No. 22-125,777-A

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IN THE
COURT OF APPEALS OF THE
STATE OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

vs.

VICTOR JOEL CARDONA-RIVERA
Defendant-Appellant

_____

BRIEF OF APPELLANT

_____

Appeal from the District Court of Lyon County, Kansas
The Honorable W. Lee Fowler, Judge
District Court Case No. 21CR366

_____

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Oral Argument: 15 minutes

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Nature of the Case

A jury convicted Victor Cardona-Rivera of two counts of rape, and one count each of aggravated burglary, aggravated criminal sodomy, criminal threat, and aggravated battery. (R.I, 260-267). The district court sentenced him to 310 months in prison. (R.XVIII, 26). Mr. Cardona-Rivera appeals his convictions and his sentence. (R.I, 303).

Issues Presented

Issue I: **Mr. Cardona-Rivera's convictions for two counts of rape are multiplicitous, in violation of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and Section 10 of the Kansas Constitution Bill of Rights.**

Issue II: **The district court erred in overruling Mr. Cardona-Rivera's objection to the introduction of evidence of alleged other crimes after he was found not guilty of those other crimes by the jury at his first trial.**

Statement of Facts

Overview

Mr. Cardona-Rivera and Y.M. are first-generation El-Salvadorian immigrants who worked at the same stone finishing plant in Herrington, Kansas. (R.XIII, 125, 184; R.XVI, 12). Y.M. accused him of breaking into her home in Emporia wearing a mask, brandishing a knife, and threatening her and her child with the knife while he sexually assaulted her. (R.XIII, 132, 158, 166-179). When Mr. Cardona-Rivera heard of these allegations at work, he denied them and left work to voluntary talk to the police and protest his innocence. (R.XVI, 48-49). He told the police that Y.M. had invited him over to her house, the sexual encounter was consensual, and that he did not have a knife or any other weapon. (R.XVI, 51).

Mr. Cardona-Rivera was charged with two counts of rape, and one count of sodomy, burglary, battery (of both Y.M. and her daughter Y.A.), assault, criminal threat, and intimidation of a victim. (R.I, 75-76). At his first trial, he was found not guilty of the battery alleged against Y.A. The jury was unable to reach a unanimous verdict on any of the remaining counts. (R.I, 184, 200-02). At his second trial, the jury returned further not guilty verdicts on the assault and victim intimidation counts, and guilty verdicts on the remaining counts. (R.I, 270-73).

Allegations and Arrest

On Tuesday, September 7, 2021, Victor Cardona-Rivera went to work at U.S Stone Industries in Herrington, Kansas with his wife, who also worked there. (R.IX, 69, 83). When he arrived at work, his supervisor approached him and told him that a co-worker, Y.M., had accused him of raping her over the weekend. (R.IX, 84). He asked his supervisor for permission to leave work so that he could go to the police department and set things straight. (R.IX, 84). At 2:00 p.m., he left work with his wife and was on his way to the police station when he was pulled over and taken into custody by Detective Kevin Shireman, who took them to the Emporia Police Department for interrogation. (R.II, 5; R.XVI, 15).

Both Mr. Cardona-Rivera and Y.M. are from El Salvador and do not speak English fluently, so Officer Marcial Hernandez was brought in specifically to assist in the investigation and interviews of Mr. Cardona-Rivera and Y.M. because he is fluent in Spanish,. (R.XV, 81-82; R.XVI, 12). Mr. Cardona initially denied going to Y.M.'s home

or engaging in any sexual acts with her. (R.II, 6). However, he eventually admitted that he brought his son to Y.M.'s house early Saturday morning and that Y.M. and he engaged in consensual sexual relations. But, he repeatedly denied that he forced her to do anything and denied that he brought a knife with him. (R.II, 6-7).

On September 9, 2021, the State of Kansas filed a Complaint/Information alleging Mr. Cardova-Rivera committed eight offenses against Y.M. and her daughter. (R.I, 22-25). On December 3, 2021, the State filed an Amended Complaint/Information reincorporating the initial eight allegations against Mr. Cardona-Rivera and adding a ninth count – a verbatim recitation of the allegations in count two (rape). (R.I, 75-78).

First Trial – State's Evidence

At trial, Y.M. claimed she woke up to find Mr. Cardona-Rivera in her bed and sitting on her left leg. (R.VII, 189). According to Y.M., Mr. Cardona-Rivera had a knife and was threatening her and her daughter, Y.A., who slept in a crib next to Y.M. in her room. (RVII, 189, 198). She further alleged that Mr. Cardona-Rivera digitally penetrated her and forced her to perform oral sex on him. (R. VII, 194, 199; R. VIII, 9).

She testified that he broke into her house and was wearing a mask. (R.XIII, 155). She also testified that he threatened to kill her or her baby or her parents in El Salvador. (R.XIII, 157, 183). She also testified that he disguised his voice at first, but later revealed his true voice which she recognized from work. (R.XIII, 192). She claimed she was also able to identify him because he was wearing flip-flops and wore a necklace chain.

According to Y.M., these distinctive traits led her to identify Mr. Cardona-Rivera. (R.I, 191-92).

First Trial – Mr. Cardona-Rivera's Evidence

Mr. Cardona-Rivera testified in his own defense, stating that while working together on September 3, he and Y.M. made plans for him to visit her at her house the following day, Saturday, September 4. Mr. Cardona-Rivera's wife left to go to work on Saturday at about 4:30 a.m., and around 5:00 a.m., Mr. Cardona-Rivera and his eight year-old son got in his mini-van and drove to Y.M.'s home. (R.IX, 74-75). She had previously provided Mr. Cardona-Rivera her address and told him that she would be expecting him. (R.IX, 77).

When Mr. Cardona-Rivera arrived, Y.M. told him she wanted to have sex with him. Mr. Cardona-Rivera replied that he could not because he had his son with him. (R.IX, 78). Y.M. responded that he could bring his son inside and have him wait in the living room. Mr. Cardona-Rivera agreed, retrieved his son from his vehicle, returned to Y.M.'s house, left his son in the living room with his phone so he could watch cartoons, and went to find Y.M., who had already returned to her room. (R.IX, 78).

After briefly talking in her bedroom, they engaged in consensual, mutual masturbation. (R.IX, 82-83). After about thirty minutes, Mr. Cardona-Rivera ejaculated, and thereafter left with his son and returned home. (R.IX, 82-83).

Mr. Cardona-Rivera also testified about the statements he made to the police officers after he was arrested and taken to the station. (R.IX, 85). He admitted that the

statements he initially made to the officers were not truthful and that he was not honest because he thought his wife was observing the interrogation on the other side of one-way mirror inside the interrogation room. (R.IX, 104-05). He explained that he was afraid that if he admitted to engaging in sexual activity with Y.M., his wife would hear and he would be at risk of losing his wife and family. (R.IX, 105).

First Trial – Verdict

On April 21, 2022 the jury returned a verdict of not guilty on count seven – aggravated battery against Y.M.'s daughter – and was unable to reach a unanimous verdict on the remaining eight counts. (R.I, 201-02; R.X, 50-51). The district court declared a mistrial on the remaining eight counts, and set the matter for a pretrial conference on April 29, 2022. (R.I, 202).

Intervening Motions

Prior to the start of the second trial, the district court addressed two motions filed by the State. (R.XIII, 4-14). The first motion tendered by the State, sought to admit Mr. Cardona-Rivera's testimony from the first trial at his retrial. (R.I, 205-206). Mr. Cardona-Rivera's counsel objected to the motion, reasoning that: (1) an important function of the jury is to determine credibility and the outcome of that determination would be distorted by testimony read into the record ~~by~~ the State, and (2) the State's evidentiary basis for the admission of Mr. Cardona-Rivera's previous testimony – prior inconsistent statements – is an exception to the hearsay rule; not and independent basis for the whole-cloth recitation of his previous testimony. (R.XIII, 7-8). The district court

overruled his objection and ruled that Mr. Cardona-Rivera's prior trial testimony was "a prior, sworn statement of the defendant" and therefore admissible. The State was allowed to introduce the previous testimony of Mr. Cardona-Rivera through the reading of the prior trial transcript into the record. (R.XIII, 5-7).

The State's second motion sought to introduce evidence and testimony of the allegations that formed the basis of aggravated battery charge for which the previous jury acquitted Mr. Cardona-Rivera. (R.I, 214-18). Mr. Cardona-Rivera's counsel objected to the introduction of evidence of those allegations, because: (1) the jury's acquittal foreclosed the admission of this evidence under any theory that references a prior crime because the jury had determined that he did not commit a crime; (2) the limiting instruction proposed by the State did not go far enough and should include language about him being acquitted of those charges; and (3) that the conduct does not establish intent, as the State asserted. The district court overruled the objections and agreed with the State that the prior conduct was *res gestae* evidence and granted the State's motion. (R.XIII, 10-13).

Second Trial

At the retrial, the State recalled many of the witnesses it presented in the first trial. However, this time during the its case in chief, the State played the recorded interview of Mr. Cardona-Rivera for the jury and Officer Hernandez testified to the statements made by Mr. Cardona-Rivera (presumably because the majority of the interrogation of Mr. Cardona-Rivera by Officer Hernandez captured in the video was in Spanish). (R.XV, 80-

87; R.XVI, 3-28). At the conclusion of Officer Hernandez's testimony, the State read the entirety of Mr. Cardona-Rivera's prior trial testimony into the record. (R.XVI, 29-56).

Second Trial – Verdict and Sentencing

Also different this time, the jury reached a verdict; finding Mr. Cardona-Rivera guilty of counts one (aggravated burglary), two (rape), three (aggravated criminal sodomy), five (criminal threat), six (aggravated battery against Y.M.), and nine (rape). Mr. Cardona-Rivera was acquitted of counts four (aggravated assault) and eight (aggravated intimidation of a victim). (R.XVII, 42-43).

The court subsequently sentenced Mr. Cardona-Rivera 155 months each on counts two (rape), three (sodomy), and nine (rape). (R.I, 284-296). The court further sentenced Mr. Cardona-Rivera to 41 months' imprisonment on count one, six months' imprisonment on count five, and 12 months' imprisonment on count six. All sentences were ordered to be served concurrently – except for count two, which was ordered to run consecutive to all other counts – for a total of 310 months. (R.I, 284-300). Mr. Cardona-Rivera timely filed his appeal. (R.I, 303).

Arguments and Authorities

Issue I: Mr. Cardona-Rivera's convictions for two counts of rape are multiplicitous, in violation of the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution and Section 10 of the Kansas Constitution Bill of Rights.

Introduction

Per the Complaint/Information in effect at the time of his trials, the State charged Mr. Cardona-Rivera in counts two and nine with rape. The charging language – setting

forth the time, place, and manner of the alleged rape – was identical in both counts. According to the State, Mr. Cardona-Rivera digitally penetrated Y.M. both before and after forcing her to perform oral sex on him. The State split this single course of conduct into three counts: two counts of rape and one count of sodomy. The verdicts for counts two and nine – the rape allegations – resulted in multiple convictions for the same offense, in violation of the Double Jeopardy Clause of the U.S. and Kansas Constitutions.

Preservation and Jurisdiction

Although Mr. Cardona-Rivera did not make this argument below, he may raise it for the first time on appeal. As a general rule, appellate courts will not consider issues, even constitutional ones, raised for the first time on appeal. *State v. Godfrey*, 301 Kan. 1041, 1043, 350 P.3d 1068 (2015). However, there are three well-recognized exceptions: (1) the newly asserted theory involves only a question of law arising on admitted facts and is finally determinative of the case; (2) consideration of the theory is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court was right for the wrong reason. *State v. Phillips*, 299 Kan. 479, 493, 325 P.3d 1095 (2014).

The first and second exceptions apply in this case. For the first, the facts determinative of the issue are settled in the transcripts; no unknown facts are needed. Plus, the outcome of this issue depends only on this Court's view of the law as applied to those settled facts.

For the second, at stake here is all defendants' fundamental right to not suffer multiple punishments for a single offense, which is prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10 of the Kansas Constitution Bill of Rights. U.S. Const. amend. V; Kan. Const. Bill of Rights, § 10; *State v. King*, 297 Kan. 955, 970, 305, P.3d 641 (2013).

Additionally, our Supreme Court has repeatedly held that an appellate court may consider a multiplicity issue raised for the first time on appeal in order to serve the ends of justice or to prevent a denial of fundamental rights. *State v. Weber*, 297 Kan. 805, 809, 304 P.3d 1262 (2013). For these reasons, this Court can resolve this issue and it is properly before this Court.

Standard of Review

"Questions involving multiplicity are questions of law subject to unlimited appellate review." *State v. Davis*, 306 Kan.400, 419, 394 P.3d 817 (2017).

Analysis

Multiplicity is the charging of a single offense in multiple counts of an information. *State v. Pribble*, 304 Kan. 824, 826, 375 P.3d 966 (2016). The Double Jeopardy Clause of the United States Constitution and the Kansas Constitution Bill of Rights prohibit the State from securing multiple convictions on multiplicitous charges. *State v. Sprung*, 294 Kan. 300, 306, 277 P.3d 1100 (2012). This is codified in K.S.A. 21-5109(e) ("A defendant may not be convicted of identical offenses based upon the same conduct"). If a person is convicted of multiplicitous charges, this Court must affirm one

conviction, and reverse the rest. *Sprung*, 294 Kan. at 311. To prevail on a multiplicity claim, Mr. Cardona-Rivera must demonstrate: (1) that his convictions arose from the same conduct; and (2) that the conduct constituted one statutory offense. *State v. Schoonover*, 281 Kan. 453, 496-97, 133 P.3d 48 (2006).

As for the first prong, in determining whether the conduct is unitary, this Court considers whether: "(1) the acts occurred at or near the same time, (2) the acts occurred at the same location, (3) a causal relationship existed between the acts, in particular whether an intervening event separated the acts, and (4) [whether] a fresh impulse motivated some of the conduct." *Schoonover*, 281 Kan. at 497. If unitary conduct is found, then this Court moves to the second prong and looks to the relevant statute to see if, by definition, there is one offense or more. *Sprung*, 294 Kan. at 308.

The relevant statute in this case is K.S.A. 21-5503(a)(1)(A) (rape). Mr. Cardona-Rivera's two convictions arose from unitary conduct and the statute does not allow for multiple units of prosecution. Therefore, the two convictions for rape are multiplicitous.

A. The State's evidence supports that this was unitary conduct

1. The acts occurred at or near the same time

Considering the first factor enunciated in *Schoonover*, 281 Kan. at 497 – that the acts occurred at or near the same time – this Court must conclude that the State's evidence supports a finding of unitary conduct. On cross-examination, defense counsel specifically asked Y.M. how long her interaction with Mr. Cardona-Rivera lasted. She responded, "I think it was for about one hour or something like that." (R.XIV, 25). One

hour has been considered at or near the same time in multiple cases before this Court. *See Amaro v. State*, No. 121,781, 2020 WL 68115591 at *7 (Kan. App. 2020) (unpublished) (one-and-a-half to two hour time period considered unitary conduct); *State v. Dorsey*, 224 Kan. 152, 153, 578 P.2d 261 (1978) (multiple counts of rape and sodomy committed over the course of one hour considered unitary conduct).

But, the statements by the prosecutor, and the testimony of their witnesses, demonstrate that Y.M.'s statement likely exaggerated the time span. For example, the State contended in their opening statement "the man put his fingers inside of her vagina and continued to do this – penetrating her repeatedly for the next twenty minutes." (R.XIII, 124).

This can also be seen via the State's theory tying the event to shortly before or after 6:00 a.m. Earlier in their opening statement, and again in their closing argument, the State claimed Y.M. awoke to Mr. Cardona-Rivera sitting on her leg at about 6:00 a.m. (R.XIII, 123; R.XVII, 15).

Based on the testimony of Y.M., Mr. Cardona-Rivera allegedly hung around for a while after sexually assaulting her and then she waited an additional few minutes after he finally left before contacting her boyfriend. According to the testimony of Y.M., instead of leaving immediately after the alleged sexual assault, she claimed that Mr. Cardona-Rivera went over to a desk and began looking through her papers and documents. She continued, "He didn't go and he kept standing there. I ask [sic] him several times to leave. And after several times, I ask him, he finally got out of the bedroom. He got out

of the bedroom, but not out of the trailer." (R.XIII, 185-86). According to Y.M., Mr. Cardona-Rivera eventually left and she "waited a little bit before [she] went out [of her room]." (R.XIII, 187.) She claimed that, approximately three minutes after Mr. Cardona-Rivera left her apartment, she called her boyfriend, Antonio Alvarado, who had just gotten to work that morning for his shift at 6:00 a.m. (R.XIII, 189; R. XIV, 93).

Mr. Alvarado also tied the event to 6:00 a.m. because that is when his shift began at work (R.XIV, 90). He testified that he did not remember the time Y.M. called him, but it was early that morning, and he had not been at work very long. (R.XIV, 94). He also testified that he was in a hurry that morning, the van with his carpool was waiting on him when he left the house, and that he was running around his house so fast that morning that he could not remember whether he left any lights on when he left (indicating that he did not arrive early for work). (R.XIV, 92-93).

During the four-minute phone call, Y.M. told him that a man had broken into the house and raped her. (R.XIV, 98-101). After the call, Mr. Alvarado called Y.M.'s uncle, Jesús Romero, who lived in the same trailer park as he and Y.M. (R.XIV, 107).

Mr. Romero testified that he received the phone call from Mr. Alvarado at 6:24 a.m., and that, after the phone call, Mr. Romero's wife called the police. (R.XIV, 107, 112). Officer McFaul also testified that he was dispatched to Y.M.'s apartment at "around 6:30 or so." (R.XIV, 136).

Based the testimony of the State's witnesses above, the evidence likely established that the sexual encounter lasted, at most, something less than half an hour (approximately

6:00 a.m. to 6:15 a.m.) The facts of this case are remarkably similar to the facts held as unitary conduct in *Dorsey*, 224 Kan. at 156. In *Dorsey*, "[t]he only difference in the three allegations of rape… was a lapse of a few minutes between each alleged offense." 224 Kan. at 156. Moreover, like this case, *Dorsey* also involved a case where the defendant was charged with oral sodomy occurring between the (allegedly separate) acts of rape. *Dorsey*, 224 Kan. at 153, 156. Because the *Dorsey* Court held that the rape allegations constituted unitary conduct, this Court should do the same.

2. The acts occurred in the same location

Moving to the second *Schoonover* factor – the acts occurred in the same location – not only did the only alleged act take place in Y.M.'s bedroom, but both allegations of digital penetration occurred while Y.M. was in the same position on her bed. *Schoonover*, 281 Kan. at 497. Neither Y.M. nor Mr. Cardona-Rivera is alleged to have ever left the bedroom during the sexual encounter.

The recent cases of *State v. Rodrigues-Manjivar*, No. 120,039, 2019 WL 5089751 at *4 (Kan. App. 2019) (unpublished) and *State v. Snyder*, No. 119,452, 2020 WL 6372259 at *14 (Kan. App. 2020) (unpublished), are illustrative of the interplay between a change of location, or lack thereof, and whether conduct is unitary. In *Rodrigues-Manjivar*, 2019 WL 5089751 at *4, the allegations of criminal conduct were held to have occurred in the same location, and therefore unitary conduct, because even though the acts occurred in different rooms, the rooms were all in the same apartment. Similarly, in *Snyder*, 2020 WL 6372259 at *14, where an allegation of sexual assault that occurred in

the bedroom was followed by a separate allegation of the same sexual assault occurring in the bathroom only a few feet away, the court reiterated its holding that two acts occurring in short order in the same home supports a finding that those acts occurred at the same location for purposes of determining whether the conduct was unitary. In this case, there was no movement of any person between, or in, or out of the room during the sexual assault and therefore must be considered to have occurred in the same location.

3. Whether an intervening event separated the acts

The third factor Appellate Courts consider when analyzing whether the convictions arose from the same conduct –whether there was an intervening event that separated the acts – weighs in favor of a finding of unitary conduct. Y.M.'s testimony established that Mr. Cardona-Rivera committed the following acts in the following order: (1) he digitally penetrated her vagina, (2) he forced her to perform oral sex on him, (3) and he digitally penetrated her again.

Kansas courts have held that acts are discrete when they are separated by some break that provides the defendant with an opportunity to reconsider his or her crime. *Compare State v. Sellers*, 292 Kan. 346, 359-60, 253 P.3d 20 (2011), *overruled on other grounds in State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016) (defendant left room for one minute to check on barking dog, held to be intervening event); *with State v. Henning*, No. 115,832, 2017 WL 3837224 at *8-9 (starting and stopping of video camera when acts occurred in same location during relatively short period of time not found to be intervening event). Incidents are factually separate when an intervening event interrupts

the causal connection among the various discrete acts. *State v. Weber*, 297 Kan. 805, 810, 304 P.3d 1262 (2013).

Here, as in *Henning*, there is not any new or fresh impulse motivating additional activity, but rather the actions constitute a continuous, unitary course of conduct. 2017 WL 3837224 at *9. There was no "interruption of causation" in the allegations as testified to by Y.M.: Mr. Cardona was engaged in one continuous act to gratify his sexual desire. In *State v. Aguilera*, No. 103,575, 2011 WL 2555423 at *7 (Kan. App. 2011) (unpublished opinion), this Court was presented with analogous facts: two convictions for rape sequentially separated by an act of sodomy. This court did not view the commission of sodomy as an intervening event and found that the two counts of rape arose from the same unitary conduct. *Aguilera*, 2011 WL 2555423 at *7.

In this case, there was no break in the sexual activity that provided Mr. Cardona-Rivera an opportunity to reconsider his crime. All of the activity alleged by Y.M. was one continuous sexual encounter. In fact, the following exchange between Y.M. and the State occurred when she was describing the encounter:

> A: I was moving a little bit, but I was crying a lot and I was beg – I was asking him to leave me alone.
>
> Q: Okay. And did he stop?
>
> A: Never.

(R.XIII, 171-72).

After the initial digital penetration, Y.M. testified that Mr. Cardona-Rivera told her to give him a blowjob. She refused so he supposedly pulled her from the bed onto the ground. (R.XIII, 173). She placed his penis into her mouth, and, as a result, he ejaculated on the floor near the side of the bed. (R.XIII, 176-77). She then testified that "next" thing he did was place her in the same position on the bed as previously and resumed placing his fingers inside her vagina. (R.XIII, 177).

From the "initial" penetration to the conclusion of the "second" penetration, Mr. Cardona-Rivera never stopped. There was no testimony that one assault concluded before another began because there was no separate or distinct causation. These facts, based on the testimony elicited by the State, establish that there was no intervening event.

4. Whether a fresh impulse motivated some of the conduct

Similar to the above discussion regarding an intervening event, the last inquiry is whether a fresh impulse motivated to the conduct. The fresh impulse factor comes into play when at least some time passes between the first and second act. *State v. Hood*, 44 Kan.App.2d 145, 234 P.3d 853 (2010). No time passed between the three alleged sexual acts – they immediately followed one after the other. Even if a few minutes passed in between any of the sexual acts – which Y.M.'s testimony does not support – that has been held to support a single, continuous sexual assault. *See Dorsey*, 224 Kan. at 156 (three rape convictions held as multiplicitous, despite a few minutes separating the specific sexual acts).

As explained above, the circumstances that existed at the initiation of the sexual contact were the same as when the sexual contact concluded. The persons inside the bedroom never changed. None of them left – even for a brief period. *Compare State v. Sellers*, 292 Kan. 346, 359-60, 253 P.3d 20 (2011) (defendant leaving the room to check on barking dog for 30-90 seconds found to be intervening event). The position of Y.M. was the exact same for the both instances of digital penetration. No significant passage of time occurred between any of the acts constituting the single encounter. Because the circumstances remained unchanged throughout the encounter, this Court must conclude that there was no fresh impulse motivating any of the conduct.

5. Summary

The State's evidence, primarily the testimony of Y.M., establishes that the three sex offenses alleged against Mr. Cardona-Rivera were the result of one, singular sexual encounter (*i.e.* unitary conduct). Each act occurred right after one another, in the same bedroom, in half an hour or less. Neither Mr. Cardona-Rivera nor Y.M. left the room at any point, or even separated themselves by more than a few inches. The circumstances of the sexual assault were the same from beginning to end with no intervening event or fresh impulse. As a result, this Court must conclude that Mr. Cardona-Rivera's convictions for rape arose out of the same conduct.

B. By statute, this conduct was a single unit of prosecution

The second step of the *Schoonover* analysis is to look at the relevant statute to determine whether the conduct is one offense or multiple offenses. And, because Mr.

Cardona-Rivera's two convictions for rape were based on the same statute, the "unit of prosecution" test applies. The Court must interpret the statute to divine the allowable unit of prosecution. *Sprung*, 294 Kan. at 308. The key component of this analysis is "the scope of conduct proscribed by the statute." 294 Kan. at 308. Only one conviction may result from each allowable unit of prosecution. *Schoonover*, 281 Kan. at 497-98.

The statute at issue here, K.S.A. 21-5503(a), prohibits:

> (1) Knowingly engaging in sexual intercourse with a victim who does not consent to the sexual intercourse
> (A) When the victim is overcome by force or fear.

K.S.A. 21-5501(a) defines sexual intercourse as "any penetration of the female sex organ by a finger, the male sex organ, or any object."

In analyzing a statute to discern the unit of prosecution, this Court should examine the plain language, punctuation, organization, and structure of the statute. *State v. Stafford*, 296 Kan. 25, 52, 290 P.3d 562 (2012). However, if the plain language of the statute is ambiguous or unclear, Courts may resort to legislative history in an attempt to divine the legislative intent of the statute. *State v. Scheetz*, – Kan.App.2d – , 524 P.3d 424, 439 (2023).

This Court has attempted to decipher the legislative intent on the unit of prosecution for rape before, examining the statutory structure and legislative history, but found neither to be of any assistance in arriving at an answer. *Aguilera*, 2011 WL 2555423 at *10. In *Aguilera*, this Court examined a factual scenario similar to the one presented here in the context of a multiplicity challenge. After determining that the

conduct was unitary, the Court attempted to discern the legislative intent regarding the unit of prosecution for rape. *Aguilera*, 2011 WL 2555423 at *8-10. The Court concluded that the rape statute is unclear on the allowable unit of prosecution, and unless the legislature "clearly and without ambiguity" allows for multiple convictions for unitary conduct, the rule of lenity must apply and only one conviction is allowed. As a result, rape is punishable as a course of conduct as opposed to separate individual acts. *Aguilera*, 2011 WL 2555423 at *10-11 ("multiple acts of penetration occurring in a continuing unbroken sequence and in the same location do not give rise to multiple counts of rape.").

Because the statute criminalizing rape does not "clearly and without ambiguity" authorize multiple convictions for unitary conduct, the rule of lenity must apply and bar the multiple convictions of Mr. Cardona-Rivera.

Summary

Applying the analysis of *Aguilera* to this case requires the same outcome. Because the alleged conduct of Mr. Cardona-Rivera, based solely on the testimony of the State's witnesses, was one, unbroken sequence, and therefore unitary conduct. Because the statute prohibiting rape does not unambiguously authorize multiple units of prosecution; the rule of lenity must apply and bar multiple convictions of Mr. Cardona-Rivera for that unitary conduct. The Court should find the convictions for counts two and nine to be multiplicitous and vacate one of the convictions.

Issue II: The district court erred in overruling Mr. Cardona-Rivera's objection to the introduction of evidence of alleged other crimes after he was found not guilty of those other crimes by the jury at his first trial.

