's property away, and R.G. would feed him and let him take showers and naps. C.C. never saw her mother in any romantic relationships and believed R.G. had been celibate for around 20 years.

C.C. then recounted the day her mother died. C.C. had left the home around 3 p.m. When she left, R.G. was sitting on the loveseat because her upper respiratory issues made it difficult to breathe when lying down. C.C. returned around 6 p.m. She tried to get in the front door, but it was locked so she went to the back door. The back door was usually "locked" by placing a knife between the door and jamb. When C.C. got to the back door on that day, the knife was on the porch. She moved to open the door and noticed R.G. was on the kitchen floor, lying face up. She blew into R.G.'s mouth and blood came out of R.G.'s nose. C.C. did not manipulate R.G.'s body beyond providing mouth to mouth. At this point she ran across the road, alerted a neighbor to call for help, and ran back to her mother.

At the time, C.C. had been up for two days on a crack cocaine binge. She was drunk and high. She admitted to a drug and alcohol

addiction. She was also schizophrenic and bipolar and had bad memory lapses.

Following the State's evidence, the defense made a motion for a directed verdict, which was denied. Pepper then presented three witnesses.

Jennifer Johnson, who has a doctorate in nursing practice and conducts forensic medical examinations, had reviewed the sexual assault examinations of Pepper and R.G., as well as the autopsy report and photographs. Johnson testified that R.G.'s genital bruising could have been caused by consensual sex or even "simple genital wiping."

As for the autopsy, Johnson testified that the injuries on R.G.'s face could be consistent with lifesaving measures including mouth to mouth resuscitation, placing an endotracheal tube, and the velcro strap and device placed around the patient's head to hold the endotracheal tube in place. Johnson also noted that the petechiae could have been caused by a cardiac event. Johnson agreed that the injuries were potentially smothering injuries. In sum, Johnson suggested the injuries could have been caused by lifesaving measures, smothering, or the cardiac event that killed R.G.

Dr. Randy Lance Parker, a licensed psychologist, had conducted an evaluation of Pepper that included two interviews, various psychological tests, interviews with Pepper's family, and a review of many documents. Dr. Parker found Pepper was a high functioning autistic. He also opined that Pepper's crack cocaine use would have diminished Pepper's impulse control.

Dr. Parker found Pepper had a medium IQ and had trouble in both school and the military. Pepper also suffered from alcohol abuse disorder, cannabis abuse disorder, and cocaine abuse disorder. His military service did not succeed because he could not stop using alcohol and marijuana. Dr. Parker explained it was impossible to understand Pepper without acknowledging his life-long alcohol and marijuana abuse, and that he began using crack cocaine in the time just before R.G.'s death.

Finally, Pepper testified in his defense. The description of his relationship with R.G. differed from C.C.'s. Pepper testified that, during the time he had his own residence, he would visit R.G. when C.C. was not present. He explained that R.G. would let him

in, and they would eat and watch game shows on a television in R.G.'s bedroom. He sat in a chair the first time they watched television, but as the visits continued, he began sharing the bed with R.G. He did not spend the night during this time.

According to Pepper's account, he and R.G. developed a relationship that began as motherly but, over time, became sexual. He testified they had consensual penile/vaginal sex two times while he still had a separate residence. He also explained that he would call R.G. "pumpkin" and expressed regret that he never bought her flowers. He said C.C. was not aware these visits were occurring.

Pepper explained that C.C. invited him to stay at R.G.'s house after he was evicted. He brought some of his property and dropped it off in R.G.'s yard. Pepper testified that he only stayed at the residence for two days. He slept outside both days.

Pepper then gave his account of R.G.'s death. That morning, he noticed the back door was ajar and started talking with R.G. R.G. allowed him to put his dog in the closet, and then Pepper met R.G. in the kitchen. R.G. told him she was constipated. Pepper suggested having anal sex to help with her constipation. R.G. thought about it and then agreed. Pepper then removed R.G.'s undergarments, and they had sex in the kitchen, rather than the bedroom, because Pepper knew C.C. was returning home soon and he wanted to complete the act in a hurry to avoid being caught. After Pepper had an orgasm, R.G. "just fell right on her face, kind of like—right like that, on her jaw, her face " Pepper then put his finger in her mouth to try to remove her teeth. He also unsuccessfully tried to roll her over. He did not notice any blood at the time. He thought R.G. was dead, so he went to sit in the closet with his dog. He explained that he was in shock, and he waited in the closet until the police found him. He had no explanation for the bruising covering R.G.'s body.

Pepper admitted to at first telling police that someone put him in the closet, even though at trial he conceded that was incorrect. Pepper also contested some of the neighbors' testimony about his interactions with them. Finally, Pepper testified that his morals deteriorated after he began using crack cocaine, but he insisted he never forced anything on R.G.

The jury found Pepper guilty of one count of first-degree felony murder and one count of aggravated criminal sodomy. Pepper filed a motion for judgment of acquittal and a motion for new trial, which were both denied. The court sentenced Pepper to life in prison with no possibility of parole for 25 years for the first-degree murder conviction, and 195 months in prison for the aggravated criminal sodomy conviction. The court ordered the sentences to run consecutive.

Pepper directly appeals. Jurisdiction is proper. K.S.A. 2022 Supp. 22-3601(b)(3) (Supreme Court has jurisdiction over life imprisonment cases); K.S.A. 2022 Supp. 22-3601(b)(4) (Supreme Court has jurisdiction over off-grid crimes); K.S.A. 2022 Supp. 21-5402(b) (felony murder is an off-grid crime).

DISCUSSION

There was sufficient evidence for a rational fact-finder to conclude that Pepper committed aggravated criminal sodomy.

Pepper first challenges his aggravated criminal sodomy conviction, arguing that the State did not present sufficient evidence to show that he committed a forcible act. The State responds that Pepper asks this court to reweigh the evidence. This issue is properly preserved for review. *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008) (criminal defendant need not challenge sufficiency of the evidence before the trial court to preserve it for appeal).

Standard of Review

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires proof beyond a reasonable doubt of every element of the crime charged. It also requires fact-finders to rationally apply the proof-beyond-a-reasonable-doubt standard to the facts in evidence. So when a criminal defendant challenges the evidence's sufficiency, a reviewing court must examine the evidence in the light most favorable to the prosecution and decide whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' 'All that a defendant is entitled to on a sufficiency challenge is for the court to make a "legal" determination whether the evidence was strong enough to reach a jury at all.' [Citations omitted.]" *State v. Sieg*, 315 Kan. 526, 530-31, 509 P.3d 535 (2022).

Generally, we will not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Zeiner*, 316 Kan. 346, 350, 515 P.3d 736 (2022). Instead, "[a] reviewing court need only look to the evidence in favor of the verdict to determine whether the essential elements of a charge are sustained." 316 Kan. at 350. Additionally, our review is unlimited insofar as this issue requires statutory interpretation. *State v. Looney*, 299 Kan. 903, 906, 327 P.3d 425 (2014).

"'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, we begin with the plain language of the statute, giving common words their ordinary meaning. When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words. But if a statute's language is ambiguous, we will consult our canons of construction to resolve the ambiguity. [Citations omitted.]'" *State v. Eckert*, 317 Kan. 21, 27, 522 P.3d 796 (2023).

Analysis

Pepper was convicted of aggravated criminal sodomy. K.S.A. 2022 Supp. 21-5501 defines sodomy as "oral contact or oral penetration of the female genitalia or oral contact of the male genitalia; anal penetration, however slight, of a male or female by any body part or object; or oral or anal copulation or sexual intercourse between a person and an animal."

The amended charging document alleged Pepper "unlawfully engage[d] in sodomy with [R.G.] or cause[d] [R.G.] to engage in sodomy with any person or animal, without [R.G.]'s consent under circumstances when [R.G.] was overcome by force or fear." Thus, Pepper was convicted under K.S.A. 2019 Supp. 21-5504(b)(3)(A):

"(b) Aggravated criminal sodomy is:
. . . .
(3) sodomy with a victim who does not consent to the sodomy or causing a victim, without the victim's consent, to engage in sodomy with any person or an animal under any of the following circumstances:
(A) When the victim is overcome by force or fear."

This version of aggravated criminal sodomy requires the State to prove beyond a reasonable doubt that (1) sodomy occurred; (2) the victim did not consent; and (3) the victim was overcome by

force or fear. *State v. Ninh*, 63 Kan. App. 2d 91, 100, 525 P.3d 767 (2023). Here, no one contests that sodomy occurred. Pepper contends the issue on appeal is whether R.G. consented to anal sex "or whether it was violently forced upon her." The State agrees.

We have not evaluated the "overcome by force or fear" language in our aggravated criminal sodomy statute, but we have outlined the meaning of the identical phrase in our rape statute. Compare K.S.A. 2022 Supp. 21-5503(a)(1)(A) ("[w]hen the victim is overcome by force or fear"), with K.S.A. 2022 Supp. 21-5504(b)(3)(A) ("[w]hen the victim is overcome by force or fear"); see, e.g., *State v. Brooks*, 298 Kan. 672, 692, 317 P.3d 54 (2014) (explaining "a rational factfinder could clearly conclude that J.P. did not consent to the sexual intercourse because she was overcome by fear, i.e., her fear got the better of her; her fear affected or influenced her so strongly as to make her physically helpless; her fear overpowered, conquered, and subdued her"); *State v. Borthwick*, 255 Kan. 899, 913-14, 880 P.2d 1261 (1994) (discussing the "force or fear" language in Kansas' rape statute).

We interpret the language the same in both the aggravated criminal sodomy and the rape statutes because of the identical statutory language and the similarity of the proscribed conduct. See *Northcross v. Bd. of Educ. of Memphis City Schools*, 412 U.S. 427, 428, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973) ("The similarity of language in § 718 and § 204[b] is, of course, a strong indication that the two statutes should be interpreted pari passu."); *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 580, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015) (Alito, J., dissenting) (noting "identical language in two statutes having similar purposes should generally be presumed to have the same meaning"); *State ex rel. Brant v. Bank of America*, 272 Kan. 182, 188, 31 P.3d 952 (2001) ("Ordinarily . . . identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning absent anything in the context to suggest that a different meaning was intended.").

Given the identical meaning of "overcome by force or fear," our cases interpreting the rape statute inform our understanding of the statutory requirements of the relevant subsection of the aggravated criminal sodomy statute. In *State v. Chaney*, 269 Kan. 10,

20, 5 P.3d 492 (2000), we "declined to define in absolute terms the degree of force required to sustain a rape conviction." Force "is a highly subjective concept that does not lend itself to definition as a matter of law." *State v. Tully*, 293 Kan. 176, 198, 262 P.3d 314 (2011) (citing *Chaney*, 269 Kan. at 20). We must "consider the record as a whole" and decide each case "on its [own] unique facts." *Borthwick*, 255 Kan. at 911. We have provided the following guidance:

"The 'force' required to sustain a rape conviction in this state does not require that a rape victim resist to the point of becoming the victim of other crimes such as battery or aggravated assault. [The Kansas rape statute] does not require the State to prove that a rape victim told the offender she did not consent, physically resisted the offender, and then endured sexual intercourse against her will. It does not require that a victim be physically overcome by force in the form of a beating or physical restraint. It requires only a finding that she did not give her consent and that *the victim was overcome* by force or fear to facilitate the sexual intercourse." *Borthwick*, 255 Kan. at 914.

Pepper first argues the State relies entirely on circumstantial evidence to prove lack of consent and force. But even the gravest crime can be proved with circumstantial evidence and the logical inferences properly drawn from that evidence. *Zeiner*, 316 Kan. at 350; *State v. Chandler*, 307 Kan. 657, 669-70, 414 P.3d 713 (2018).

Next, Pepper's brief provides many ways that the evidence presented at trial could be understood to show his innocence. His argument is that the medical interventions, such as chest compressions and the endotracheal tube, caused the injuries to R.G.'s body, rather than a forcible act of sodomy.

The State agrees Pepper's brief is replete with ways R.G.'s injuries *could* have occurred, but asserts it is not our role to make that determination. The State is right. Pepper's argument asks us to reweigh the evidence, which we will not do. *State v. Harris*, 310 Kan. 1026, 1030, 453 P.3d 1172 (2019) ("reviewing court generally will 'not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations'"). Instead, jurors are best equipped to evaluate the evidence presented at trial. See *State v. Franklin*, 206 Kan. 527, 528, 479 P.2d 848 (1971) (jury's function to evaluate evidence within framework of all evidence adduced). "[T]he jury discerns the truth through the process of trial, particularly the taking of the oath or affirmation,

the jury's observation of the witness' demeanor, and the refining fires of cross-examination." DeCoux, *Textual Limits on the Residual Exception to the Hearsay Rule: The "Near Miss" Debate and Beyond*, 35 S.U. L. Rev. 99, 100 (2007).

Rather than resolving evidentiary conflicts or evaluating the credibility of Pepper, C.C., or the other witnesses, our role is to "look to the evidence in favor of the verdict to determine whether the essential elements of a charge are sustained." *Zeiner*, 316 Kan. at 350. In doing so, we must view all evidence in the light most favorable to the State and determine whether a rational fact-finder could have found Pepper guilty of aggravated criminal sodomy beyond a reasonable doubt. We conclude a rational fact-finder could have done so here.

As noted above, the State need not prove "beating or physical restraint" and must instead prove "that [R.G.] did not give her consent and that [R.G.] *was overcome* by force or fear to facilitate the sexual intercourse." *Borthwick*, 255 Kan. at 914. We find that, based on the following nonexhaustive list of evidence, a reasonable juror could have found R.G. did not consent and was overcome by force or fear:

- Detective Dustin Noll's testimony that R.G. was naked from the waist down when he arrived on scene.
- C.C.'s testimony that blood came out of R.G.'s airway just after C.C. attempted mouth to mouth.
- EMS testimony that R.G. had a significant amount of blood in her airway when resuscitative efforts began.
- Peck's testimony that R.G. had genital bruising that could be caused by nonconsensual sex.
- Dr. Oeberst's testimony about the bruises and scrapes covering R.G.'s body.
- Dr. Oeberst's testimony that only some bruises could have been caused by chest compressions.
- Dr. Oeberst's testimony that R.G.'s vertebra fracture could have been caused by a sharp forward movement.
- Dr. Oeberst's testimony that R.G. had petechial hemorrhages which could suggest smothering.
- Dr. Oeberst's testimony that she had never seen an endotracheal tube cause some injuries in R.G.'s mouth, particularly the injuries to the insides of R.G.'s cheeks.