Introduction

For multiple reasons, the district court erred in admitting evidence of the prior charge of battery against Y.M.'s daughter – conduct for which Mr. Cardona-Rivera was acquitted. First, the district court's admission of the evidence as *res gestae* fails because *res gestae* is not an independent basis for the admissibility of evidence. Nor was the evidence admissible under the State's alternative theory under K.S.A. 60-455 because it was not evidence of a ***prior*** bad act. Even if K.S.A. 60-455 were found to apply, (1) the evidence of Mr. Cardona-Rivera's prior acquitted conduct does not establish intent; and (2) the evidence is not relevant. Furthermore, the doctrine of *collateral estoppel* barred the admission of evidence of crimes for which he was acquitted. Finally, the district court erred by failing to give any limiting instruction, to prevent the jury's improper consideration of the evidence. These errors, individually and cumulatively, led to the erroneous admission of evidence. Its admission was not harmless and, as a result, Mr. Cardona-Rivera's case should be remanded to the district court for trial.

Preservation and Jurisdiction

In order to preserve an evidentiary issue for review on appeal, K.S.A. 60-404 requires that an objection be lodged at trial when the complained-of evidence is admitted. *State v. King*, 288 Kan. 333, 341-42, 204 P.3d 585 (2009).

Counsel for Mr. Cardona-Rivera objected to the introduction of evidence of the battery against Y.A. at the hearing on the State's motion. (R.XIII, 10-11). Additionally, during the testimony of Y.M., and at the first mention of her daughter, counsel for Mr. Cardona-Rivera renewed his objection, and the district court overruled his objection. (R.XIII, 160). Counsel requested that the objection be recognized as a continuing objection, and that request was granted by the court. (R.XIII, 160). Therefore, the evidentiary issue is properly preserved for review.

Mr. Cardona-Rivera's counsel also addressed the limiting instruction issue during the hearing on the State's motion: "[T]he limiting instruction doesn't go near far enough to say it's limited to intent. I think the limiting instruction should include the fact that this has either been acquitted or dismissed." (R.XIII, 10-11). He was later granted a continuing objection when the evidence necessitating the instruction was introduced. (R.XIII, 160). Because the State proposed the limiting instruction, and because Mr. Cardona-Rivera's counsel objected to the instruction and made reference to his proposed revisions/additions, and because he renewed his objection at trial, and because that objection was granted as continuing, that satisfies the requirements of K.S.A. 22-3414(3) and is properly preserved.

Standard of Review

The thorough analysis of this issue requires the Court to review distinct sub-issues. Each is subject to its own standard of review.

A. Res Gestae

Whether evidence is admissible because it forms the *res gestae* of the crime charged is a question of law. "When the adequacy of the ***legal*** basis of a district judge's decision on admission or exclusion of evidence is questioned, we review the decision *de novo*." *State v. Gunby*, 282 Kan. 39, 47-48, 144 P.3d 647 (2006) (emphasis in original).

B. Relevance

A review of a district court's decision to admit evidence occurs in two steps; the first step is to determine whether the evidence is relevant. *State v. Robinson*, 306 Kan. 431, 450, 394 P.3d 868 (2017). K.S.A. 60-401(b) defines relevant evidence as evidence that is probative and material. "On appeal, the question of whether evidence is probative is judged under an abuse of discretion standard; materiality is judged under a *de novo* standard." *Robinson*, 306 Kan. at 435. Next, "[t]he court must then also determine whether the probative value of the evidence outweighs the potential for producing undue prejudice… Our standard for reviewing this determination also is abuse of discretion." *State v. Wells*, 289 Kan. 1219, 1227, 221 P.3d 561 (1009) (*citing State v. Reid*, 286 Kan. 494, 512, 186 P.3d 713 (2008)). "A district court abuses its discretion if its decision is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact." *State v. Brune*, 307 Kan. 370, 372, 409 P.3d 862 (2018).

C. Collateral estoppel

The Court must also examine "which rules of evidence or other legal principles apply. On appeal this conclusion is reviewed *de novo*." *King*, 299 Kan. at 383. "[T]he

doctrine of *collateral estoppel* prevents a second litigation of the same issues between the same parties…" *In re City of Witchita*, 277 Kan. 487, 506, 86 P.3d 513 (2004). "Whether the doctrine of issue preclusion… applies in a certain situation is a question of law. An appellate court may analyze the question using unlimited *de novo* review." *Stanfield v. Osborne Industries, Inc.*, 263 Kan. 388, 396, 949 P.2d 602 (1997).

D. Failure to give limiting instruction

Failure to give a limiting instruction when evidence of other crimes or bad acts is introduced is error. *Gunby*, 282 Kan. at 57. Because this error is preserved, this Court must unless the prosecution proves the error is harmless. *Gunby*, 282 Kan. at 57. Because the district court failed to give the requested instruction this error implicates Mr. Cardona-Rivera's right under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. U.S. Const. amend. V. "Errors implicating the defendant's rights under the United States Constitution… requires a court holding an error harmless to conclude there is no 'reasonable possibility' the error contributed to the verdict." *State v. Berkstresser*, – Kan. –, 520 P.3d 718, 725 (2022).

Alternatively, if the Court concludes the instructional issue is not preserved, then the Court will reverse if it finds clear error – which is "in reality a heightened standard of harmlessness." *Berkstresser*, 520 P.3d at 725 (*quoting State v. Carter*, 305 Kan. 139, 159, 380 P.3d 189 (2016)). "[T]he clear error standard bars a conviction's reversal unless the reviewing court determines the jury 'would have reached a different verdict.'"

Berkstresser, 520 P.3d at 725 (*quoting State v. Valdez*, 316 Kan. 1, 6, 512 P.3d 1125 (2022)).

Additional Relevant Facts

At the conclusion of Mr. Cardona-Rivera's first trial, the jury found him not guilty of count seven – aggravated battery against Y.A. (Y.M.'s daughter). (R.I, 184). Prior to Mr. Cardona-Rivera's second trial, the State filed a motion to allow the introduction of evidence that Mr. Cardona-Rivera poked Y.A. with a knife – the conduct of which he had previously been acquitted. (R.I, 214). The State argued that the evidence was admissible because "it is so intimately intertwined with the facts of the case to make it intrinsic to the crimes charged." (R.I, 215). Alternatively, the State contended the evidence was admissible pursuant to K.S.A. 60-455 to establish evidence of Mr. Cardona-Rivera's intent. (R.I, 216).

On the morning of Mr. Cardona-Rivera's second trial, counsel for Mr. Cardona-Rivera objected to the admission of any testimony about a battery of Y.A. and stated, "I don't think that it should be out there that this is a fact that can be considered. It's already been decided. It's been – he's been found not guilty of that." (R.XIII, 11). Trial counsel additionally argued that the State's proposed limiting instruction was insufficient and that it "should include the fact that this has either been acquitted or dismissed." (R.XIII, 10-11). Trial counsel also objected to the State's alternative theory of admission per K.S.A. 60-455 (*i.e.* admissible to show intent). (R.XIII, 11).

The court granted the State's motion and stated, "it's part of the general circumstances of the entire crime allegedly occurred, you know, at the same time." (R.XIII, 11-12). The State sought clarification that Mr. Cardona-Rivera would not be able to establish that he was found not guilty of that crime. (R.XIII, 12). The court ruled that no one could mention the fact that there had been a prior trial and that the results of the prior trial were not relevant at his retrial. (R.XIII, 12). The court did not mention the disputed limiting instruction, and did not include it as an instruction when the case was submitted to the jury. (R.I, 232-54).

Analysis

A. Res gestae

1. Generally

The term *res gestae* refers to statements or actions made at or around the time of the crime for which a defendant is on trial. They are incidental and intrinsic to the main prosecution. *State v. Clark*, 261 Kan. 460, 470-71, 931 P.2d 664 (1997). "[C]rimes or civil wrongs committed as part of the events surrounding the crimes for which [the defendant is] on trial," are considered *res gestae* of the crime(s) for which a defendant is later prosecuted. *King*, 297 Kan. at 964.

2. The State and the district court characterized the evidence of acquitted conduct as *res gestae*

The State argued in its motion to admit evidence of other crime that: (1) "poking Y.A. with a knife… is intrinsic to the crimes charged," (2) "evidence of other crimes may be admissible… when such evidence is that of the acts done or declarations made before,

during, or after the happening of the principal occurrence where those acts are so closely convicted to the principal occurrence as to become in reality part of it," (3) "poking Y.A. with a knife was one of numerous actions he took during the attack on Y.M.," and (4) "pok[ing] Y.A. with a knife during the attack on Y.M. is part of the crimes charged and should be admissible as it is so intimately intertwined with the facts of the case to make it intrinsic to the crimes charged." (R.I, 214-15). At the hearing on the motion before trial, the State reiterated their argument that "[w]e believe that that evidence is intrinsic, in and of itself, of the crime itself."

The court ruled: "I'm going to allow the discussion or presentation of evidence relating [to the acquitted battery of Y.A.]… it's part of the general circumstances of the entire crime allegedly occurred, you know, at the same time." (R.XIII, 11-12). While neither the State nor the judge managed to utter the phrase "*res gestae*," their characterization of the evidence as "intrinsic" and "intimately intertwined" to the principal occurrence and as "part of the general circumstances of the entire crime" makes clear that the judge and the prosecutor viewed the acquitted conduct as *res gestae* evidence.

3. *State v. Gunby* abolished *res gestae* as an independent basis for the admission of evidence

Nearly seventeen years ago, in *Gunby*, 282 Kan. at 59-63, our Supreme Court held that *res gestae* evidence is not its own independent category of evidence that deserves special treatment or exception – it should be subject to the same requirements for admissibility as all other pieces of evidence. *Gunby*, 282 Kan. at 63. Rather, questions

of relevancy and whether the evidence is subject to any procedural or exclusionary rules must be analyzed before admitting it, just like any piece of evidence. The Court noted, "***[t]he concept of res gestae is dead*** as an independent basis for admissibility of evidence in Kansas." *Gunby*, 282 Kan. at 63 (emphasis added).

In this case, the district court adopted the State's argument that the evidence of the acquitted conduct was admissible simply because it was part of the *res gestae* of the alleged burglary and sexual assault – not because it determined the *res gestae* evidence was relevant and not subject to any exclusionary rules. Because *res gestae* is no longer an independent basis for admission, the district court's admission of the evidence over Mr. Cardona-Rivera's objection was error.

B. K.S.A. 60-455

1. K.S.A. 60-455 does not apply to the admission of *res gestae* evidence

K.S.A. 60-455(a) states "[E]vidence that a person committed a crime or civil wrong on ***a specified occasion***, is inadmissible ... as the basis for an inference that the person committed another crime or civil wrong ***on another specified occasion.***" (emphasis added). The alleged battery of Y.A. did not occur "on another specified occasion" different than the other alleged offenses for which Mr. Cardona-Rivera was standing trial. It allegedly occurred at the same time as the alleged burglary and sexual assault of Y.M. It was *res gestae* evidence that, as the State argued, was "intimately intertwined" with the principal offense.

"K.S.A. 60-455 does not apply if the evidence relates to crimes or civil wrongs committed as part of the events surrounding the crimes for which [the defendant is] on trial – that is, the *res gestae* of the crime." *King*, 297 Kan. at 964 (*citing State v. Gunby*, 282 Kan. 39, 63, 144 P.3d 647 [2006]). As a result, any admission of evidence of the acquitted conduct under K.S.A. 60-455, or any analysis conducted pursuant to the statute, is in error.

2. The evidence of acquitted conduct was not relevant to the issue of intent

In its written motion, the State contended the evidence of the acquitted conduct was alternatively admissible to prove intent under K.S.A. 60-455(b). While not conceding K.S.A. 60-455 is applicable to the situation before the Court, even if this Court determines the evidence deserves analysis under the statute, intent would be an improper vehicle for admission because intent was not in issue.

"Intent," in this context, is used in the broader sense of the overall guilty mind required for proof of criminal behavior – rather than the particular sense of "general" or "specific" intent crimes. *State v. Prine*, 287 Kan. 713, 726, 200 P.3d 1 (2009). And, moreover, "[w]here criminal intent is obviously proved by the mere commission of an act, the introduction of other-crimes evidence has no real probative value to prove intent and it is error to admit it." PIK Crim. 4th 51.030 (Comment, II(C)(3)), *citing State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

In *Prine*, the defendant was charged with multiple sex offenses. The Court determined that evidence of prior sex offenses was not admissible to prove intent,

because "[i]t was simply a given that, if the sexual abuse of [the victim] occurred as described by her, it was motivated by criminal intent…" *Prine*, 287 Kan. at 727. When the criminal behavior alleged is egregious, intent is not in issue because no adult would engage in that behavior if they did not possess the *mens rea* required by the statue. *Prine*, 287 Kan. at 727.

Here, if the sexual assault occurred as Y.M. described it, it could be characterized as egregious. But, precisely because of that characterization, intent is not at issue in the case it would be in error to admit the evidence under K.S.A. 60-455(b).

C. Relevancy

K.S.A. 60-401(b) defines "relevant evidence" as "evidence having any tendency to prove any material fact." Relevance has two components. First, relevant evidence must be probative – having a material or logical connection between the facts and the conclusion it is intended to establish. *Reid*, 286 Kan. at 502-03. Secondly, even if evidence is both probative and material, the trial court must still determine whether the probative value of the evidence outweighs its potential for producing undue prejudice. *State v. Wilson*, 295 Kan. 605, 612, 289 P.3d 1082 (2012)

1. Evidence was not probative of a fact in issue

Probative evidence is evidence that furnishes, establishes, or contributes toward proof. *State v. Brazzle*, 311 Kan. 754, 762, 466 P.3d 1195 (2020). The State's motion to admit evidence of other crime asserts that the evidence of the crime Mr. Cardona-Rivera was acquitted of (*i.e.* the battery of Y.A.), is relevant because it establishes elements of

the crimes for which he is currently on trial ("[t]he defendant poking Y.M.'s daughter with a knife is one action that shows Y.M. was overcome by force or fear," and "[t]he fact that defendant poked Y.A. with a knife is an expressed or implied threat of violence against Y.M.'s daughter"). (R.I, 215). But, it is not a "***fact***" that Mr. Cardona-Rivera poked Y.A. with a knife. More accurately, a jury determined that it was not a ***fact***, or at least not as definite as the State seems to assert in its motion. The State is baking in the occurrence of the crime in their justification while conveniently omitting that he was found not guilty of the crime.

The State cannot argue the evidence of the battery against Y.A. is relevant to establish the elements of other charged offenses because the State failed to prove that the battery occurred at all. And, if there is not proof beyond a reasonable doubt of the the battery of Y.A., the evidence is likewise insufficient establish as an element of a different crime (*i.e.* rape). Also problematic is the district court's ruling, "as I view the evidence from the State's viewpoint, [this evidence relates to an element of the crime]… I think its relevant." In adopting the State's view, the district judge is ignoring the most important viewpoint – the viewpoint of the jury that determined Mr. Cardona-Rivera did not commit that crime.

2. The evidence was more prejudicial than probative

The introduction of the prior bad acts evidence was more prejudicial than probative of a material fact and therefore should have been excluded. In *State v. Davis*,

213 Kan. 54, 515 P.2d 802 (1973), the Kansas Supreme Court recognized the types of prejudice associated with admitting prior bad acts evidence:

> "First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed."

Davis, 213 Kan. at 58. These concerns of prejudice should carry extra weight when the defendant has been acquitted of the prior crime the State is trying to introduce into evidence. Mr. Cardona-Rivera suffered even more prejudice, and particularly so, given the district court's refusal to allow the second jury to even know about the acquittal.

In *State v. Irons*, 230 Kan. 138, 144, 630 P.2d 1116 (1981), the court held that an acquittal causes a prior allegation to lose its probative force:

> "When a prior similar offense is offered as evidence of a particular issue of material fact and the defendant was previously tried and acquitted of the offense… Then such evidence should not be admitted."

Giving full weight and credit to the prior jury's verdict, the evidence from the prior trial had no probative force. The great prejudicial effect outweighed any possible probative force. Therefore, it was error to admit it.

D. Collateral estoppel

Inherent in the double jeopardy clause of the Fifth Amendment is the prohibition against compelling a person to defend themselves a second time on charges for which

they have already been acquitted. *State v. Roberts*, 293 Kan. 29, 34, 259 P.3d 691 (2011). In *State v. Irons*, the defendant was tried and acquitted of a robbery, and his defense was based on alibi. 230 Kan. at 139. Later he was tried for another robbery, where the issue was, again, identity. However, the evidence concerning the first robbery was admitted in the second case for proof of plan and identity. *Irons*, 230 Kan. at 139.

The Court reversed, holding *collateral estoppel* precluded admission of the underlying evidence of the prior acquittal:

> "*Collateral estoppel* protects him from having to retry the prior offense and defend a second time. Acquittal by the jury in the prior trial had to be based on a finding that he did not commit the prior offense. In the words of *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), no rational jury could have grounded its verdict upon an issue other than that which defendant now seeks to foreclose from consideration."

Irons, 230 Kan. at 144.

In the case at bar, the acquittal of the aggravated battery allegation established that Mr. Cardona-Rivera did not poke Y.A. with a knife. The State presented the exact same evidence and facts to the jury in the retrial, forcing Mr. Cardona-Rivera to defend on the same grounds he did previously, arguing that he did not hurt anyone or do anything without permission. So, this is a constitutional violation of double jeopardy under *Ashe*, as explained in the *Irons* case above.

In Mr. Cardona-Rivera's case, the same issue was litigated twice. Under *Irons*, the prosecution should have been prevented from introducing the issue. A jury's verdict is not a mere advisory opinion. Certainly against a defendant it is routinely accorded

conclusive weight, for example, in calculating prior criminal history or in a prosecution for failing to register after a conviction. As stated by a prior Chief Justice of our Supreme Court:

> "The presumption of innocence continues until the defendant is proven guilty. In the instant case, the defendant is presumably innocent of the charges asserted by [the State] in the earlier case[]. If the presumption that the defendant is innocent of the prior charges is to have any validity, the defendant must be entitled to its benefits in the present case. This defendant should not be required to again defend against the charge… when he has been acquitted of that alleged offense."

State v. Searles, 246 Kan. 567, 587–88, 793 P.2d 724, 737 (1990) (Holmes, J., dissenting).

E. Failure to give limiting instruction

While evidence of acquitted conduct is not automatically inadmissible, the acquittal does bear upon the weight accorded such evidence. *State v. Bly*, 215 Kan. 168, 177, 523 P.2d 397 (1974). However, in this case, because there was no instruction given to the jury advising them that Mr. Cardona-Rivera had been acquitted of the alleged battery, they were not allowed to alter the weight accorded to such testimony. Additionally, per the State's request, trial counsel was specifically forbidden by the district court from mentioning that he was acquitted of the battery of Y.A. (R.XIII, 12).

When the district court admits evidence of other crimes or bad acts, the trial judge is required to give a limiting instruction informing the jury of the specific purpose for admission. *Gunby*, 282 Kan. at 48. "These safeguards are designed to eliminate the

danger that the evidence will be considered to prove the defendant's mere propensity to commit the charged crime." *Gunby*, 282 Kan. at 48.

This is especially true when the State seeks to introduce evidence of a crime for which the defendant was acquitted at a previous trial. Whether the other crime or bad act occurred contemporaneously (*i.e.* is *res gestae* evidence), or "on another occasion" is inconsequential. Basic principles of fairness are implicated. Prior convictions that actually occurred on "another occasion" should not receive the benefit of a limiting instruction, while evidence of acquitted conduct that occurred at the same time does not. It would be nonsensical to instruct jury to only consider a prior ***conviction*** for a specific limited purpose, but tell them nothing about the prior ***acquittal*** – keeping from the jury that it may be considered for only a limited purpose and that there was an acquittal in the first place. It is fundamentally unfair to introduce evidence of a crime for which the defendant was acquitted to establish the elements of other crimes, while simultaneously preventing the defendant even addressing the fact that he was found not guilty of that offense.

This Court has never addressed this specific factual scenario: the other cases where the Court determined that *res gestae* evidence is not subject to the provisions of K.S.A.60-455 (and therefore not entitled to a limiting instruction), dealt with ***uncharged*** *res gestae* crimes or other bad acts. Mr. Cardona-Rivera was not only charged, but then he was found not guilty. This Court should take the opportunity to canonize "what is good for the goose is good for the gander" – if the State wants to introduce evidence of

previously adjudicated conduct, then the jury should be instructed on how/why they should consider that information and what the prior adjudication was.

F. The instructional error is reversible

1. Overview

This Court employs a three-step process in analyzing jury instructions issues:

> (1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal;
> (2) considering the merits of the claim to determine whether error occurred below; and
> (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.

State v. Williams, 295 Kan. 506, 510, 286 P.3d 195 (2012).

Again, failure to give a limiting instruction is error. It is that simple. *Gunby*, 282 Kan. at 57. Also, in determining whether any error occurred, this Court "consider[s] whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record." *Williams*, 295 Kan. at Syl. ¶ 4. Here, the jury should have been instructed on the limited purpose for which they could consider the allegations of previously acquitted conduct, and the fact that Mr. Cardona-Rivera was acquitted by a jury. This would have been factually appropriate as it accurately reflected the factual scenario before the court. It also would have been legally appropriate because decades of caselaw direct the district courts to provide limiting instructions regarding evidence of other crimes not before the jury. *See State v. Bly*, 215 Kan. 168, 176, 523 P.2d 397 (1974), *overruled on other grounds State v. Mims*, 220 Kan. 726, 556 P.2d 387

(1976); *State v. Peterson*, 236 Kan. 821, 832, 696 P.2d 387 (1985); *State v. Higgenbotham*, 294 Kan. 593, 605, 957 P.2d 416 (1998); *State v. Garcia*, 285 Kan. 1, 12, 169 P.3d 1069 (2007); *State v. Butler*, 307 Kan. 831, 860, 416 P.3d 116 (2018).

2. The error was not harmless

Because Mr. Cardona-Rivera requested the instruction, and the district court erred in refusing to issue it, this Court reviews the error for harmlessness consistent with the rule established in K.S.A. 60-261 (that the error is "inconsistent with substantial justice"). *Gunby*, 282 Kan. at 59. "Inconsistent with substantial justice" has been equated with "whether substantial rights of the defendant were affected" by the failure to give the requested limiting instruction. *State v. Donesay*, 265 Kan. 60, 88, 959 P.2d 862 (1998).

The answer here is unequivocally in the affirmative. One of the hallmarks of our justice system is the prohibition against being put on trial for the same offense more than once. It is embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10 of Kansas Constitution Bill of Rights. By failing to provide the jury with any limiting instruction, and failing to allow them to be advised that Mr. Cardona-Rivera was acquitted of that conduct, the district court's error negatively affected his substantial rights, and the result is inconsistent with substantial justice.

Even the district judge presiding over Mr. Cardona-Rivera's trials recognized the harm and/or prejudice this evidence could create: "A threat against a child, as described in the testimony, even though the jury acquitted him of that particular act, certainly could

have an impact on the evidence on the other crimes that have not been resolved." And yet, even with that realization, the district court still failed to issue any limiting instruction. And, the most obvious impact was his conviction in the second trial – something pushed the needle, and it cannot be said that it was not this.

3. The error was clearly erroneous

And while Mr. Cardona-Rivera maintains that he adequately preserved his request for a limiting instruction, if the Court concludes that Mr. Cardona-Rivera failed to sufficiently request the instruction he seeks, then the Court will reverse for the failure to give the instruction only if it was clearly erroneous. *Gunby*, 282 Kan. at 58. Instructions are clearly erroneous only if the reviewing court is firmly convinced that there is a real possibility that the jury would have rendered a different verdict if the error had not occurred. *State v. Shirley*, 277 Kan. 659, 666, 89 P.3d 649 (2004).

And, as discussed above, this error was not harmless. And the clear error is in reality a heightened standard of harmlessness. *State v. Tahah*, 302 Kan. 783, 793, 358 P.3d 819 (2015). A jury was not convinced that Mr. Cardona-Rivera was guilty of any crime at his first trial. Allowing the presentation of evidence of him putting a knife to a two-year old child (for which he was acquitted) cannot be held to be harmless when the same evidence did not produce a conviction the first time around. Allegations of such egregious conduct are more likely to influence the verdict in a close-call case such as this, and that is precisely why the jury should have been instructed on this fact.

By allowing the introduction of this evidence, and foreclosing any possibility that the jury was accurately informed all the facts surrounding the allegations, and refusing to issue any limiting instruction, the district court invited all the concerns expressed in *Davis*. The district court's error allowed the jury to believe that Mr. Cardona-Rivera is a general wrongdoer and therefore deserves punishment, that his evidence should not be believed because he has committed other crimes, or that he likely committed the crimes he is on trial for because he committed the other crime. *Davis*, 213 Kan. at 58. The jury heard the State elicit testimony about Mr. Cardona-Rivera poking a knife into the back of a two year old child in a rude, insulting, or angry manner. But, they did not get to hear that the State failed to prove those allegations as true when they had the chance previously. Not only would the exclusion of the evidence and/or the issuing of a limiting instruction alleviated some of the concerns expressed in *Davis*, but it also may have very well affected the credibility of Y.M. if the jury heard that Mr. Cardona-Rivera had been acquitted of the crime she stated he committed. Lastly, but perhaps most importantly, it bears repeating that two different juries were at least skeptical of the State's proposed version of the events –having returned a single not guilty verdict at the first trial and hanging on all remaining counts. Then, at the second trial, the jury acquitted him of two additional counts. When viewed as a whole, a real possibility exists that the jury would have returned a different verdict(s) if the error had not occurred.

Summary

The State argued, and the district court ruled, that the evidence was admissible as *res gestae* of the crimes for which he was facing re-prosecution. However, *res gestae* is not an independent basis for the admission of evidence. Rather, the evidence is subject to the general relevancy considerations as all other pieces of evidence and must be determined to be more probative than prejudicial. The evidence was not relevant to a material fact at issue, and the probative value did not outweigh the potential to create undue prejudice. Furthermore, the doctrine of *collateral estoppel* is an additional independent bar to the admission of the testimony. And, even if the Court determines that the evidence was admissible, the Court should extend its holding in *Gunby* and its progeny. When the State seeks to introduce evidence of a crime for which the defendant has already been acquitted, regardless of when the conduct took place, the district court must issue a limiting instruction advising the jury of the reasons they may consider the evidence and advise them that the defendant has been found not guilty of that offense. Introduction of the evidence over Mr. Cardona-Rivera's objection, and the failure to issue the instruction, were in error. The errors were not harmless and require reversal of Mr. Cardona-Rivera's convictions.

Conclusion

Because the convictions for counts two and nine are multiplicitous, this Court should vacate one of those convictions. The Court should also find the district court's errors in admitting evidence of an offense for which Mr. Cardona-Rivera had been

previously acquitted, and its failure to issue any limiting instruction, so affected the substantial rights of Mr. Cardona-Rivera to an extent that there is a real possibility the jury would have returned different verdict but for the error. As a result, the convictions should be set aside and Mr. Cardona-Rivera's case be remanded for a new trial.

475 P.3d 724 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Hector Arturo AMARO, Appellant,
v.
STATE of Kansas, Appellee.

No. 121,781
|
Opinion filed November 20, 2020.

Appeal from Seward District Court; BRADLEY E. AMBROSIER, judge.

Attorneys and Law Firms

James C. Dodge, of Sharp McQueen, P.A., of Liberal, for appellant.

Russell Hasenbank, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Gardner, P.J., Buser and Bruns, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Hector Arturo Amaro appeals the district court's denial of his K.S.A. 60-1507 motion alleging ineffective assistance of counsel. Amaro presents three issues for our consideration. First, he asserts his attorney was ineffective for failing to object or move for a mistrial when the district court was advised that some jurors were concerned about the possible presence of gang members in the courtroom during the trial. Second, Amaro claims his attorney was ineffective when he failed to object when Amaro was handcuffed in the courtroom during the jury's announcement of its verdict. Third, Amaro contends his attorney was ineffective when he failed to object to multiplicitous convictions.