- Dr. Oeberst's conclusion that blunt force trauma caused R.G.'s cardiac event.
- The landlord's testimony that R.G. was her best friend and revealed nothing about Pepper.
- The landlord's testimony that she believed R.G. was celibate.
- C.C.'s testimony that she believed R.G. was celibate.
- C.C.'s testimony that R.G. wanted Pepper to leave.
- C.C.'s testimony that she did not believe R.G. and Pepper had ever been intimate.
- Johnson's testimony that some of R.G.'s injuries could have been caused by smothering.
- Pepper's testimony that he at first told police that someone else had put him in the closet.

Though the evidence allows for alternative inferences, "[s]ufficient circumstantial evidence does not need to exclude every other reasonable conclusion to support a conviction." *Zeiner*, 316 Kan. at 350.

When viewing the evidence in a light most favorable to the State, we conclude a rational fact-finder could have found Pepper guilty of aggravated criminal sodomy beyond a reasonable doubt.

Pepper did not sufficiently proffer Dr. Parker's testimony about sexual deviance.

Pepper next argues the district court erroneously excluded Dr. Parker's testimony that Pepper did not suffer from a sexual deviancy. The State responds in three ways. First, the evidence was insufficiently proffered and therefore the issue is not properly preserved for appellate review. Second, if the proffer is sufficient for appellate review, the district court appropriately excluded the evidence. Finally, any error was harmless. We agree Pepper made an inadequate proffer.

Preservation

When a party objects to an opposing party's presentation of evidence, the court must rule on that objection. If the objection is sustained, the proposed evidence is excluded from jury consideration. "When a district court excludes evidence at trial, the party seeking to admit that evidence must make a sufficient substantive proffer to preserve the issue for appeal." *State v. White*, 316 Kan. 208, 212, 514 P.3d

368 (2022). This rule "has dual purposes: (1) It assures the trial court is advised of the evidence at issue and the parties' arguments, and (2) it assures an adequate record for appellate review." *State v. Gonzalez*, 311 Kan. 281, 299, 460 P.3d 348 (2020); see also 3 Kan. Law & Prac., Guide Kan. Evid. § 1:12 (5th ed.) ("As indicated, the proffer is a requirement to preserve appellate review. In addition, it gives the judge an opportunity to reconsider and change the ruling after a more complete disclosure of the proffered evidence.").

"A formal proffer is not required, and we may review the claim as long as 'an adequate record is made in a manner that discloses the evidence sought to be introduced.'" *White*, 316 Kan. at 212 (quoting *State v. Swint*, 302 Kan. 326, 332, 352 P.3d 1014 (2015). Though a proffer need not be formal, there are still rules about what may be considered as being part of the proffer. We first turn to the relevant statute. K.S.A. 2022 Supp. 60-405 provides:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence *unless it appears of record that the proponent of the evidence either made known the substance of the evidence in a form and by a method approved by the judge, or indicated the substance of the expected evidence by questions indicating the desired answers.*" (Emphasis added.)

In *Gonzalez*, defense counsel told the court at a bench conference that they would ask the accomplice what they saw Gonzalez do on the night in question. We held the proffer insufficient because it was "not clear from this what Gonzalez anticipated [the accomplice] saying." *Gonzalez*, 311 Kan. at 300.

Similarly, in *State v. Hudgins*, 301 Kan. 629, 650-51, 346 P.3d 1062 (2015), we found a proffer of evidence about a police department policy was insufficient. During a sidebar, defense counsel only stated, "Yes, naturally, I would proffer that the Court accept the policy in the record for review for purposes of appeal." 301 Kan. at 650. The policy was not admitted as evidence at trial, and the policy was not included in the record on appeal. Based on this dearth of information, we concluded we could not review the district court's finding that the policy was not relevant. 301 Kan. at 651.

In *State v. Swint*, the defense wanted to present witness testimony that the victim asked the witness to file false claims against the defendant. The State filed a motion to exclude the evidence, the defendant filed a responsive pleading addressing the topic, and the district court held a hearing on the motion. We found this proffer was sufficient. *Swint*, 302 Kan. at 334.

In *State v. Evans*, 275 Kan. 95, 99-101, 62 P.3d 220 (2003), a murder defendant proffered that potential witness testimony would show that someone else committed the crime. While arguing a motion in limine, defense counsel explained the witnesses would testify that the alternative suspect had a gun, the gun was in the alternative suspect's hand following the shooting, and the witnesses never saw the defendant with a gun. We found this proffer was sufficient to allow review. 275 Kan. at 101.

As these cases show, the proffer presented to the court need not always be presented contemporaneously to the objection. See also *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, 622-23, 822 P.2d 591 (1991) (finding a proffer of expert testimony was sufficient because the court read the deposition prior to trial, the testimony was included in a pretrial motion, the court heard arguments on the matter, and the court allowed a written proffer to be filed posttrial). The plain language of the statute allows the court to agree to various forms of the proffer. See *Swint*, 302 Kan. at 332 ("Answers to discovery, the parties' arguments, or in-court dialogue may satisfy K.S.A. 60-405 depending on the circumstances.").

Here, Pepper claims that he presented his proffer in three parts, though this assertion is made for the first time on appeal. Thus, our first task is to ascertain from the record exactly what the proffer was. Next, we will explore the adequacy, or reviewability, of that proffer.

Pepper claims his proffer concerning Dr. Parker's sexual deviancy evidence collectively consisted of the following: (1) a written pretrial motion filed by the State to limit evidence, (2) defense counsel's informal oral colloquy at trial made immediately after, and in response to, the State's oral objection to the sexual deviancy evidence, and (3) Pepper's written posttrial motion for departure sentence.

Pretrial, the State filed a motion to exclude Dr. Parker's testimony. Notably, the motion's focus was Pepper's *autism*, not the lack of sexual deviancy. The motion did, however, briefly reference Dr. Parker's lack-of-sexual-deviancy findings by quoting a portion of Dr. Parker's report, though the report is not included in the record on appeal. The relevant quotation from the motion, about the report, reads: "Further, psychological testing did not find that [Pepper] harbored any sexual deviancies. Testing suggested that [Pepper] holds traditional views of sex, is a follower in a relationships [*sic*] and is less likely to act on sexual thoughts than others." Pepper's response to the motion does not reference the sexual deviancy testimony.

During trial, but before Dr. Parker testified, the State made the following objection:

"We had talked last week, I believe, maybe earlier this week about Dr. Parker's testimony and my objection to eliciting any testimony concerning tests he may have conducted on Mr. Pepper that would indicate he does not suffer from a sexual deviancy of any kind or speak to his sexual proclivities. I'm going to object to the relevance of that."

Pepper's counsel responded:

"Yes, Your Honor, I understand the State's position. The only thing I would add on our side of the situation is I think it is relevant. We aren't talking about any type of specific behavior or if Mr. Pepper has more proclivity to try to rape somebody or not try to rape somebody.

"The basic fact is is [*sic*] that Dr. Parker found that Mr. Pepper does not suffer from any type of sexual deviancy, even though he's charged with aggravated criminal sodomy. And it isn't overwhelming, there's no allegations, it's not particularly at issue whether, you know, those—you know, those particular points. The particular point is we have a sexual act. And that's our position, Your Honor."

Posttrial, Pepper filed a motion for a durational departure sentence. The motion explains that Dr. Parker used the Garos Sexual Behavior Inventory (GSBI) to evaluate Pepper. Based on Pepper's scores, Dr. Parker concluded:

- "He was not likely to engage in extreme or aberrant sexual behavior,"
- "Defendant's sexual interest did not interfere with his normal functioning,"
- "His view on sexuality was conventional,"

- "He was able to be sexually stimulated without engaging in high risk or unrestrained sexual activity," and
- "Defendant did not display any sexual deviancies."

The posttrial motion also stated: "The GSBI scores are at odds with the behavior that led to Defendant's convictions. Defendant's lack of a history of any type of violence further demonstrates Defendant's actions were aberrant and in stark contrast with his behavior during the previous fifty years of his life."

The district court did not state explicitly which part, or parts, of the record it considered as the proffer, but the court ruled on the objection to the evidence after the second part was presented. The court sustained "any objection to [Dr. Parker] testifying about suffering from a sexual deviancy or likelihood of reoffending, the degree to which [Pepper] may suffer from some sort of sexual disorder or deviancy, ability to be able to rehabilitate or amenability to treatment." The court had two bases for doing so: (1) the testimony would invade the province of the jury, and (2) the probative value was questionable and outweighed by potential prejudice. The court did not reference either pretrial matters or potential posttrial matters in its ruling.

The plain language of K.S.A. 60-405 provides that a district court *may* approve of various forms and methods of proffering evidence. See *National Bank of Andover v. Kansas Bankers Sur. Co.*, 290 Kan. 247, 278, 225 P.3d 707 (2010) ("As noted, the court and counsel agreed that KBS could submit its proffer posttrial."). However, if the district court does not approve any particular form or method of proffering evidence, then the same statute demands that the "substance of the expected evidence" must be indicated "by questions indicating the desired answers."

Here, there is no indication in the record the district court *explicitly* approved an alternative to a substance-by-questions proffer. When the State objected to the sexual deviancy portion of Dr. Parker's report, Pepper did not ask the court to consider as his proffer pretrial motions and arguments, informal statements of counsel, posttrial motions or arguments, or even Dr. Parker's report.

But the record indicates the district court *implicitly* approved the form and method of counsel's informal colloquy during trial. We infer the court agreed to accept defense counsel's informal colloquy during trial for three reasons. First, the State's oral objection to admission of evidence was directly related to the specific subject of Dr. Parker's opinion that Pepper lacked sexual deviancy. Second, defense counsel's oral colloquy was made immediately after the State's objection and was also confined to the specific subject of Dr. Parker's opinion about Pepper's lack of sexual deviancy. Finally, the court's ruling came immediately after both parties' positions had been made concerning the specific matter of sexual deviancy and before Dr. Parker was scheduled to testify. The timing of the ruling implicitly indicates the district court believed it had received and considered the entirety of the information from which it was to render its ruling on the specific subject of Dr. Parker's sexual deviancy evidence.

Conversely, we cannot reasonably infer the district court implicitly approved Pepper's other asserted forms of proffer. The focus of the pretrial motion and hearing was Pepper's autism, not a lack of sexual deviancy. The posttrial motion's focus was Pepper's sentence, not trial evidence. Because the court did not explicitly or implicitly agree to consider these pretrial or posttrial motions and hearings for purposes of a *proffer*, Pepper's proffer was limited to defense counsel's colloquy during the trial.

After reviewing the content of defense counsel's oral colloquy, we hold it is insufficient for us to review the propriety of the district court's ruling to disallow the evidence. Though we have more information than in *Gonzalez* because we know Dr. Parker's conclusion, neither we nor the district court were provided with information explaining how Dr. Parker defined sexual deviancy, or the reason or purpose for admitting such evidence—in other words, how Pepper intended to use such evidence to bolster his defense in a manner consistent with the rules of evidence. Without that, the defendant fails to show the relevance of this evidence. In other words, even if we assume Pepper lacks sexual deviancy, we cannot judge from the proffer at trial why that matters. Cf. *Gonzalez*, 311 Kan. at 300 ("But even if the proffer established [the accomplice] would say he saw Gonzalez smoke marijuana or take

a Xanax, there is nothing else about any other potentially relevant details his testimony could provide such as how much, when, or what specifically he observed about Gonzalez' behavior near the time of the crime."); *State v. Mays*, 254 Kan. 479, 486, 866 P.2d 1037 (1994) (proffer approved because it contained *both* the nature of the excluded evidence and its significance to the case). Nor can we review the district court's weighing of the proffered testimony's probativeness compared to its potential for unfair prejudice or the district court's finding that the testimony would impermissibly invade the province of the jury.

In summary, we hold Pepper did not sufficiently proffer Dr. Parker's testimony to enable appellate review. The issue is not preserved.

Pepper was not prejudiced by the presence of one camera in pretrial and trial proceedings.

Pepper's third argument on appeal is that the district court erred in allowing one camera in the courtroom to record pretrial and trial proceedings. The State replies that Pepper does not establish there was a camera in the courtroom during trial and, even if there were a camera, Pepper does not demonstrate the camera's presence was prejudicial. Pepper's objections to camera coverage were raised below, so they are preserved for appeal. See *State v. Johnson*, 309 Kan. 992, 995, 441 P.3d 1036 (2019) ("Litigants generally are precluded from raising an issue on appeal when they failed to raise the issue in the district court.").

Standard of Review

"Where a trial court permits photographic, audio, and television reproduction of the trial proceedings, the defendant has the burden to prove prejudice by showing that media coverage prevented the defendant from presenting his or her defense or in some way affected the ability of the jury to judge defendant fairly." *State v. Ji*, 251 Kan. 3, 32, 832 P.2d 1176 (1992).

Analysis

In *State v. McNaught*, we explained the competing interests that inform considerations about cameras in courtrooms:

"Generally speaking, the propriety of granting or denying permission to the media to broadcast, record, or photograph court proceedings involves weighing the constitutional guaranties of freedom of the press and the right to a public trial on the one hand and, on the other hand, the due process rights of the defendant and the power of the courts to control their proceedings in order to permit the fair and impartial administration of justice." *State v. McNaught*, 238 Kan. 567, 574, 713 P.2d 457 (1986).

The right to a public trial is guaranteed by the Sixth Amendment to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights. *State v. Albano*, 313 Kan. 638, 644, 487 P.3d 750 (2021). "The concept of a public trial implies that doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be admitted, subject to the right of the court to exclude objectionable characters." *State v. Galloway*, 311 Kan. 238, 250, 459 P.3d 195 (2020). This right, however, "is primarily for the benefit of the defendant" and "does not entitle the press to broadcast, record, or photograph court proceedings." *McNaught*, 238 Kan. at 574.

The second consideration, the defendant's due process rights, was at issue in *Chandler v. Florida*, 449 U.S. 560, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981). The Court concluded that cameras in the courtroom do not amount to a per se due process violation. *McNaught*, 238 Kan. at 574. That said, a due process violation may occur depending on the factual circumstances. 238 Kan. at 574. In *McNaught*, we outlined several factors to consider when making this determination: "the location of the broadcast or photographic equipment in the courtroom; the degree of distraction or disruption, if any, caused by the presence; and the effect of the presence and use of such equipment on the defendant's ability to present his case." *McNaught*, 238 Kan. at 575.

On appeal, Pepper argues the camera impacted his right to a fair trial in several ways. Before we get to that, we must first address the State's argument that there is no evidence in the record to establish the existence of cameras at all. The State is correct that it is Pepper's burden to designate a record showing reversible error. *State v. Nguyen*, 285 Kan. 418, 430, 172 P.3d 1165 (2007). The State is also correct that, on appeal, Pepper does not direct us to any portion of the record where defense counsel conveyed the camera was in the courtroom during trial.

But during a pretrial hearing, defense counsel asserted Pepper had been videotaped in prison garb while remotely making his first appearance before the court on a video screen. Neither the prosecutor nor the judge refuted that assertion. So we find there is sufficient evidence that Pepper was videotaped during his first appearance while he was wearing prison garb.

And following jury selection, the court told the jury: "Don't be concerned about being photographed or videotaped during the trial. The law, court rules prohibit media from doing that in any way which would allow you to be identified." This statement appears to reference Supreme Court Rule 1001(e)(6), which provides that the media may record proceedings in Kansas courts with permission but may not do so in a way that allows for juror identification. Supreme Court Rule 1001(e)(6) (2023 Kan. S. Ct. R. at 651). In context, it makes no sense for the court to make this statement if there had been no cameras in the courtroom during the trial. So we hold the record sufficiently reflects the presence of a camera during Pepper's first appearance and trial.

Pepper suggests the camera impacted the trial because "witnesses would have been aware that their testimony was reaching a possibly very large audience." He argues that the camera "in the courtroom *could* have influenced the jurors or witnesses" and that "witnesses *may* be more nervous testifying in front of a camera, and *may* not testify as openly knowing there is a far broader audience than the people present in the courtroom." (Emphases added.) But Pepper cannot point to a single witness whose testimony was affected by the camera's presence. See *State v. Viurquez*, No. 88,653, 2003 WL 27393652, at *2-4 (Kan. App. 2003) (unpublished opinion) (rejecting a *McNaught* challenge related to defendant's testimony because, among other things, defendant was not overtaken by nervousness or hesitation while testifying). In fact, the phrasing of his statement belies the speculative nature of his argument. Without evidence of witness influence by the camera, we need not address prejudice. This argument has no merit.

Next, Pepper argues "it was possible that [Pepper] was recorded while sitting with counsel at the defense table." The phrasing of this argument also shows it is speculative. Though we have

already inferred the existence of a camera in the courtroom because of general statements referring to a camera, we cannot also infer specifically what the camera captured while Pepper was seated with his counsel at the defense table. We only know it is "possible." Without citing to the record where Pepper is on camera sitting at counsel table, it is only speculation. This argument also fails.

Finally, Pepper argues that the recording of him in a jumpsuit at his first appearance could have been seen by individuals who later became jurors. See *State v. Alston*, 256 Kan. 571, 580, 887 P.2d 681 (1994) ("We have noted that adverse pretrial publicity may endanger the ability of a defendant to receive a fair trial in situations where prospective jurors read or hear the adverse publicity and are affected in their judgment should they later sit as jurors."). Though the court granted Pepper's motion to wear civilian clothing in the pretrial and trial proceedings, Pepper suggests the footage of him at his first appearance shows prejudice had already occurred.

In *State v. Hall*, 220 Kan. 712, 714-15, 556 P.2d 413 (1976), we explained that "requiring an accused to stand trial in distinctive prison clothing . . . may result in an unfair trial and may deny the prisoner the presumption of innocence " But we also observed "the appearance of an accused in prison garb at a trial or some portion thereof, does not in and of itself constitute reversible error. It must be shown that the accused was prejudiced by such appearance in that such appearance resulted in an unfair trial." *Hall*, 220 Kan. at 715. In *Hall*, the defendant briefly wore prison attire but then wore civilian clothes during voir dire questioning and the remainder of the trial proceedings. We found there was no prejudice because the record did not reveal any jurors knew the defendant's initial clothing was prison attire. 220 Kan. at 715.

Here, while there is evidence Pepper was videotaped wearing prison clothing, there is no evidence his jurors were aware of it. During voir dire, the prosecutor asked the potential jurors whether anyone had heard about the case. One potential juror indicated she had heard about it in the media but did not elaborate. The prosecutor then asked if anyone else had encountered Pepper's case in

the media, and no other potential jurors said they had. The potential juror who responded was struck and did not sit on Pepper's jury, meaning the only person who may have come across a prior media report with footage of Pepper wearing prison attire did not determine his guilt. Consequently, Pepper has not presented any "evidence that any individual juror's ability to judge the defendant fairly was influenced by media coverage prior to trial." *McNaught*, 238 Kan. at 576.

Again, without evidence any member of the jury saw Pepper in prison clothing, he has no evidence upon which he could claim prejudice. Pepper has no basis to prove prejudice from what might not have happened. Pepper also suggests that jurors may not have admitted to seeing his first appearance video during voir dire, but this is entirely speculative. This argument also has no merit.

We conclude Pepper fails to show he was prejudiced by the camera and, therefore, the district court did not err.

Affirmed.

No. 125,254

STATE OF KANSAS, *Appellee*, v. DEVAWN T. MITCHELL, *Appellant*.

(539 P.3d 218)

SYLLABUS BY THE COURT

1. TRIAL—*Defendant's Competence to Stand Trial—Burden of Proof.* A party who raises a claim concerning a criminal defendant's competence to stand trial bears the burden of proving that claim by a preponderance of the evidence.

2. SAME—*Presumption of Competency to Stand Trial*. Courts presume a criminal defendant is competent to stand trial.

3. APPEAL AND ERROR—*Court's Decision to Order Competency Evaluation—Appellate Review*. An appellate court reviews a district court's decision to order an evaluation under K.S.A. 2020 Supp. 22-3429 for abuse of discretion.

4. CRIMINAL LAW—*Sentencing—Life Sentence*. For purposes of K.S.A. 2022 Supp. 21-6819(b), a life sentence cannot be either a base or a nonbase sentence.

5. SAME—*Sentencing—Life Sentence Not Converted to Grid Sentence under Statute*. Nothing in the plain language of K.S.A. 2022 Supp. 21-6620(b)(2) converts a life sentence into a grid sentence.

Appeal from Lyon District Court; W. LEE FOWLER, judge. Oral argument held May 17, 2023. Opinion filed December 8, 2023. Affirmed.

Kurt P. Kerns, of Kerns Law Group, of Wichita, argued the cause and was on the brief for appellant.

Carissa Brinker, assistant county attorney, argued the cause, and *Marc Goodman*, county attorney, and *Kris W. Kobach*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by

WILSON, J.: Devawn T. Mitchell appeals from his bench trial convictions for first-degree felony murder, aggravated assault on a law enforcement officer, two counts of felony fleeing and eluding, and misdemeanor fleeing and eluding. Mitchell claims the district court erred by finding him competent to stand trial, by failing to obtain a psychological evaluation under K.S.A. 2020 Supp. 22-3429 before sentencing

him, and by applying his "B" criminal history score to a nonbase offense to increase his mandatory minimum sentence. We find no error and affirm Mitchell's convictions and sentence.

FACTS AND PROCEDURAL HISTORY

The parties do not dispute the facts. In short, over the afternoon of March 18, 2021, Mitchell committed traffic infractions that led to several short, isolated pursuits by law enforcement in Emporia. The afternoon's events, which began when Mitchell swerved at a police car, tragically ended about an hour later when Mitchell's car slammed into Steven Henry's truck, killing Henry.

The State charged Mitchell with five counts over the incident, including first-degree felony murder and aggravated assault of a law enforcement officer. Mitchell's counsel filed a pretrial notice of lack of intent due to mental disease or defect and told the district court that Mitchell had an "extensive history of psychiatric illness and hospitalization." But after hearing back from the psychologist contracted by the defense to evaluate Mitchell, Mitchell's counsel withdrew the notice. Mitchell also waived his right to a jury trial.

The district court held a two-day bench trial. Mitchell presented no evidence. The district court examined each charge on the record and found Mitchell guilty on all counts.

After trial, Mitchell's counsel filed a motion to determine competency. The district court ordered a competency evaluation with Crosswinds. After Crosswinds submitted its report, the district court found Mitchell competent. We will discuss the facts surrounding this motion, including the evaluation report, in greater detail below.

The district court sentenced Mitchell to a life sentence with a minimum 554 months before parole eligibility, followed by a consecutive controlling 39-month sentence for Mitchell's remaining convictions. Mitchell directly appealed to this court.

ANALYSIS

Mitchell failed to carry his burden of proving his incompetency to stand trial.

Mitchell first argues the district court erred by finding him competent to stand trial. He focuses on one line from the Crosswinds report,

arguing that it set forth conditions on his competency and that the district court failed to ensure that those conditions were met at all critical stages of the case.

Standard of review

"An appellate court applies an abuse of discretion standard when determining whether a district court made the correct decision regarding a defendant's competency to stand trial. 'Judicial discretion can be abused in three ways: (1) if no reasonable person would have taken the view adopted by the trial court; (2) if the judicial action is based on an error of law; or (3) if the judicial action is based on an error of fact.' [Citations omitted.]" *State v. Marshall*, 303 Kan. 438, 444-45, 362 P.3d 587 (2015).

"[A] party who raises the issue of competence to stand trial has the burden of going forward with the evidence, which will be measured by the preponderance of the evidence standard." *State v. Cellier*, 263 Kan. 54, 70, 948 P.2d 616 (1997). We have also recognized "a presumption that the defendant is competent." *State v. Woods*, 301 Kan. 852, 860, 348 P.3d 583 (2015).

Additional facts

Mitchell's counsel filed a posttrial motion to determine competency, which prompted the district court to order a competency evaluation with Crosswinds. After two interviews, Crosswinds issued an evaluation report diagnosing Mitchell with schizophrenia. The report documented:

"Mr. Mitchell demonstrates likely auditory hallucinations that persecute him during the day hours or instructs [*sic*] him to misbehave. He has paranoia, hypersexual behaviors, social isolation, bizarre behaviors, combative and argumentative behaviors without any seeming trigger, hostility, outbursts of anger, screaming, threatening statements and actions. He appears extremely immature and lacks ability to understand consequences to his own behaviors."

Despite this diagnosis, the report concluded that Mitchell was "competent." While the report noted the "unusual" difficulty of the assessment and that "Mr. Mitchell clearly is mentally ill or has mental deficiencies that cause his significant struggles," it concluded that:

"Despite these concerns regarding his mental health or possible cognitive struggles, overall, he does possess the ability to understand the legal process and participate adequately in his own defense *if given coaching and support*. He does

understand that he could be facing a prison sentence given his current conviction and does express a normal fear and depression that this consequence may occur. While his behavioral response seems unpredictable and could be highly inappropriate, he does demonstrate the ability to control this. Ultimately, it does appear that Mr. Mitchell is competent to stand trial and/or to participate adequately in his sentencing advocacy." (Emphasis added.)

During a short hearing, the district court accepted the competency evaluation report. After the district court gave the parties a chance to present additional evidence—which neither chose to do—the court found the defendant "competent based upon the findings in the report." It then set the matter for sentencing.

Discussion

"'[T]he Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial.'" *State v. Ford*, 302 Kan. 455, 461, 353 P.3d 1143 (2015). Under this due process umbrella, Mitchell raises both procedural and substantive competency claims. Our court has explained the difference between these two claims.

"A procedural competency claim falls under K.S.A. 22-3302 and is generally based upon the district court's alleged failure to hold a competency hearing or its failure to hold an adequate competency hearing. A substantive competency claim alleges the defendant was tried and convicted while, in fact, incompetent." *State v. Stewart*, 306 Kan. 237, 252, 393 P.3d 103 (2017).

In assessing a procedural competency claim, due process is satisfied if the court adheres to the statutory framework set forth in K.S.A. 2022 Supp. 22-3302. *Woods*, 301 Kan. at 859; *State v. Barnes*, 263 Kan. 249, 262-63, 948 P.2d 627 (1997). In assessing a substantive competency claim, due process is satisfied if substantial competent evidence supports a finding of actual competency. *Woods*, 301 Kan. at 860.

Mitchell's procedural competency claim is without support in the record. K.S.A. 2022 Supp. 22-3302 states:

"(a) At any time after the defendant has been charged with a crime and before pronouncement of sentence, the defendant, the defendant's counsel or the prosecuting attorney may request a determination of the defendant's competency to stand trial. If, upon the request of either party or upon the judge's own knowledge and observation, the judge before whom the case is pending finds that there is

reason to believe that the defendant is incompetent to stand trial, the proceedings shall be suspended and a hearing conducted to determine the competency of the defendant.

"(b) If the defendant is charged with a felony, the hearing to determine the competency of the defendant shall be conducted by a district judge.

"(c)(1) The court shall determine the issue of competency The court may order a psychiatric or psychological examination of the defendant. . . .

. . . .

(4) Upon notification of the court that a defendant committed for psychiatric or psychological examination under this subsection has been found competent to stand trial, the court shall order that the defendant be returned no later than seven days after receipt of the notice for proceedings under this section. . . .

"(d) If the defendant is found to be competent, the proceedings that have been suspended shall be resumed. . . .

. . . .

"(f) If proceedings are suspended and a hearing to determine the defendant's competency is ordered after the defendant is in jeopardy, the court may either order a recess or declare a mistrial.

"(g) The defendant shall be present personally at all proceedings under this section."

Here, the district court both ordered a competency evaluation and held a hearing after receiving the report from Crosswinds. The district court admitted the report into evidence without objection and offered both parties the opportunity to present additional evidence. Neither party did so. In short, the district court followed the proper procedure.

We now turn to Mitchell's substantive competency claim alleging he was tried and convicted while incompetent. In support of this claim, Mitchell argues the district court ignored the facts set forth in the Crosswinds report. He focuses on the evaluation report's qualification that "he does possess the ability to understand the legal process and participate adequately in his own defense *if given coaching and support*." (Emphasis added.) Mitchell argues that the report showed he was only conditionally competent and complains that the record lacks evidence that he had "coaching and support" during all critical stages of pretrial and trial proceedings.

We disagree. Mitchell bore the burden of proof to show he had *not* been provided such coaching and support. The record does not explain exactly what is meant by "coaching and support," but the report's narrative undermines the weight Mitchell places on the phrase:

"In our second contact with Mr. Mitchell, we explained the importance of being able to complete this assessment to make a case on his behalf about possible placement besides prison as he has been strongly advocating that he needs mental health services instead. He did then complete the remainder of the assessment with more ease. He showed more tearfulness and fearfulness about possibly going to prison. At the conclusion, *he was coached by us to identify tools he could use to stay calm and cooperative when he returned to his cell.* It was presented to Mr. Mitchell that he had a far better chance of reaching his placement goals if he was cooperative with the staff, not screaming or becoming combative. We followed up with staff at the end of the day to see *how Mr. Mitchell behaved after that coaching*. It is our understanding that when he left our area, he did initially try to walk to the exit door, but otherwise was cooperative and remained civil the remainder of the day. This seems to indicate that Mr. Mitchell can *control his impulses when given incentives*. It also seems to suggest that he is more cooperative when he believes others are in his corner." (Emphases added.)

Mitchell points to excerpts from this paragraph as proof that, without coaching, he was incompetent to stand trial. But the trial court was justified in drawing precisely the opposite conclusion, as nothing in the report suggests that the "tools" or "coaching" given to Mitchell affected his *understanding*—just his ability to control his *behavior*. While the social worker could, of course, have testified on this point, Mitchell failed to present the social worker's testimony. In light of that failure, Mitchell cannot complain that the district court drew conclusions adverse to his position.