Upon our review, we hold the district court did not err in denying Amaro's K.S.A. 60-1507 motion. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2015, Amaro was convicted of aggravated kidnapping in violation of K.S.A. 2013 Supp. 21-5408(b), aggravated battery in violation of K.S.A. 2013 Supp. 21-5413(b)(1)(C), aggravated intimidation of a witness in violation of K.S.A. 2013 Supp. 21-5909(b), and criminal threat in violation of K.S.A. 2013 Supp. 21-5415(a)(1). Amaro filed a direct appeal to our court, claiming trial errors regarding a jury instruction, insufficient evidence, prosecutorial misconduct, and cumulative error. Finding no reversible error, we affirmed the convictions. *State v. Amaro*, No. 114,238, 2017 WL 1822303, at *10 (Kan. App. 2017) (unpublished opinion). In that opinion, we summarized the trial evidence:

> "On the evening of April 28, 2014, Julio Ruiz was visiting Adrian Molina at his house. Miguel Mariscal was also present. While Ruiz and Molina were in the living room, five members of the Sureño gang arrived at the house. Molina spoke to the men in the kitchen. Eventually, Molina informed Ruiz that the men were talking about 'jumping' him and that he should leave. Ruiz believed that the men were there to beat him up because he was considered a 'snitch' after he testified against a codefendant at a preliminary hearing in a robbery case.
>
> "Ruiz went outside and the group of men followed. Before Ruiz could get away, the men told him that they needed to talk to him inside. Once inside the house, the five men confronted Ruiz and accused him of being a snitch. According to Ruiz, a man who the others called 'Animal' put his hand on Ruiz' chest and said they should go outside to talk. The man called 'Animal' was later identified to be Amaro. As Ruiz began to open the door, Amaro hit him in the side of the head. The other men jumped in and also began hitting Ruiz. As a result of the beating, Ruiz' face became bloodied.
>
> "Ruiz was allowed to go to the bathroom to wash the blood off his face. Although Ruiz thought about attempting to escape from the bathroom window, he did not think he could open the window without the men hearing him. When he came out of the bathroom, the

men cornered him in the kitchen and again began to accuse him of being a snitch. Once again, Amaro and the other men began beating him. The men beat Ruiz with a chair, knocking him to the floor, and began kicking him in the head. They then made Ruiz take off his shirt and use it to clean up his blood from the floor.

***2** "The men then placed Ruiz in a chair facing the corner of the kitchen. Amaro told him that if he ever told anyone what happened, the results would be 10 times worse. Amaro also indicated that he might prevent Ruiz from leaving the house permanently and said that there was plenty of room left in the fields. Ruiz later indicated that he believed that Amaro was threatening his life.

"The men began to beat Ruiz for a third time. After knocking him to the ground, the men broke a chair over him. One of the men then began to repeatedly thrust a broken chair leg into Ruiz' face. Amaro also repeatedly slapped Ruiz in the face with the wire handle of a flyswatter. Several of the men began to say that Ruiz had been beaten enough and asked Amaro to stop. Molina also tried to stop the beating but Amaro threatened him and made him punch Ruiz. Ruiz later testified that he was too scared to move and that he felt that he was not able to leave the house." 2017 WL 1822303, at *1.

After his direct appeal was final, on October 22, 2018, Amaro filed a pro se K.S.A. 60-1507 motion which is the subject of this appeal. In the motion, Amaro alleged numerous instances of ineffective assistance of trial counsel. On March 19, 2019, after appointing counsel to represent Amaro, the district court held an evidentiary hearing on the K.S.A. 60-1507 motion. After taking the matter under advisement, on April 11, 2019, the district court issued an 18-page order. In the comprehensive order, the district court summarized the trial evidence, made findings of fact regarding the evidence presented at the evidentiary hearing, and stated legal conclusions upon which the district court based its decision to deny Amaro's K.S.A. 60-1507 motion.

Amaro filed a timely appeal.

BRIEF SUMMARY OF RELEVANT LAW AND STANDARDS OF REVIEW

A district court has three options when handling a K.S.A. 60-1507 motion:

" '(1) The court may determine that the motion, files, and case records conclusively show the prisoner is entitled to no relief and deny the motion summarily; (2) the court may determine from the motion, files, and records that a potentially substantial issue exists, in which case a preliminary hearing may be held. If the court then determines there is no substantial issue, the court may deny the motion; or (3) the court may determine from the motion, files, records, or preliminary hearing that a substantial issue is presented requiring a full hearing.' [Citations omitted.]" *White v. State*, 308 Kan. 491, 504, 421 P.3d 718 (2018).

Our standard of review depends upon which of the three options a district court employs. 308 Kan. at 504. Here, the district court held a full evidentiary hearing on all the issues that Amaro raises on appeal. After a full evidentiary hearing on a K.S.A. 60-1507 motion, the district court must issue findings of fact and conclusions of law concerning all issues presented. Supreme Court Rule 183(j) (2020 Kan. S. Ct. R. 223). An appellate court reviews the court's findings of fact to determine whether they are supported by substantial competent evidence and are sufficient to support the court's conclusions of law. Appellate review of the district court's ultimate conclusions of law is de novo. *Fuller v. State*, 303 Kan. 478, 485-86, 363 P.3d 373 (2015).

On appeal, Amaro raises three claims of ineffective assistance of counsel in his K.S.A. 60-1507 motion. The right of an accused to have assistance of counsel for his or her defense is guaranteed by the Sixth Amendment to the United States Constitution. The right is "applicable to state proceedings by the Fourteenth Amendment." *Miller v. State*, 298 Kan. 921, 929, 318 P.3d 155 (2014). Moreover, the guarantee includes not only the presence of counsel, but counsel's effective assistance as well. *Sola-Morales v. State*, 300 Kan. 875, 882, 335 P.3d 1162 (2014) (relying on *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674, *reh. denied* 467 U.S. 1267 [1984]). Thus, Amaro claims he was denied a constitutional right.

***3** "To prevail on a claim of ineffective assistance of trial counsel, a criminal defendant must establish (1) that the performance of defense counsel was deficient under the totality of the circumstances, and (2) prejudice, i.e., that there is a reasonable probability the jury would have reached a different result absent the deficient performance. [Citations omitted.]" *State v. Salary*, 309 Kan. 479, 483, 437 P.3d 953 (2019).

Judicial scrutiny of counsel's performance in a claim of ineffective assistance of counsel is highly deferential and requires consideration of all the evidence before the judge or jury. *Fuller*, 303 Kan. at 488. The reviewing court must strongly presume that counsel's conduct fell within the

broad range of reasonable professional assistance. *State v. Kelly*, 298 Kan. 965, 970, 318 P.3d 987 (2014). As the movant, the burden of proof to establish ineffective assistance of counsel is on Amaro. See *Fuller*, 303 Kan. at 486.

Each of Amaro's three claims of ineffective assistance of counsel will be discussed separately.

FAILURE TO MAKE A RECORD OR MOTION FOR MISTRIAL DUE TO JURORS' SAFETY CONCERNS

Amaro contends his trial attorney was ineffective for failing to object or move for a mistrial after learning that some jurors reported they were concerned about gang members being in the courtroom during the trial. Amaro asserts his attorney should have made a record of the conversation that took place in chambers between Deputy Court Clerk Donna Odneal, the judge, and attorneys, or moved for a mistrial. Amaro claims prejudice due to possible racial animus because the jurors reported feeling unsafe when, according to Amaro, the people in the gallery were primarily Hispanic.

Based on the hearing evidence, the district court found that during the trial, Odneal relayed to the judge and counsel in chambers "that members of the jury had some personal safety concerns." According to the district court: "At no time during the trial were there any difficulties presented from any members of the gallery." Moreover, although Amaro's family members were in the courtroom, Amaro had not shown "that any persons in the courtroom were identified by clothing, tattoos or any other markings as gang members." Based on these factual findings, the district court concluded:

> "As it relates to [Amaro's] first 2 issues, the Court is convinced that the standards set forth have not been met by [Amaro]. As to the allegation of gang members' presence in the courtroom somehow improperly influencing the jury, the Court is not convinced as a factual matter that any persons were in the Court gallery, other than 1 witness to the crime who was subpoenaed by the State and other supporters of the then defendant. Furthermore, there is absolutely no evidence that the presence of any persons had any impact upon the jury verdict whatsoever. The crimes in which [Amaro] stands convicted were, in a word, brutal. The testimony established beyond a reasonable doubt to this jury that a victim was brutally beaten over a course of time in retaliation for his cooperation with local authorities. Sitting in judgment of one so accused could give reasonable jurors some concern. To ask that their names not be read during the polling procedure and to request law enforcement be present as they exit the courthouse to their automobiles is nothing more than a reasonable request under such circumstances. [Amaro] has failed to show that [his counsel] was in any way ineffective for failing to place said facts into the record at the time of the trial or to request the Court to take any action in that regard. Even with complete and total hindsight at this point, the Court sees nothing deficient in [Amaro's counsel's] performance. Furthermore, there is absolutely no indication that the jury verdict was in any way affected by these alleged fears."

***4** Upon our review, the district court's factual findings and legal conclusions were supported by substantial competent evidence. Odneal testified that she did not recall any courtroom spectators who looked like gang members and she did not see anything occur in the courtroom that alarmed her. Sergeant Josh Olson, the lead investigator in the case, testified that while Amaro was a member of a gang, the only other gang member he recognized in the courtroom was Molina, who owned the house where the attack occurred, and who was a potential witness. Sergeant Olson indicated that while there were a few other spectators in the courtroom, he assumed they were members of Amaro's family.

Amaro's only evidentiary basis to support his claim derives from the fact that a juror notified the court clerk that some jurors were concerned about their safety. But, as Amaro acknowledges in his brief, there is no explanation as to what caused the jurors' concern. Amaro merely speculates that the jurors "believed stereotypically that all Hispanics in the courtroom were gang members." This claim is conclusory and without factual support in the record.

As summarized earlier, to prevail on this issue Amaro must demonstrate his attorney's deficient performance and prejudice. See *Salary*, 309 Kan. at 483. On this record, Amaro has failed in both aspects of the ineffective assistance of counsel test. As to deficient performance, the evidence supports the district court's legal conclusion that Amaro has failed to show any basis to find his attorney was ineffective in making a record of the court clerk's remarks or any basis to move the court to declare a mistrial.

Regarding prejudice, as the district court found, Amaro failed to prove "there is a reasonable probability the jury would have reached a different result absent the deficient performance." 309 Kan. at 483. As our court noted in Amaro's direct appeal, the evidence produced against him at trial was strong. Moreover, the jury acquitted Amaro of conspiracy to commit aggravated kidnapping. This would

suggest that the jury did not allow prejudice to adversely affect their decision making against Amaro.

In summary, we conclude the district court's findings of fact were supported by substantial competent evidence and were sufficient to support the court's conclusions of law that Amaro's attorney was not ineffective for failing to object or move for a mistrial upon learning of some jurors' safety concerns. Additionally, consistent with the district court's findings, we do not discern prejudice as a result of the attorney's performance.

FAILURE TO MAKE A RECORD OR MOTION FOR MISTRIAL DUE TO HANDCUFFING OF AMARO

For his second issue, Amaro contends his attorney was ineffective for failing to object or move for a mistrial when the district court ordered Amaro handcuffed in the courtroom when the jury returned with its verdict.

The district court,

> "found that for safety concerns and as the presiding judge, ordered [Amaro] to be handcuffed at counsel table **during the reading of the verdict**. The jury never saw and [Amaro] never was restrained in the presence of the jury at any time during the trial or deliberations and the only restraints placed upon [Amaro] were done so after the jury had reached a verdict, but before that verdict was delivered to the Court."

Based on these factual findings, the district court made conclusions of law:

> "As to [Amaro's] restraint argument, the facts are clearly established that [Amaro] was not restrained at any point in the process in which said restraint could have adversely affected the jury verdict. The evidence clearly establishes that the Court received some sort of credible evidence as to a possible safety concern. In an effort to procure a safe courtroom, as is not only the judge's right but his responsibility, Judge Peterson took reasonable action. Furthermore, this action was not implemented at any time in the presence of the jury until their verdict had been reached and they were present in the courtroom to announce that verdict on the record. There is simply no credibility to [Amaro's] argument that his restraint in any way shows that his lawyer acted inappropriately or that any conduct on behalf of [Amaro's counsel] adversely affected the outcome of the trial."

***5** The district court's factual findings and legal conclusions were supported by substantial competent evidence. At the K.S.A. 60-1507 hearing, Amaro's trial attorney testified that the district judge told him that Amaro was going to be handcuffed prior to the jury returning to the courtroom to announce its verdict because he was concerned for the attorney's safety. The basis for the district court's concern was a report from the sheriff's department that Amaro was going to hit his attorney if the jury returned a guilty verdict. Amaro's attorney learned from the sheriff's department about the specific threat after the trial but before sentencing. For his part, Sergeant Olson testified that he heard during a lunch break about Amaro threatening to hit his attorney if he was found guilty at trial.

Under the first prong of ineffective assistance of counsel analysis, Amaro must demonstrate that his counsel's performance was deficient under the totality of the circumstances. See 309 Kan. at 483. But Amaro does not favor us with any caselaw precedent involving a similar factual situation wherein a trial court held that counsel was ineffective for failing to object or make a motion for mistrial when the defendant was handcuffed in the courtroom after the jury had reached its verdict.

In *State v. Race*, 293 Kan. 69, 82, 259 P.3d 707 (2011), our Supreme Court explained that, "[g]enerally, we have held that shackling or otherwise restraining a defendant while in the view of the jury is appropriate only in limited circumstances and for particularly dangerous defendants." Our Supreme Court instructed:

> " '[t]he basic principle involved is an accused's right to the presumption of innocence until guilt is proved beyond a reasonable doubt; however, the accused's rights must be balanced with the duty of the trial judge to protect the lives of the trial participants and to protect the institution of the judicial process.' " 293 Kan. at 83 (quoting *State v. Cahill*, 252 Kan. 309, 315, 845 P.2d 624 [1993]).

We are persuaded that the circumstances involving Amaro being handcuffed after the jury had reached a verdict were justified given the district court's knowledge of the possible threat of physical violence to Amaro's attorney. Moreover, the trial evidence detailed Amaro's ability to engage in physical violence. Given the specific threat communicated to the district court, the handcuffing of Amaro as his attorney was nearby in the courtroom was an appropriate precaution under *Race*. Given that the district court appropriately exercised its judicial discretion, we discern no ineffectiveness by Amaro's attorney in failing to object to the handcuffing or to move for a mistrial.

Moreover, assuming for purposes of argument that Amaro's attorney was deficient in his performance, Amaro has not shown the second prong of the ineffective assistance of counsel test: "prejudice, i.e., that there is a reasonable probability the jury would have reached a different result absent the deficient performance." *Salary*, 309 Kan. at 483. Our Supreme Court has defined reasonable probability as " 'a probability sufficient to undermine confidence in the outcome.' [Citations omitted.]" *State v. Sprague*, 303 Kan. 418, 426, 362 P.3d 828 (2015).

As Amaro acknowledges in his brief: "The record is clear that the juror's decision had been reached before they saw [Amaro] in handcuffs." Still, Amaro argues that the jury seeing him in handcuffs prior to announcing its verdicts and being polled as to the verdicts called into question the validity of his convictions. We are not persuaded.

As the district court concluded: "There is simply no credibility to [Amaro's] argument that his restraint in any way shows that his lawyer acted inappropriately or that any conduct on behalf of [Amaro's counsel] adversely affected the outcome of the trial." Our review of the record reveals no abnormality in the polling of the jurors or their responses after the verdicts were announced. There is no showing in the record that any juror was influenced in any way. Moreover, the fact that the jurors only observed Amaro in handcuffs after they had arrived at their verdicts, completed the verdict forms, and entered the courtroom to announce the verdicts, is indicative that if Amaro had not been handcuffed at this stage of the trial, there is not a reasonable probability the jury would have reached a different result.

***6** We conclude the district court's findings of fact were supported by substantial competent evidence and were sufficient to support the court's conclusions of law that Amaro's attorney was not ineffective for failing to object or failing to move for a mistrial upon learning that Amaro would be handcuffed after the jury had arrived at its verdicts. Additionally, in accordance with the district court's findings, we do not find any prejudice as a result of his attorney's performance.

FAILURE TO OBJECT TO MULTIPLICITOUS CONVICTIONS

For his final issue on appeal, Amaro contends his attorney's failure to object to the multiplicitous nature of the four crimes for which he was convicted was ineffective assistance of counsel. In particular, Amaro argues that his convictions for aggravated kidnapping and aggravated battery were multiplicitous because "one cannot commit aggravated kidnapping without also committing aggravated battery at the same time." Additionally, Amaro asserts that his convictions for aggravated intimidation of a witness and criminal threat were multiplicitous because "one could not commit aggravated intimidation of a witness without also making a criminal threat."

The district court rejected Amaro's claims that his convictions were multiplicitous. Given this legal conclusion, the district court also found that Amaro's attorney was not ineffective for failing to object to multiplicitous convictions during or after the trial.

Whether crimes are multiplicitous is a question of law and an appellate court's review is unlimited. *State v. Colston*, 290 Kan. 952, 971, 235 P.3d 1234 (2010), *overruled on other grounds by* *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). Multiplicity "is the charging of a single offense in several counts of a complaint or information," and the principal danger "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. Thompson*, 287 Kan. 238, 244, 200 P.3d 22 (2009).

In *State v. Schoonover*, 281 Kan. 453, 463-64, 133 P.3d 48 (2006), our Supreme Court discussed how the United States Supreme Court historically addressed multiplicity. In the first layer of analysis, the United States Supreme Court divides the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution into three categories: "(1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." 281 Kan. at 463 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 [1969], *overruled on other grounds by* *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 [1989]).

After discussing the historical context, our Supreme Court held that the same analysis should apply to Kansas cases. *Schoonover*, 281 Kan. at 474-75. In this regard, Amaro's case fits within the third category because he does not make any argument concerning a successive prosecution, either after an acquittal or a conviction, but he is concerned about receiving multiple punishments for the

same crime. See 281 Kan. at 464.

The second layer of the analysis focuses on whether the defendant was prosecuted for the same offense. In deciding what constitutes a "same offense," cases are divided into two categories. "In one, the defendant is charged with violations of multiple statutes that may or may not be deemed the same offense. ... In the second category, the defendant is charged with multiple violations of the same statute." 281 Kan. at 464. When, as here, a defendant is charged with violations of multiple statutes, a court must determine whether the charges 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?" 281 Kan. at 496.

***7** The possibility of a double jeopardy violation only arises if the conduct is unitary. To determine whether the convictions arise from the same conduct, a court must consider several factors, including:

> "(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 497.

If the conduct is deemed unitary, then a court uses the same elements test to determine whether there is a double jeopardy violation when the defendant was convicted of multiple violations of different statutes. "[T]he test is: Does one statute require proof of an element not necessary to prove the other offense? If so, the statutes do not define the same conduct and there is not a double jeopardy violation." 281 Kan. at 498.

Here, as Amaro points out, the district court "apparently assumed the first step had been met, and proceeded to apply the second." We agree. It is apparent the district court implicitly concluded that Amaro's convictions arose from the same conduct. Neither Amaro nor the State objects to this finding.

To determine whether Amaro's convictions arose from the same conduct, we must apply the factors our Supreme Court laid out in *Schoonover*. Each of Amaro's four charges arose from conduct that occurred on the night of April 28 into the early morning of April 29, 2014. All the acts occurred during a one-and-a-half- to two-hour time period at Molina's house. Amaro threatened Ruiz in between instances of beating him without an intervening event. During the time Ruiz was at Molina's house, Amaro repeatedly beat him. We are persuaded that Amaro's convictions arose from the same conduct. See 281 Kan. at 497.

The district court then applied the second component of the inquiry: Does one statute require proof of an element not necessary to prove the other offense? On appeal, both parties focus their argument on the second component of the inquiry. We will separately analyze the two sets of convictions that Amaro claims are multiplicitous.

Aggravated Kidnapping and Aggravated Battery

The second component requires our court to determine if the statute for aggravated kidnapping requires an element not necessary to prove aggravated battery. See 281 Kan. at 498. The jury instruction setting forth the elements of the crime of aggravated kidnapping stated in relevant part:

> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant confined Julio Ruiz by force or fear.
>
> "2. The defendant did so with the intent to hold Julio Ruiz to inflict bodily injury on or to terrorize Julio Ruiz.
>
> "3. Bodily harm was inflicted upon Julio Ruiz.
>
> "4. This act occurred on or about the 28th to the 29th day of April, 2014, in Seward County, Kansas."

See K.S.A. 2013 Supp. 21-5408(b).

The jury instruction setting forth the elements of the crime of aggravated battery stated in relevant part:

> "To establish this charge, each of the following claims must be proved:
>
> "1. The defendant knowingly caused physical contact

with Julio Ruiz in a rude, insulting or angry manner in any manner whereby great bodily harm, disfigurement or death can be inflicted.

***8** "2. This act occurred on or about the 28th to the 29th day of April, 2014, in Seward County, Kansas."

See K.S.A. 2013 Supp. 21-5413(b)(1)(C).

Applying the same elements test, it is apparent that Amaro's conviction for aggravated kidnapping required that he confined Ruiz, while his conviction of aggravated battery did not require any confinement. On the other hand, Amaro's conviction for aggravated battery required that the physical contact occurred in a manner whereby great bodily harm, disfigurement, or death can be inflicted. To commit aggravated kidnapping, however, does not require that the physical contact occurred in a manner whereby great bodily harm, disfigurement, or death can be inflicted. Only bodily harm is required. As a result, under the same elements test, the two convictions are not multiplicitous.

Aggravated Intimidation of a Witness and Criminal Threat

Next, we consider whether the statute for aggravated intimidation of a witness requires an element not necessary to prove criminal threat. See 281 Kan. at 498. The jury instruction setting forth the elements of the crime of aggravated intimidation of a witness stated in relevant part:

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

"1. The defendant attempted to dissuade a victim, Julio Ruiz, from causing the arrest of any person in connection with the victimization of ... Julio Ruiz.

"2. This act was done with the intent to vex, annoy, harm or injure Julio Ruiz.

"3. This act was accompanied by an expressed threat of violence against ... Julio Ruiz.

"4. This act occurred on or about the 28th to the 29th day of April, 2014, in Seward County, Kansas."

See K.S.A. 2013 Supp. 21-5909(a)(2)(D), (b)(1).

The jury instruction setting forth the elements of the crime of criminal threat stated in relevant part:

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

"1. The defendant threatened to commit violence and communicated the threat with the intent to place another in fear.

"2. This act occurred on or about the 28th to the 29th day of April, 2014, in Seward County, Kansas."

See K.S.A. 2013 Supp. 21-5415(a)(1).

Applying the same elements test, it is apparent that Amaro's conviction for aggravated intimidation of a witness required an attempt to dissuade a witness or victim from causing the arrest of a person in connection with the victimization of the witness or victim. No such element is part of the elements of the crime of criminal threat. On the other hand, Amaro's conviction for criminal threat required that he had a specific intent to place another in fear. No such specific intent is required as an element of aggravated intimidation of a witness. On the contrary, that statute required Amaro to have a different specific intent—to vex, annoy, harm, or injure Ruiz.

Applying the double jeopardy principles established in *Schoonover*, we conclude that regarding the two sets of convictions Amaro complains of, each offense required proof of an element not necessary to prove the other offense. Accordingly, since there was no double jeopardy violation, the district court did not err in ruling that Amaro's attorney was not ineffective for failing to object to multiplicitous convictions during or after the trial.

***9** Affirmed.

All Citations

475 P.3d 724 (Table), 2020 WL 6815591

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253 P.3d 385 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Hugo AGUILERA, Appellant.

No. 103,575.
|
June 24, 2011.
|
Review Denied Feb. 17, 2012.

Appeal from Ford District Court; E. Leigh Hood, Judge.

Attorneys and Law Firms

Michael P. Whalen, of Law Office of Michael P. Whalen, of Wichita, for appellant.

Josh Seiden, assistant county attorney, Terry J. Malone, county attorney, and Steve Six, attorney general, for appellee.

Before PIERRON, P.J., ATCHESON, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM:

***1** This is Hugo Aguilera's direct appeal from his jury convictions of two counts of rape, severity level 1 person felonies; one count of aggravated criminal sodomy, a severity level 1 person felony; and two counts of domestic battery, class B person misdemeanors.

Aguilera alleges: (1) The giving of improper jury instructions during the initial phase of the jury trial; (2) prosecutorial misconduct during closing argument in misstating the law as to reasonable doubt; and (3) the two rape charges were multiplicitous, improperly pled, confusing, and detrimental to him by arguing there were separate acts of rape.

The record reflects the following facts and legal proceedings.

In January 2009, Aguilera was first charged with one count of rape. The complaint was later amended to charge two counts of rape, one count of aggravated criminal sodomy, and three counts of domestic battery. Aguilera pled not guilty to all charges, and the case proceeded to a jury trial in September 2009.

After the jury was impaneled, but before the State gave its opening statement, the trial court gave instructions to the jury which included the following comments:

> "When you receive this case at the conclusion of all the evidence, please keep in mind that the attitude and conduct of the jurors at the outset of their deliberations are matters of considerable importance. It is rarely helpful for the juror upon entering the jury room to make an emphatic expression of his or her opinion on the case or to announce a determination to stand for a certain verdict. The result of the conduct of this nature might be that a juror because of personal pride would hesitate to retreat from an announced position when it is shown that it is felicitous. When deliberating it is natural that differences of opinion will arise. When they do, each juror should not only express their opinion but the facts and reasons upon which it is based.
>
> "Although a juror should not hesitate to change his or her vote when his or her reason and judgment are changed, each juror should vote according to his or her honest judgment applying the law from the instructions to the facts as proved. If every juror is fair and reasonable a jury can almost always agree. It is your duty as jurors to consult with one another and to deliberate with the view to reaching an agreement if you can do so without violation to your personal judgment."

No objection was made at trial to the court's statement.

D.A. testified that in January 2009, she was still married to

Aguilera but they had been separated off and on in 2008 and 2009. Aguilera was not living with D.A. when early in the morning on January 22, 2009, he returned to the house where she and their children were living and asked to come in. D.A. initially refused because it was too late but eventually allowed Aguilera to come in to say goodbye to his children before leaving for Houston.

They sat in separate areas and discussed various matters, including her filing for divorce. Aguilera told DA. this would be their last chance to have sexual relations, but she refused and told him to leave. He continued asking for sex, and she refused. He asked for a ride, and she refused to leave the children alone to take him. They then argued about who was to sleep where and Aguilera finally decided he would sleep on the sofa and D.A. would sleep with the children.

***2** D.A. testified that when she was on her way to the children's room, Aguilera grabbed her, lifted her up, and placed her on the sofa. She demanded to be released, but he pushed her shoulders and would not release her. Aguilera then leaned over her, put his left hand underneath her pants and underwear, and touched her vagina. With his other hand, he covered her mouth and nose. Aguilera forced his fingers inside D.A.'s vagina without her permission and continued to move his fingers around inside her. He continued to do so for some time, but she was not exactly sure how long.

D.A. managed to push Aguilera's hand away from her face. He then removed his other hand from her vagina, stripped her of her pants and underpants, began masturbating, and then forced her close to him and penetrated her vagina with his penis. D.A. testified Aguilera's penis was inside her for roughly a minute. He then pried her legs apart and proceeded to lick and suck her vagina for what she believed to be about a minute. He then removed his face from her lap and reinserted his penis in her vagina, saying to let him "finish," and he continued until he ejaculated into her vagina.