Having failed to clarify the meaning of "coaching and support" as something inconsistent with the court's inferences of competency, the absence of evidence does not help Mitchell prove otherwise. After all, Mitchell and his counsel appear to have discussed various matters from time to time throughout the case. Moreover, nothing suggests that Mitchell could not control his behavior throughout the proceedings.

Ultimately, given the court's reasonable inferences from the report, no evidence suggests that Mitchell was incompetent during any critical stage of his case. Thus, Mitchell has failed to satisfy

his burden to overcome the presumption of competence through proof of his incompetence. In light of this failure, the presumption that Mitchell was competent controls. We find no error in the district court's competency determination.

The district court did not abuse its discretion in failing to sua sponte order an evaluation under K.S.A. 2020 Supp. 22-3429.

Mitchell next claims the district court erred by failing to order a mental evaluation for him under K.S.A. 2020 Supp. 22-3429.

Standard of review

We review a district court's decision to order an evaluation under K.S.A. 2020 Supp. 22-3429 for abuse of discretion. *State v. Hilyard*, 316 Kan. 326, 343, 515 P.3d 267 (2022).

Preservation

We begin with preservation. Mitchell claims the district court erred by rejecting his "explicit" request for an evaluation at Larned. But the record does not support this characterization. At the competency hearing, Mitchell had the following exchange with the district court:

"[Mitchell]: I've been tested.

"[District Court]: You've been evaluated, but you've not been sentenced.

"[Mitchell]: From Larned?

"[District Court]: You've been evaluated by Crosswinds Counseling.

"[Mitchell]: Crosswinds Counseling. Do I get evaluated by Larned as well?

"[District Court]: At this point, that—

"[Mitchell]: Okay. But I—I haven't been receiving my medication is what I'm trying to get to. I need my meds."

We see no "explicit" request for an evaluation by Larned in this exchange. At most, it was a request for clarification, which he interrupted before the court could fully respond. Consequently, we view Mitchell's argument as a complaint that the district court failed to sua sponte order an evaluation under K.S.A. 2020 Supp. 22-3429.

Still, we have previously recognized that claims like Mitchell's implicate a fundamental right, which is one of three prudential exceptions to our general preservation rules. *Hilyard*, 316 Kan. at 343. We will again apply this exception to address Mitchell's argument for the first time on appeal.

Discussion

K.S.A. 2020 Supp. 22-3429 provides:

"After conviction and prior to sentence and as part of the . . . presentence investigation report as provided in K.S.A. 21-6813, and amendments thereto, the trial judge may order the defendant committed for mental examination, evaluation and report. If the defendant is convicted of a felony, the commitment shall be to the state security hospital or any suitable local mental health facility A report of the examination and evaluation shall be furnished to the judge and shall be made available to the prosecuting attorney and counsel for the defendant. A defendant may not be detained for more than 120 days under a commitment made under this section."

K.S.A. 2022 Supp. 22-3430(a) authorizes a district court to commit a defendant to a mental care institution instead of imprisonment

"[i]f the report of the examination authorized by K.S.A. 22-3429, and amendments thereto, shows that the defendant is in need of psychiatric care and treatment, that such treatment may materially aid in the defendant's rehabilitation and that the defendant and society are not likely to be endangered by permitting the defendant to receive such psychiatric care and treatment."

We have rejected arguments like Mitchell's twice in recent years. First, in *State v. Evans*, 313 Kan. 972, 993, 492 P.3d 418 (2021), the defendant asserted we should reverse a district court's unjustified, perfunctory denial of a motion for evaluation under K.S.A. 2020 Supp. 22-3429. *Evans*, 313 Kan. at 992. Instead, we reasoned that the defendant's argument, if accepted, would have established "a rule that all requests for presentencing mental evaluations must be granted unless the trial court can state some compelling reason not to grant the request." 313 Kan. at 992. We observed that such a rule would conflict with the statute, which contained "clearly permissive" language granting district courts discretion over orders for evaluation under K.S.A. 2020 Supp. 22-3429. 313 Kan. at 992-93. We thus concluded that defendants bear

the burden of persuading sentencing courts to order such evaluations. It was not the sentencing court's duty to specify, subject to appellate scrutiny, why the discretionary evaluation was not done. 313 Kan. at 992.

In *Hilyard*, we again addressed a challenge to a district court's failure to order an evaluation under K.S.A. 2016 Supp. 22-3429. 316 Kan. at 343-44. Unlike Evans, Hilyard did not ask the district court to order an evaluation. *Hilyard*, 316 Kan. at 343. But, as noted, we addressed Hilyard's claim anyway because we agreed that "a fundamental right is implicated." 316 Kan. at 343. Even so, we still rejected Hilyard's argument:

> "Hilyard did not request a mental examination, let alone meet her burden to persuade the sentencing court to order a mental examination. The statute imposes no affirmative duty for courts to raise this issue sua sponte and whether to do so is clearly discretionary. There is no indication the sentencing judge was unaware of this discretion. There is no error." *Hilyard*, 316 Kan. at 345.

The same is true here. Although evidence of mental illness was present in both Hilyard's and Mitchell's cases, the district court was under no duty to sua sponte order an evaluation under K.S.A. 2020 Supp. 22-3429. Nor, as we pointed out in *Evans*, was it obliged to set forth compelling reasons *not* to order an evaluation. Thus, despite the district court's recognition that Mitchell "does have a mental illness" and the statements of counsel—which informed the district court that Mitchell had a history of involuntary commitment—the district court did not err in failing to sua sponte order an evaluation.

Mitchell also argues that the district court abused its discretion by failing to recognize that it *had* any discretion to exercise. But Mitchell takes the district court's comments out of context. When the district court noted at sentencing that it had "no decision today on the length of the sentence," it was speaking not of its discretion to order an evaluation, but of its discretion to order a different *sentence*. And the district court spoke accurately: without an evaluation in hand, it had no discretion to order a different sentence, as we will discuss below. Thus, the district court did not indicate ignorance of its discretion by failing to sua sponte order an evaluation under K.S.A. 2020 Supp. 22-3429 and did not abuse its discretion by electing not to order the evaluation.

The district court's application of Mitchell's criminal history score to his life sentence, as required by K.S.A. 2020 Supp. 21-6620(b), did not create an illegal sentence.

Finally, Mitchell argues the district court erred by applying his "B" criminal history score to his felony murder sentence *and* to his aggravated assault on a law enforcement officer conviction.

Standard of review

Mitchell's argument turns on statutory interpretation, which this court reviews de novo. E.g., *Roe v. Phillips County Hosp.*, 317 Kan. 1, 5, 522 P.3d 277 (2023).

Additional facts

Upon receiving the presentence investigation report, Mitchell's counsel filed a motion for departure because "[p]ursuant to K.S.A. 21-6620, the sentence moves from the hard 25 to the grid." In the motion and again at sentencing, Mitchell's counsel argued against the double application of Mitchell's criminal history score to his sentence.

The district court reasoned that it "really does not have a decision today on the length of the sentence" for the felony murder conviction because "the statute" mandated "you go to the box on the grid, which is a 554-month minimum sentence" based on Mitchell's criminal history score of "B." The district court's journal entry reflects this as a life sentence with a minimum of 554 months before parole eligibility. The court also considered count two—aggravated assault on a law enforcement officer—as the "primary offense," and although it ran Mitchell's sentences for counts two through five (the longest of which was 39 months) concurrent, it ran them all consecutive with the 554-month sentence for count one. The district court thus ordered that Mitchell could not begin serving his effective 39-month sentence on counts two through five until he had been paroled from his life sentence for count one.

Discussion

Mitchell's argument hinges on an alleged discrepancy between K.S.A. 2022 Supp. 21-6620(b)(2) and K.S.A. 2022 Supp. 21-6819(b). Mitchell claims that, under K.S.A. 2022 Supp. 21-6819(b), felony

murder cannot be the primary crime and thus—as a nonbase offense—the only criminal history score that can be applied to it is "I."

We disagree. K.S.A. 2022 Supp. 21-6819(b) provides, in relevant part:

"(b) The sentencing judge shall otherwise have discretion to impose concurrent or consecutive sentences in multiple conviction cases..... In cases where consecutive sentences may be imposed by the sentencing judge, the following shall apply:

. . . .

(2) The sentencing judge shall establish a base sentence for the primary crime. The primary crime is the crime with the highest crime severity ranking. *An off-grid crime shall not be used as the primary crime in determining the base sentence when imposing multiple sentences*. If sentences for off-grid and on-grid convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease supervision term will be based on the off-grid crime. . . .

. . . .

(5) Nonbase sentences shall not have criminal history scores applied, as calculated in the criminal history I column of the grid, but base sentences shall have the full criminal history score assigned." (Emphasis added.)

But K.S.A. 2022 Supp. 21-6620(b) provides:

"(b) The provisions of this subsection shall apply only to the crime of murder in the first degree as described in K.S.A. 21-5402(a)(2), and amendments thereto, committed on or after July 1, 2014.

(1) Except as provided in subsection (b)(2), a defendant convicted of murder in the first degree as described in K.S.A. 21-5402(a)(2), and amendments thereto, shall be sentenced to imprisonment for life In addition, the defendant shall not be eligible for parole prior to serving 25 years' imprisonment, and such 25 years' imprisonment shall not be reduced by the application of good time credits. No other sentence shall be permitted.

(2) The provisions of subsection (b)(1) requiring the court to impose a mandatory minimum term of imprisonment of 25 years shall not apply if the court finds the defendant, because of the defendant's criminal history classification, would be subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range would exceed 300 months if the sentence established for a severity level 1 crime was imposed. *In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established for a severity level 1 crime pursuant to the sentencing range.* The defendant shall not be eligible for parole prior to serving such mandatory minimum term of imprisonment, and such mandatory minimum term of imprisonment shall not be reduced by the application of good time credits. No other sentence shall be permitted." (Emphasis added.)

Mitchell's claim that his felony murder sentence *must* be nonbase hinges on a false dilemma: that K.S.A. 2022 Supp. 21-6819(b)(2) separates all sentences into base and nonbase categories. If this were true, off-grid sentences—which, by statute, cannot be base sentences—would necessarily qualify as nonbase sentences.

But this premise dissolves upon closer inspection. K.S.A. 2022 Supp. 21-6819(b) concerns *grid*-eligible crimes; it only mentions off-grid crimes to clarify that (1) off-grid crimes cannot be the *primary* crime that establishes a base sentence, and (2), "If sentences for off-grid and on-grid convictions are ordered to run consecutively, the offender shall not begin to serve the on-grid sentence until paroled from the off-grid sentence, and the postrelease supervision term will be based on the off-grid crime." Since a base sentence is only established by a primary crime, and an off-grid crime cannot be the primary crime, nothing in the plain language of the statute suggests that off-grid crimes result in either a base or nonbase sentence. They instead represent a separate category: *life* sentences. Cf. *State v. Louis*, 305 Kan. 453, 466-68, 384 P.3d 1 (2016) (rejecting argument that the "double rule" of K.S.A. 2011 Supp. 21-6819[b][4] "limit[s] the total prison term for off-grid crimes to twice the sentence for any grid-felony conviction also entered in a multiple conviction case" because "[t]he statute clearly contemplates on-grid and off-grid sentences may be imposed in the same case"); *State v. Grotton*, 50 Kan. App. 2d 1028, 1033, 337 P.3d 56 (2014) (concluding "that grid and off-grid sentences are handled separately" under the predecessor to K.S.A. 21-6819[b] for purposes of the double rule); *State v. Cessna*, No. 115,999, 2018 WL 386844, at *5-6 (Kan. App. 2018) (unpublished opinion). To highlight this distinction, K.S.A. 2022 Supp. 21-6819(b)(2) mandates that a defendant must first be paroled from an off-grid sentence *before* they can begin to serve a consecutive on-grid sentence.

Further, nothing in the language of K.S.A. 2022 Supp. 21-6620(b)(2) alters the distinct character of life sentences by converting them to grid sentences. Unlike K.S.A. 2022 Supp. 21-6819(b)(5), K.S.A. 2022 Supp. 21-6620(b)(2) does not "apply" a defendant's criminal history score to a sentence—it applies the

score to the minimum amount of time before a defendant is eligible for parole *while serving* a life sentence. Finally, unlike *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001), to which Mitchell likens his case, neither the plain language nor any reasonable interpretation of the statutes here prohibits the use of Mitchell's criminal history score to calculate his minimum "life" sentence before parole eligibility. Thus, Mitchell's sentence was lawful.

CONCLUSION

Because we conclude the district court did not abuse its discretion and correctly applied Mitchell's criminal history to his mandatory minimum life sentence before parole eligibility, we affirm Mitchell's conviction and sentence.

Affirmed.

No. 124,378

LEAGUE OF WOMEN VOTERS OF KANSAS, LOUD LIGHT, KANSAS APPLESEED CENTER FOR LAW AND JUSTICE, INC., and TOPEKA INDEPENDENT LIVING RESOURCE CENTER, *Appellants*, v. SCOTT SCHWAB, in His Official Capacity as Kansas Secretary of State, and KRIS W. KOBACH, in His Official Capacity as Kansas Attorney General, *Appellees*.

(539 P.3d 1022)

SYLLABUS BY THE COURT

1. CIVIL PROCEDURE—*Two-Part Standing Test in Kansas—Cognizable Injury and Causal Connection between Injury and Conduct*. Under Kansas' traditional, two-part standing test, a party must demonstrate they have suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct. A party establishes a cognizable injury—i.e., an injury in fact—when they suffer some actual or threatened injury as a result of the challenged conduct.

2. SAME—*Allegation of Future Injury Can Satisfy Injury Component—Allegation of Constitutional Interest and Threat of Prosecution*. An allegation of future injury can satisfy the injury-in-fact component in a pre-enforcement challenge if there is a threatened impending, probable injury. Plaintiffs need not expose themselves to liability or prosecution before suing to challenge the basis for the threat. Rather, plaintiffs can satisfy the injury-in-fact component when they allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.

3. CONSTITUTIONAL LAW—*State May Regulate Content of Speech Based on Content if Not Constitutionally Protected*. The State may validly regulate the content of speech based on content that is not constitutionally protected, such as obscenity, incitement, defamation, fighting words, speech integral to criminal conduct, true threats, speech presenting some grave and imminent threat the government has the power to prevent, child pornography, and fraud.

4. SAME—*Legislature Criminalizes Constitutionally Unprotected Speech—Unclear to Confer Standing to Plaintiff Challenging Law*. When the Legislature criminalizes speech and does not—within the elements of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 310, 513 P.3d 1222 (2022). Appeal from Shawnee District Court; TERESA WATSON, judge. Oral argument held February 1, 2023. Opinion filed December 15, 2023. Judgment of the Court of Appeals dismissing the appeal is vacated, and the case is remanded to the Court of Appeals.

Elisabeth C. Frost, pro hac vice, of Elias Law Group LLP, of Washington, D.C., argued the cause, and *Henry J. Brewster*, pro hac vice, *Tyler L. Bishop*, pro hac vice, *Justin Baxenberg*, pro hac vice, *Mollie A. DiBrell*, pro hac vice, *Richard A. Medina*, pro hac vice, *Marisa O'Gara*, pro hac vice, and *Spencer M. McCandless*, pro hac vice, of the same firm, *David Anstaett*, pro hac vice, of Perkins Coie LLP, of Madison, Wisconsin, and *Pedro L. Irigonegaray*, *Jason Zavadil*, *Nicole Revenaugh*, and *J. Bo Turney*, of Irigonegaray, Turney & Revenaugh LLP, of Topeka, were with her on the briefs for appellants.

Bradley J Schlozman, of Hinkle Law Firm LLC, of Wichita, argued the cause, and *Scott R. Schillings*, of the same firm, *Brant M. Laue*, former solicitor general, *Anthony J. Powell*, solicitor general, and *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were with him on the briefs for appellees.

The opinion of the court was delivered by

STEGALL, J.: The appellants—four non-profit groups aimed at maximizing political engagement in Kansas—sought a temporary injunction against K.S.A. 25-2438(a)(2)-(3), which makes it a severity level 7, nonperson felony to engage in "conduct that gives the appearance of being an election official" or conduct that "would cause another person to believe a person engaging in such conduct is an election official." Appellants contend the statute is overbroad, unconstitutionally vague, and results in the criminalization of their voter education and registration activities. To support their claims, they have asserted that during past events, observers at times believed they were election officials even though they always take measures to clearly identify themselves as private citizens. The State contends appellants' fear of prosecution is unfounded because the statute criminalizes only "knowingly" misleading someone into thinking one is an election official. No actual prosecutions have commenced against appellants.

The district court denied appellants' request for a temporary injunction after finding they could not establish a substantial likelihood of eventually prevailing on the merits. A split panel of the Court of Appeals dismissed appellants' claims for lack of standing,

finding appellants failed to satisfy their burden to demonstrate an injury-in-fact because they are not at risk of prosecution under the statute. We granted appellants' petition for review. Today we hold that when the Legislature criminalizes speech and does not—within the elements of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law. Such is the case with the statute at issue here.

FACTS

In 2021 the Kansas Legislature enacted House Bill 2183 which reads in relevant part:

> "(a) False representation of an election official is knowingly engaging in any of the following conduct by phone, mail, email, website or other online activity or by any other means of communication while not holding a position as an election official:
>
> (1) Representing oneself as an election official;
>
> (2) engaging in conduct that gives the appearance of being an election official; or
>
> (3) engaging in conduct that would cause another person to believe a person engaging in such conduct is an election official." L. 2021, ch. 96, §3 (codified at K.S.A. 25-2438[a]).

Governor Laura Kelly vetoed the bill on April 23, 2021. The Legislature voted to override the Governor's veto, and the statute took effect on July 1, 2021.

The appellants—League of Women Voters of Kansas, Loud Light, Kansas Appleseed Center for Law and Justice, Inc., and Topeka Independent Living Resource Center—quickly challenged the new law. They sought a temporary injunction against subsections (a)(2) and (a)(3), claiming these provisions contravene their rights to free speech and association in violation of sections 3 and 11 of the Kansas Constitution Bill of Rights, are overbroad, and are unconstitutionally vague in violation of section 10.

Appellants maintain that (a)(2) and (a)(3) "turn on how conduct is *perceived*, rather than the actor's intent (or lack thereof) to create that perception." Appellants argued before the district court

that although they always overtly identify themselves as volunteers from their respective organizations, given the nature of their work, individuals easily can—and often do—mistake them for county election officials.

Appellants submitted several affidavits in support of their claims. Ami Hyten, executive director of appellant Topeka Independent Living Resource Center, provided an example of one of the Center's recent voter engagement plans where the Center had generated an area mailing list of individuals who were not registered to vote, sent letters with voting information and official registration forms to those individuals, and then followed up by phone to offer support with the registration process or casting their ballot. Hyten expressed concern that if the Center continues to engage in these kind of activities—which involves "reproducing official state documents for the individuals [the Center] serve[s]"—the Center's volunteers risk prosecution under the new law, because "[a]s anyone who has worked on voter education activities long enough knows, voters may innocently mistake people who conduct the work we conduct as election officials."

Several of the other individuals who submitted affidavits reflected this concern—as individuals experienced in conducting voter engagement activities, they personally have experienced citizens mistaking them for elections officials. Davis Hammet, president and executive director of appellant Loud Light, described several of Loud Light's activities, which include running young voter registration drives, creating multi-media content about how to participate in elections, giving classroom presentations, and sending educational mailers to voters. In addition, Loud Light organizes ballot cure programs where it contacts voters whose ballots are challenged by county election officers—with a specific focus on voters who election officials had been unable to contact—for things like mismatched signatures, and educates the voters on how to cure their ballots. Hammet expressed concern about the new law because he personally has been mistaken for an election official in the past, "because voters innocently mistake people who are knowledgeable about voter registration and election procedures as election officials." Hammet described one such event that occurred while canvassing in Pittsburg, Kansas. At the event,

the Crawford County Board of Elections had a voter registration booth next to another booth with an organization also conducting voter registration, and Loud Light volunteers were also present walking through the crowd registering voters near those booths. Hammet described how many individuals he interacted with during the event asked whether he was with the county election office. He always clarified that he was not, but asserted that "had they never asked, [he was] not certain they would have ever reached the correct conclusion."

Hammet further described how Loud Light often receives supplies from the Shawnee County Board of Elections to help in their voter registration drives. These supplies include voter registration forms, banners advertising voter registration materials, and other materials to help facilitate the events, which Loud Light utilizes alongside their own supplies. Hammet fears that continuing to use these supplies could leave an impression with voters that these drives are run by the local county board, but that discontinuing use of these supplies would make their drives less effective.

Jacqueline Lightcap, co-president of appellant League of Women Voters of Kansas, also described the various events the Kansas League puts on throughout the year, including at local high schools and community colleges, local libraries, public housing offices, YMCAs, local utility offices, and state and county fairs. Lightcap highlighted a handful of specific events, including describing a booth set up by the Wichita-Metro League at the annual Wichita Riverfest. The booth—located directly next to the Sedgwick County Election's Office booth—was decorated with banners and signs encouraging individuals to register to vote. Lightcap's affidavit asserted that while the Sedgwick County booth displayed its voting machines, it did not register individuals to vote; that task was delegated solely to the Wichita-Metro League. Lightcap further stated that the Metro League members were often intermingled and talking with the local elections staff during the festival. The proximity of the booths, as well as the friendliness between the volunteers at each booth, could cause a person strolling by during the busy festival to have easily mistaken the two booths for one another or perceive it as one large installation from the local board, according to Lightcap.

Lightcap expressed additional concerns about the Kansas League's current practice of relying on and promoting websites and information put together by Kansas local and state elections officials. Given the Kansas League's wide reach—for example, in 2020, the Kansas League coordinated 354 total election-related activities which yielded 7,766 unique voter contacts and registered over 2,000 voters—Lightcap expressed concern that inevitably some individuals may think Kansas League volunteers were affiliated with the local elections office.

Jamie Shew, Douglas County clerk, asserted that despite Douglas County's large size, the clerk's office has just three full-time and one part-time staff that work on the administration of elections. Their small size requires them to rely on outside groups to conduct nearly all voter registration drives. To that end, Shew stated that he has worked with the Douglas County chapter of the Kansas League for years. Shew specified that to assist the League in conducting voter registration drives, his office often provides them with materials—which are typically marked with the Douglas County Clerk's Office emblem—such as signs, banners, and leaflets advertising the drives. Shew has also collaborated with the Douglas County League at other events, noting as one example that he has spoken at several informational sessions sponsored by the Douglas County League about upcoming elections. Shew stated that if his office receives a request to set up a voter registration drive at an event, he refers the request directly to the Douglas County League, as he knows from experience that they are "extremely knowledgeable and professional," and by relying on the League and other similar groups his office can fulfill outreach and registration functions he otherwise would not have the resources to fulfill.

Caleb Smith, the integrated voter engagement director of appellant Kansas Appleseed, stated that Appleseed also conducts many voter education and engagement activities, including door-to-door canvassing and registering citizens to vote, tabling and engaging with voters at local fairs, art festivals, and other large gatherings, and assisting voters in remote and rural areas with returning their completed advance voting ballots to county election of-

fices. Smith asserted that text messages sent out from Kansas Appleseed volunteers—and clearly identified as such—contained links to official websites managed by the Kansas Secretary of State. His work in conducting these kinds of activities has caused citizens to ask Smith and his volunteers whether they were with the local county elections board. He stated that while he and his volunteers always correctly identify themselves, "this confusion persists in our communities. At any given event, citizens will ask if Kansas Appleseed volunteers are affiliated with the local elections boards."

Once the new statute went into effect, appellants claimed that due to these concerns, they cancelled and curtailed many of their planned voter events because they believe the statute places "at risk of prosecution anyone who engages in conduct that they reasonably know *could* give another person the impression that they are an election official." Appellants contend that based on the above facts, their voter engagement events may cause inadvertent misimpressions among members of the public—despite their best efforts to clearly identify themselves—which places them at risk of felony prosecution under the new law.

The district court denied appellants' request for a temporary injunction. The court reasoned that a successful prosecution under K.S.A. 25-2438(a)(2)-(3) would require "that the *actor*—not the bystander—be reasonably certain that what he or she is doing gives the appearance of or causes another person to believe that he or she" is an election official. The court also disposed of appellants' overbreadth claim because "protected
activity is not the law's target at all." Finally, the court reasoned that the statute "does not focus entirely on subjective perceptions," as it "focuses on the culpable mental state of the actor, not the subjective impression of a bystander."

The district court concluded appellants failed to demonstrate "a substantial likelihood of eventually prevailing on the merits of their Section 11 challenge" which proved "fatal" to their request for a temporary injunction. As a result, the court declined to examine the other necessary components for a grant of temporary injunction. The court also recognized that though the State claimed appellants lacked standing to pursue their claims, it would

not address the standing arguments in its order because it was denying the motion "on another basis." These aspects of the district court's decision are not before us in this appeal, and we express no opinion on them. Our review is strictly limited to the subsequent Court of Appeals' ruling on standing.

In fact, the district court's refusal to address the parties' standing arguments drew criticism from the Court of Appeals, which quipped that the district court "'put the merits cart before the standing horse.'" *League of Women Voters of Kansas v. Schwab*, 62 Kan. App. 2d 310, 317, 513 P.3d 1222 (2022). The panel accordingly began its analysis by evaluating appellants' standing.

The Court of Appeals found that because "appellants' conduct does not involve deceptive practices but is properly characterized as reasonable efforts to foster discourse and facilitate the exchange of ideas," their activities "lack the nefarious or deceptive qualities K.S.A. 2021 Supp. 25-2438 is designed to combat, placing the appellants beyond its reach." 62 Kan. App. 2d at 321-22. The panel concluded that appellants lacked standing to challenge K.S.A. 25-2438(a) because they could not establish a cognizable injury. Specifically, appellants failed to take the necessary steps to mount a pre-enforcement challenge because they could not show that their conduct was proscribed by the statute or that they were under a credible threat of prosecution. 62 Kan. App. 2d at 322, 328.

Judge Hill dissented, writing that the majority would require appellants to be arrested, charged, tried, and convicted before the statute could be challenged, and criticized the majority opinion as being broad enough to do away with the possibility of a pre-enforcement challenge. 62 Kan. App. 2d at 332-40 (Hill, J., dissenting).

We granted appellants' petition for review on the question of standing.

DISCUSSION

Parties in a judicial action must have standing as part of the Kansas case-or-controversy requirement imposed by the Judicial Power Clause of Article 3, § 1 of the Kansas Constitution. The effect of this requirement is that standing is a component of subject matter jurisdiction, which any party, or the court on its own

motion, may raise at any time. *Sierra Club v. Moser*, 298 Kan. 22, 29, 310 P.3d 360 (2013). Plaintiffs must establish that they have standing to raise the claims before they can proceed. *Baker v. Hayden*, 313 Kan. 667, Syl. ¶ 4, 490 P.3d 1164 (2021).

The test for standing in Kansas differs from the federal standard. See *Kansas Bldg. Industry Workers Comp. Fund v. State*, 302 Kan. 656, 679-80, 359 P.3d 33 (2015) ("Given the differences in the genesis of the two systems, we do not feel compelled to abandon our traditional two-part analysis as the definitive test for standing in our state courts."). Under Kansas' traditional, two-part standing test, a party must demonstrate they have "suffered a cognizable injury" and that there is "a causal connection between the injury and the challenged conduct." *State v. Bodine*, 313 Kan. 378, 385, 486 P.3d 551 (2021).

A party establishes a cognizable injury—i.e., an injury-in-fact—when they "'suffer[] some actual or threatened injury as a result of the challenged conduct.'" *State v. Stoll*, 312 Kan. 726, 734, 480 P.3d 158 (2021). The injury must pose "'adverse legal interests that are immediate, real, and amenable to conclusive relief.'" *Kansas Bldg. Industry Workers Comp. Fund*, 302 Kan. at 678. An allegation of future injury can satisfy the injury in fact component of the standing inquiry if there is a threatened "impending, probable injury," as a plaintiff is not required to "expose himself to liability before bringing suit to challenge the basis for the threat." *Sierra Club*, 298 Kan. at 33; *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29, 127 S. Ct. 764, 166 L. Ed. 2d 604 (2007); see also *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) ("When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law.").

The United States Supreme Court has referred to this as a "pre-enforcement" challenge and has held that a plaintiff satisfies the injury-in-fact component in such a challenge when they allege "'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" 573 U.S. at 159. A high threshold is required to demonstrate standing on a pre-

enforcement challenge. The challenger must show an imminent threat of prosecution that is not speculative or imaginary. 573 U.S. at 160.

Importantly, when evaluating whether a plaintiff has satisfied the injury-in-fact component, we "accept the facts alleged in the petition as true, along with any inferences that can be reasonably drawn therefrom." *Board of Sumner County Comm'rs v. Bremby*, 286 Kan. 745, 751, 189 P.3d 494 (2008); see also *Steckline Communications, Inc. v. Journal Broadcast Group of KS, Inc.*, 305 Kan. 761, 766-67, 388 P.3d 84 (2017) (evaluating whether plaintiff had "alleged sufficient facts which, if true, would establish its standing to pursue the claims it asserts"). We note here that appellants have provided a robust factual record which, at this stage of the proceedings and for the purposes of our standing analysis, we accept as true.