At this point, Aguilera let D.A. up. She grabbed her clothes, went into a bedroom, locked the door, and cleaned herself up. D.A. then got the children up and put them into her car. They had a disagreement over him being there and after a short drive, she returned to her house, dropped him off, and drove to the house of her friend, Maria Andrate. Later that morning, D.A. took the children to school and then went to the police department to report what had happened.

D.A. went to the hospital and was examined by a nurse on January 22. The nurse took swabs and collected physical evidence, including D.A.'s clothing. The nurse also conducted a pelvic examination on D.A. during which she found an abrasion of D.A.'s labia. The nurse testified that this type of abrasion is uncommon during consensual sex. The nurse also conducted a physical examination and discovered bruising on D.A.'s left arm which looked like a grasping-type injury.

The cervical swabs were tested and showed seminal fluid matching Aguilera's DNA as did D.A.'s underpants.

D.A. also testified at trial to several other instances where Aguilera had hurt her, but the domestic battery convictions are not in issue in this appeal.

Additionally, a Dodge City police officer testified that during her interview with Aguilera, he said D.A. had told him she did not want to have sex but that he had made her have sex. The officer also testified Aguilera said that whatever D.A. said was true.

Aguilera testified at trial that he had sex with D.A. on January 21 or 22, but that the sex was consensual. He testified he did not have oral sex with D.A. He maintained that D.A. did not tell him "no." He further testified that he never used force during the sexual encounter.

During closing argument, the State made the following statement, to which no objection was made:

> ***3** "The elements of the crime, three or four things you have to show to find the defendant guilty of each crime, that's what you have to determine beyond a reasonable doubt. You don't have to determine if this happened necessarily beyond a reasonable doubt if there's [*sic*] different versions of whether something did or didn't happen or minor things, those are not elements of the crime. The things that you have to find beyond a reasonable doubt are the elements of the crime. So please keep that in mind when you're back in the jury room deliberating."

The jury deliberated over 4 hours, asked several questions, and found Aguilera guilty of two counts of rape, the one charged count of aggravated criminal sodomy, and two counts of domestic battery. Aguilera was found not guilty

of one count of domestic battery.

Aguilera was sentenced to 155 months in prison for the first rape charge, 155 months in prison for the second rape charge to run concurrent with the first rape charge, and 155 months in prison for the aggravated criminal sodomy conviction, again concurrent to the other charges. Finally, Aguilera was sentenced to two consecutive 6–month sentences for the domestic battery convictions to run concurrent to the other sentences.

Aguilera has timely appealed. We will consider Aguilera's arguments in the order raised.

Aguilera first argues the trial court committed reversible error in giving a modified *Allen-type* instruction to the jury after jury selection had been completed. See *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

The standard of review depends on whether the defendant has raised a timely objection to the instruction. Aguilera contends that because of the initial nature of the instruction given to the jury, he was not afforded an opportunity to object to the court's language. We do not agree.

Aguilera and his counsel were present at the time the court spoke to the jury. He could have raised an objection during the instruction or if uncomfortable in stopping the court, he could have lodged an objection when the court was done with the instructions.

> "An appellate court reviewing a district court's giving or failure to give a particular instruction applies a clearly erroneous standard where a party neither suggested an instruction nor objected to its omission. See K.S.A. 22–3414(3). An instruction is clearly erroneous only if the reviewing court is firmly convinced there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred. [Citation omitted.]" *State v. Martinez*, 288 Kan. 443, 451–52, 204 P.3d 601 (2009).

We need not again set forth the language which was included in our factual statement. Aguilera contends the trial court's language is simply a modified but erroneous *Allen*-type instruction. An *Allen*-type instruction instructs the jury towards reaching a unanimous verdict. Kansas courts have on several occasions disapproved of *Allen*-type instructions containing language telling the jury that the case must be decided, that an additional trial would be a burden on both sides, and that there is no reason to believe another jury would be better situated to decide the case. *See* *State v. Scott–Herring*, 284 Kan. 172, 180, 159 P.3d 1028 (2007).

***4** But, the exact language used by the trial court in this case was the subject of review in *State v. Cofield*, 288 Kan. 367, 374–75, 203 P.3d 1261 (2009). The language mirrors that of PIK Civ.3d 101.89. Our Supreme Court has found the language of the instruction is "a fair statement concerning ... the proper attitude which jurors should maintain." *State v. Hall*, 220 Kan. 712, 718, 556 P.2d 413 (1976). Our Supreme Court has found in several cases that the language is not coercive. *Cofield*, 288 Kan. at 376, *State v. Cummings*, 242 Kan. 84, 90–91, 744 P.2d 858 (1987).

In this case, the language was not coercive. The language was not prejudicial. The language was appropriate, and in giving it, the trial court did not act improperly or commit error.

Aguilera further argues the State committed prosecutorial misconduct by making improper and legally erroneous statements regarding reasonable doubt. The precise statement which is deemed erroneous has been fully set forth as a part of the factual and procedure statement.

While there was no objection to the State's closing argument, a claim of prosecutorial misconduct during closing argument may be brought on appeal even absent a contemporaneous objection. *State v. King*, 288 Kan. 333, 349, 204 P.3d 585 (2009).

Appellate review of an allegation of prosecutorial misconduct involving improper comments to the jury requires a two-step analysis. First, the appellate court decides whether the comments were outside the wide latitude that the prosecutor is allowed in discussing the evidence. Second, if misconduct is found, the appellate court must determine whether the improper comments constitute plain error; that is, whether the statements prejudiced the jury against the defendant and denied the defendant a fair trial. *State v. McReynolds*, 288 Kan. 318, 323, 202 P.3d 658 (2009).

The State commits prosecutorial misconduct where it improperly states its burden of proof. *State v. Magallanez*, 290 Kan. 906, 914–15, 235 P.3d 460 (2010). Additionally, Kansas courts have admonished prosecutors against defining reasonable doubt, finding that the words themselves are the best explanation of the words. See *State v. Brinklow*, 288 Kan. 39, 49–50, 200 P.3d 1225

(2009).

The prosecutor's statement which is claimed to be reversible error was not an attempt to define reasonable doubt. The language is somewhat confusing but it appears to be an attempt to tell the jury what elements of the crime must be proved beyond a reasonable doubt but that the same standard does not apply to factual differences that are not elements of the charged crime. The State argues the language should be characterized only as comments on the evidence and should fall within the wide latitude such statements should be given. See *McReynolds*, 288 Kan. at 325.

However, while the statements were framed in terms of which elements had to be proven beyond a reasonable doubt, the wording was confusing enough to cast a question on what reasonable doubt meant. The State told the jury, "You don't have to determine if this happened necessarily beyond a reasonable doubt if there's [*sic*] different versions of whether something did or didn't happen or minor things, those are not elements of the crime." It appears the prosecutor was telling the jury that it could disagree as to facts not related to the elements of the crime. But, it is troubling for a jury to be told in a "she said/he said" rape prosecution that if there are different versions of whether something did or did not happen that reasonable doubt is not implicated.

***5** This statement is as much confusing as improper, and confusion is often more to the benefit of a defendant than to the State. However, even if found to be improper, this statement does not violate the second step of the two-step prosecutorial misconduct analysis. We are taught to consider three factors: (1) Whether the misconduct was gross and flagrant; (2) whether the misconduct showed ill will on the prosecutor's part; and (3) whether the evidence was of such a direct and overwhelming nature that the misconduct would likely have little weight in the minds of the jury. None of these three factors is individually controlling. *McReynolds*, 288 Kan. at 323.

Comments have been held to be gross and flagrant where a prosecutor commented on defendant's refusal to testify, *State v. Kemble*, 291 Kan. 109, 123–24, 238 P.3d 251 (2010), or called opposing counsel a liar. *State v. Magdaleno*, 28 Kan.App.2d 429, 437, 17 P.3d 974, *rev. denied* 271 Kan. 1040 (2001). In contrast, our court found no gross and flagrant conduct where the prosecutor improperly commented on reasonable doubt. *State v. McMillan*, 44 Kan.App.2d 913, 922, 242 P.3d 203 (2010), *rev. denied* 291 Kan. —— (2011). The prosecutor's comment here was not gross and flagrant.

Further, there was no evidence the prosecutor acted out of ill will as was found in *Brinklow*, 288 Kan. at 50. Our court has on several occasions found that where there is a single misstatement as to reasonable doubt and a clear and correct standard in the jury instruction, no ill will is shown. *McMillan*, 44 Kan.App.2d at 923–24; *State v. Jackson*, 37 Kan.App.2d 744, 751, 157 P.3d 660, *rev. denied* 285 Kan. 1176 (2007).

The jury instruction was referenced by the prosecutor's statement and it clearly and correctly provided, "If you have reasonable doubt as to the truth of any of the claims required to be proved by the State, you must find the defendant not guilty." There is no evidence in the record that the prosecutor showed ill will in the statement as to the burden of proof.

Finally, it is frequently difficult to say that the evidence is of a direct and overwhelming nature in a classic "she said/he said" rape trial. But, if that inherent conflict was resolved against Aguilera, all of the other evidence corroborated D.A.'s testimony. And, most damaging to the defendant were the admissions he made in his interview with the Dodge City police.

While we hesitate to clearly hold the prosecutor's burden of proof statement was misconduct, even if it was so characterized, it would have been harmless error and not entitle Aguilera to any relief.

Aguilera next argues that the two counts of rape were multiplicitous and improperly pled by the State. He argues it was constitutionally improper to subject him to the potential for multiple punishments for a single offense by charging him with identical language of two counts of rape. He also maintains he was denied a fair trial because the amended complaint was vague and did not give him notice of the acts for which he was being prosecuted.

***6** The State argues it was proper to convict Aguilera of two counts of rape because they were separate incidents. The State contends the evidence showed two different penetrations, one digital and one penile, and the jury was properly instructed, without objection, that one count related to penetration by Aguilera's penis and the other to penetration by Aguilera's finger or fingers.

We will quote extensively from *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48 (2006), which holds: "The issue of whether convictions are multiplicitous is a question of law subject to unlimited review."

Aguilera intertwines his multiplicity argument with claims that this is a multiple acts situation in which he was improperly charged, tried, and convicted.

A multiple acts issue is related but not the same as the multiplicity issue Aguilera raises here. In a multiple acts case, several acts are alleged, any one of which could constitute the single crime charged. In such a case, the State must elect or the court must give a unanimity instruction and the jury must unanimously decide which act or incident constitutes the crime. A multiple acts issue involves a defendant's right to a unanimous jury. *See* *State v. Voyles*, 284 Kan. 239, 244, 160 P.3d 794 (2007). Multiplicity, on the other hand, involves the charging of a single offense in multiple counts of a complaint or information. It creates a potential for a defendant to receive multiple punishments for a single offense which would violate the defendant's constitutional right to be free from double jeopardy. *Schoonover*, 281 Kan. at 475.

To determine if a multiple acts issue is involved, a court must first decide whether the conduct constitutes one act or separate and distinct multiple acts, which is essentially the same as the first step of the multiplicity analysis. Compare *Voyles*, 284 Kan. at 244 (threshold determination in multiple acts analysis is whether defendant's conduct is part of one act or represents separate and distinct acts) with *Schoonover*, 281 Kan. at 496–97 (first component of multiplicity analysis requires determination of whether charged conduct is discrete or unitary); see also *State v. Foster*, 290 Kan. 696, 713, 233 P.3d 265 (2010) (applying *Schoonover* factors for determining if conduct unitary under first step of multiplicity inquiry to multiple acts analysis); *State v. Rivera*, 42 Kan.App.2d 1005, 1014–15, 219 P.3d 1231 (2009), *rev. denied* 290 Kan. 1102 (2010) (same). The answer to this threshold determination controls which issue is involved: If the conduct constitutes separate and distinct acts, there may be a multiple acts problem; if the acts are unitary, there may be a multiplicity problem. By arguing his conduct was unitary, Aguilera effectively admits he is not raising a multiple acts issue.

Although Aguilera did not raise the multiplicity issue to the trial court, exceptions to the rule which preclude appellate rule have often been applied to consider multiplicity issues for the first time on review to serve the ends of justice and prevent the denial of a fundamental right. See, *e.g.*, *State v. Nguyen*, 285 Kan. 418, 433, 172 P.3d 1165 (2007); *State v. Simmons*, 282 Kan. 728, 743, 148 P.3d 525 (2006).

***7** *Schoonover's* analysis summarized the multiplicity inquiry as involving two components, both of which must be met to find 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?" 281 Kan. at 496.

The first component of the multiplicity inquiry requires a court to determine if the conduct is discrete, "*i.e.*, committed separately and severally," or unitary, *i.e.*, "the charges arise from the same act or transaction." 281 Kan. at 496–97. If the conduct is discrete, there is no double jeopardy violation; if unitary, the second component must be analyzed to determine if the convictions arise from the same offense. 281 Kan. at 496.

Turning to the second component when, as here, the double jeopardy issue arises from convictions on multiple counts for violations of the same statute, the court must determine what the allowable unit of prosecution is under the statutory definition of the crime. 281 Kan. at 497–98. "[T]he test is: How has the legislature defined the scope of conduct which will comprise one violation of the statute?" 281 Kan. at 497. Only one conviction per unit of prosecution is allowed. 281 Kan. at 497–98.

In determining whether the events arose from the same conduct, *Schoonover* identified the following four factors to be considered:

> "(1) [W]hether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 497.

We understand, but do not agree with, the State's argument that Aguilera's commission of aggravated criminal sodomy was an intervening event and placing his penis back into D.A.'s vagina so he could "finish" was a fresh impulse which prevents a finding that his actions were unitary.

Under our facts, the two rape convictions arise from the same course of conduct. The acts occurred at the same time and at the same location. D.A.'s testimony described the acts as immediately following one after the other. All of Aguilera's actions were in furtherance of his stated goal of having sexual intercourse with D.A. and were taken within only a few minutes in order to accomplish his intended

purpose. All of his actions occurred and arose from the same unitary conduct.

Our case is different factually from *State v. Sellers*, 292 Kan. 117, 253P.3d 20 (2011), slip op. at 18, where unitary conduct was not found where the defendant "did leave the room for 30 to 90 seconds, breaking the chain of causality and giving him the opportunity to reconsider the felonious course of action." *Sellers* was an acknowledged close call, but the defendant checked on the dog and the continuing slumber of the mother to ensure that no noise impeded his overall plan to molest the victim a second and separate time.

***8** Both our Supreme Court and a panel of this court recently reviewed a similar issue of whether separate penetrations constituting rape were unitary or discrete. See *State v. Colston*, 290 Kan. 952, 964, 235 P.3d 1234 (2010) (concluding defendant's act of penile penetration of child victim immediately followed by digital penetration did not constitute multiple acts because "[b]ased on the record, the digital penetration on August 11 did not appear to be factually separate and distinct from the penile penetration on that same date"); *State v. Coffee*, No. 101,608, unpublished Court of Appeals opinion filed September 17, 2010, slip op. at 13 (citing *Colston* and applying *Schoonover* factors to "say with legal certitude that [the defendant's] digital penetration of [the victim] immediately followed by penile penetration [did] not constitute multiple acts" because the conduct occurred within seconds of each other, in the defendant's bedroom, there was no intervening event between the acts of penetration, and the victim's testimony "suggest[ed] that she continually struggled with the defendant throughout both the digital and penile penetration and, therefore, constituted a continuous event involving a single unitary act of *rape* "), *pet. for rev.* filed October 12, 2010 (pending). But see *Foster*, 290 Kan. at 715 (facts presented two separate rapes thereby implicating a multiple acts issue where more than one act of penetration separated in time and by significant intervening events).

Once unitary conduct is found, we must determine if, by statutory definition, there are two offenses or only one. In *Schoonover*, our Supreme Court explained:

> "The determination of the appropriate unit of prosecution is not necessarily dependent upon whether there is a single physical action or a single victim. Rather, *the key is the nature of the conduct proscribed* .... The unit of prosecution [is] determined by the scope of the course of conduct defined by the statute rather than the discrete physical acts making up that course of conduct or the number of victims injured by the conduct." (Emphasis added.) 281 Kan. at 472.

Aguilera was charged with rape as defined by K.S.A. 21–3502(a)(1)(A) as "sexual intercourse with a person who does not consent to the intercourse when the victim is overcome by force or fear."

Instruction No. 8 followed K.S.A. 21–3501(1), stating: "Sexual intercourse means any penetration of the female sex organ by a finger, the male sex organ or any object."

Instruction No. 6 defined the one count of rape as requiring proof that the defendant had sexual intercourse with D.A. by penetrating her vagina with his penis. Instruction No. 7 defined the second count of rape as requiring proof that the defendant had sexual intercourse with D.A. by penetrating her vagina with his finger or fingers.

It is Augilera's position that the unit of prosecution for the rape charges should not be determined by the number of separate acts of penetration, but by the number of separate incidents during which any number of acts of penetration may have occurred. Stated another way, he argues the legislature intended to punish a course of conduct involving vaginal penetration rather than each separate act of vaginal penetration.

***9** Applicable to Aguilera's position is this court's decision in *State v. Mendoza*, 41 Kan.App.2d 996, 207 P.3d 1072 (2009), *rev. denied* 290 Kan. 1100 (2010). The issue in Mendoza was "whether the State can charge two stabs of a knife attack as two distinct counts of aggravated battery." 41 Kan.App.2d at 997. After concluding the aggravated battery charges arose from the same conduct upon application of the *Schoonover* factors to the facts, this court looked to the language of the aggravated battery statute, K.S.A. 21–3414(a) to determine the unit of prosecution. 41 Kan.App.2d at 1000–04.

The *Mendoza* decision relied on *State v. Gomez*, 36 Kan.App.2d 664, 670–73, 143 P.3d 92 (2006) (criminal discharge of a firearm in violation of K.S.A. 21–4219[b], where it was held the legislature intended to punish a curse of conduct and not that each occupant in a house constituted a separate violation), and *State v.. Thompson*, 287 Kan. 238, 246–52, 200 P.3d (2009) (possession of precursors with intent to manufacture in violation of K.S.A. 65–7006[a], conduct is unitary and defendant cannot be sentenced separately for possession of each prohibited, listed substance).

The *Mendoza* opinion reasoned:

> "The statutory language clearly indicates aggravated battery is inflicted upon another person. The nature of the conduct proscribed appears to encompass all physical harms, disfigurements, and physical contacts inflicted upon the person. [Citation omitted.] ... [T]he statute does not state that harm to each individual body part constitutes a separate violation of the statute. [Citation omitted.] The legislature could have provided this language when enacting K.S.A. 21–3414 but chose not to do so." 41 Kan.App.2d at 1004.

It is Aguilera's argument that analysis of the rape statute requires the same conclusion because the legislature could have, but did not, define rape as any "act" of vaginal penetration. He claims that multiple penetrations occurring at the same place and at the same time in a continuing course of conduct can only be charged or convicted of as one act or a single offense.

The State here did not argue this issue beyond its contention the actions were separate crimes with an intervening event and a fresh impulse. But, the State's unit of prosecution best argument is as follows: Because the legislature defined sexual intercourse in K.S.A. 21–3501(1) as "any penetration of the female sex organ by a finger, the male sex organ, or any object," it intended to punish separately penetration by a finger and penetration by the male sex organ. By using his finger or fingers first and then later his penis, the State claims this involves two separate and distinct actions. Stated another way, the State's position is the legislature clearly defined the unit of prosecution for rape by the object used to complete the penetration.

The ultimate question is whether the legislature intended to publish rape as a course of conduct or based on whether and to what extent a finger, the male sex organ, or any object was used, and possibly how often for the act of penetration.

***10** Neither the statutory structure or the legislative history of the statutory definition of sexual intercourse in K.S.A. 21–3501(1) provides definitive assistance in deciphering the legislative intent on this unit of prosecution question. Accordingly, it is appropriate to apply the rule of lenity. That rule derives from the United States Supreme Court's pronouncement that " '[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity .' " *Schoonover*, 281 Kan. at 472 (quoting *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 [1955]). Thus, if the legislature fails to authorize a unit of prosecution that ' "clearly and without ambiguity" ' allows two convictions for unitary conduct, the rule of lenity dictates that only one conviction will be allowed. 281 Kan. at 472 (quoting *Bell*, 349 U.S. at 84).

If we are allowed to provide the rule of lenity here, we must conclude that rape is punishable as a course of conduct as opposed to separate individual acts based on what is used to complete the penetration, *i.e.*, a finger or the male sex organ. This would require us to hold Aguilera's rape convictions are multiplicitous and one must be released.

This is not easily done as we are required to follow Kansas Supreme Court precedent. And, there is a 1990 Kansas Supreme Court case which is directly on point and reached a different result from what our *Schoonover* analysis seems to require. *State v. Zamora*, 247 Kan. 684, 693–94, 803 P.2d 568 (1990), which was cited in both *Colston* and *Coffee*, and as late as *Sellers*, held that separate acts of penetration by finger and penis though separated by only a short interval, constituted separate acts of rape. The logic for the majority's holding was that proof of one count required proof of a fact not required in the other "(proof that Zamora inserted his fingers into A.J.'s vagina) ... (proof that Zamora inserted his penis into A.J.'s vagina)." *Zamora*, 247 Kan. at 694.

Zamora was a 4 to 3 decision with a strong dissent by Justice Abbott who noted:

> "This court has long held that '[i]t is a generally accepted principle of law that the state may not split a single offense into separate parts. Where there is a single wrongful act it generally will not furnish the basis for more than one criminal prosecution. [Citations omitted.]'
>
> "K.S.A. 21–3502 lists sexual intercourse as an element of rape. Then, K.S.A. 21–3501 defines the ways in which sexual intercourse may take place. Section 3501 is merely definitional, it does not set forth elements of rape. It is the act of sexual intercourse that is an element of rape, not the insertion of a finger, a penis, or an object." *Zamora*, 247 Kan. at 697.

The dissent contended the trial court erroneously allowed two separate counts of the same offense to go to the jury. The dissenters concluded there was only one act of sexual intercourse and one count was multiplicitous. 247 Kan.

at 697–98 (Abbott, J., dissenting, joined by Lockett and Allegrucci, JJ.).

***11** As is apparent, Zamora was decided in 1990 and *Schoonover* in 2006. Under *Schoonover*, we are required to look to the unit of prosecution that is contemplated by the applicable statute. See 281 Kan. at 497–98. That is the test that would have to be applied if the Zamora facts would be decided today, and we believe that a different result would be reached.

We also note that the majority opinion in *Zamora* relied on *State v. Garnes*, 229 Kan. 368, 372–73, 624 P.2d 448 (1981), for the rule that " '[i]f each offense charged requires the proof of a fact not required in proving the other, the offenses do not merge.' " *Zamora*, 247 Kan. at 694. But, this appears to have addressed in *Garnes* circumstances in which offenses based on two different statutes had been charged, not two violations of the same statute. This has the effect of weakening the precedent of Zamora as being required to be followed in our case.

We choose to believe our Supreme Court when the issue is squarely presented to them will follow *State v. Dorsey*, 224 Kan. 152, 156, 578 P.2d 261 (1978), and *Rivera*, 42 Kan.App.2d at 1013–17, and hold that multiple acts of penetration occurring in a continuing or unbroken sequence and in the same location do not give rise to multiple counts of rape. Consequently, we hold that the convictions of two convictions of rape are multiplicitous and one count is reversed.

This is a small victory for Aguilera as the trial court sentenced him to concurrent sentences on the two rape convictions (as well as the aggravated criminal sodomy conviction) so he receives the same sentence as has already been entered. His criminal history is reduced by the reversed rape conviction. There is no reason or requirement for Aguilera to be resentenced.

Aguilera's remaining arguments are without merit. The charging document did not impede his ability to respond to the charges as he now contends.

For a charging document to be complete, it must contain "a plain and concise written statement of the essential facts constituting the crime charged, which complaint, information or indictment, drawn on the language of the statute, shall be deemed sufficient." K.S.A. 22–3201(b).

The amended complaint contained two charges of rape, stating the language of the statute. They alleged Aguilera had sexual intercourse with a person who did not consent and was overcome by force or fear. This is the statutory requirement of K.S.A. 21–3502(a)(1)(A). While the charging document did not distinguish between the two counts of rape, a bill of particulars could have been requested if needed to defend against the charges. It was not error to allow the case to proceed based on the charging document.

There is no multiple acts issue here for as we earlier held that when Aguilera argued his conduct was unitary, he admitted he was not raising a multiple acts issue.

All the convictions except for one rape conviction are affirmed. One rape conviction is reversed. There is no need for Aguilera to be resentenced. The reversed rape conviction is to be removed from Aguilera's criminal history.

***12** Affirmed in part and reversed in part.

All Citations

253 P.3d 385 (Table), 2011 WL 2555423

401 P.3d 185 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
James Gulie HENNING, Appellant.

No. 115,832
|
Opinion filed September 1, 2017
|
Review Denied June 25, 2018

Appeal from Geary District Court; BENJAMIN J. SEXTON, Judge.

Attorneys and Law Firms

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Michelle L. Brown, assistant county attorney, Jason Oxford, assistant county attorney, and Derek Schmidt, attorney general, for appellee.

Before Buser, P.J., Malone, J., and Hebert, S.J.

MEMORANDUM OPINION

Hebert, J.:

***1** Following waiver of jury trial, the district court convicted James Gulie Henning of 10 off-grid felonies after a trial to the court. The convictions included one count of rape, three counts of aggravated criminal sodomy with a child, two counts of aggravated indecent liberties with a child and four counts of sexual exploitation of a child. Henning was sentenced pursuant to Jessica's Law to 10 life sentences, with two convictions to run consecutively and the remainder to run concurrently.

On appeal, Henning raises three issues regarding his convictions: The probable cause affidavits in support of the search warrants for his computer records and for his residence were unreliable; the search warrant for his residence was overbroad; and several of his convictions were multiplicitous.

We find no reversible error regarding the probable cause affidavits or the resulting residential search warrant, but we do find several of Henning's convictions were multiplicitous and, as set forth in our opinion, we vacate several of the convictions and remand for resentencing.

Henning also raises several issues regarding his sentencing. He argues that the district court erred by weighing aggravating factors against mitigating factors in denying his motion for durational departure; the district court abused its discretion by imposing two life sentences consecutively; and the district court erred by imposing lifetime postrelease supervision and electronic monitoring.

We find the district court ruling denying departure should be vacated and the motion for departure be remanded for proceedings in accordance with K.S.A. 2016 Supp. 21-6627(d), as construed in *State v. Jolly*, 301 Kan. 313, 324–25, 342 P.3d 935 (2015). We further find the imposition of lifetime postrelease supervision and electronic monitoring exceeded the authority of the district court when imposing an off-grid life sentence and, accordingly, we vacate the district court's orders imposing such terms.

In view of our remand for resentencing and reconsideration of durational departure, we need not reach the issue regarding the imposition of consecutive sentences.

Factual and Procedural Background

On November 10, 2014, Detective William Arnold, Jr. of the Junction City Police Department received a tip from the Wichita Police Department. Tumblr—a website typically used to post image blogs—reported to the Wichita Police Department that an account titled "dadydaughtertimes" uploaded an image suspected to be child pornography. Tumblr disabled the account and reported the IP address—*i.e.*, the internet service provider's address, or the location to which the internet sends information—and the

associated email address from which the image was uploaded.

Detective Arnold confirmed the image appeared to be child pornography. He researched the IP address and determined it was located in Junction City, Geary County, Kansas and was registered to Cox Communications. By researching the email address provided by Tumblr, Arnold discovered an associated account with Google Picasa—a cloud-based photo archive website—which displayed the name "Jimmy Henning." Believing the name "Jimmy" to be a nickname for "James," Arnold searched the Junction City Police Department internal database records and identified James Henning living at a residence on 12th Street in Junction City.