Appellants also allege standing under our established "overbreadth" exception to traditional standing requirements. In such cases, a plaintiff "need not establish a personal injury arising from that law." *City of Wichita v. Trotter*, 316 Kan. 310, 312, 514 P.3d 1050 (2022). It is enough that the challenger alleges "'the mere existence of the statute could cause a person not before the Court to refrain from engaging in constitutionally protected speech or expression.'" *State v. Williams*, 299 Kan. 911, 919, 329 P.3d 400 (2014). But because we hold appellants have established standing under our pre-enforcement rules, we need not address the parties' arguments concerning standing under our overbreadth exception.

Whether a party has standing is a question of law subject to unlimited review. *Sierra Club*, 298 Kan. at 29. To the extent the standing question requires us to engage in statutory interpretation, we likewise exercise unlimited review. This means we "give no deference to the district court's or the Court of Appeals' interpretation of the statute." *Jarvis v. Kansas Dept. of Revenue*, 312 Kan. 156, 159, 473 P.3d 869 (2020).

When a statute is plain and unambiguous, we must give effect to the intention of the Legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, we will not "'speculate as to the legislative intent behind it and will not read such a statute

so as to add something not readily found in the statute.'" *Roe v. Phillips County Hospital*, 317 Kan. 1, 5, 522 P.3d 277 (2023).

As already discussed, the Court of Appeals held the nonprofits could not establish standing because they faced no credible threat of prosecution. To evaluate that holding, we must first articulate the potentially protected nature of the speech regulated by the statute. And as a further housekeeping note, we recognize that appellants' challenge arises under our state Constitution. But we have previously recognized that the First Amendment and section 11 protections are generally considered coextensive. *State v. Russell*, 227 Kan. 897, 899, 610 P.2d 1122 (1980). Though appellants argue our recent caselaw indicates the Kansas Constitution provides even broader protection than the federal Constitution (and the language of section 11 may support that claim), we need not explore that argument here as even under traditional First Amendment jurisprudence we conclude that appellants have standing to challenge the law.

The government may impose two types of restrictions on protected speech. First, it may make reasonable restrictions on the time, place, or manner of content-neutral protected speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). The provisions at issue here are not time, place, or manner restrictions. Second, the state may regulate the content of speech if it does so within strict constitutional boundaries. Content-based restrictions are identified by examining if the law "draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). Content-based regulations of speech are generally subject to strict scrutiny unless the speech at issue falls within a narrowly defined category of constitutionally unprotected speech. 576 U.S. at 163-64; *United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012). Constitutionally unprotected speech may be freely restricted by the state so long as the regulations fall within the scope of its police power:

"'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.' These 'historic and traditional categories long familiar to the bar,'—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are 'well-defined and

narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.' [Citations omitted.]" *United States v. Stevens*, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010).

These historic and traditional categories—as well as fighting words, true threats, and "speech presenting some grave and imminent threat the Government has the power to prevent"—all "have a historical foundation in the Court's free speech tradition" and thus fall outside of First Amendment protection. *Alvarez*, 567 U.S. at 717-18. Outside of these limited historic categories, the Court has expressed reluctance to recognize new categories of unprotected speech; for example, it has declined to recognize flag burning, outrageous and intentional infliction of emotional distress, vice and temperance, or dog fighting videos as categories of unprotected speech. See *United States v. Eichman*, 496 U.S. 310, 315-18, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990) (flag burning); *Snyder v. Phelps*, 562 U.S. 443, 457-58, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) (outrageous and intentional infliction of emotional distress); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) (plurality opinion) (vice); *Stevens*, 559 U.S. at 481-82 (dog fighting). One of the only new categories of unprotected speech recognized by the Court is child pornography, *New York v. Ferber*, 458 U.S. 747, 758, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982), but the Court made clear that child pornography represented a "special case" as "'[t]he market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *Stevens*, 559 U.S. at 471-72. It emphasized, however, that it was not "establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment." 559 U.S. at 472.

As already noted, fraud is one category of speech that is well-established as being beyond the scope of First Amendment protection. See, e.g., *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

The parties do not dispute that K.S.A. 25-2438(a) is a content-based restriction that *attempts* to prohibit a type of fraud—which, as a historically recognized category of unprotected speech, the government may legitimately restrict without running afoul of the First Amendment. The dispute is focused on whether the plain language of the statute actually does this. The State and both courts below conclude that it does by saying—albeit in different ways—that the statute does not regulate the protected activities of appellants. The nonprofit groups, meanwhile, are not consoled and continue to insist that the plain language of the statute sweeps more broadly than simply unprotected fraudulent speech and catches in its dragnet protected speech such as their voter registration drives.

The factual record—which again, we must accept as true at this point in the lawsuit—helpfully narrows the focus of the dispute to one sharp point. Namely, the appellants complain about the problem of what they describe as the "innocent listener mistake." Appellants argue that subsections (a)(2) and (a)(3) of the statute impose criminal liability in the case of the innocent listener mistake, but that such a scenario does not involve unprotected speech.

The actus reus of the two challenged subsections—that is, the verbs—are to "give[] [an] appearance" and to "cause [a] person to believe." The necessarily subjective and interpretive process inherent in these verbs are what disturb the nonprofits and allegedly chill their constitutionally protected activities. The State (and the lower courts) contend that the mens rea of "knowingly" in K.S.A. 25-2438(a) effectively side-steps the innocent listener mistake. See *League of Women Voters of Kansas*, 62 Kan. App. 2d at 322

("[T]he activities at issue lack the nefarious or deceptive qualities K.S.A. 2021 Supp. 25-2438 is designed to combat, placing the appellants beyond its reach."); District Court Memorandum Decision and Order ("The statute requires a culpable state of mind on the part of the actor; there is no violation based solely on the subjective perception of a bystander."); Appellee's Brief, at 35 ("Plaintiffs['] . . . contention [that the statute focuses entirely on others' subjective perceptions] is inconsistent with the statutory text, as informed by the canons of statutory construction and fundamental principles relating to criminal statutes' *mens rea* requirements. The statute's prohibitions target only the conduct of the *speaker*, not the subjective views of the *listener*. The statute's reach is likewise limited to actions by the speaker in which he/she *knowingly* engaged in actions designed to convey the false impression that he/she is an election official.").

But again, the nonprofits are not consoled. They argue persuasively that based on their experience, they "know" that a certain percentage of the people they encounter will make the innocent listener mistake. To demonstrate their credible fear of prosecution under (a)(2) or (a)(3), volunteers with appellants' organizations submitted affidavits, as described above, asserting that while helping people register to vote during voter registration drives, citizens have approached them and asked whether the volunteers were with the local county elections board. As such, there exists a factual basis for the proposition that appellants "know" their protected speech will generate some innocent or unreasonable listener mistakes. And they ask, how can the known possibility of an innocent or unreasonable listener mistake alter the fundamental nature of the speech from protected to unprotected? Put another way, can a listener's mistake—whether innocent or in fact entirely unreasonable—turn otherwise honest speech into fraud?

The answer must be no. But why? Because, in this context, in order to fall outside constitutional protections, the speech at issue must be deceptive, fraudulent, or otherwise false, at its heart. See, e.g., K.S.A. 2022 Supp. 21-5917 (criminalizing the "impersonation [of] . . . a public officer . . . with knowledge that such representation is false"). The particular mens rea required in order to

establish the requisite gravamen of falsity or fraud may be intentional, knowing, or even reckless. See *Counterman v. Colorado*, 600 U.S. 66, 78-79, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023); see also *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739, 750-51, 143 S. Ct. 1391, 216 L. Ed. 2d 1 (2023). But fraud or deception cannot arise out of a true listener mistake. See, e.g., *Griffith v. Byers Construction Co.*, 212 Kan. 65, 73, 510 P.2d 198 (1973) (defining fraud to include an element of "reasonable" reliance on the part of the listener).

Human language and the complexities of speech—through words, behavior, dress, mannerisms, gestures, facial expressions, etc.—are infinitely varied and not amenable to a rigorous, mathematical, inputs-equal-outputs kind of analysis. See Drew, 12 Types of Communication, https://helpfulprofessor.com/types-of-communication/ (describing nonverbal, verbal, visual, written, intrapersonal, interpersonal, mass, synchronous, asynchronous, formal, informal, and metacommunication); Ford, Body Language and Behavioral Profiling 4 (2010) ("The *Oxford English Dictionary* collectively contains over a half-million words; however, . . . the everyday vocabulary of most Americans seldom consists of more than two to three thousand words which they use repeatedly. Humans, however, are extremely clever in devising wonderful nonverbal techniques Everyone, to one degree or another, has a personal array of nonverbal skills that express their innermost attitudes, feelings, and beliefs in ways that other people quickly and clearly understand."); Pease & Pease, The Definitive Book of Body Language: The Hidden Meaning Behind People's Gestures and Expressions 8 (2008) (our spoken language acknowledges how important body language is to communication as evidenced by common phrases like "get it off your chest"; "keep a stiff upper lip"; "stay at arm's length"; "keep your chin up"; "put your best foot forward"; and that's "hard to swallow").

Speech—that is, human communication—is a two-way street. But sometimes a listener may mistake the meaning intended by the speaker. This may be due to the imprecision of the speech itself. It may also arise from the unfamiliarity of the listener with the particular language, dialect, or culture and idioms of the

speaker. Mistakes also at times result from just plain old unreasonableness or willfulness on the part of the listener.

Despite these "problems" with speech, however, it remains the cornerstone of our free society and undoubtedly an essential, fundamental principle of American government. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) ("The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."); *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161, 60 S. Ct. 146, 84 L. Ed. 155 (1939) (the right to speech is "vital to the maintenance of democratic institutions").

Indeed, the framers knew that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth," and that all discussion would be futile without the freedom of speech. *Whitney v. California*, 274 U.S. 357, 375, 47 S. Ct. 641, 71 L. Ed. 1095 (1927), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (acknowledging the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

Nonetheless, we note the reality of declining respect—in many quarters and across the political spectrum—for the open and free exchange of ideas and engagement in the political process. Efforts to curb speech protections extend beyond speech that is widely condemned—such as hate speech—and have come to include more amorphous categories labeling contested speech as false.

Legal scholars have explored various means of either regulating or punishing allegedly false speech occurring in the political arena. Some propose banning political speech that is "misleading or factually incorrect. The European Union, and in particular Germany, has begun heading down this avenue with significant fines for failure to remove false or misleading content upon notice to do so." This approach may involve requiring "pre-approval before publication" or "content that is flagged as potentially false could be investigated and then ordered removed if falsity is confirmed." Barrett, *Free Speech Has Gotten Very Expensive: Rethinking Political Speech Regulation in A Post-Truth World*, 94 St. John's L. Rev. 615, 650 (2020).

So we are cognizant—and wary—of recent government efforts to expand the scope of fraudulent speech to include speech the government, in its judgment, determines is simply false or misleading in some fashion. As one commentator has put it, the Constitution requires "breathing space" safeguards when the government attempts to regulate "false statements that occur within election speech." Jacobs, *Freedom of Speech and Regulation of Fake News*, 70 Am. J. Comparative L. i278, i292 (2022). In this environment, we understand why the nonprofits may legitimately fear even a good-faith effort to initiate prosecution arising out of the innocent listener mistakes that could flow from their voluntary election activities.

With this backdrop, we can ask and answer the precise question presented—is there actually a credible threat of prosecution under K.S.A. 25-2438(a)(2)-(3) in the case of an innocent or unreasonable listener mistake? Given the plain language of the statute, we think the answer must be yes. The statute simply does not provide clarity that truthful speech which generates an innocent or unreasonable listener mistake is outside of its scope. And this is sufficient to confer pre-enforcement standing.

Thus, when the Legislature criminalizes speech and does not—within the elements and definitions of the crime—provide a high degree of specificity and clarity demonstrating that the only speech being criminalized is constitutionally unprotected speech, the law is sufficiently unclear to confer pre-enforcement standing on a plaintiff challenging the law. As such, and accepting appellants' well-pled facts as true, we conclude appellants have standing to pursue their challenge of K.S.A. 25-2438(a)(2)-(3). We caution, however, that our holding today does not pronounce any definitive interpretation or construction of K.S.A. 25-2438(a). We limit today's opinion to the broader question of standing.

The Court of Appeals erred in dismissing appellants' claims for lack of standing. Accordingly, we vacate the Court of Appeals' opinion and remand this matter to the Court of Appeals for further proceedings.

BILES, J., not participating.

ROSEN and STANDRIDGE, JJ., concur in the result only.

No. 124,458

STATE OF KANSAS, *Appellee*, v. ROBERT LOWELL-LAWRENCE WARD, *Appellant*.

(539 P.3d 1042)

SYLLABUS BY THE COURT

CRIMINAL LAW—*Untimely Motion to Withdraw Plea—Burden to Show Excusable Neglect.* An untimely motion to withdraw a plea is procedurally barred when the defendant does not meet the burden to show excusable neglect.

Review of the judgment of the Court of Appeals in 62 Kan. App. 2d 721, 522 P.3d 337 (2022). Appeal from Franklin District Court; DOUGLAS P. WITTEMAN, judge. Submitted without oral argument November 3, 2023. Opinion filed December 22, 2023. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed.

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

Brandon L. Jones, county attorney, *Steven J. Obermeier*, assistant solicitor general, *Kristafer R. Ailslieger*, deputy solicitor general, *Derek Schmidt*, former attorney general, and *Kris W. Kobach*, attorney general, were on the briefs for appellee.

The opinion of the court was delivered by

BILES, J.: In 2021, Robert Lowell-Lawrence Ward moved to withdraw his 2013 plea of no contest to various crimes. The district court summarily denied the motion on the merits. In doing so, it did not consider whether Ward could overcome the one-year time bar created by K.S.A. 2022 Supp. 22-3210(e) based on a showing of "excusable neglect." A divided Court of Appeals panel affirmed the district court in a published opinion, but it also did not consider the statutory limitation. *State v. Ward*, 62 Kan. App. 2d 721, 522 P.3d 337 (2022). On review, we ordered supplemental briefing to address whether Ward overcame the procedural hurdle of showing excusable neglect to the district court. He now concedes his motion is untimely.

Even so, Ward argues we should consider the merits because no one previously suggested the timeliness issue was a problem. The statute, however, does not give us that flexibility. We affirm the district court on other grounds and note the panel's merits review failed to consider the procedural bar. See *State v. Parks*, 308 Kan. 39, Syl. ¶ 2, 417 P.3d 1070 (2018) (holding an untimely motion to withdraw a plea is

procedurally barred when the defendant does not meet the burden to show excusable neglect).