***2** Detective Arnold also searched the IP address in the Child Protective System (CPS) database. He found the IP address was associated with a Globally Unique Identifier (GUID)—an internet-capable machine, such as a computer—for a period of time including October 11, 2014, which was the date of the last login to the Tumblr account. Therefore, he concluded that the IP address and GUID were connected on the same date as the last login of the Tumblr account that uploaded the child pornography image. Arnold identified two images of suspected child pornography associated with the GUID and IP address together. In addition, CPS records indicated the GUID had been in possession of 1,612 images of known or suspected child pornography and was associated with several other network or proxy IP addresses, which could indicate an attempt to hide online activity.

Detective Arnold drafted a probable cause affidavit, upon which the district court issued a search warrant to Cox Communications seeking account information—name, address, date of birth, and social security number—for the account assigned to the IP address on October 11, 2014. Cox Communication's response revealed the account in question was registered to Mary Henning, who resided at the same address Arnold had previously identified as James Henning's residence. Arnold added the information received from Cox Communications to his probable cause affidavit in support of a search warrant for his residence on 12th Street, which was issued by the district court.

During execution of the residential warrant, Detective Arnold questioned Henning at his residence and arrested him for dissemination of child pornography. At the county jail, Henning told Detective Arnold he was addicted to pornography and informed Detective Arnold where on Henning's computer child pornography would be found. Detective Arnold searched the laptop Henning identified and found not only child pornography, but also four homemade videos and additional still photographs of Henning engaging in sexual acts, including sexual intercourse and anal sodomy, with Henning's eight-year-old daughter, K.H.

The State charged Henning with 11 off-grid felonies stemming from the 4 videos and the still photographs of sexual acts with K.H. Henning filed motions to suppress the evidence obtained from both the Cox Communications and the residential search warrants and his statements to the police. The district court denied those motions after a hearing.

Henning waived his right to a jury trial. His case was tried to the district court, which convicted him of 10 off-grid felonies. At sentencing, Henning sought a durational departure. The district court heard argument at sentencing but denied the motion. The district court sentenced Henning to 10 life sentences with 2 convictions to run consecutively and the remainder concurrently to those convictions. Henning timely appealed.

The Probable Cause Affidavits

Henning contends that the district court erred in denying his motion to suppress evidence because the probable cause affidavits provided by Detective Arnold in support of the search warrants for Cox Communications and the Henning residence contained material omissions. The two affidavits contained identical information as it is relevant to this issue; the residential affidavit had the same content as the Cox Communications affidavit but added the information obtained from the Cox Communication warrant. Since our consideration applies to both affidavits without distinction, we will refer to them jointly in the singular.

When reviewing a motion to suppress evidence, this court applies a bifurcated standard. We must determine whether the factual findings underlying the district court's decision are supported by substantial competent evidence and review the ultimate legal conclusion drawn from the factual findings de novo. *State v. Reiss*, 299 Kan. 291, 296, 326 P.3d 367 (2014). When an affidavit supporting an application for a search warrant is challenged, we apply a deferential standard, asking " 'whether the affidavit provided a substantial basis for the magistrate's determination that there is a fair probability that evidence will be found in the place to be searched.' " *State v. Adams*, 294 Kan. 171, 180, 273 P.3d 718 (2012) (quoting *State v. Hicks*, 282 Kan. 599, Syl. ¶ 2, 147 P.3d 1076 [2006]). Because we have the same access to the content of the

affidavit as the issuing magistrate, we may perform our own determination of the sufficiency of the affidavit under this deferential standard. *Adams*, 294 Kan. at 180.

***3** An affidavit in support of a search warrant is presumed valid. See *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L.Ed. 2d 667 (1978). For that reason, the facts contained in an affidavit generally may not be disputed by the party against whom the warrant is directed. *Adams*, 294 Kan. at 178–79. However, a limited exception exists when the subject alleges that the affidavit contains either deliberate falsehoods, untrue statements demonstrating a reckless disregard for the truth, or deliberate omissions of material fact. *Franks*, 438 U.S. at 171–72. The district court must hold an evidentiary hearing—called a *Franks* hearing—if the defendant shows by a sworn allegation that an affidavit in support of a search warrant is unreliable. 438 U.S. at 171–72.

When a defendant alleges that an affidavit in support of a search warrant omits information, the court must determine if the omission was material and, if so, whether the omission rendered the application and affidavit unreliable. *State v. Schoonover*, 281 Kan. 453, 513, 133 P.3d 48 (2006). A warrant containing omissions is valid if the affidavit, even with the omitted material added to it, sufficiently establishes probable cause. 281 Kan. at 513.

In his motion, Henning claimed the affidavit was misleading in that it included the fact the GUID at issue was associated with 1,612 images of known or suspected child pornography but omitted that only two of those images were in association with the IP address connected with the Henning residence. He also argued that the affidavit failed to state that the 1,612 child pornography images were downloaded to the GUID prior to its association with the IP address connected to the Henning residence. Following a first *Franks* hearing on August 11, 2015, District Judge Hornbaker denied the motion but subsequently recused himself from the case and vacated his order. District Judge Sexton took over the case and held a second hearing on Henning's motion to suppress on September 9, 2015.

After reviewing the transcript of the first *Franks* hearing and listening to argument from counsel, Judge Sexton found that the alleged omissions were not misleading or material because the warrants would have been issued even if the alleged omitted material had been included. Specifically, the court relied on the fact that there was probable cause to establish that on October 11, 2014, the IP address associated with the Henning residence was accessed to upload images of known child pornography. Thus, even if the affidavit had included only information about the two images uploaded from the IP address and not the 1,612 additional images located on the GUID, the court held there was still probable cause to establish felonious conduct at the residence. The district court held Detective Arnold did not deliberately mislead the court into believing that there was evidence of child pornography that was accessed on the IP address associated with Henning's residence. Our review, therefore, focuses on whether there is substantial competent evidence to support the district court's findings.

The probable cause affidavit provides substantial competent evidence to support the district court's findings of fact. It traces Detective Arnold's investigation from the initial tip he received from the Wichita Police Department that Tumblr reported an account which uploaded an image suspected to be child pornography. Tumblr provided an IP address associated with the account. Detective Arnold therefore believed he had probable cause that the IP address was used to upload child pornography on October 11, 2014. Detective Arnold used the CPS database to identify a GUID associated with the IP address beginning October 11, 2014, which was the same date as the last login of the Tumblr account. The search warrant response Detective Arnold received from Cox Communications confirmed that the IP address was associated with the Henning residential address.

***4** The district court did not err in concluding that even if the alleged omitted material was added to the probable cause affidavit the affidavit sufficiently established probable cause of a crime. See *Schoonover*, 281 Kan. at 513. Even if the affidavit had included the fact that only two images were associated with both the GUID and the IP address, the affidavit provided a substantial basis for the magistrate's determination there was a fair probability that evidence of child pornography would be found in the Henning residence. See *Adams*, 294 Kan. at 180.

On appeal, Henning raises several additional alleged omissions. He argues the affidavit stated the GUID and IP address had been associated "since" October 11, 2014, but claims the evidence actually indicated the association was only proven through October 28, 2014, not the time that the affidavits were written on November 14 and November 25, 2014. Henning also claims the affidavit omitted detailed explanations about what network or proxy IP addresses are and should have included information about Detective Arnold's training and education. Since these issues were not specifically raised or pressed below, the district court never made factual findings or rendered a decision on these

grounds.

As a general rule, issues not raised in the district court cannot be raised for the first time on appeal. While there are several exceptions to this rule, Supreme Court Rule 6.02(a)(5) (2017 Kan. S. Ct. R. 34) requires an appellant to specifically explain why an issue not raised below should be considered for the first time on appeal. Since Henning did not present us with a reason why we should consider the additional alleged omissions, they are not properly preserved for review. See *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015); *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014).

In any event, we would find these additional alleged omissions are neither material nor misleading. The affidavit contained sufficient information to allow the magistrate to conclude the IP address and GUID were associated on the date that the Tumblr account uploaded the image of child pornography—October 11, 2014. Thus, even if the affidavit specified the IP address and GUID were not associated after October 28, 2014, it would not alter the court's finding. Similarly, additional information about network or proxy IP addresses (which were described in the affidavit as suggesting the user attempted to hide online activity) or information about Detective Arnold's training and education would not make it less likely that evidence of child pornography would be found at the Henning residence. See *Schoonover*, 281 Kan. at 513.

In summary, we conclude under the facts presented, even with the addition of all the alleged omitted material, Detective Arnold's probable cause affidavit was sufficient to provide a substantial basis for the issuing magistrate to determine there was a fair probability officers would find evidence of the crime of dissemination of child pornography. The *Franks* motion was properly denied.

The Residential Search Warrant

Henning next argues that the search warrant for his residence was deficient because it did not describe the items to be searched with particularity, in violation of his rights under the Fourth Amendment to the United States Constitution. This court uses a bifurcated standard to review the district court's decision on a motion to suppress. Factual findings are reviewed for substantial competent evidence and legal conclusions are reviewed de novo. *Reiss*, 299 Kan. at 296.

***5** The Fourth Amendment states: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The scope of § 15 of the Kansas Constitution Bill of Rights is the same. See K.S.A. 2016 Supp. 22-2502. The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings—commonly referred to as the "particularity requirement." See *Crowther v. State*, 45 Kan. App. 2d 559, 566, 249 P.3d 1214 (2011) (citing *United States v. Carey*, 172 F.3d 1268, 1272 [10th Cir. 1999]). The purpose of the requirement is to prevent general searches and seizure of items at the discretion of the officer executing the warrant. *State v. LeFort*, 248 Kan. 332, 340, 806 P.2d 986 (1991).

"[W]arrants and their supporting affidavits are interpreted in a common sense, rather than a hypertechnical, fashion. To do otherwise would discourage police officers from submitting their evidence to a judicial officer before acting." *LeFort*, 248 Kan. at 335–36; see K.S.A. 22-2511 ("No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.").

The warrant in this case begins with an introductory paragraph stating: "Having evidence under oath before me from which I find there is probable cause to believe that an offense against the laws of the State of Kansas has been committed (Distribution of Child Pornography)." The warrant then lists in 20 paragraphs the items Detective Arnold sought to search under the warrant. At trial and on appeal, Henning specifically challenges the following paragraphs as overbroad:

> "2. Computers.
>
> "3. To forensically process and search in a controlled setting all electronic media for the purpose of viewing and or retrieving for evidentiary purposes all data including electronic images, documents and stored electronic communications.
>
> ....
>
> "9. Digital communications devices allowing access to the Internet or to cellular digital networks to include cellular telephones, email devices and personal digital assistants.

> "10. Digital input and output devices to include but not limited to keyboards, mice, scanners, printers, monitors, network communication devices, modems and external or connected devices used for accessing computer storage media.
>
> ....
>
> "13. Contents of volatile memory related to computers and other digital communication devices that would tend to show the current and recent use of the computer, use of encryption, use of other communications devices, routes of Internet and other digital communications traffic and passwords, encryption keys or other dynamic details necessary to preserve the true state of running evidence.
>
> "14. Computer software, hardware or digital contents related to the sharing of Internet access over wired or wireless networks allowing multiple persons to appear on the Internet from the same IP address."

Searching computers presents unique issues under the Fourth Amendment. Law enforcement " 'cannot simply conduct a sweeping, comprehensive search of a computer's hard drive.' " *State v. Rupnick*, 280 Kan. 720, 732, 125 P.3d 541 (2005) (quoting *United States v. Walser*, 275 F.3d 981, 986 [10th Cir. 2001], *cert. denied* 535 U.S. 1069 [2002]). Warrants for computer searches must affirmatively limit the search to evidence of specific types of material. *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005); *State v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001); *United States v. Campos*, 221 F.3d 1143, 1147–48 (10th Cir. 2000). "Officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant." *Crowther*, 45 Kan. App. 2d at 566.

***6** Henning cites *United States v. Otero*, 563 F.3d 1127 (10th Cir. 2009) to support his claim that the challenged paragraphs are overbroad. In *Otero*, the search warrant at issue was divided into two sections: first "ITEMS TO BE SEIZED," and second "COMPUTER ITEMS TO BE SEIZED." 563 F.3d at 1129–30. The first section "limit[ed] the search to evidence of specific crimes" of which Otero was suspected, namely mail and credit card theft. In contrast, the second section had no such limitation but rather appeared to allow seizure of "[a]ny and all" information contained in Otero's computer. 563 F.3d at 1132–33. The Tenth Circuit held that the second section of the warrant was invalid because it authorized a "wide-ranging search" of Otero's computer. 563 F.3d at 1133.

The State contends that this case is more like *United States v. Brooks*, 427 F.3d 1246 (10th Cir. 2005). The search warrant at issue in that case authorized officers to search for " 'evidence of child pornography,' " including " 'photographs, pictures, computer generated pictures or images, depicting partially nude or nude images of prepubescent males and or females engaged in sex acts' " as well as " 'correspondence, including printed or handwritten letters, electronic text files, emails and instant messages.' " 427 F.3d at 1252. The court held that "although the language of the warrant may, on first glance, authorize a broad, unchanneled search through Brooks's document files, as a whole, its language more naturally instructs officers to search those files only for evidence *related to child pornography*." 427 F.3d at 1252. The court held while the warrant "could have been more artfully written" in context, the limitation on the image files implicitly authorized officers to search through computer files only for items specifically related to child pornography. 427 F.3d at 1253.

Here, Henning correctly points out that the challenged paragraphs of the search warrant do not explicitly limit the search to the specific crimes or evidence sought. However, like in *Brooks*, the warrant as a whole indicates the search should be limited to the crime of distribution of child pornography. Before listing the items to be seized, the warrant states that Detective Arnold, "[h]aving evidence under oath before me from which I find there is probable cause to believe that offense against the State of Kansas has been committed (Distribution of Child Pornography)" seeks "certain items," which he identifies in a single list containing some 20 numbered paragraphs—suggesting that the entire list is subject to the purpose of finding evidence of the crime at issue. Several paragraphs specify the evidence must relate to child pornography. Paragraph 1 specifically refers to "images or visual depictions representing exploitation of children." Paragraph 3, one of the challenged sections, refers to "evidentiary purposes" which would necessarily relate back to the introductory probable cause statement referring to the crime of distribution of child pornography. Paragraphs 6, 7, and 19 specifically refer to "child pornography" and in paragraphs 17 and 18, the reference to "exploitation" is specific. Henning does not challenge paragraphs 4, 5, 8, 11, or 12, even though they do not make specific references to "child pornography" or "exploitation of children."

The officer executing the warrant would not read the

challenged paragraphs in isolation but rather in the context of the entire document. Like in *Brooks*, the warrant here could have been more artfully drawn, but a common-sense reading of the language of the warrant as a whole makes clear that it is limited to evidence related to the crime of distribution of child pornography. See *LeFort*, 248 Kan. at 334–35.

***7** At the very least, under the circumstances of this case, the good faith exception to the exclusionary rule announced in *United States v. Leon*, 468 U.S. 897, 918–20, 104 S. Ct. 3405, 82 L.Ed. 2d 677 (1984), would salvage the evidence obtained pursuant to the search of Henning's residence, since the officer herein acted in good faith and in reasonable reliance on the warrant in executing a search within the scope of the warrant. See *United States v. Nolan*, 199 F.3d 1180, 1184 (10th Cir. 1999).

Whether the good faith exception applies is a question of law subject to de novo review. *United States v. Leary*, 846 F.2d 592, 606 (10th Cir. 1988). To determine whether the good faith exception applies, the court's "inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Leon*, 468 U.S. at 922 n.23. The court should review the text of the warrant and the circumstances of the search to ascertain whether the agents might have reasonably presumed it to be valid. *Leary*, 846 F.2d at 607.

In *Otero*, the case relied on by Henning, the court considered the circumstances surrounding the issuance and execution of the warrant and determined that the good faith exception applied. It noted the officer had attempted to craft a warrant that would authorize a search for evidence of the crimes at issue. The officer sought the assistance of an Assistant United States Attorney, who had assured the officer the language satisfied legal requirements, and the officer received approval from the magistrate. The court also noted that the search was in fact limited to evidence of the crime. 563 F.3d at 1134.

Similarly in *Riccardi*, the Tenth Circuit affirmed application of the good faith exception where:

> "The district court noted the following factors in support of applying the *Leon* exception: (1) the affidavit limited the search to child pornography; (2) the officers executing the warrant were involved in the investigation throughout, and one of the executing officers actually wrote the affidavit to support the application; (3) Agent Finch stopped to ask if the warrant was sufficient and received assurances from Detective Dickey; (4) the search methodology was limited to finding child pornography; and (5) investigators seized only evidence relevant to the crimes identified in the affidavit." 405 F.3d at 864.

Detective Arnold submitted the probable cause affidavit for approval to the County Attorney's office for advice on its legality and was provided assurance of its completeness before submitting it to the magistrate. Detective Arnold was the officer who prepared the affidavits, obtained the warrant, and led the search to collect evidence. He was the only officer who searched the computers. Detective Arnold testified at length to the district court that he searched only for evidence of child pornography and disregarded any file on the hard drive that was irrelevant to the distribution of child pornography. He also testified that he couldn't identify the GUID containing the relevant child pornography files until he performed a forensic search of the machines. His search was clearly limited to evidence pertaining to child pornography.

Detective Arnold had reason to believe the warrant was valid, considered himself authorized to search only for evidence of crimes for which he had probable cause, and conducted his search accordingly. The district court did not err in denying Henning's motion to suppress.

Multiplicitous Convictions

***8** Henning was convicted on two counts of aggravated indecent liberties with a child (Counts 1 and 4); two counts of aggravated criminal sodomy with a child (Counts 2 and 3); and four counts of sexual exploitation of a child (Counts 5, 6, 7, and 8). These convictions are based on the video recordings found on Henning's computer. Henning argues that these convictions are multiplicitous in violation of the constitutional prohibitions against double jeopardy, contending he was convicted multiple times for one continuous course of conduct. He requests we vacate his convictions for one count of aggravated indecent liberties, one count of aggravated criminal sodomy, and three counts of sexual exploitation of a child. Henning was also convicted of one count of rape (Count 9) and one additional count of aggravated criminal sodomy (Count 11). These convictions were based on separate visual images and are not included in Henning's multiplicity challenge.

The issue of multiplicity is a question of law over which we exercise unlimited review. *State v. Sprung*, 294

Kan. 300, 306, 277 P.3d 1100 (2012). Multiplicity is the charging of a single offense in several counts of a complaint. Multiplicity offends the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights when the improper splitting of a single offense into multiple counts results in multiple punishments following conviction of those counts. See *Schoonover*, 281 Kan. at 475.

> "[T]he 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?" 281 Kan. at 496.

The first component of the multiplicity inquiry requires we determine whether the conduct is discrete or unitary. If the conduct is discrete, the convictions do not arise from the same offense and there is no double jeopardy violation. If the charges arose from the same act or transaction, then the conduct is unitary and we must move to the second component of the inquiry. *Sprung*, 294 Kan. at 307.

To determine whether convictions arose from unitary conduct, *Schoonover* identified the following factors:

> "(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct." 281 Kan. at 497.

Henning contends the conduct depicted in the four videos was a single unitary course of conduct, and application of the first two *Schoonover* factors would tend to support this contention. The time stamp on the videos would suggest that all of the sexual activity depicted occurred within eight minutes of each other. The events all occurred in the same location—a room over the detached garage at the Henning residence. There is no evidence anyone left or came into the room during the course of the activities.

However, the State focuses its argument on the last two *Schoonover* factors, contending that the act of starting and stopping of the video camera constituted an intervening event and indicates a separate fresh impulse motivated each of the four videos.

Kansas courts have held that acts are discrete when they are separated by some break that provides the defendant with an opportunity to reconsider his or her crime. See *State v. Sellers*, 292 Kan. 346, 359–60, 253 P.3d 20 (2011), *overruled on other grounds in* *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016); *State v. Colston*, 290 Kan. 952, 964, 235 P.3d 1234 (2010), *overruled on other grounds in* *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

In *Sellers*, the Supreme Court upheld the defendant's conviction of two counts of aggravated indecent liberties with a child, where Sellers had touched the victim, then left the room for 30–90 seconds to check on a barking dog, returned to the room, and touched the victim a second time. The Court reasoned that leaving the room broke the chain of causality and gave Sellers an opportunity to reconsider his felonious course of action. 292 Kan. at 360.

***9** In *Colston*, the Supreme Court found that multiple acts had occurred where the evidence indicated that the defendant had completed an act of penile penetration and that a subsequent digital penetration was motivated by a fresh impulse when the victim asked to leave the room to urinate. The ruling in *Colston* was, however, made in considering whether a unanimity instruction was required, rather than in the context of a multiplicitous conviction challenge.

When we consider the nature of the sexual conduct which occurred within a relatively short period of approximately eight minutes in a singular location, we are not convinced that the act of stopping and restarting the video camera constituted a purposeful intervening break in the causality between the various sexual activities depicted on each short video. There does not appear to be any new or fresh impulse motivating additional activity, but rather the actions constitute a continuous, unitary course of conduct involving the sexual exploitation of the child victim. Thus, we find that the four convictions for sexual exploitation of a child under Counts 5, 6, 7, and 8 are multiplicitous.

Having determined that all of the sexual activity depicted on the four videos arose out of the same unitary course of conduct, we then turn to the statutory definitions to determine the allowable unit of prosecution for aggravated indecent liberties with a child and aggravated criminal sodomy. See *Sprung*, 294 Kan. at 307–08.

In *Sprung*, it was noted that in *Schoonover* the court had determined that in considering the unit of prosecution test, the key is the nature of the conduct proscribed, not the number of acts or the number of victims. 294 Kan. at

310. In applying that test to indecent liberties with a child under K.S.A. 21-3504(a)(3)(A)—the identical predecessor to K.S.A. 2016 Supp. 21-5506(b)(3)(A), the recodified statute under which Henning was charged and convicted—the court determined that the legislature had intended to create a single unit of prosecution where convictions arose out of multiple acts during a unitary course of conduct. 294 Kan. at 310. The *Sprung* analysis and rationale clearly precludes Henning's multiple convictions for aggravated indecent liberties with a child under Counts 1 and 4. The same rationale and analysis would also apply to a consideration of the conduct proscribed by K.S.A. 2016 Supp. 21-5504(b)(1) to preclude Henning's multiple convictions for aggravated criminal sodomy with a child under Counts 2 and 3.

Accordingly, we vacate one conviction of aggravated indecent liberties with a child, one conviction of aggravated criminal sodomy with a child, and three convictions of sexual exploitation of a child, and remand the remaining three convictions for resentencing. In so doing, we are mindful that each of the three crimes constitutes an off-grid felony subject to a potential life sentence. See K.S.A. 2016 Supp. 21-5504(c)(3); K.S.A. 2016 Supp. 21-5506(c)(3); K.S.A. 2016 Supp. 21-5510(b)(2).

Durational Departure

Prior to sentencing, Henning moved for a durational departure, seeking a sentence of 155 months in prison. The district court held a hearing and denied the motion. Henning argues on appeal that the district court erred in denying his departure motion for two reasons. First, he argues the court improperly weighed aggravating and mitigating factors in violation of K.S.A. 2016 Supp. 21-6627(d) and *State v. Jolly*, 301 Kan. 313, 324–25, 342 P.3d 935 (2015). Alternatively, he claims the district court should have granted the motion based on substantial and compelling mitigating factors.

***10** This court reviews the district court's denial of a motion for departure for an abuse of discretion. *Jolly*, 301 Kan. at 324–25. A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the trial court; (2) the action is based on an error of law; or (3) the action is based on an error of fact. *State v. Marshall*, 303 Kan. 438, 445, 362 P.3d 587 (2015).

Under Jessica's Law, the presumptive sentence for a defendant who is 18 years or older and convicted of rape, aggravated criminal sodomy of a child, sexual exploitation of a child, or aggravated indecent liberties with a child is life in prison with no possibility of parole for 25 years. K.S.A. 2016 Supp. 21-6627(a)(1)(B), (C), (D), (F). The district court must impose the presumptive sentence "unless the judge finds substantial and compelling reasons, following a review of mitigating circumstances, to impose a departure." K.S.A. 2016 Supp. 21-6627(d)(1).

K.S.A. 2016 Supp. 21-6627(d) refers to "mitigating circumstances" but not aggravating circumstances—factors that increase the severity of the crime. In *Jolly*, our Supreme Court determined that K.S.A. 2016 Supp. 21-6627(d)(1) "makes no provision for the weighing of aggravating circumstances against the mitigating circumstances to determine if a departure should be imposed." 301 Kan. at 321. Accordingly, the court disapproved of any language in prior caselaw "that would indicate aggravating circumstances can be weighed against mitigating circumstances when considering a departure in a Jessica's Law sentencing." 301 Kan. at 322.

The *Jolly* court further stated: "While [the statute] does not allow a weighing of aggravating factors against mitigating factors, the facts of the case—including any egregious ones—are essential for a judge to consider in deciding if a departure is warranted based on substantial and compelling reasons." 301 Kan. at 323–24. The court recognized that "a judge does not sentence in a vacuum" and specifically stated the "sentencing judge is to consider information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed, including the manner or way in which an offender carried out the crime. This includes those 'circumstances inherent in the crime and the prescribed sentence.' " 301 Kan. at 324. The court concluded by stating:

> "[T]he proper statutory method when considering a departure from a Jessica's Law sentence is for the sentencing court first to review the mitigating circumstances without any attempt to weigh them against any aggravating circumstances. Then, in considering the facts of the case, the court determines whether the mitigating circumstances rise to the level of substantial and compelling reasons to depart from the otherwise mandatory sentence. Finally, if substantial and compelling reasons are found for a departure to a sentence within the appropriate sentencing gridlines, the district court must state on the record those substantial

and compelling reasons." *Jolly*, 301 Kan. at 324.

In his motion for durational departure and at sentencing, Henning's attorney argued that several mitigating factors justified granting a shorter sentence. Henning cited the following factors: his lack of criminal history; his established military and law enforcement career experience; his education; his cooperation with law enforcement during the investigation; his diagnosis indicating he suffers from PTSD and recommendation that he be given treatment opportunities for his sexual addiction issues; his current time served; and his remorse for his actions. In response, the State acknowledged that Henning was employed by the United States Army in a military police capacity and he had no scoreable prior criminal history. However, the State argued that letters Henning wrote to his sister while incarcerated indicate that he lacked remorse for his actions. Further, the State pointed to the psychological evaluation, which determined Henning was a pedophile, blamed his daughter for sexually pursuing him, and suffered from denial, a mixed personality disorder, narcissism, paranoia, and antisocial features.

***11** The district court heard argument at the sentencing hearing and ruled on Henning's departure motion as follows:

> "I see and have gone through each of these defendant's exhibits. And I see the service you have to our country. When I take that, and I put that [*sic*] the scale of the lady with the blindfold holding it, and I put over here the incident you did—the incident with your daughter, the—what you've done to her.
>
> "And we talk about throwing lives away, and ... we talked about your—these other—these other lives, here, that your actions have affected. In your letters that's set forth in State's Exhibit 1, indicates that you don't have a clue as to what damage you've caused. You say you're sorry, here today, but letters written almost—right after yo—your trial date would indicate other—now, it's true, you could have had a—an epiphany, and hope that's true. But the exhibits would indicate otherwise.
>
> "When I take those—all those exhibits from the [A]rmy and all your service to our country, and I put that on one scale. And I put on the other scale that videotape, that this Court reviewed, it dropped like a rock. There is no mitigating circumstances here. There's only aggravating circumstances here.
>
> "A parent has a duty to be the gatekeeper to harm getting to their children. And you violated that in every way possible. You violated the fiduciary duty you have to your child. You violated you[r] child in every conceivable way.
>
> "And when we talk about lives, in order for this Court to consider this mitigating, I find that absurd, sir. I understand your attorney's doing his job, but there is in no way, shape, or form any mitigation in this matter whatsoever, and the Court denies the motion for the durational departure."

Henning argues that the district court explicitly weighed aggravating and mitigating circumstances in violation of K.S.A. 2016 Supp. 21-6627(d) and *Jolly*. At the hearing, neither the district court nor the parties referred to *Jolly*. However, another panel of this court recently stated that "our job on appeal is to measure the district court's ruling against the standard set out in *Jolly*." *State v. Sullivan*, No. 114,369, 2016 WL 4413563, at *2 (Kan. App. 2016) (unpublished opinion).

Unfortunately, the district court here failed to first address each of the mitigating circumstances claimed by Henning, as appears to be required by the *Jolly* procedure, making reference only to Henning's military service. Further, by explicitly making a literary reference to the "scale of the lady with the blindfold holding it," the district court ran afoul of the mandate to avoid weighing mitigating circumstances against aggravating factors. The district court specifically considered the video tape, the State's primary piece of evidence, to be an "aggravating" circumstance causing the scale to have "dropped like a rock."

The district court's descriptions could reasonably be construed as consideration of information that "might bear on the proper sentence for a particular defendant, given the crime committed, including the manner or way in which an offender carried out the crime." *Jolly*, 301 Kan. at 324. But in *State v. McCormick*, 305 Kan. 43, 46, 48–51, 378 P.3d 543 (2016), a four-justice majority of our Supreme Court vacated a sentence where the trial judge explicitly referred to a key piece of the State's evidence—the extreme intoxication of the 13-year-old victim—as an aggravating factor which "trumped" any mitigation in denying a departure motion in a Jessica's Law case.

***12** Justice Stegall, joined in dissent by Justices Luckert and Rosen, argued that the Supreme Court had elevated form over substance and vacated a valid sentence because the district court judge "simply used the 'wrong' words to describe what he did" by considering both the mitigating factors and the circumstances of the crime. *McCormick*, 305 Kan. at 53.

However, despite this articulate dissent and despite Judge Malone's well-reasoned dissent in *State v. Powell*, 53 Kan. App. 2d 758, 763–771, 393 P.3d 174 (2017), in which he pointed out the confusion created by the conflicting directives of *Jolly* we are duty bound to follow the Supreme Court precedent established in *Jolly*, and reiterated in *McCormick*. *State v. Meyer*, 51 Kan. App. 2d 1066, 1072, 360 P.3d 467 (2015).

By failing to strictly adhere to the procedure set out in *Jolly* and by using the apparently verboten words "weighing" and "aggravating circumstances," the district court abused its discretion by basing its denial of dispositional departure on a legal error. Accordingly, the order denying Henning's motion for dispositional departure is vacated and the case is remanded with directions to conduct a new motion hearing in compliance with K.S.A. 2016 Supp. 21-6627 as interpreted in *Jolly* and *McCormick*. This hearing will be held in conjunction with the resentencing of the multiplicitous convictions vacated and remanded previously ordered in this opinion.

It would seem compatible with *Jolly* that at such motion hearing the State should be allowed to present rebuttal to any evidence in mitigation presented by the defendant, although the State is precluded from offering independent evidence in aggravation. The district court and all the parties must, however, scrupulously avoid use of the terms "aggravating" or "weighing" in describing the decision making process.

Because of this remand, we do not consider Henning's alternative argument that the district court should have granted his motion for departure based on substantial and compelling factors which he presented. Henning may reraise this consideration in the district court.

Consecutive Sentences

Henning also argues that in the alternative, if this court does not remand for resentencing on his motion for departure, then remand is necessary because the district court erred in running two counts consecutively. As a general rule, the district court has discretion to order concurrent or consecutive sentences in off-grid cases. K.S.A. 2016 Supp. 21-6606(a); K.S.A. 2016 Supp. 21-6819(b). However, since we have remanded this case for resentencing and reconsideration on other grounds set forth above in this opinion, we need not address Henning's issue of whether the district court abused its discretion by imposing consecutive sentences. Henning may reraise this consideration in the district court.

Lifetime Postrelease and Electronic Monitoring

Henning argues that the district court made two sentencing errors regarding his postrelease term: (1) the court improperly ordered lifetime postrelease supervision; and (2) the court improperly ordered electronic monitoring. He contends that his sentence is therefore illegal and may be corrected at any time under K.S.A. 22-3504(1). Whether a sentence is illegal is a question of law over which this court has unlimited review. *State v. Trotter*, 296 Kan. 898, 902, 295 P.3d 1039 (2013).

***13** The district court ordered lifetime postrelease supervision and electronic monitoring for all 10 counts for which he was convicted. The State concedes the court erred on both points. "An inmate who has received an off-grid indeterminate life sentence can leave prison only if the successor to the Kansas Parole Board grants the inmate parole. Therefore, a sentencing court has no authority to order a term of postrelease supervision in conjunction with an off-grid indeterminate life sentence." *State v. Cash*, 293 Kan. 326, Syl. ¶ 2, 263 P.3d 786 (2011).

Under K.S.A. 2016 Supp. 22-3717(u), when the prisoner review board orders parole of an inmate, it "shall order as a condition of parole that the inmate be electronically monitored for the duration of the inmate's natural life." It is well established that although electronic monitoring is mandated as a condition of parole under K.S.A. 2016 Supp. 22-3717(u), "the sentencing court does not have the authority to impose parole conditions." *State v. Mason*, 294 Kan. 675, 677, 279 P.3d 707 (2012); see *State v. Beaman*, 295 Kan. 853, 869, 286 P.3d 876 (2012) (sentencing court does not have authority to impose electronic monitoring).

The district court erred in ordering lifetime postrelease supervision and electronic monitoring, and the judgments imposing such terms are vacated. Since this case has been remanded for resentencing, the district court should take note of this limitation on its authority when reconsidering the sentences to be imposed.

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

Malone, J., concurring:

I agree with the result of the well-reasoned majority opinion on all issues. I write separately only as to James Gulie Henning's claim that the district court erred in denying his motion for a durational departure by failing to comply with the holding in *State v. Jolly*, 301 Kan. 313, 324–25, 342 P.3d 935 (2015). It appears that the district court in Henning's case made the same mistake the district court made in *State v. McCormick*, 305 Kan. 43, 50–51, 378 P.3d 543 (2016), by referring to the State's evidence in opposition to the departure motion as "aggravating factors" and by expressly "weighing the aggravating evidence against the mitigating evidence" presented by Henning. Thus, we must reverse with directions for the district court to comply with the holding in *Jolly*. However, I restate my belief that the analysis in *Jolly* is confusing and flawed for all the reasons more fully stated in my dissenting opinion in *State v. Powell*, 53 Kan. App. 2d 758, 763–771, 393 P.3d 174 (2017). Our Supreme Court must take the first opportunity it has to further clarify how sentencing courts should conduct hearings on departure motions under Jessica's Law.

All Citations

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Unpublished Disposition
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NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Hector Antonio RODRIGUEZ-MANJIVAR, Appellant.

No. 120,039
|
Opinion filed October 11, 2019.

Appeal from Meade District Court; SIDNEY R. THOMAS, judge.

Attorneys and Law Firms

Derek W. Miller, of Miller & French, LLC, of Liberal, for appellant.

Steven J. Obermeier, assistant solicitor general, and Derek Schmidt, attorney general, for appellee.

Before Schroeder, P.J., Pierron and Standridge, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Hector Antonio Rodriguez-Manjivar appeals his conviction of one count of aggravated indecent liberties with a child. He argues the State did not present sufficient evidence to support his conviction; the district court erred by failing to give a multiple acts instruction; and the court erred by admitting evidence of prior sexual misconduct. We disagree and affirm.

FACTS

In April 2017, H.Z. was 13 years old and living in an apartment with her sister, M.S., and her brother-in-law, B.C., who were friends with Rodriguez-Manjivar. H.Z. knew Rodriguez-Manjivar and his family, including his wife, kids, and his mother-in-law, A.A. H.Z. had gone to Rodriguez-Manjivar's house to eat dinner and spend time with his family.

On April 1, 2017, A.A. was moving into an apartment above H.Z.'s apartment. H.Z. saw A.A. moving boxes and asked M.S. if she could help A.A. move. M.S. agreed. When H.Z. got up to A.A.'s apartment, A.A. and Rodriguez-Manjivar were there. H.Z. asked if she could help them, and A.A. agreed.

Rodriguez-Manjivar asked H.Z. to help him put a bedframe together in the bedroom. A.A. left the apartment to get something from the car. As H.Z. and Rodriguez-Manjivar were assembling the bedframe, he stood behind her. He began rubbing his hands on her body, grabbing her butt, and "squishing" her breasts. H.Z. told him to stop but he did not. She struggled to get away from Rodriguez-Manjivar, and he eventually let go.

H.Z. left the bedroom, but Rodriguez-Manjivar followed her, "staring at [her] in a nasty way." As she walked into the kitchen, Rodriguez-Manjivar began moaning and making "sexual noises." He asked H.Z. if she shaved her vagina. He grabbed her again, rubbing her body with his hands and touching her breasts. He slid his hands into her pants and tried to digitally penetrate her. H.Z. pushed him away. She then went into the bedroom and locked the door.

Within five minutes, H.Z. heard Rodriguez-Manjivar's wife come into the kitchen. H.Z. left the bedroom and told Rodriguez-Manjivar's wife what had just happened, but his wife did not believe her. Rodriguez-Manjivar then told H.Z. to go get him some water. H.Z. ran downstairs to her apartment.

H.Z. was crying and told M.S. she had been left alone in the apartment with Rodriguez-Manjivar. He had touched her and asked her if she shaved "on that part." M.S. saw marks on H.Z.'s arms and chest.

Rodriguez-Manjivar came downstairs after H.Z. He knocked on the door, but H.Z. told M.S. not to let him in because she was scared. About 10 minutes later,

Rodriguez-Manjivar's wife came downstairs. She asked M.S. to open the door, explaining that Rodriguez-Manjivar "didn't do it on purpose." When M.S. did not answer the door, Rodriguez-Manjivar's wife sent her a text message saying: "Hector didn't do it on purpose. It was an accident. He just wanted to say sorry." Rodriguez-Manjivar also called B.C. to tell him he had accidentally touched H.Z. during the move.

H.Z. and her family discussed what to do. They decided to tell their priest what happened. The next day, they went to see their priest, and they all decided to call law enforcement. Sheriff's Deputy Jason Miller responded to the call. H.Z. told Miller that Rodriguez-Manjivar had touched her breasts, buttocks, and vaginal area while they were putting a bed together in A.A.'s apartment. She said Rodriguez-Manjivar "put his hands [on her forearms] from behind her, and then squeezed in on her sides with his arms."

***2** Miller noticed H.Z. had a few light bruises on her forearms, and he believed those bruises were consistent with her version of events. He asked if she had any other bruises or injuries. She said "she was pretty sure she had some bruising on the sides of her body and under her breast area." Miller then contacted a female officer to take pictures of H.Z.'s injuries. Those pictures showed H.Z. had bruises on her arms and back and around her breasts and waist. She also had scratches around her waist.

Miller later spoke with Rodriguez-Manjivar. He said he and H.Z. were alone in the bedroom putting the bed together. H.Z. was helping him hold the headboard up so he could put screws in. She was distracted by a pair of handcuffs on the headboard, and the headboard started to fall. Rodriguez-Manjivar accidentally brushed her waist area as he moved to catch the headboard. H.Z. said something like, "[D]on't touch me, stop." Rodriguez-Manjivar then went to the kitchen, and his wife arrived. H.Z. told his wife that Rodriguez-Manjivar had touched her inappropriately.

A few days after the incident, H.Z. submitted to a forensic interview. She said she had been helping A.A. move and Rodriguez-Manjivar had grabbed her. He squeezed her vagina and her breast. He followed her from the bedroom to the kitchen before she eventually locked herself in the bedroom.

The State charged Rodriguez-Manjivar with one count of aggravated indecent liberties with a child. Because Rodriguez-Manjivar was more than 18 years old and H.Z. was less than 14 years old at the time of the crime, the State charged the offense as an off-grid felony.

At trial, H.Z., M.S., Miller and several other witnesses testified for the State while Rodriguez-Manjivar called his wife and A.A. to testify in his defense. A.A. testified she had propped open the bedroom door and she saw H.Z. and Rodriguez-Manjivar putting the bed together. H.Z. was playing with the handcuffs on the headboard and caused it to fall down. Rodriguez-Manjivar had to keep the headboard from falling on her. A.A. then left the apartment for seven or eight minutes to get a part for the bed that she had forgotten. When she returned, Rodriguez-Manjivar and his wife were in the apartment, but H.Z. had left. A.A. added that the doors in her apartment did not have locks.

Rodriguez-Manjivar's wife testified that when she arrived, the apartment's front door was open. She saw H.Z. in one of the bedrooms playing with some things on a dresser. H.Z. did not appear to be upset. H.Z. told Rodriguez-Manjivar's wife that Rodriguez-Manjivar had touched her inappropriately. After H.Z. left the apartment, Rodriguez-Manjivar's wife asked him about it and told him he should apologize if he did it. They went down to H.Z.'s apartment, but no one answered the door.

The jury convicted Rodriguez-Manjivar of aggravated indecent liberties with a child. The district court granted his request for a durational departure and sentenced him to 155 months' imprisonment. Rodriguez-Manjivar appeals.

Sufficiency of the Evidence

On appeal, Rodriguez-Manjivar argues the State did not present sufficient evidence to support his conviction for aggravated indecent liberties with a child. He claims the State's case rested mainly on the testimony of H.Z., a young child. He also asserts the State did not prove he lewdly touched H.Z. or that he touched H.Z. with the intent to arouse or satisfy sexual desires.

When a criminal defendant challenges the sufficiency of the evidence supporting a conviction, the standard of review is whether, after reviewing all the evidence in a light most favorable to the State, this court is convinced a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In performing this review, this court does not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations. *State v. Chandler*, 307 Kan. 657, 668, 414 P.3d 713 (2018). It is only in rare cases where the testimony is so incredible that no reasonable fact-finder could find guilt beyond a reasonable doubt that a guilty verdict will be reversed.

State v. Matlock, 233 Kan. 1, 5-6, 660 P.2d 945 (1983).

***3** The State charged Rodriguez-Manjivar with aggravated indecent liberties with a child under K.S.A. 2017 Supp. 21-5506(b)(3). As laid out in the jury instructions, the State had to prove (1) Rodriguez-Manjivar lewdly fondled or touched H.Z.; (2) he did so with the intent to satisfy his sexual desires, H.Z.'s sexual desires, or both; and (3) H.Z. was less than 14 years old. See K.S.A. 2017 Supp. 21-5506(b)(3)(A). "In considering if a touch is lewd, a factfinder ... should consider whether the touch 'tends to undermine the morals of a child [and] is so clearly offensive as to outrage the moral senses of a reasonable person.' " *State v. Reed*, 300 Kan. 494, 500-01, 332 P.3d 172 (2014).

Rodriguez-Manjivar argues his conviction is unsupported by the evidence because the State's case relied mainly on the testimony of a minor. This appears to be an attack on H.Z.'s credibility. Witness credibility is a question for the jury, not this court. Additionally, two officers observed physical injuries on H.Z. consistent with her version of events. Several witnesses testified Rodriguez-Manjivar was left alone in the apartment with H.Z. Rodriguez-Manjivar admitted to several people that he had touched H.Z. inappropriately, although he claimed it was an accident. Thus, this argument fails.

Rodriguez-Manjivar next asserts the State presented insufficient evidence to prove he lewdly touched or fondled H.Z. or that he did so with the intent to arouse or satisfy sexual desires. He does not provide any argument on this point beyond a few conclusory sentences, so he has abandoned this argument. See *State v. Arnett*, 307 Kan. 648, 650, 413 P.3d 787 (2018). Nevertheless, the State presented sufficient evidence of both these elements.

According to H.Z., Rodriguez-Manjivar grabbed her breasts and buttocks. He also slid his hands down her pants and tried to digitally penetrate her. Looking at this evidence in a light most favorable to the State, a rational fact-finder could conclude Rodriguez-Manjivar touched H.Z. in way that " 'undermine[d] the morals of a child [and] is so clearly offensive as to outrage the moral sense of a reasonable person.' " *Reed*, 300 Kan. at 500-01.

Similarly, the evidence supports a finding that Rodriguez-Manjivar touched H.Z. with the intent to satisfy or arouse his sexual desires, her sexual desires, or both. The State may prove sexual intent through circumstantial evidence. 300 Kan. at 502. In addition to touching H.Z. on her breasts, buttocks, and genitals, Rodriguez-Manjivar also made sexual moaning sounds and asked H.Z. if she shaved her pubic hair. From this evidence, a rational fact-finder could conclude Rodriguez-Manjivar touched H.Z. with the requisite intent.

Unanimity Jury Instruction

Next, Rodriguez-Manjivar argues the district court erred in failing to give a unanimity instruction. He claims the jury heard evidence of three separate acts that could have supported his conviction: the two touchings that occurred on April 1, 2017, and a touching that occurred sometime before April 1. The State responds it relied only on the April 1 incident in prosecuting the case, and the touchings on that day constituted a single act.

A criminal defendant is entitled to a unanimous jury verdict under Kansas law. K.S.A. 22-3421; *State v. Santos-Vega*, 299 Kan. 11, 18, 321 P.3d 1 (2014). When a case involves multiple acts, any one of which could constitute the crime charged, the jury must be unanimous in finding which specific act constitutes the crime. *State v. King*, 297 Kan. 955, 977-78, 305 P.3d 641 (2013). To ensure unanimity in these cases, the State must elect which act it is relying upon for the charge or the district court must instruct the jury that it must unanimously agree on the specific act constituting the crime charged. *King*, 297 Kan. at 978.

***4** In *State v. De La Torre*, 300 Kan. 591, 596, 331 P.3d 815 (2014), the Kansas Supreme Court has identified a three-part procedure for reviewing unanimity instruction errors. First, the reviewing court determines whether the case involves multiple acts. If so, the court then determines whether error was committed. An error is committed when the State fails to inform the jury which act to rely on or the district court fails to give a unanimity instruction. Finally, the court determines whether the error was harmless using the appropriate standard.

In the first step, we must decide whether this is a multiple acts case, which is a question of law subject to unlimited review. *King*, 297 Kan. at 981. This analysis requires us to decide whether the defendant's conduct constitutes one course of conduct or represents multiple acts that are separate and distinct from each other. No single test exists to make this determination. Instead, courts must look to the facts and the State's theory of the crime to decide whether a jury verdict implicates unanimity issues. *State v. A.A.*, 290 Kan. 540, Syl. ¶¶ 1-2, 232 P.3d 861 (2010). Kansas courts have used these factors to determine if multiple acts exist: (1) whether the acts occurred in the same place; (2)

whether the acts occurred at or near the same time; (3) whether there was a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there was a fresh impulse motivating some of the conduct. *State v. Schoonover*, 281 Kan. 453, 507, 133 P.3d 48 (2006).

Rodriguez-Manjivar alleges the jury heard evidence of three separate acts. He claims his conduct on April 1, 2017, constitutes two acts. He also points to evidence that he had touched H.Z. before the April 1 incident. Specifically, during cross-examination, defense counsel asked H.Z., "Had [Rodriguez-Manjivar] ever touched you anywhere on you before April 1st?" and H.Z. responded affirmatively. He then asked, "Where had [Rodriguez-Manjivar] touched you?" and she responded, "My legs when we were eating dinner. Like, he would, like, play with my leg, like, my feet and stuff."

The State did not present evidence of possible criminal conduct occurring before April 1, 2017. And the State did not argue this conduct was criminal. The State also made clear in opening statement and closing argument that it was relying on the April 1 incident. The real issue here is whether Rodriguez-Manjivar's conduct on April 1, 2017, constitutes one or two acts.

The problem in completing the first step of this analysis is some of the relevant facts are unclear. The acts here most likely can be considered to have occurred in the same place. While each touching occurred in a different room, those rooms were in the same apartment. See *State v. Ultreras*, 296 Kan. 828, 856, 295 P.3d 1020 (2013) (holding aggravated battery which began inside a bar and ended outside the bar occurred in the same location). But see *State v. Long*, 26 Kan. App. 2d 644, 650, 993 P.2d 1237 (1999) (holding defendant's multiple convictions for sodomy and rape were not multiplicitous because the acts occurred over a one- to two-hour time span in different locations in victim's apartment).

As for whether the acts occurred at the same time, the evidence at trial was conflicting. H.Z. did not testify about the amount of time between the touching in the bedroom and the touching in the kitchen, though she did testify that the whole incident took 30 to 40 minutes. M.S. testified H.Z. was in A.A.'s apartment for about 30 minutes. A.A. testified that she was away from the apartment for only seven to eight minutes. Rodriguez-Manjivar's wife also estimated A.A. would only have been gone from the apartment for seven to eight minutes. Thus, both the time span of the whole incident and the time period between each touching is unclear.

***5** Likewise, the record is unclear about whether there was an intervening event. According to H.Z.'s testimony at trial, Rodriguez-Manjivar followed her from the bedroom to the kitchen. But the forensic interviewer testified H.Z. said she had helped Rodriguez-Manjivar assemble a second bed after he touched her in the bedroom.

The State relies on *State v. Kesselring*, 279 Kan. 671, 112 P.3d 175 (2005), and *State v. Hilson*, 28 Kan. App. 2d 740, 20 P.3d 94 (2001), to support its argument that Rodriguez-Manjivar's acts are one course of conduct. In *Kesselring*, the Kansas Supreme Court found no jury unanimity issue existed regarding the defendant's kidnapping conviction:

> "In this case, although the events transpired over a longer period of time, there were no breaks in the sequence of events sufficient to establish separate criminal acts. The crime of kidnapping, as compared to the crime of battery ... may occur over a longer period of time. Yet a kidnapping over several hours or days could not be broken into several crimes. Under the facts of this case, the length of time involved does not prevent a finding of a continuous incident. Furthermore, the moving of a kidnapping victim from one location to a car and from the car to another location does not constitute separate acts. Similarly, the fact that [the victim] was momentarily free when he attempted to escape was not a sufficient interruption to say that a new criminal impulse or new act of kidnapping had occurred. The evidence was that the interruption was not appreciable." 279 Kan. at 683.

In *Hilson*, the Court of Appeals held that the defendant's two threats did not constitute multiple acts of criminal threat. 28 Kan. App. 2d at 743. The court reasoned the threats took place over approximately 30 minutes, a relatively short period of time. Also, the threats were made to the same victim with the same objective. Based on this, the court concluded the defendant's conduct was continuous, and the jury delivered a unanimous verdict. 28 Kan. App. 2d at 743.

The State does not explain how *Kesselring* and *Hilson* relate to this case. These cases do support an argument that multiple criminal acts within a certain time frame without a significant interruption may be considered a continuous course of conduct. But no single test exists to determine whether one act or separate and distinct multiple acts have occurred, and "[a] test that applies to kidnapping may not apply to possessing a controlled substance." *A.A.*, 290 Kan. at 544. For example, in *State v. Foster*, 290 Kan. 696,

714-15, 233 P.3d 265 (2010), the Kansas Supreme Court held that several threats over one hour was a continuing course of conduct but two rapes over the same period were separate and distinct acts. So neither *Kesselring* nor *Hilson* is dispositive.

If Rodriguez-Manjivar immediately followed H.Z. out of the bedroom and into the kitchen, the acts in this case are most likely one course of conduct. But if the two acts were spread out over 30 to 40 minutes with a break to assemble a second bed, the acts in this case are more likely to be separate and distinct acts. Ultimately, though, it may be unnecessary to determine whether this is a multiple acts case because any error was harmless.

If this case presents a multiple acts case, error occurred because the State did not elect one of the acts and the district court did not give an instruction. Because Rodriguez-Manjivar did not request an instruction, we must review for clear error. See *King*, 297 Kan. at 978, 980. This requires Rodriguez-Manjivar to firmly convince us the jury would have reached a different verdict if the district court had given a unanimity instruction. See *State v. Cooper*, 303 Kan. 764, 770, 366 P.3d 232 (2016).

***6** Failing to give a unanimity instruction is generally reversible error "except when the defendant presents a unified defense, *e.g.*, a general denial." *State v. Voyles*, 284 Kan. 239, 253, 160 P.3d 794 (2007). "[I]n one of its purest forms," a unified defense is "a mere credibility contest between the victim and the alleged perpetrator." 284 Kan. at 253.

In his brief, Rodriguez-Manjivar does not discuss the nature of his defense, and the exact nature of his defense is not entirely clear from the record. The State introduced evidence that Rodriguez-Manjivar admitted to touching H.Z. inappropriately but claimed it was an accident. Rodriguez-Manjivar also presented testimony from A.A. that he had to stop the headboard from falling on H.Z., which would corroborate his statement to Miller. But in closing argument, defense counsel focused on attacking H.Z.'s credibility. He did not argue that the touchings happened but were an accident.

That said, a review of the record does show that the trial was essentially a credibility contest between H.Z. and Rodriguez-Manjivar. H.Z. provided detailed testimony about the April 1 incident at trial. Her testimony was generally consistent, and Rodriguez-Manjivar does not suggest there were any inconsistences.

Moreover, Rodriguez-Manjivar's case is distinguishable from cases like *Voyles*, 284 Kan. 239, in which the Kansas Supreme Court reversed the defendant's convictions for aggravated indecent solicitation of child and aggravated criminal sodomy. In that case, the jury heard evidence of acts involving two victims occurring in different locations on different days. The court noted that "potentially 20 different acts or offenses could have been committed" but the State only charged the defendant with 8 counts. 284 Kan. at 254. Additionally, there were discrepancies and inconsistencies in the witnesses' testimonies.

The danger in cases like *Voyles* is a mixed verdict in which the jury convicts on a charge even though it did not unanimously agree on the occurrence of any one act supporting that charge. But a mixed verdict was much less likely here. Only one victim testified about two touchings occurring in the same apartment within 40 minutes at most. H.Z.'s testimony was generally consistent. Rodriguez-Manjivar has not explained how some of the jurors could have believed the touching in the bedroom occurred but the one in the kitchen did not, while other jurors could have believed the touching in the kitchen occurred but the one in the bedroom did not. As a result, he has failed to show the jury would have reached a different verdict if the district court had given a unanimity instruction.

Prior Crimes Evidence

For his final issue, Rodriguez-Manjivar argues the district court erred in admitting prior crimes evidence. He points out that H.Z. testified Rodriguez-Manjivar had touched her under the table when she ate dinner at his house before the April 1 incident. He asserts the district court erred in admitting this evidence because the State did not file a pretrial motion for its admission.

Assuming, without deciding, that H.Z.'s testimony did constitute evidence of prior bad acts, Rodriguez-Manjivar invited any error. Despite his claim that the State introduced this evidence, Rodriguez-Manjivar is actually the one who elicited this testimony from H.Z. A litigant may not invite error and then complain of the error on appeal. *State v. Lowery*, 308 Kan. 1183, Syl. ¶ 8, 427 P.3d 865 (2018); see also *State v. Anthony*, 282 Kan. 201, 215, 145 P.3d 1 (2006) (holding invited error doctrine prevented defendant from complaining about admission of prior crimes evidence without limiting instruction when defendant elicited the evidence). Because Rodriguez-Manjivar elicited the testimony he now complains about,

the invited error doctrine bars him from complaining about its admission on appeal.

***7** But even if Rodriguez-Manjivar had not invited this error, it would not require reversal of his conviction. Again assuming this was prior crimes evidence, evidence of a defendant's other sexual misconduct is admissible under K.S.A. 2017 Supp. 60-455(d). Prior misconduct involving the same victim and conduct of the same character is unlikely to lead to an improper jury verdict. See *State v. Dern*, 303 Kan. 384, 395, 362 P.3d 566 (2015) (finding defendant's admission to sexual misconduct unlikely to lead to improper jury verdict because misconduct involved same victim and conduct of same character).