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, Ward pled no contest to one count of criminal threat and two counts of assault. The district court accepted the plea and sentenced him accordingly. In 2021, he moved to withdraw his plea in the district court, while his K.S.A. 60-1507 appeal was pending in the Court of Appeals on remand. See *State v. Ward*, 311 Kan. 619, 624, 465 P.3d 1143 (2020). The district court denied the plea withdrawal motion on the merits without holding an evidentiary hearing, stating "there are no substantial questions of law or facts . . . no evidentiary hearing is necessary." Ward appealed, and a Court of Appeals' panel majority affirmed. *Ward*, 62 Kan. App. 2d at 721. Ward sought review in this court, which we granted.

Our evaluation of the record suggested Ward's motion in the district court did not comply with K.S.A. 2022 Supp. 22-3210(e)(1)'s requirement to file such a motion within one year of a final order on direct appeal. The district court sentenced him in August 2013, and Kansas law prohibited him from filing a direct appeal because he pled nolo contendere. See K.S.A. 2013 Supp. 22-3602(a) ("No appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere, except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507."). And Ward's 60-1507 motion did not implicate "other grounds going to the legality of the [2013] proceedings." K.S.A. 2013 Supp. 22-3602(a).

Therefore, the one-year period to withdraw his nolo contendere pleas expired in 2014. Both Ward and the State complied with our order for supplemental briefing to address whether the motion was timely since it was filed in 2021, and if not, what effect, if any, that had on the court's authority to consider the merits.

ANALYSIS

This court typically reviews summary denial of motions to withdraw pleas de novo, applying the same procedures and standards as a K.S.A. 60-1507 case because this court has "'the same access to the motion, records, and files as the district court.'" *State v. Moses*, 296

Kan. 1126, 1127-28, 297 P.3d 1174 (2013) (quoting *State v. Neal*, 292 Kan. 625, 629, 258 P.3d 365 [2011]). But a threshold question is always whether the record reflects such motions comply with procedural requirements set out by the Legislature.

Ward correctly notes untimeliness is not an absolute bar to consider a motion to withdraw a plea so long as the district court first makes a finding of "excusable neglect." K.S.A. 2022 Supp. 22-3210(e)(2). But the district court made no such finding here. Still, he argues we have considered a district court's dismissal of untimely motions to withdraw a plea in the past, but the cases he cites all involve a district court finding no excusable neglect. See, e.g., *State v. Davisson*, 303 Kan. 1062, 1070, 370 P.3d 423 (2016) (affirming the district court's ruling that the defendant did not establish excusable neglect for withdrawing his late motion to withdraw a plea); *State v. Ellington*, 314 Kan. 260, 265, 496 P.3d 536 (2021) (agreeing with the district court the defendant failed to show excusable neglect); *State v. Hill*, 311 Kan. 872, 878, 467 P.3d 473 (2020) (affirming district court's dismissal of the defendant's motion as untimely absent defendant arguing or showing excusable neglect).

When a district court summarily denies an untimely motion to withdraw a plea on the merits without addressing the procedural bar, this court will not review the merits. See *Moses*, 296 Kan. at 1126-28 (declining to "address the merits . . . [because defendant's] motion to withdraw pleas was untimely filed and is procedurally barred" even though the district court summarily denied the motion on its merits). Similarly, appellate review is not appropriate here. The record reflects Ward's motion is untimely and procedurally barred. The motion's summary dismissal on the merits does not change that.

In the absence of an express finding of excusable neglect, Ward argues we should just assume the district court made such a finding as necessary to support its conclusion on the merits. But that suggests at least two problems. First, he misses the context in which this court will make such an assumption. We will not employ this model when the record does not support such an assumption. See *State v. Riffe*, 308 Kan. 103, 111, 418 P.3d 1278 (2018). The record cannot support Ward's proposed assumption because the district court went straight to the merits without considering the time bar. Second, an extension of

the applicable time requires the defendant make an "affirmative showing of excusable neglect." K.S.A. 2022 Supp. 22-3210(e)(2); see also *Davisson*, 303 Kan. at 1066. To make such an assumption would relieve Ward of that statutory burden. Besides, even in his supplemental briefing, Ward does not argue he meets the excusable neglect standard.

K.S.A. 2022 Supp. 22-3210(e)(2) permits a court to extend the one-year time limitation only upon an additional, affirmative showing of excusable neglect by the defendant. But Ward did not claim excusable neglect, and the district court made no determination on this threshold question. We affirm the district court on other grounds. See *State v. McAlister*, 310 Kan. 86, 87, 444 P.3d 923 (2019).

Judgment of the Court of Appeals is affirmed. Judgment of the district court is affirmed on other grounds.

No. 126,643

In the Matter of PHILIP R. SEDGWICK, *Respondent*.

(539 P.3d 1033)

ORIGINAL PROCEEDING IN DISCIPLINE

ATTORNEY AND CLIENT—*Disciplinary Proceeding—Six-Month Suspension, Stayed Pending Successful Completion of Three-year Period of Probation.*

Original proceeding in discipline. Oral argument held November 2, 2023. Opinion filed December 29, 2023. Six-month suspension, stayed pending successful completion of a three-year period of probation.

Julia A. Hart, Deputy Disciplinary Administrator, argued the cause and was on the formal complaint for the petitioner.

John J. Ambrosio, of Morris Laing Law Firm of Topeka, argued the cause, and *Philip R. Sedgwick*, respondent, argued the cause pro se.

PER CURIAM: This is an attorney-discipline proceeding against the respondent, Philip R. Sedgwick, of Kansas City, Kansas. Sedgwick received his license to practice law in Kansas in April 1983.

On February 7, 2023, the Disciplinary Administrator's office filed a formal complaint against Sedgwick alleging violations of the Kansas Rules of Professional Conduct (KRPC). Sedgwick answered the formal complaint on February 24, 2023.

On June 8, 2023, Sedgwick appeared at the complaint hearing before a panel of the Kansas Board for Discipline of Attorneys. After the hearing, the panel determined that Sedgwick had violated KRPC 1.1 (competence) (2023 Kan. S. Ct. R. at 327), KRPC 1.3 (diligence) (2023 Kan. S. Ct. R. at 331), and KRPC 1.4 (communication) (2023 Kan. S. Ct. R. at 332). The panel set forth its factual findings, legal conclusions, and recommended discipline in a final hearing report. The relevant portions of that report are set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

"*Findings of Fact*

"18. The hearing panel finds the following facts, by clear and convincing evidence:

"DA13,686

"19.On October 17, 2019, T.W. hired the respondent to represent him in an ongoing domestic case in which C.C. was the opposing party.

"20. Prior to T.W. hiring the respondent, the court had issued an order establishing paternity and ordering T.W. to pay child support. The court also approved a parenting plan establishing visitation.

"21. During a hearing on August 22, 2018, the court ordered supervised visitation between T.W. and the minor child at a court-approved visitation facility. The court further ordered T.W. to engage in family therapy with the minor child.

"22. Later, in August 2019, the court suspended T.W.'s supervised visitation with the minor child because therapy between T.[W]. and the child had ceased after the therapist discharged T.W. as a client.

"23.The therapist filed a report, dated July 9, 2019, with the court regarding her decision to discharge T.W. This report was filed under seal and listed in the court's 'record of actions' in an entry dated August 26, 2019.

"24. Around this same time, the court also held a hearing on T.W.'s pro se motion seeking an order to require C.C. to sign off on their minor child's passport. The court granted this motion.

"25. On May 28, 2019, the court filed an order to appear and show cause against C.C. due to her refusal to sign off on the minor child's passport as ordered.

"26. On October 17, 2019, when T.W. hired the respondent to represent him in the domestic case, T.W. also hired the respondent to represent him in a misdemeanor domestic battery charge pending in Kansas City Municipal Court. C.C. was the alleged victim in this case.

"27. On December 16, 2019, the respondent entered his appearance as T.W.'s attorney in the domestic case and filed an

amended proposed parenting plan and domestic relations affidavit to supplement T.W.'s previously filed pro se motion.

"28. The proposed plan contained typographical errors, including paragraph #4, which left the time for weekend visitation blank.

"29. The proposed parenting plan also contained what the court perceived as inappropriate language in the heading for paragraph #8: 'Dog in the Manger Rule.'

"30. The court scheduled a hearing in the child custody case for December 19, 2019. At the hearing, opposing counsel, C.C., and the respondent were present for the hearing; the respondent's client T.W. failed to appear timely. Accordingly, the court granted default judgment and dismissed the pending motion.

"31. On December 27, 2019, the respondent filed a motion to set aside the default judgement.

"32. The court granted the motion to set aside and scheduled the matter for rehearing. The hearing was continued by agreement several times. Some continuances were due to the emerging COVID-19 pandemic. Yet, others were due to the respondent's inability to obtain service on C.C. due to his typographical errors in the certificates of service.

"33. On November 13, 2020, the respondent filed an amended motion to modify custody and child support. In support of this motion, the respondent stated: 1) T.W. has no income and is applying for disability, and 2) T.W. seeks to have contact with the minor child.

"34. The court set the matter for hearing on March 16, 2021. The court blocked off the entire afternoon for the parties to present evidence and argument. Due to the ongoing pandemic, this hearing was to occur via Zoom.

"35. The respondent sent out notice of the March 16, 2021, hearing. However, the Zoom meeting identification number in the notice was incorrect. The court caught this clerical error, provided

the parties with the correct identification number, and the matter proceeded.

"36. At this hearing, the respondent called his client as a witness. The respondent asked T.W. if he had completed the court-ordered therapy with the minor child. T.W. testified that he had completed this therapy.

"37. On cross-examination, T.W. admitted he did not successfully complete court-ordered therapy, as he had not attended any sessions since August 2019.

"38. The respondent also asked T.W. how he and C.C. got along. T.W.'s testimony indicated they got along 'fine.'

"39. On cross-examination, T.W. admitted the municipal court had convicted him of the domestic misdemeanor battery charge against C.C.

"40. At this hearing, T.W. also asserted he had applied for and was placed on disability.

"41. In response to the court's questioning, T.W. admitted his application for disability had been denied, but he had appealed the decision.

"42. On March 17, 2021, the court issued a written order denying T.W.'s motion to modify custody and child support and specifically found that T.W.'s testimony that he successfully completed court-ordered therapy was 'untrue.'

"43. During the disciplinary investigation, the respondent acknowledged inappropriately using the 'Dog in the Manger Rule' phrase in the amended parenting plan, making typographical errors in filings, not spending the appropriate time preparing T.W. for his March 16, 2021, testimony, and that he had not reviewed the therapist's reports or spoken with the therapist before the hearing.

"DA13,702

"44. On June 5, 2019, the respondent appeared with and on behalf of the complainant, T.B., in the Wyandotte County District

Court on allegations that T.B. violated his court-ordered probation. T.B. waived his right to an evidentiary hearing and stipulated to the alleged probation violations. The court then proceeded to disposition, revoked T.B.'s probation, and imposed his underlying prison sentence of 161 months in the custody of the Kansas Department of Corrections.

"45. On June 18, 2019, the respondent properly and timely filed a notice of appeal with the sentencing court and requested that the court appoint an appellate defender for T.B.

"46. On July 30, 2019, T.B. filed a complaint with the disciplinary administrator's office, alleging that the respondent entrapped T.B. and failed to present a defense. As a result, T.B. alleges the court sentenced him to more than ten years of additional incarceration.

"47. On September 19, 2019, T.B. sent another letter to the disciplinary administrator's office stating the local court had still not appointed the appellate defender's office to represent him in his June 2019 probation revocation appeal.

"48. The disciplinary administrator's office sent timely responses to T.B. regarding these complaints, stating that they would not be docketed for investigation, as they did not appear to implicate the rules of professional conduct.

"49. Approximately one year later, on October 10, 2020, and October 26, 2020, T.B. sent letters to the disciplinary administrator's office. In addition to reiterating the prior allegations, T.B. noted that the local court had not yet appointed the appellate defender's office to appeal his probation revocation. On March 25, 2021, T.B. submitted a written complaint regarding the failure to appoint appellate counsel.

"50. On April 7, 2021, the disciplinary administrator's office asked the respondent to provide any information he had regarding why there was no court-appointed counsel representing T.B. in his appeal.

"51. On April 16, 2021, the respondent replied by letter noting his usual practice when a client requests to appeal a sentence. The respondent also stated that he would inquire of the court what happened with the appointment of counsel for T.B.'s appeal.

"52. On April 30, 2021, the respondent told the disciplinary administrator's office that after he contacted the judge's aide on April 20, 2021, the court appointed the appellate defender's office to represent T.B.

"53. During the subsequent disciplinary investigation, the respondent acknowledged that he should have followed up with the court earlier to ensure the appellate defender's office was appointed.

"54. The parties stipulate that the respondent's conduct violated KRPC 1.1 (competence), 1.3 (diligence), and 1.4 (communication) in the DA13,686 matter and KRPC 1.3 (diligence) in the DA13,702 matter.

"55. During the formal hearing, the respondent testified that he believes changing the nature of his law practice to less complex matters and reducing the number

of cases he accepts at any one time, along with following the terms of his proposed probation plan will help ensure he complies with the Kansas Rules of Professional Conduct in the future.

"56. Craig Lubow, the respondent's proposed probation supervisor, is an attorney who practices separately from the respondent, but in the same office building. Mr. Lubow testified during the formal hearing that he has been meeting regularly with the respondent to go over the respondent's case files. Mr. Lubow said that the respondent is very open to suggestions and reaches out to Mr. Lubow with any concerns about a case.

"57. However, Mr. Lubow is concerned that the respondent does not keep his case files organized well and has a lot of papers on his desk that do not always make it to their assigned files. He also felt that the respondent should reduce his caseload further than its current level. Mr. Lubow said that the respondent needs to be more organized so that matters don't fall through the cracks,

but otherwise felt that the respondent was doing reasonably well complying with the probation plan.

"58. Mr. Lubow testified that he is willing to work with the respondent on his organization, help him continue to reduce his case load, and supervise the respondent for the proposed three-year term of probation.

"*Conclusions of Law*

"59. Based upon the findings of fact, the hearing panel concludes as a matter of law that the respondent violated KRPC 1.1 (competence), 1.3 (diligence), and 1.4 (communication), as detailed below.

"KRPC 1.1

"60. Lawyers must provide competent representation to their clients. KRPC 1.1. 'Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.' *Id.*

"61. The respondent was not competent to represent T.W. in the domestic matter due to the respondent's failure to review therapist reports or speak with the therapist, use of an inappropriate phrase in a parenting plan, failure to correct typographical errors to ensure proper service on the opposing party, and failure to properly prepare T.W. for his testimony during the March 26, 2021, hearing. This conduct reflects inadequate skill, thoroughness, and preparation to represent T.W. in the domestic case.

"62. Further, the respondent stipulated that his conduct in DA13,686 violated KRPC 1.1.

"63. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.1.

"KRPC 1.3

"64. 'A lawyer shall act with reasonable diligence and promptness in representing a client.' KRPC 1.3.

"65. The respondent failed to diligently represent T.W. in the DA13,686 matter when he failed to obtain proper service of the notice of hearing on C.C. Further, the respondent failed to act with reasonable diligence when he failed to properly investigate the situation involving T.W.'s former family therapist and failed to adequately prepare T.W. for his testimony prior to the March 26, 2021, hearing.

"66. In addition, the respondent failed to act diligently in his client T.B.'s case in not confirming that the court [had] appointed appellate counsel to represent T.B. in a timely manner.

"67. The respondent stipulated that his conduct in DA13,686 and DA13,702 violated KRPC 1.3.

"68. Because the respondent failed to act with reasonable diligence and promptness in representing T.W. and T.B., the hearing panel concludes that the respondent violated KRPC 1.3.

"KRPC 1.4

"69. KRPC 1.4(b) provides that '[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.'

"70. In the DA13,686 matter, the respondent violated KRPC 1.4(b) when he failed to explain the potential legal consequences of the misdemeanor battery case and other circumstances in the domestic matter to T.W. prior to T.W.'s testimony during the March 26, 2021, hearing.

"71. Further, the respondent stipulated that his conduct in DA13,686 violated KRPC 1.4.

"72. Accordingly, the hearing panel concludes that the respondent violated KRPC 1.4(b).

"*American Bar Association*
Standards for Imposing Lawyer Sanctions

"73. In making this recommendation for discipline, the hearing panel considered the factors outlined by the American Bar As-

sociation in its Standards for Imposing Lawyer Sanctions (hereinafter 'Standards'). Pursuant to Standard 3, the factors to be considered are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors.

"74. *Duty Violated*. The respondent violated his duty to his clients T.W. and T.B.

"75. *Mental State*. The respondent negligently violated his duty. The hearing panel concludes that the respondent engaged in a pattern of neglect.

"76. *Injury*. As a result of the respondent's misconduct, the respondent caused injury to T.W. in negatively impacting T.W.'s opportunity to present the best case he could to gain the court's approval of his motion during the March 26, 2021, hearing. As a result of the respondent's misconduct, the respondent caused potential injury to T.B.'s appeal and actual injury to T.B. by creating unnecessary stress and T.B.'s worsened disillusionment with the legal process.

"Aggravating and Mitigating Factors

"77. Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following aggravating factors present:

"78. *Prior Disciplinary Offenses*. The respondent has been previously disciplined on three occasions for rules violations similar to those involved here. In 2002, the respondent was disciplined by informal admonition for violation of KRPC 1.3 and 1.4. In 2007, the respondent was placed on diversion for violation of KRPC 1.3. In 2018, the respondent was placed on diversion for violation of KRPC 1.1, 1.4, 3.1, 8.1, and 8.4(a). The respondent successfully completed and was discharged from both diversions.

"79. *A Pattern of Misconduct*. The respondent has engaged in a pattern of misconduct, particularly involving violation of KRPC

1.1, 1.3, and 1.4. The respondent has violated each of these rules more than once between this and prior disciplinary cases and violated KRPC 1.3 in both docketed matters at issue here.

"80. *Multiple Offenses*. The respondent committed multiple rule violations. The respondent violated KRPC 1.1, KRPC 1.3, and KRPC 1.4. This matter involves misconduct in two separate client representations. Accordingly, the hearing panel concludes that the respondent committed multiple offenses.

"81. *Vulnerability of Victim*. T.W. and T.B. were both particularly vulnerable to the respondent's misconduct. T.W.'s ability to have contact with his child was at stake and lost in the domestic case. T.B. was in prison and unable to take independent action to employ appellate counsel or ensure counsel was appointed as he would have been if not incarcerated. The hearing panel concludes that the victims of the respondent's misconduct were vulnerable.

"82. *Substantial Experience in the Practice of Law*. The Kansas Supreme Court admitted the respondent to practice law in the State of Kansas in 1983. At the time of the misconduct, the respondent has been practicing law for more than 36 years.

"83. *Misconduct Occurred During Prior Diversion Period*. The hearing panel notes that the respondent's 2018 diversion was for a term of 24 months, from August 2018 to August 2020. At least some of the misconduct in the two docketed matters here occurred during the term of this diversion. The hearing panel considered this as an aggravating factor.

"84. Mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed. In reaching its recommendation for discipline, the hearing panel, in this case, found the following mitigating circumstances present:

"85. *Absence of a Prior Disciplinary Record*. While the respondent received prior discipline, this is the first hearing on a formal complaint involving the respondent in more than 36 years of practice. The hearing panel took this into account in mitigation when considering prior discipline as an aggravating factor.

"86. *The Present and Past Attitude of the Attorney as Shown by His or Her Cooperation During the Hearing and His or Her Full and Free Acknowledgment of the Transgressions.* The respondent fully cooperated with the disciplinary process. The respondent and his counsel worked with the disciplinary administrator's office and ultimately entered into a joint stipulation regarding the underlying facts and stipulated to rules violations.

"87. *Previous Good Character and Reputation in the Community Including Any Letters from Clients, Friends and Lawyers in Support of the Character and General Reputation of the Attorney*. The respondent is an active and productive member of the bar in Wyandotte County, Kansas. The respondent also enjoys the respect of his peers and generally possesses a good character and reputation as evidenced by several letters received by the hearing panel.

"88. *Remorse*. At the hearing on this matter, the respondent expressed genuine remorse for having engaged in the misconduct.

"89. In addition to the above-cited factors, the hearing panel has thoroughly examined and considered the following Standards:

'4.42Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.'

'4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.'

'4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.'

'8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.'

'8.3 Reprimand is generally appropriate when a lawyer:

(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has received an admonition for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.'

"*Recommendation of the Parties*

"90. The disciplinary administrator recommended that the respondent's license to practice law be suspended for a period of three years and that the respondent be required to undergo a reinstatement hearing pursuant to Rule 232 (2023 Kan. S. Ct. R. at 293), with the suspension being stayed while the respondent serves three years' probation according to the terms of the respondent's proposed probation plan in respondent's exhibit F1.

"91. The respondent recommended the same discipline as that recommended by the disciplinary administrator.

"*Discussion*

"92. When a respondent requests probation, the hearing panel is required to consider Rule 227, which provides:

'(d) Restrictions on Recommendation of Probation. A hearing panel may not recommend that the respondent be placed on probation unless the following requirements are met:

(1) the respondent complies with subsections (a) and (c) and the proposed probation plan satisfies the requirements in subsection (b);

(2) the misconduct can be corrected by probation; and

(3) placing the respondent on probation is in the best interests of the legal profession and the public.'

"93. The hearing panel concludes based on the evidence that the requirements of Rule 227 are met here. The hearing panel heard testimony of Mr. Lubow that when the respondent is supervised by Mr. Lubow, the respondent is able to maintain the necessary attention, thoroughness, and preparation necessary to properly represent his clients. Mr. Lubow believed that the respondent is competent in the areas of law he practices in and with the proper limitation of his caseload and supervision, the respondent can appropriately represent his clients. The respondent accepts cases from a portion of the population that may not otherwise be able to obtain legal representation, and the hearing panel believes that the respondent can serve these clients appropriately if he follows the terms of the proposed probation plan.

"94. The respondent's probation plan is workable, substantial, and detailed, contains adequate safeguards to address the respondent's misconduct, protect the public, and ensure the respondent's compliance with the rules going forward, names Mr. Lubow, who seems capable of handling the assignment, as practice supervisor, and includes a provision that the respondent will not commit misconduct.

"95. Further, the respondent complied with subsections (a) and (b) of Rule 227.

"96. Accordingly, the hearing panel concludes that with the proper supports through the respondent's probation plan and limiting the amount and types of cases he handles, the respondent's misconduct can be corrected by probation and placing the respondent on probation is in the best interest of the legal profession and the public.

"97. While the hearing panel concludes that the probation plan is adequate to meet the requirements of Rule 227, the hearing panel further recommends that paragraph 20 of the proposed probation plan be amended to permit the respondent to accept or handle no cases other than municipal criminal matters, misdemeanor criminal matters, or severity level 7-9 felonies. Based on the evidence, limiting the respondent to only handling these types of cases will ensure the lowest possibility of error or violation of the Kansas Rules of Professional Conduct.

"98. The hearing panel further recommends that the respondent be required to undergo a KALAP law practice audit within 6 months of the Court's decision in this matter and follow all recommendations from KALAP. The hearing panel believes that the respondent could benefit from the assistance of a qualified law practice management monitor who could help the respondent develop systems he can use to become better organized and ensure his compliance with the Kansas Rules of Professional Conduct.

"99. Mr. Lubow testified that he is not familiar with the KALAP program. Therefore, the hearing panel recommends that, while Mr. Lubow should serve as the respondent's probation supervisor, another lawyer should be appointed to assist the respondent with any law practice management assistance recommended by KALAP.

"*Recommendation of the Hearing Panel*

"100. Accordingly, based upon the findings of fact, conclusions of law, and the Standards listed above, the hearing panel unanimously recommends that the respondent's license to practice law be suspended for a period of three years with the requirement that the respondent undergo a reinstatement hearing pursuant to Rule 232 (2023 Kan. S. Ct. R. at 293). The hearing panel further recommends that the suspension be stayed while the respondent serves three years' probation according to the terms of the respondent's proposed probation plan in respondent's exhibit F1, as amended pursuant to the panel's recommendations in sections 97 and 98.

"101. Costs are assessed against the respondent in an amount to be certified by the Office of the Disciplinary Administrator."

After the hearing panel issued its report, we ordered oral arguments in this matter under Rule 232(g)(4)(D) (2023 Kan. S. Ct. R. at 296). And we heard oral argument on November 2, 2023.

DISCUSSION

In a disciplinary proceeding, this court generally considers the evidence, the disciplinary panel's findings, and the parties' arguments to determine whether KRPC violations exist and, if they do, the appropriate discipline to impose. Attorney misconduct must be established by clear and convincing evidence. *In re Spiegel*, 315 Kan. 143, 147, 504 P.3d 1057 (2022); see Supreme Court Rule 226(a)(1)(A) (2023 Kan. S. Ct. R. at 281). Clear and convincing evidence is evidence that causes the fact-finder to believe that the truth of the facts asserted is highly probable. *In re Murphy*, 312 Kan. 203, 218, 473 P.3d 886 (2020).

The respondent filed no exceptions to the panel's final hearing report. Thus, the hearing panel's final report is deemed admitted. Supreme Court Rule 228(g)(1) (2023 Kan. S. Ct. R. at 288). After a review of the entire record, we conclude the panel's findings of fact are supported by clear and convincing evidence and support the panel's conclusions of law. We therefore adopt those findings and conclusions.

As to the discipline to be imposed, both the Disciplinary Administrator and the hearing panel recommended a three-year suspension, with a stay of the suspension while the respondent serves three years' probation. But these recommendations are advisory only and do not prevent this court from imposing different discipline. *In re Biscanin*, 305 Kan. 1212, 1229, 390 P.3d 886 (2017).

To aid in determining appropriate discipline, this court generally considers the American Bar Association (ABA) Standards for Imposing Lawyer Sanctions. *In re Hodge*, 307 Kan. 170, 230-31, 407 P.3d 613 (2017). Under those Standards, a suspension is generally an appropriate sanction for a lack of diligence when "a lawyer engages in a pattern of neglect and causes injury or potential injury to a client." ABA Standard 4.42(b). Suspension is also "generally appropriate when a lawyer has been reprimanded for

the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession." ABA Standard 8.2.

Here, the respondent negligently violated his duties to T.W. and T.B. resulting in violations of KRPC 1.1, 1.3, and 1.4(b). The respondent showed a lack of diligence in his representation of both T.W. and T.B., demonstrating a pattern of neglect. And the respondent has previously been disciplined for violations of KRPC 1.1, 1.3, and 1.4. Thus, we agree that suspension is an appropriate sanction under the relevant ABA Standards.

But we disagree that a three-year suspension is appropriate in this case. We have previously imposed suspensions of this length in cases involving knowing misconduct. See, e.g., *In re Martinez*, 315 Kan. 245, 257, 506 P.3d 909 (2022) (imposing three-year suspension on attorney for knowingly violating KRPC 1.1, 1.4, 1.5, 1.15, 1.16, 7.1, and 8.4); *In re Rumsey*, 301 Kan. 438, 450, 343 P.3d 93 (2015) (imposing three-year suspension on attorney for knowingly violating KRPC 3.5, 8.1, and 8.4); *In re Cline*, 289 Kan. 834, 849, 217 P.3d 455 (2009) (imposing three-year suspension on attorney for knowingly violating KRPC 1.1, 1.2, 1.3, 1.4, 1.8, 1.16, 5.3, 8.3, and 8.4). But in cases of negligent conduct, we have imposed lesser sanctions. See, e.g., *In re Works*, 307 Kan. 26, 36-37, 404 P.3d 681 (2017) (imposing two-year suspension on attorney for negligently violating KRPC 1.2, 1.3, 1.4, 1.16, and 3.2); *In re Freed*, 294 Kan. 655, 663, 279 P.3d 118 (2012) (imposing six-month suspension on attorney for negligently violating KRPC 1.1, 1.3, 1.4, and 1.15); see also *In re Boaten*, 276 Kan. 656, 663, 78 P.3d 458 (2003) (imposing sanction of published censure on attorney for negligently violating KRPC 1.3 and 1.4).

Here, respondent's misconduct was neither intentional nor knowing. Thus, we hold that a suspension of six months is appropriate discipline in this case. However, that suspension shall be stayed pending respondent's successful participation in and completion of a three-year probation period. During this probation period, respondent shall comply with the terms and conditions of his amended proposed probation plan. Respondent shall also be subject to two additional conditions during this probation period. First, the respondent shall neither accept nor handle any criminal

cases other than municipal criminal matters, misdemeanor criminal matters, or severity level 7-9 felonies. Second, the respondent shall be required to undergo a Kansas Lawyers Assistance Program (KALAP) law practice audit within six months of the court's decision in this matter and follow all recommendations from KALAP.

CONCLUSION AND DISCIPLINE

IT IS THEREFORE ORDERED that Philip R. Sedgwick is suspended for six months from the practice of law, effective the date of this opinion, in accordance with Supreme Court Rule 225(a)(3) (2023 Kan. S. Ct. R. at 281) for violating KRPC 1.1, 1.3, and 1.4. However, respondent's suspension is stayed pending successful completion of three years of probation under the terms and conditions set forth above, including the terms of the amended proposed probation plan which are incorporated by reference.

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this opinion be published in the official Kansas Reports.