Affirmed.

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Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

STATE of Kansas, Appellee,
v.
Steven Jon SNYDER, Appellant.

No. 119,452
|
Opinion on remand filed October 30, 2020.

Appeal from Saline District Court; JARED B. JOHNSON, judge.

Attorneys and Law Firms

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Ellen Mitchell, county attorney, and Derek Schmidt, attorney general, for appellee.

Before Schroeder, P.J., Malone and Standridge, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Steven J. Snyder appeals following his convictions of two counts of rape, one count of attempted rape, two counts of aggravated indecent liberties with a child, and one count of kidnapping. Snyder claims: (1) the State committed reversible prosecutorial error during closing argument; (2) the district court committed reversible error by denying his request to use demonstrative exhibits during closing argument; (3) even if the first two errors do not independently require reversal, they do so when considered cumulatively; (4) there was insufficient evidence to support his kidnapping conviction; (5) the district court committed reversible error in instructing the jury on kidnapping; (6) Snyder's convictions of aggravated indecent liberties were multiplicitous; (7) the district court erred by ordering consecutive sentences; and (8) the district court erred by ordering lifetime postrelease supervision. We agree with Snyder that there was insufficient evidence to support his kidnapping conviction and that his convictions of aggravated indecent liberties were multiplicitous. We also agree that the district court erred by ordering lifetime postrelease supervision. Thus, we affirm in part, reverse in part, vacate in part, and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

The parties are aware of the extensive factual and procedural history of this case. We will set forth the facts only to the extent necessary to address the issues Snyder has raised on appeal. Snyder met A.B. (Mother) in 2005, and they began an off-and-on romantic relationship. Their first daughter, K.B., was born in 2006 and their second daughter, H.S., was born in 2010.

In 2014, Mother's sister's son, D.L., was charged in juvenile proceedings with molesting K.B. Snyder asserts that he was the individual who reported to police that D.L. had molested K.B. and that doing so strained his relationship with Mother. Their relationship became so strained that Mother asked him to relinquish his parental rights to K.B. and H.S., but Snyder refused to do so. In December 2014, Mother, H.S., and K.B. moved into a new home, and Snyder went to live with his parents. Even though they were separated, Snyder would watch the girls at Mother's house while Mother worked in the basement, taking calls for a cell phone insurance company.

In April 2015, H.S. told Mother that Snyder "had touched her 'puter,' "—H.S.'s word for vagina—with his "turkey"—H.S.'s word for penis. Mother asked H.S. if she was sure, and H.S. said she was. Mother called Snyder, who denied it, and Mother did not report H.S.'s accusation to the police. Mother thought that H.S. was trying to get attention because Mother was putting so much attention into D.L. molesting K.B.

Mother and Snyder continued their "on and off" relationship, but at some point in 2015, Snyder stopped

taking care of the girls at Mother's home while she worked. On November 16, 2015, Mother opened the door to H.S.'s bedroom and saw her lying on the bed on her back with her feet on the wall, naked, with her body in "a 'v' " position and her fingers in her vagina. Startled, H.S. pulled her fingers out of her vagina. Mother told H.S. not to do that because she could hurt herself, and H.S. said, " 'But Mommy my Daddy does it.' " Mother asked what H.S. meant, and H.S. replied " 'He takes his turkey and puts it on my puter.' " Mother did not question H.S. further at the time; instead, she told H.S. " 'that's not supposed to happen' " and put H.S. to sleep in her bed. Mother tried to call Snyder, but she could not reach him. She also called Maternal Grandmother and told her what H.S. had said; Maternal Grandmother advised her to call the police.

***2** Mother called the Salina Police Department on November 18, 2015. She told the dispatcher that she "need[ed] to report child molestation" of her daughter. When asked if she knew what happened or who molested her daughter, Mother replied, "Her dad," and gave Snyder's name. Mother explained that she "caught [H.S.] playing with herself and we had a discussion and she told me that her dad would touch her." The dispatcher told Mother that they would send someone to speak with her.

Officers Andrew Meek and Jon Roberts responded to the call. Mother told them that she had seen H.S. "playing with herself" two days earlier, so she asked H.S., "Has anybody done that to you?" and H.S. replied, "My daddy." After explaining to Roberts that H.S.'s "word for penis is turkey" and her word for vagina is "puter," Mother said that H.S. told her that Snyder "took his turkey and put it in my puter."

Mother explained that H.S. had made similar comments the previous April, but Mother thought she was making the comments to get attention, "like her older sister is getting attention" because of D.L.'s ongoing juvenile proceedings. Mother said that Tuesday evening—the night before Mother called the police—H.S. also told her about a time when Snyder was watching television with K.B. and H.S. and he had a blanket over H.S. "and he was messing with her." H.S. had told Mother that Snyder had touched her "underneath my flower blankie." Mother also said that she had asked K.B. if Snyder had done anything to her and K.B. denied that anything happened.

Detective Crystal Marks was assigned to the case and she scheduled a forensic interview for H.S. on November 20, 2015. Highly summarized, H.S. told Marks that her dad had put his "puter" on her "puter" more than one time. On November 25, 2015, Marks interviewed K.B., who stated that her cousin had molested her but that no one else had ever touched her in a place she did not like. That same day, Snyder was arrested and charged with three counts of rape of H.S.

Mother began taking H.S. and K.B. to counseling. In November 2016, K.B. told her therapist that Snyder had touched her inappropriately when she was nine years old. When Marks learned that K.B. had disclosed that Snyder had molested her, she scheduled a second forensic interview with K.B. During the second interview, K.B. said that Snyder made her touch his penis and that he tried to touch her vagina. K.B. said that she, H.S., and Snyder were in Snyder's room on his bed, and H.S. was "sound asleep." K.B. said, "He was trying to pull down my pants. But then I got to escape. But then he dragged me back in the room." She clarified that Snyder unbuttoned and unzipped her pants and pulled them and her underwear down. K.B. told Snyder that she had to go to the bathroom, where she tried to lock the door, "but somehow he got in."

When Marks took K.B. through the events, asking for more detail, K.B. said that Snyder's hands were "right there" when she made her excuse to escape, and she pointed to her abdominal/genital area. Marks asked if Snyder's hands were "on your vagina" and K.B. nodded and agreed. At this point in the interview, K.B. said that Snyder had rubbed his hand "on the outside" of her vagina for "a minute" before she said she had to go to the bathroom. K.B. stated that her pants were around her ankles when she went into the bathroom, and she closed the bathroom door.

When Snyder opened the bathroom door, K.B. tried to crawl out to run away and get outside, but Snyder grabbed her arm, so she tried to kick him and tried to escape. Later in the interview, K.B. said after Snyder grabbed her arm, "he like tried to pull me, so I kicked him." Then, still in the bathroom, Snyder rubbed the outside of her vagina by putting his hand inside her underwear. K.B. said that the bathroom door was shut again when Snyder rubbed her vagina, at which point, H.S. had woken up and was trying to get into the bathroom.

***3** Later in the interview, K.B. told Marks that earlier during the same nap, Snyder had grabbed her hand and made her touch his penis and he ignored her when she told him to stop. K.B. estimated that the entire nap was 30 minutes to an hour. K.B. said she touched his penis for about a minute and it was "slimy" and "soft like a worm." K.B. said that when she pulled her hand away, Snyder began pulling her pants down. Toward the end of the interview, Marks asked K.B. about her initial comment that Snyder dragged her back into the bedroom. K.B. said he had not dragged her into the bedroom, he dragged her back into the bathroom when she was trying to escape.

As a result of these statements, the State charged Snyder in a new criminal case with three counts of aggravated indecent liberties with a child and one count of kidnapping. With the district court's permission, the State consolidated the two cases against Snyder, resulting in one case charging three counts of raping H.S., three counts of committing aggravated indecent liberties with K.B., and one count of kidnapping K.B.

The five-day jury trial began on August 28, 2017. We will not recite all the evidence admitted at the trial. Marks testified about her forensic interview with the children. H.S. testified and, highly summarized, described three times that Snyder touched or tried to touch her "puter" with his "puter."

K.B. also testified. K.B. testified that Snyder had touched her private parts in his bedroom when she was nine years old. K.B. testified that her grandparents were out shopping, and H.S., K.B., and Snyder were in his bedroom to take a nap. All three of them were under the covers and Snyder unbuttoned her pants, pulled the zipper down, and pulled her pants down. K.B. testified that she "thought he was going to try to touch" her, so she "made an excuse to get out" by asking asked Snyder if she could go to the bathroom. She then went to the bathroom, shut and locked the door, and "stay[ed] in there until" Snyder's parents came home. K.B. maintained that Snyder did not come into the bathroom, he never asked her to touch him, she never touched him, and she did not remember telling Marks that she touched his penis. K.B. did, however, remember telling Marks that Snyder "did it a second time, and he got [her] pants and [her] panties down, and then [she] went to go to the bathroom and he came in."

As for the second time, K.B. testified that she, H.S., and Snyder again were taking a nap in Snyder's bedroom, but this time H.S. and Snyder were under the covers and K.B. was not. K.B. was lying back to back with Snyder when "he pulled [her] over and then he pulled down [her] pants." K.B. testified that Snyder undid her pants, pulled her pants and underwear down around her thighs, and rubbed the front of her vagina with his hand for about a minute until she asked to go to the bathroom. Once again, K.B. said that Snyder was clothed, she did not touch him, and she did not see his "private part."

K.B. testified she went to the bathroom and shut the door. Snyder then came into the bathroom. K.B. testified that Snyder "pulled down my pants again, and then my panties, and then he went to touch me and then like he was still standing up, so I crawled underneath his legs and then I ran outside." On further questioning, K.B. testified that while they were in the bathroom, Snyder again moved his hand back and forth on her vagina. On cross-examination, K.B. testified that she told Mother what had happened when she got home, and that the second incident happened in the summer of 2015.

The State also presented evidence that the distance from Snyder's bedroom to the bathroom was 2 feet, 11 inches. After the State rested, Snyder moved for a judgment of acquittal for insufficient evidence on the rape and kidnapping charges, and he argued that the charges of aggravated indecent liberties with K.B. were multiplicitous. The district court reserved ruling on the multiplicity argument and denied the rest of the motion.

***4** Snyder testified on his own behalf. He denied touching H.S. inappropriately, he denied exposing himself to her, and he stated that he had never heard H.S. use the term "puter." Similarly, he denied K.B.'s allegations. He also testified that he was never alone with his children in his home.

At the close of the evidence, Snyder again argued to the district court that the three charges of aggravated indecent liberties with K.B. were multiplicitous because they arose from the same conduct. The State conceded that Snyder had a point about two of the charges, and the district court ruled that those two charges should merge into one. After the merger, two charges of aggravated indecent liberties with K.B. remained: one based on Snyder's alleged behavior in his bedroom, and one based on his alleged behavior in the bathroom. The district court held that these two charges were not multiplicitous because they were separate instances of conduct.

In accordance with the district court's order merging two of the aggravated indecent liberties charges, the State filed a fourth amended information, charging Snyder with three counts of rape of H.S., two counts of aggravated indecent liberties with K.B., and one count of kidnapping K.B. On two of the rape charges, the district court instructed the jury that it could also find Snyder guilty of the lesser included offense of attempted rape. After about three hours of deliberation on September 1, 2017, the jury found Snyder guilty of two counts of rape and one count of attempted rape of H.S., two counts of aggravated indecent liberties with K.B., and one count of kidnapping K.B.

On April 23, 2018, the district court sentenced Snyder to 59 months' imprisonment for the kidnapping conviction and to life imprisonment with no chance of parole for 25 years on each of the remaining five convictions. The district court ordered Snyder to serve the kidnapping sentence, one of the hard 25 rape sentences, and one of the

hard 25 aggravated indecent liberties with a child sentences consecutively, with the remaining sentences running concurrent. From the bench, the district court ordered Snyder to serve lifetime postrelease supervision for each conviction except kidnapping. Snyder timely filed a notice of appeal from the district court's judgment.

On appeal, Snyder does not challenge the sufficiency of the evidence to support his convictions of rape or attempted rape of H.S. Likewise, Snyder does not challenge the sufficiency of the evidence to support a conviction of aggravated indecent liberties with K.B., but he argues there should only be one conviction of this crime and not two. Snyder claims: (1) the State committed prosecutorial error during closing argument; (2) the district court erred by denying his request to use demonstrative exhibits during closing argument; (3) the first two errors require reversal when considered cumulatively; (4) there was insufficient evidence to support his kidnapping conviction; (5) the district court erred in instructing the jury on kidnapping; (6) Snyder's convictions of aggravated indecent liberties were multiplicitous; (7) the district court erred by ordering consecutive sentences; and (8) the district court erred by ordering lifetime postrelease supervision.

DID THE STATE COMMIT PROSECUTORIAL ERROR DURING CLOSING ARGUMENT?

***5** Snyder first claims the State committed reversible prosecutorial error during closing argument. He argues that certain statements constituted error by improperly bolstering the credibility of the State's witnesses and by shifting the burden of proof to the defense. During closing argument, the prosecutor discussed the evidence the State had presented at trial, including

> "all of the digital media that was introduced to you in this case; the 9-1-1 call, the Axon of the officer that captures the demeanor of [Mother] when she was very first reporting this to the authorities, and the forensic interviews of these children, *which were taken and captured so much closer in time to when the molest[ing] occurred compared to, what, two years later, when they have to come into court in front of a room of strangers, and their father, sitting just feet away from them*." (Emphasis added.)

While discussing H.S.'s allegations against Snyder, the prosecutor said: "So when you consider the consistency, the corroboration, the credibility, the additional disclosures over time, ask yourselves *what motive does six-year-old* [*H.S.*] *have to falsify or distort this conspiracy of sexual abuse against her dad now*." (Emphasis added.) Later in closing argument, the State acknowledged the differences between K.B.'s trial testimony and her 2016 statements to Marks, telling the jury: "In her forensic interview, [K.B.] clearly said that she had to touch his penis. ... Wet and slimy and everything. In court, when he is feet away from her, she *could not* say that." (Emphasis added.) And finally, toward the end of its initial closing argument, the State asked the jury, "What motive does [Mother] have for this?" and instructed: "*As you assess this case, consider consistency, corroboration, what motive do these children have to make this up, what motive does he have*. You assess the credibility of the witnesses." (Emphasis added.)

Kansas courts use a two-step process to analyze claims of prosecutorial error:

> " 'To determine if the prosecutor erred, "the appellate court must decide whether the prosecutorial acts complained of fall outside the wide latitude afforded prosecutors to conduct the State's case and attempt to obtain a conviction in a manner that does not offend the defendant's constitutional right to a fair trial." If the court finds error, the burden falls on the State to demonstrate "beyond a reasonable doubt that the error complained of will not or did not affect the outcome of the trial in light of the entire record, *i.e.*, where there is no reasonable possibility that the error contributed to the verdict." ' [Citations omitted.]" *State v. James*, 309 Kan. 1280, 1306-07, 443 P.3d 1063 (2019).

Snyder's only specific arguments are that the comments quoted above, taken together, implied to the jury that Snyder had "to prove motive" and that the prosecutor's statement that K.B. "could not" tell the truth in front of Snyder "was vouching for the truth of [K.B.'s] second forensic interview." Both arguments fail.

> "Kansas caselaw provides that it is ' " 'improper for the prosecutor to attempt to shift the burden of proof to the defendant or to misstate the legal standard of the burden of proof.' " ' But even so, ' " 'considerable latitude [is] granted to prosecutors to comment on the weakness' " of the defense.' [Citations omitted.]" *State v. Blansett*, 309 Kan. 401, 414, 435 P.3d 1136 (2019).

***6** Snyder argues that the prosecutor impermissibly shifted the burden of proof through her comments on Snyder's, Mother's, K.B.'s, and H.S.'s possible motives to make the statements that they did, leaving him required to prove that he had no motive to lie. But improper burden shifting occurs, for example, when a prosecutor asks the jury whether there was " ' "any evidence that [the crimes] didn't happen? Is there any evidence that the things [the victim]

told you didn't happen?" ' " See *State v. Tosh*, 278 Kan. 83, 92, 91 P.3d 1204 (2004), *overruled on other grounds by* *State v. Sherman*, 305 Kan. 88, 378 P.3d 1060 (2016). The comments Snyder highlights in this appeal simply asked the jury to consider the various witnesses' motives for their statements, the comments did not shift the burden of proof to Snyder. See *State v. Ross*, 310 Kan. 216, 222, 445 P.3d 726 (2019) ("A prosecutor does not shift the burden of proof by highlighting the implausibility of a defendant's account.").

Moreover, none of the comments Snyder now challenges impermissibly vouch for any witness' credibility. Certainly, "a prosecutor is not allowed to offer a personal opinion on credibility." *State v. Williams*, 299 Kan. 911, 935, 329 P.3d 400 (2014). And prosecutors are not allowed to accuse witnesses of lying or inform the jury that a witness is telling the truth. For example, a prosecutor may not argue "during closing argument that a witness was 'brutally honest' and 'was on the stand telling you the truth.' " *State v. Knox*, 301 Kan. 671, Syl. ¶ 3, 347 P.3d 656 (2015).

But asking a jury to consider possible motives behind a witness' statements and evaluate witness credibility differs from vouching for a witness' credibility. In *State v. Ortega*, 300 Kan. 761, 335 P.3d 93 (2014), the Kansas Supreme Court recognized:

> "Although it is improper for a prosecutor to offer his or her personal opinion as to the credibility of a witness, a prosecutor has ' "freedom ... to craft an argument that includes reasonable inferences based on the evidence" ' and, 'when a case turns on which [version] of two conflicting stores is true, [to argue] certain testimony is not believable.' For example, it is not improper for a prosecutor to offer 'comments during closing argument regarding the witness' motivation [or lack thereof] to be untruthful.' But a prosecutor must do so by basing the comment on evidence and reasonable inferences drawn from that evidence and without stating his or her own personal opinion concerning a witness' credibility or accusing a witness or defendant of lying. [Citations omitted.]" 300 Kan. at 775-76.

Even before *Ortega*, the Kansas Supreme Court held that statements like the ones Snyder now challenges were not improper. In *State v. Finley*, 273 Kan. 237, 247, 42 P.3d 723 (2002), the Kansas Supreme Court considered a prosecutor's comment that the defendant and his girlfriend " 'are the only ones that really have a motive to fabricate any lies in this case' " and concluded that it was "a fair comment based on reasonable inferences from the evidence." In *State v. King*, 288 Kan. 333, 353, 204 P.3d 585 (2009), the court held that a prosecutor's argument that the victim "was not the person who had a 'motive' to be untruthful" was permissible, even though "the natural implication of this statement is that [the defendant] *did* have a motive to conceal the truth," because the "argument was fair and based on the evidence."

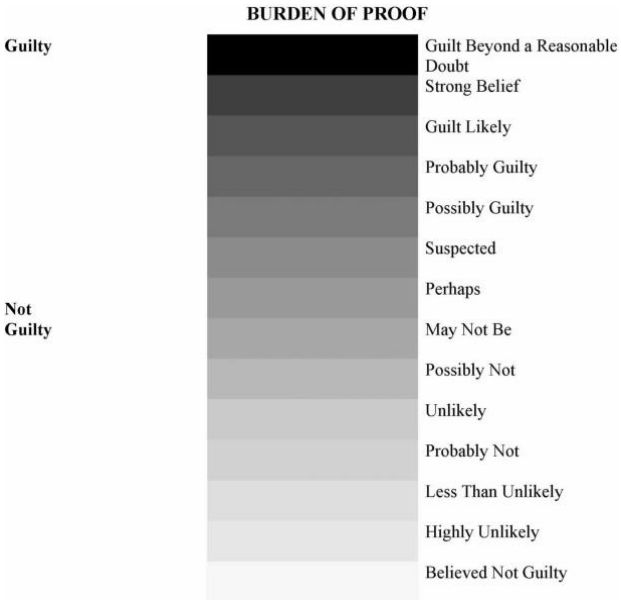
As Snyder acknowledges, this case depended on credibility determinations—which version of events did the jury find more credible. In that context, the prosecutor's comment that K.B. "could not" testify about her abuse with Snyder present is a reasonable inference from the evidence presented, including her age and her prior statements. Similarly, the other statements Snyder characterizes as impermissibly vouching for witness' credibility were merely requests that the jury consider the evidence before it "to determine the weight and credit to be given the testimony of each witness," as the district court had instructed it to do.

***7** The comments of which Snyder complains did not fall outside the wide latitude afforded prosecutors in closing argument to fairly obtain a conviction. Thus, we do not need to consider the second step of the analysis about whether the alleged prosecutorial error affected the outcome of the trial. Snyder's claim of error on this point fails.

DID THE DISTRICT COURT ERR BY DENYING SNYDER'S REQUEST TO USE DEMONSTRATIVE EXHIBITS DURING CLOSING ARGUMENT?

Next, Snyder claims the district court committed reversible error by denying his request to use demonstrative exhibits during closing argument. During the jury instruction conference, Snyder's counsel told the district court that he was "contemplating using a demonstrative aid at time of closing regarding the burden of proof." The record on appeal contains black-and-white copies of the proposed demonstrative aids identified as Defendant's Exhibit 2 and Defendant's Exhibit 3, which are set forth here in substantially similar form.

Defendant's Exhibit 2



Defendant's Exhibit 3

LEGAL BURDENS OF PROOF

"BEYOND" REASONABLE DOUBT	GUILTY
"REASONABLE DOUBT"	**NOT GUILTY**
CRIMINAL TRIAL	
"CLEAR AND CONVINCING"	**NOT GUILTY**
TERMINATE PARENTAL RIGHTS	
"PREPONDERANCE"	**NOT GUILTY**
CIVIL TRIAL ($)	
"PROBABLE CAUSE"	**NOT GUILTY**
SEARCH WARRANT – ARREST	

”REASONABLE SUSPICION” **NOT GUILTY**

TRAFFIC STOP

The State objected, arguing that the Kansas Supreme Court disfavors quantifying the burden of proof through tools. The district court took the request under advisement. The next morning, before closing arguments, the district court denied Snyder's request, holding that the aids would not "be helpful to assist the trier of fact." The district court noted cases in which the Kansas Supreme Court "held that there's no definition or analogy that could make the [concept] of reasonable doubt any clearer than the words themselves" and that such efforts to define reasonable doubt usually only confuse jurors.

Snyder argues that this court should review the district court's denial of his request de novo because it violated his constitutional right to present a full and complete defense. See *State v. Macomber*, 309 Kan. 907, 921, 441 P.3d 479 (2019) ("An appellate court reviews de novo a claim that the trial judge interfered with the defendant's constitutional right to present a defense."). But Snyder did not make a constitutional argument to the district court. And parties may not raise constitutional claims for the first time on appeal without asserting one of the recognized exceptions to the general rule that prohibits doing so. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018). Snyder neither acknowledges the failure to make a constitutional argument in district court nor asserts that an exception applies to allow him to make that argument for the first time on appeal.

Snyder also argues that this court should review de novo because he "argues the [district] court's decision was based on an error of law," citing *State v. Dukes*, 290 Kan. 485, 487, 231 P.3d 558 (2010). In *Dukes*, our Supreme Court held that Kansas appellate courts review de novo a challenge to the "legal basis" for a district court's decision. 290 Kan. at 487. Although Snyder repeatedly asserts that the district court made "an error of law," he does not specifically articulate what the alleged "error of law" was.

***8** The State argues that we should review for abuse of discretion because a district court exercises discretion over the use of demonstrative exhibits. Our Supreme Court has held that the district court has the discretion to allow or disallow a demonstration for the jury, in light of the " 'demonstration's propriety, probative value, and assistance to the trier of fact.' " *State v. Donesay*, 270 Kan. 720, 722, 19 P.3d 779 (2001). We agree with the State that we should review the district court's decision to deny the defendant's use of the demonstrative exhibits for an abuse of discretion. But even if we considered Snyder's claim that the district court's denial of his request violated his constitutional right to present a complete defense subject to de novo review, the result would be the same.

In the context of prosecutorial error, our Supreme Court has held that "[a]ny attempt to lower the burden of proof—*or even to define reasonable doubt*—is misconduct." (Emphasis added.) *State v. Holt*, 300 Kan. 985, 1004, 336 P.3d 312 (2014). " 'Efforts to define reasonable doubt, other than as provided in [the applicable PIK instruction], usually lead to a hopeless thicket of redundant phrases and legalese, which tends to obfuscate rather than assist the jury in the discharge of its duty.' " *State v. Walker*, 276 Kan. 939, 956, 80 P.3d 1132 (2003).

In response to Snyder's claim about the demonstrative exhibits, the State points to a prior case before this court that is factually similar. In *State v. Avery*, No. 117,379, 2018 WL 1976440, at *2 (Kan. App.) (unpublished opinion), *rev. denied* 308 Kan. 1596 (2018), the district court prevented defense counsel from "draw[ing] a chart on the chalkboard for the jury showing a graduated scale of various burdens of proof: 'Guilt is highly unlikely; it's less than unlikely; probably not; possibly not; suspected; perhaps; probably guilty; strong belief; guilty beyond a reasonable doubt.' " 2018 WL 1976440, at *1. And like Snyder, Avery argued on appeal "that the district court violated his constitutional right to present his theory of defense by limiting defense counsel's closing argument regarding the State's burden of proof." 2018 WL 1976440, at *1. The *Avery* court held:

> "The jury here was instructed that the State was required to prove Avery's crimes beyond a reasonable doubt. Avery's theory of defense was that the State had not

satisfied its burden of proof—proof beyond a reasonable doubt. ... [A]lthough the court restricted defense counsel from using a chart to show a graduated scale of various burdens of proof, defense counsel was able to fully develop Avery's defense throughout trial and in its closing argument.

"Avery was not deprived of a meaningful opportunity to present a complete defense simply because his attorney was precluded from showing the jury a chart that he believed represented the graduated scale of various burdens of proof. The district court never excluded any defense evidence and the limitation it did impose did not hinder Avery's presentation of evidence in any way. Instead, defense counsel was able to comprehensively argue that the State failed to meet its burden of proof based on a lack of evidence. Thus, the district court did not violate Avery's constitutional right to present his theory of defense.

"Rather than restrict Avery's right to present a defense, the district court exercised its discretion by limiting defense counsel's closing argument—a decision that this court reviews only for an abuse of discretion. A judicial action constitutes an abuse of discretion if (1) no reasonable person would take the view adopted by the district court; (2) the action is based on an error of law; or (3) the action is based on an error of fact. [Citations omitted.]" 2018 WL 1976440, at *2.

***9** After noting the cases in which our Supreme Court has disapproved trying to explain the phrase "reasonable doubt," the *Avery* panel concluded:

"A reasonable person could decide that allowing defense counsel to draw a chart demonstrating the proposed graduated scale of burdens of proof would confuse the jury. No claim is made that the court's decision was based on an error of fact or law. Thus the trial court's ruling was not an abuse of discretion." 2018 WL 1976440, at *2.

Snyder does not address this court's decision in *Avery*, even in his reply brief. Like at Avery's trial, the district court instructed the jury at Snyder's trial that the State had the burden to prove Snyder guilty beyond a reasonable doubt. Snyder's theory of defense was that the State had not done so. During closing argument, defense counsel began by reiterating the jury's responsibility to hold the State to its burden of proof and counsel comprehensively argued that the State had not proven Snyder's guilt beyond a reasonable doubt. The district court's decision not to allow the proposed charts explaining reasonable doubt did not hinder this argument, nor did it restrict Snyder's ability to present evidence. As in *Avery*, the district court here did not impair Snyder's right to present a full defense, and it cannot be said that no reasonable person would agree with the decision not to allow the charts. We conclude the district court did not err by denying Snyder's request to use demonstrative exhibits during closing argument.

WAS SNYDER DENIED A FAIR TRIAL BASED ON CUMULATIVE ERROR?

Snyder argues that the prosecutorial errors and the refusal to allow him to use demonstrative aids during closing argument cumulatively denied him a fair trial. But as we have concluded, the prosecutor committed no error during closing argument and the district court did not err by denying Snyder's request to use the demonstrative exhibits. And "when there is no error, there can be no errors to contribute to cumulative error and there is no basis for reversal." *State v. Barlett*, 308 Kan. 78, 91, 418 P.3d 1253 (2018).

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT SNYDER'S KIDNAPPING CONVICTION?

Next, Snyder claims there was insufficient evidence to support his kidnapping conviction. The operative information charged that Snyder "unlawfully and feloniously [took] or confine[d] a person, to wit: [K.B.] (YOB: 2006), accomplished by force, threat or deception and with the intent to hold said person to facilitate the commission of any crime, to wit: aggravated indecent liberties." Snyder argues that there was insufficient evidence to support the claim that he took or confined K.B. by force. The State disagrees.

"When a defendant challenges the sufficiency of the evidence supporting a conviction, we 'review[ ] the evidence in a light most favorable to the State to determine whether a rational factfinder could have found the defendant guilty beyond a reasonable doubt.' We will not 'reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses.' [Citations omitted.]" *State v. Rucker*, 309 Kan. 1090, 1093, 441 P.3d 1053 (2019).

***10** To review, the State's kidnapping charge against Snyder was based on the evidence that Snyder began fondling K.B. in the bedroom but then K.B. got up from the bed and went into the bathroom about 3 feet away and closed the door. Snyder then followed K.B. into the

bathroom and when she tried to leave, Snyder grabbed her arm and pulled her back into the bathroom where he continued to touch K.B. inappropriately. The only evidence about Snyder grabbing K.B.'s arm and pulling her back into the bathroom was presented by the State through K.B.'s forensic interview with Marks.

Snyder argues that the statements in K.B.'s interview with Marks do not provide sufficient evidence of a taking or confinement to support a kidnapping conviction. He bases this argument on our Supreme Court's holding in *State v. Buggs*, 219 Kan. 203, 216, 547 P.2d 720 (1976). In *Buggs*, the Kansas Supreme Court held:

> "[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.
>
> "For example: A standstill robbery on the street is not a kidnapping; the forced removal of the victim to a dark alley for robbery is. The removal of a rape victim from room to room within a dwelling solely for the convenience and comfort of the rapist is not a kidnapping; the removal from a public place to a place of seclusion is. The forced direction of a store clerk to cross the store to open a cash register is not a kidnapping; locking him in a cooler to facilitate escape is. The list is not meant to be exhaustive, and may be subject to some qualification when actual cases arise; it nevertheless is illustrative of our holding." 219 Kan. at 216.

Snyder argues that any taking or confinement in the bathroom with K.B. was slight, inconsequential, and merely incidental to the crime of aggravated indecent liberties, so, under *Buggs*, it would not support a kidnapping. He asserts that grabbing K.B.'s arm did not lessen the chance that his crime would be discovered because the bathroom was only 3 feet away from the bedroom in which H.S. slept and they were the only three people in the house at the time. The State argues that "[k]eeping [K.B.] in the bathroom helped [Snyder] avoid detection of his illegal activities by other family members." The State also asserts that "[t]he bathroom door could be closed and locked," which would have helped prevent detection if Paternal Grandmother had come home.

The cases that the State cites in support of its argument are materially distinguishable from what happened here. In *Buggs*, a kidnapping conviction was affirmed where the victims "were accosted outside the Dairy Queen, at the fringe of the parking lot, where they were subject to public view ... and the robbery could have been accomplished then and there," but the defendants forced the victims back inside the store, which "substantially reduced the risk of detection not only of the robbery but of the rape." 219 Kan. at 216. In *State v. Chears*, 231 Kan. 161, 163-64, 643 P.2d 154 (1982), the defendant moved the victim from the living room to a bedroom to sodomize her, "ensur[ing] that there would be but one witness," because the defendant's cohorts, the victim's husband, and the victim's daughter remained in the living room, where they could neither see what was happening or attempt to interfere.

***11** And in *State v. Richmond*, 250 Kan. 375, 378, 827 P.3d 743 (1992), the defendant moved the victim from "near the entrance to the home to a distant bedroom" to "lessen[ ] detection of the crime[s]" of burglary and rape, and he tied her up, which aided in facilitation of the burglary "by incapacitating her while he searched through her house and ... remove[d] any items he desired to take." Importantly, in *Richmond*, the defendant's remarks to the victim showed that he "was concerned about the fact that the victim had seen his automobile [parked in front of her home] and also about whether any other person might be coming to the house." 250 Kan. at 378.

After the parties filed their briefs here, the Kansas Supreme Court decided *State v. Harris*, 310 Kan. 1026, 453 P.3d 1172 (2019). In that case, the defendant was convicted of kidnapping based on forcibly moving the victim from room to room within her apartment over a two-hour period, all while repeatedly demanding money. The defendant challenged his conviction, in part, by arguing that these movements did not satisfy the "taking or confinement" element of kidnapping that requires taking or confining to facilitate the commission of a crime or to facilitate flight. After setting forth the *Buggs* test, our Supreme Court first rejected the defendant's argument that the short distance he had removed the victim was merely incidental to his crimes. 310 Kan. at 1032, 453 P.3d at 1177. The court reiterated its prior holdings that there is no distance requirement for the "taking" element of kidnapping. 310 Kan. at 1032, 453 P.3d at 1177. The court also rejected the defendant's argument that the taking or confining was

merely incidental to his other crimes, noting that the defendant forced the victim to move from room to room over an extended period of time and that he expressed concern that she would run away. 310 Kan. at 1032, 453 P.3d at 1177-78. In fact, the defendant prevented the victim from getting dressed, commenting that she was less likely to run out of the house if she remained naked. 310 Kan. at 1033, 453 P.3d at 1178.

Buggs, *Chears*, *Richmond*, and *Harris* involve takings or confinements that substantially facilitated the crimes of commission. In each of these cases, the defendant moved the victim from one room to another over a long time period. On the other hand, Snyder's act of grabbing K.B.'s arm as she tried to escape the bathroom and dragging her back inside was "slight, inconsequential, and merely incidental to" his committing aggravated indecent liberties with a child. See *Buggs*, 219 Kan. at 216. Likewise, the act did not substantially lessen the risk of Snyder's detection or substantially facilitate his commission of the crime. See *Buggs*, 219 Kan. at 216.

We conclude the State did not present sufficient evidence of "taking or confining" to support Snyder's conviction of kidnapping. As a result, Snyder's conviction of kidnapping is reversed and we remand for the district court to vacate the sentence.

DID THE DISTRICT COURT ERR IN INSTRUCTING THE JURY ON KIDNAPPING?

Even though we are reversing Snyder's kidnapping conviction because of insufficient evidence to support the conviction, we will also address his claim that the district court erred in instructing the jury on kidnapping. The State charged Snyder with kidnapping by taking or confining K.B. with the intent to hold her to commit the specific crime of aggravated indecent liberties with a child. But at trial, the district court instructed the jury that to establish the charge of kidnapping, the State had to prove that (1) Snyder "took or confined [K.B.] by force"; (2) he did so "with the intent to hold [K.B.] to facilitate the commission of *any crime*"; and (3) he did so "on or between January 31, 2015 and November 25, 2015 in Saline County, Kansas." (Emphasis added.)

***12** Snyder argues that the district court "violated [his] due process rights" by instructing the jury on a broader definition of kidnapping than was charged in the information. More specifically, Snyder argues that the district court erred because the State charged him with taking or confining K.B. with the intent to hold her to commit the specific crime of aggravated indecent liberties with a child, but the court instructed the jury that it could find Snyder guilty of kidnapping if he took or confined K.B. with the intent to hold her to facilitate the commission of *any crime*. He asserts that had the district court properly instructed the jury, it would have reached a different verdict on the kidnapping charge.

When reviewing a jury instruction challenge, "[w]e must first determine whether the alleged instruction error occurred, which requires us to consider if the instruction was legally and factually appropriate. In doing this, we exercise unlimited review." *State v. Garcia-Garcia*, 309 Kan. 801, 819, 441 P.3d 52 (2019). The State concedes that the jury instruction was erroneous. The jury instruction failed to limit the elements of kidnapping to what was charged in the information, and the Kansas Supreme Court has long instructed that " '[a] jury instruction on the elements of a crime that is broader than the complaint charging the crime is erroneous.' " *State v. Brown*, 306 Kan. 1145, 1165, 401 P.3d 611 (2017) (quoting *State v. Trautloff*, 289 Kan. 793, 802, 217 P.3d 15 [2009]).

Because there was error, this court must conduct a reversibility inquiry and, as the parties agree, Snyder's failure to object to the district court giving the instruction means that the clear error standard applies. See *Blansett*, 309 Kan. at 408; K.S.A. 2018 Supp. 22-3414(3). This court "determines whether it is firmly convinced that the jury would have reached a different verdict without the error, in which case reversal is required. Reversibility is subject to unlimited review and is based on the entire record." *State v. Betancourt*, 299 Kan. 131, 135, 322 P.3d 353 (2014). As the defendant, Snyder bears the burden to prove clear error. See 299 Kan. at 135.

Snyder points out that right after the district court gave the erroneous instruction, the court instructed the jury: "Evidence has been admitted tending to prove that the defendant committed bad acts with [K.B.] other than the crimes charged. Such evidence may only be considered as evidence of the relationship of the parties and motive." He argues that this instruction could have led the jury to rely on an uncharged "bad act" as constituting the "crime" that the kidnapping was intended to facilitate. For example, he contends that "[t]he jury could have relied on the 'bad act' of grabbing [K.B.] by the arm, which is arguably a battery," or "the 'bad act' of rubbing her vagina, and thought it was rape," and then used that finding to support the kidnapping conviction. Because of these possibilities, Snyder asserts that the jury would have reached a different result had the jury instruction been properly limited to acts intended to

facilitate the commission of aggravated indecent liberties with a child.

The State disagrees, arguing that because the only crime related to K.B. other than kidnapping with which the State charged Snyder was aggravated indecent liberties with a child, the jury would have understood that the phrase "any crime" in the erroneous jury instruction meant aggravated indecent liberties with a child. A review of the record as a whole supports the State's argument.

In opening argument, the prosecutor summarized the charges against Snyder involving K.B. as

> "aggravated indecent liberties, the lewd fondling of his person in the bedroom; aggravated indecent liberties, the lewd fondling of [K.B.] in the bedroom; aggravated indecent liberties for touching her again in the bathroom; and kidnapping, for taking or confining her in that bathroom in order *so that he could fondle her*." (Emphasis added.)

***13** In closing argument, the prosecutor addressed the other "bad acts" instruction:

> "You've heard evidence of other bad acts with respect to [K.B.] ... The first time that this really happened in the bed, they were napping, and he unbuttoned and unzipped her pants, and he was trying to get, but she made the excuse to go to the bathroom, went to the bathroom, shut the door and stayed there for ten minutes, until Grandma and Grandpa come home. *This may not be used to support a specific charge that is set forth for you*. You may consider this evidence solely for the purpose of establishing motive and relationship of the parties." (Emphasis added.)

Later in closing argument, the prosecutor discussed the kidnapping charge, telling the jury that it referred to the allegation "[t]hat he took or confined her by force, with [the] intent to hold her to facilitate the commission of a crime, *aggravated indecent liberties*." (Emphasis added.) At the end of the State's initial closing argument, the prosecutor said:

> "I ask that you find him guilty of three counts of rape, of [H.S.]; aggravated indecent liberties in his bed of his daughter, [K.B.]; and an episode of aggravated indecent liberties in that bathroom, in taking or confining her, trying to keep her in there so he could do *that crime* to her, ultimately the kidnapping." (Emphasis added.)

The record contains nothing—other than the erroneous jury instruction—that suggested to the jury that anything but an intent to commit aggravated indecent liberties could support the kidnapping charge. Given the State's repeated explanation of the kidnapping charge as resting on an intent to commit aggravated indecent liberties, along with the explanation to the jury that it could not use the "other bad acts" to support kidnapping, we are not firmly convinced that the jury would have found Snyder not guilty of kidnapping had the proper instruction been given. Thus, the jury instruction alone, though erroneous, does not require reversal of Snyder's kidnapping conviction.

WERE SNYDER'S CONVICTIONS OF AGGRAVATED INDECENT LIBERTIES MULTIPLICITOUS?

Next, Snyder claims his convictions of aggravated indecent liberties with K.B. were multiplicitous. Multiplicity is " 'the charging of a single offense in several counts of a complaint or information.' " *State v. Pribble*, 304 Kan. 824, 826, 375 P.3d 966 (2016). " '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.' [Citation omitted.]" 304 Kan. at 826.

Snyder was originally charged with three counts of aggravated indecent liberties with K.B. Snyder argued to the district court that the three charges were multiplicitous because they arose from the same conduct. The State conceded that Snyder had a point about two of the charges, and the district court ruled that those two charges should merge into one. After the merger, two charges of aggravated indecent liberties with K.B. remained: one based on Snyder's alleged behavior in his bedroom, and one based on his alleged behavior in the bathroom. The district court held that these two charges were not multiplicitous because they were separate instances of conduct. By making the multiplicity argument in the district court, Snyder preserved it for appeal.

***14** On appeal, Snyder renews his argument that his two convictions of aggravated indecent liberties with K.B. were multiplicitous because both charges arose from one course of conduct. The State disagrees, arguing that there was a sufficient break between Snyder touching K.B. in his bedroom and Snyder touching K.B. in the bathroom to justify charging two separate counts. "Questions involving multiplicity are questions of law subject to unlimited appellate review." *State v. Davis*, 306 Kan. 400, 419, 394 P.3d 817 (2017). When considering multiplicity issues,

> " '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?' [Citation omitted.]" *State v. King*, 297 Kan. 955, 970, 305 P.3d 641 (2013).

If the answer to the first question—whether the convictions arose from the same conduct—is no, "multiplicity is inapplicable" and the analysis concludes. See *State v. Weber*, 297 Kan. 805, 809, 304 P.3d 1262 (2013). If the answer to the first question is yes, the court moves on to consider whether the unitary conduct was statutorily defined as one offense. See 297 Kan. at 809.

Unitary Conduct

This court considers multiple factors to determine whether the convictions arose from the same—or "unitary"—conduct:

> " '(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.' [Citation omitted.]" *State v. Holman*, 295 Kan. 116, 148, 284 P.3d 251 (2012), *overruled on other grounds by* *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016).

It is undisputed that the acts in question occurred at or near the same time. During her forensic interview, K.B. told Marks that the time from laying down to take a nap to the end of the encounter in the bathroom was 30 minutes to an hour. Moreover, during K.B.'s trial testimony, defense counsel asked if Snyder "went in [to the bathroom] with you" and whether he "followed you in," and K.B. responded "[y]eah" to both questions. This shows that the acts in the bedroom and the acts in the bathroom were close in time.

The State argues that the acts did not occur in the same location because the second act "occurred in a different room." The State's point is too fine a parsing of the concept of the same location in multiplicity analysis. One act occurred in Snyder's bedroom and one act occurred in the bathroom, but both rooms were in the same home. At trial, a witness testified that the distance from Snyder's bedroom to the bathroom was 2 feet, 11 inches. This court recently held that two acts occurring in short order in the same home supports a finding that those acts occurred at the same location for purposes of determining whether the conduct was unitary. See *State v. Rodriguez-Manjivar*, No. 120,039, 2019 WL 5089751, at *4 (Kan. App. 2019) (unpublished opinion) ("The acts here most likely can be considered to have occurred in the same place. While each touching occurred in a different room, those rooms were in the same apartment."). Thus, the evidence presented here supports a finding that the acts occurred in the same location.

The remaining two factors are harder to resolve. The State argues that there was an intervening event—"a break between the touchings in the bedroom and in the bathroom." The State asserts that this "break" is showed by K.B. going to the bathroom and pulling up her pants and underwear. The State further argues that the "break" between acts "provided the defendant with an opportunity to reconsider his or her [*sic*] crime, and the acts were motivated by a fresh impulse."

***15** But even if Snyder had to open the bathroom door and pull K.B.'s pants and underwear back down, this is not the sort of "intervening event" that by itself prohibits a finding of unitary conduct. The State analogizes this case to *State v. Sellers*, 292 Kan. 346, 253 P.3d 20 (2011), *overruled on other grounds by* *State v. Dunn*, 304 Kan. 773, 375 P.3d 332 (2016). In that case, the defendant touched the minor victim's breast while they were lying with her mother on her mother's bed, then he "left the room to go check on the family's dog, which was making noise in another room." 292 Kan. at 349. He was out of the bedroom for 30 to 90 seconds. The defendant came back into the room, "checked to see if [the victim's] mother was asleep," lay back down on the bed, and touched the victim's "pubic area." 292 Kan. at 349-50. The defendant "got off the bed again and walked over to [the victim's mother's] side of the bed to see if she was still asleep." 292 Kan. at 350. "He then walked to [the victim's] side of the bed and started to push [her] shirt up," and the victim woke her mother. 292 Kan. at 350.

Sellers argued on appeal that his convictions for (1) touching the victim's breast and (2) touching the victim's pubic area were multiplicitous. The Kansas Supreme Court held that "the acts occurred at or near the same time and in the same location." 292 Kan. at 358. So the Supreme Court turned to "whether the break to check on the dog in

another room was sufficient to constitute an intervening event and whether Sellers formulated a fresh impulse to reoffend in the time between leaving the room and returning to the bed." 292 Kan. at 359. The *Sellers* court concluded:

> "[T]his case is a close call. The sequence of events is subject to the interpretation that Sellers checked on the dog, and, for that matter, on the continuing slumber of [the victim's] mother, to ensure that no noise impeded his overall plan to molest [the victim]. But he did leave the room for 30 to 90 seconds, breaking the chain of causality and giving him an opportunity to reconsider his felonious course of action. The district court judge ultimately determined that Sellers had to make a second conscious decision to touch [the victim] and, acknowledging the difficulty of this call, we agree. The conduct underlying [the two charges] was not unitary." 292 Kan. at 359-60.

The State argues that this case "is closer to *Sellers*" because K.B. left the bathroom, pulled up and fastened her pants, and shut the bathroom door before Snyder entered the bathroom. On the other hand, Snyder argues that the behavior in the bedroom and the bathroom "was one continuous act," that "occurred within mere minutes, in a small space, with the same two people, with touching as the acts."

Snyder's characterization of the events is more persuasive. Highly summarized, the evidence at trial showed that Snyder and K.B. were in his bedroom, lying on his bed, when Snyder made K.B. touch his penis and he touched her vagina. K.B. said that she needed to go to the bathroom, so she got up off the bed, pulled up her underwear and pants, and walked out of the bedroom to the bathroom, which was across the hallway, less than 3 feet away. Before she could lock the door, Snyder entered the bathroom, pulled K.B.'s pants and underwear back down, and touched her vagina. There was no evidence that Snyder remained in the bedroom for any appreciable amount of time before following K.B. to the bathroom, nor is there any indication that he followed her to the bathroom because of a fresh impulse to molest her. Rather, the evidence suggests that he was continuing with his original impulse to molest K.B., which was only momentarily interrupted by K.B.'s leaving to go to the bathroom.

This is also a material distinction between this case and *Sellers*—the acts recognized by the *Sellers* court as breaking the chain of causality were acts by the defendant: he stopped molesting his victim so that he could leave the room to check on a dog and so he could walk around the bed to see if the other person in the room was asleep. Here, the original molestation halted because K.B. said she needed to go to the bathroom. Unlike in *Sellers*, there is no indication that the original impulse to molest K.B. ceased or that the molestation stopped because of the defendant's actions.

***16** Snyder molested K.B. in the bathroom within a few minutes of molesting her in the bedroom and the two locations were in the same home, not far apart. Although K.B.'s journey to the bathroom and her pulling up her underwear and pants arguably could be characterized as an intervening event, there was no evidence that Snyder's molestation of K.B. in the bathroom was motivated by a fresh impulse. Under the evidence presented at trial, this was a unitary course of conduct. Thus, we must move to the second step of the multiplicity analysis, which involves determining the unit of prosecution under the statute that criminalizes aggravated indecent liberties with a child.

Unit of Prosecution

As for the second step, our Supreme Court has instructed:

> " 'If the double jeopardy issue arises because of convictions on multiple counts for violations of a single statute, the test is: How has the legislature defined the scope of conduct which will comprise one violation of the statute? Under this test, 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.' " *Holman*, 295 Kan. at 148-49.

In *State v. Sprung*, 294 Kan. 300, 311, 277 P.3d 1100 (2012), the court held that the plain language of the statute on aggravated indecent liberties with a child—which remains unchanged today and under which the State charged Snyder—creates a single unit of prosecution when an offender fondles or touches a child and the child fondles or touches the offender. Compare 294 Kan. at 308 with K.S.A. 2018 Supp. 21-5506(b)(3). Thus, Snyder forcing K.B. to touch his penis and Snyder touching K.B.'s vagina comprise only one violation of the statute. Because those acts occurred during a unitary course of conduct, Snyder's two convictions of aggravated indecent liberties with K.B. were multiplicitous. As a result, we reverse one of Snyder's convictions of aggravated indecent liberties with K.B. and we remand for the district court to vacate the sentence. See *State v. Hood*, 297 Kan. 388, 396, 300 P.3d 1083 (2013) (finding theft convictions multiplicitous, reversing one conviction, and remanding for the district court to vacate

the sentence).

DID THE DISTRICT COURT ERR BY ORDERING CONSECUTIVE SENTENCES?

Next, Snyder claims the district court erred by ordering consecutive sentences. After announcing the sentences imposed for each of Snyder's convictions, the district court ordered Snyder to serve the kidnapping sentence, one of the hard 25 rape sentences, and one of the hard 25 aggravated indecent liberties with a child sentences consecutively, with the remaining sentences running concurrent. To explain its decision to run some of the sentences consecutive, the district court stated:

> "Noting, for the record, that the defendant was in a father fiduciary relationship as indicated by the State, as it relates to [H.S.], and was in the position of father to [K.B.]. The existence of that relationship does play a part, as does the particulars of the molestation, the duration, and the age of these particular children."

We have reversed Snyder's kidnapping conviction because of insufficient evidence and vacated his 59-month sentence for that crime, so whether the district court erred by ordering the kidnapping sentence to be consecutive is now moot. But Snyder still has a hard 25 sentence for one of his rape convictions and a hard 25 sentence for his one remaining conviction of aggravated indecent liberties with a child that the district court ordered to run consecutive.

Snyder argues that the district court erred by ordering two of his hard 25 sentences to run consecutive because (1) Snyder argues sufficient factors to warrant concurrent circumstances, such as his "intellectual functioning issues" and his low criminal history score; (2) the district court's stated reasons for ordering consecutive sentences were the same factors the State argued when asking for consecutive sentences; (3) neither Mother, K.B., or H.S. asked for Snyder to serve 50 years before the possibility of parole; and (4) his sentence, practically speaking, is a life sentence without parole.

> ***17** "A sentencing judge has discretion to impose concurrent or consecutive sentences in multiple conviction cases under K.S.A. 2018 Supp. 21-6819(b) (absent certain circumstances, the sentencing judge shall 'have discretion to impose concurrent or consecutive sentences in multiple conviction cases'). This statute does not list specific factors for consideration. Rather, it states the judge 'may consider the need to impose an overall sentence that is proportionate to the harm and culpability' associated with the crimes. [Citations omitted.]" *State v. Darrah*, 309 Kan. 1222, 1227, 442 P.3d 1049 (2019).

A district court abuses its discretion when its action is: (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. 309 Kan. at 1227. As the party asserting that the district court abused its discretion, Snyder "bears the burden of establishing such abuse." See 309 Kan. at 1227.

Snyder does not allege an error of fact or law undermines the district court's sentencing decision. Put simply, Snyder asks this court to reweigh the information before the district court and make the independent decision that consecutive sentences were not warranted. But that is not this court's role. Rather, to conclude the district court abused its discretion by unreasonably ordering the sentences to run consecutive instead of concurrent, this court "would have to conclude that no reasonable person would have taken the [district] court's view." See 309 Kan. at 1227.

But as the district court noted, K.B. and H.S. were Snyder's children. At the time of the crimes against them, both victims were under 10 years old. In a victim impact statement at the sentencing hearing, Mother spoke at length about the lasting effects of Snyder's crimes on K.B. and H.S., including ongoing emotional issues for both children. Mother specifically asked that Snyder "never be allowed around children again." The fact that the two hard 25 sentences involve separate victims is justification to run the sentences consecutive. A reasonable person could have concluded that consecutive sentences as ordered by the district court were proportionate to the harm and culpability associated with Snyder's crimes.

Snyder's argument that the district court abused its discretion in imposing a sentence that leaves him ineligible for parole until he is 88 years old—is effectively speaking, a sentence of life without parole. But the fact that Snyder will be 88 years old before being eligible for parole does not mean that the district court acted arbitrarily, fancifully, or unreasonably in imposing the sentence. Rather, the record reflects that the district court considered the evidence before it and imposed a sentence with which other reasonable people could agree. We conclude the district court did not abuse its discretion by ordering two of Snyder's hard 25 sentences to run consecutive.

DID THE DISTRICT COURT ERR BY ORDERING LIFETIME POSTRELEASE SUPERVISION?

In his final issue, Snyder claims the lifetime postrelease supervision component of his life sentences is illegal. The State agrees that this portion of Snyder's sentence is illegal and should be vacated. See *State v. Page*, 303 Kan. 548, 549, 363 P.3d 391 (2015) (vacating lifetime postrelease supervision component of off-grid sentence because "sentencing court has no authority to order lifetime postrelease supervision in conjunction with off-grid indeterminate life sentence"). Thus, we vacate the portion of Snyder's life sentences that imposed lifetime postrelease supervision.

***18** Finally, although the issue has not been raised by either party, we note that the journal entry of judgment reflects that Snyder was convicted of three counts of raping H.S. even though the verdict forms reflect that the jury found Snyder guilty of two counts of raping H.S. and a lesser included offense of attempted rape. On remand, we order the district court to correct the journal entry of judgment so that it reflects that Snyder's conviction in Count 3 is of attempted rape. This correction will not affect Snyder's sentence. K.S.A. 2018 Supp. 21-6627(a)(1)(B) requires the hard 25 sentence for a conviction of rape when the victim is under 14 years of age and K.S.A. 2018 Supp. 21-6627(a)(1)(H) requires the hard 25 sentence for convictions of "an attempt ... of an offense defined in subsection (a)(1)(A) through (a)(1)(G)."

CONCLUSION

In conclusion, we reverse Snyder's conviction of kidnapping because of insufficient evidence and we reverse one of his convictions of aggravated indecent liberties with a child as multiplicitous and we remand for the district court to vacate the sentences on those convictions. We also direct the district court to vacate the portion of Snyder's life sentences that imposed lifetime postrelease supervision. Finally, we direct the district court to correct the journal entry of judgment so that it reflects that Snyder's conviction in Count 3 is of attempted rape. At Snyder's original sentencing hearing, kidnapping was designated as his primary crime of conviction. But that fact will not affect Snyder's case because his four remaining convictions are all off-grid crimes.

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

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Certificate of Service

I hereby certify that the above and foregoing Appellant's Brief was served on the Lyon County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b) and by e-mailing a copy to the Attorney General, at ksagappealsoffice@ag.ks.gov on the 3rd day of May, 2023.

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